COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO
TRIBUNAL DE JUSTIÇA DA COMUNIDADE,
CEDEAO

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IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) HOLDEN AT ABUJA, NIGERIA

SUIT N°: ECW/CCJ/APP/37/15/ REV

JUDGMENT N°: ECW/CCJ/JUD/01/18

BETWEEN:

Vision Kam- Jay Investment Limited } Judgment Creditor/ Respondent

AND

President of the ECOWAS Commission

ECOWAS Commission } Judgment Debtor/Applicant

1. COMPOSITION OF THE COURT:

Hon. Justice Friday Chijioke Nwoke – Presiding

Hon. Justice Yaya Boiro – Member

Hon. Justice Alioune Sall – Member

Assisted by Athanase Attanon Deputy Chief Registrar

SUMMARY OF FACTS

The Applicant filed this Application for review of judgment number **ECW/CCJ/JUD/24/16**, delivered by this Honorable Court on the 6th October 2016.

The Applicants aver that a contract for the supply, installation, and maintenance of Power and Associated Equipment was awarded to the Respondent sequel to the Newspaper Publication of 12th June 2014 and subsequent competitive bid. The said contract was signed on the 10th September 2014 by the Parties.

Based on the same contract, the Applicants requested the Respondent by direct contracting to supply and install two additional inverters at the same unit cost with the initial contract. The Respondent/Judgment creditor submitted a proposed price schedule to the Applicant on the 15th October 2014 which was accepted by the Applicants and a contract was entered into by both parties on 21st November 2014.

The Applicants stated that they observed an inflation in the contract and brought it to the notice of the Respondents on the 10th April 2015. The Applicants however agreed to pay for the contract in two tranches. While the Applicant paid the first tranche **of N35,716,422 (Thirty Five Million, Seven Hundred and Sixteen Thousand, Four Hundred and Twenty Two Naira)** only, it failed to pay the second tranche.

Consequently, the Respondent filed the suit for breach of contract and recovery of the sum owed.

The Applicant tried to file its defense out of time without leave of Court and prayed the Court for time to enable the parties settle out of Court. However, on the 6th October 2016, the Court delivered its judgment in lieu of defense and ordered the Applicant to pay to the Plaintiff the sum **of N20, 698,920 (Twenty Million, Six Hundred and Ninety Eight Thousand, Nine Hundred and Twenty Naira)** only being the outstanding contract sum and interest at 1% of the sum per day from 16th April 2015 till judgment debt is liquidated.

ISSUE FOR DETERMINATION

1. **Whether the Applicants have laid before the Court new facts which are of a decisive nature capable of sustaining this Application.**

The facts upon which the Applicants filed this application is premised on the grounds that the Respondent allegedly, fraudulently misrepresented the contract price which forms the material fact in the contract and the Applicants relied on these facts as the basis of signing the contract. The Applicant further contend that the contract is voidable and the Respondent/Judgment creditor is not entitled to the Judgment debt.

The Applicant relied on the following Articles as contained in the Preamble to the contract as basis for the award of the direct contract to the Respondent which reads as follows:

Preamble:

"whereas the purchaser invited Vision Kam-Jay for the supply of two additional Inverters (15KVA) for the Server rooms at Niger House and River Plaza Office Annex at the same unit cost as in the initial contract for the supply, installation and maintenance of Power and Associated Equipment at ECOWAS Commission Headquarters in Abuja on 10th September 2014".

Paragraph 15.1 GCC on "Contract Price" states:

"Prices charged by the Supplier for the goods supplied and related services performed under the contract shall not vary from the prices quoted by the Supplier in its bid with the exception of any price adjustment authorized in the SCC".

Paragraph 9.1 SCC states:

"The Applicable law to the Contract will be the ECOWAS Tenders Code, the ECOWAS Community Law of Contract".

The Applicants claim that at the time of signing the contract, they believed the Respondent presented the agreed price unit in tandem with the contract of 10th September 2014 and that it was on the strength of these facts the Applicants issued the Respondents a Job Completion Certificate on 18th December 2014.

The Applicants contend that the Respondent by its actions contravened the provisions of Articles 45 (3) (a) of the ECOWAS Tender Code which provides that:

"Procurement may be made by direct contracting for goods, works and services in the following cases only:

Procurement of additional supplies or works of a similar nature where it is established that a new competitive bidding would not provide any benefit and that prices obtained during the contract extension are reasonable. If the extension is predictable from the onset, the initial contract must have some provisions to that effect".

It is pertinent to examine the provisions guiding applications for review before this Court.

Applications for review of judgment are governed principally by Article 25 of the Protocol of the Court and Article 92 of the Rules of Court.

Article 25 of the Protocol A/P1/7/91 reads:

1) **An application for revision of a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the court and also to the party claiming revision, provided always that such ignorance was not due to negligence.**
2) The proceedings for revision shall be opened by a decision of the Court expressly recording the existence of a new fact, recognizing that it has such a character as to lay the case open to revision and declaring the application admissible on this ground.
3) The Court may require prior compliance with the terms of the decision before it admits proceedings in revision.

Article 93 (2) (d) of the Rules of Court provides that in addition, such an application shall:

"indicate the nature of the evidence to show that there are facts justifying revision of the judgment and that the time limit laid down by Article 92 has been observed".

Article 92 provides:

"an application for revision of a judgment shall be made within three (3) months of the date on which the facts upon which the application is based came to the applicant's knowledge".

The above Articles lend credence to the fact that issues raised must be new, of a decisive nature and not within the knowledge of the Applicant and the Court as at the time judgment was delivered provided it is not as a result of negligence of the party.

In **DJOT BAYI TALBIA & 1 OR V. FEDERAL REPUBLIC OF NIGERIA & 3 ORS, (2010) CCJELR, Pg 21 Para 7,** this court laid down three (3) conditions precedent to a successful application for review of judgment/decision as follows:

a. The application must be made within five years of the delivery of the decision which is sought to be reviewed.
b. The party applying for a review must file his application within three months of his discovering of new fact/facts upon which his application is based.
c. An application for review must be premised on the discovery of new facts that are of a decisive nature, which facts were unknown to the Court or the party claiming revision provided that such ignorance was not due to negligence.

While the instant application fulfills the first and second conditions above, it is pertinent to establish whether or not the facts relied upon are new facts within the contemplation of the above provisions or whether such facts were in existence but not pleaded due to the negligence of the Applicants.

The issue as to when a particular fact came within the knowledge of the Applicant is a question of fact to be determined by the Court after carefully considering all the information available to it.

It is submitted that the facts upon which the Applicant hinge their argument is one which existed prior to the institution of the substantive application leading to this application for review. From the facts before this Court, the alleged issue of misrepresentation or fraud was within the knowledge of the Applicants before judgment. However, Applicants failed to plead it.

The Applicants in their application also admitted having knowledge of the fraud and bringing same to the notice of the Respondent on the 10th of April 2015. That being the case, the ground for review does not fall within the contemplation of Article 25 above. Considering the implication of executing an agreement, it is implied that parties to a valid contract agreement have gone through each and every term contained therein and are satisfied with same before appending their signatures to be legally bound. The issuance of a Job Completion Certificate by the Applicant to the Respondent is also a clear indication of satisfaction.

The Black's Law Dictionary, (9th Edition), defined negligence as a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance.

Negligence has also been defined as the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances.

It is glaring that the acts of the Applicants is characterized by negligence in different aspects which include: failure to carefully vet and scrutinize the local purchase order issued by the Respondent vis a vis the initial one to ensure that it has not been inflated, failure to put up a proper defense having known as they claim that there was an inflation of the contract sum and finally admitting to pay the said inflated amount. Nonetheless, in the midst of all these, the Applicants admitted liability even to the extent of agreeing to pay in two installments.

The Applicants had the responsibility and opportunity to scrutinize the price quotation given to it by the Respondent which it failed, refused and or neglected to do for whatever reasons. The Applicant was at liberty either to reject the quotation or request a review, or even call for a fresh bid if in its opinion there was a reasonable ground to do so. It is submitted that the Applicant failed to exercise due diligence ab initio.

It is trite that ignorance is not an excuse in law. Parties must have made significant findings of facts upon which to hinge their argument which was unknown to them, and the Court at the time the decision of the Court was made without relying on existing facts to over burden the court.

A party must necessarily meet the requirements for review in order to succeed, and the Court has little or no discretion in this regard. The provisions of the Protocol and Rules of Court are clear and unambiguous.

It is submitted that the facts upon which the Applicant based its submissions for review are not new facts in line with the provisions of Article 25. The facts were within the knowledge of the Applicants who by their ignorance and negligence waived their rights by failing to take all reasonable and necessary steps to plead them right from the start so to ameliorate the situation. It is trite that equity aids the vigilant and not the indolent. It is axiomatic that the Defendants from the beginning of this case has shown complete indiligence in pursuing this matter. First they inserted a penalty clause in a contract they are in breach as if that is not enough, they filed a purported defence after the expiration of the period of time allowed by the rules.

Furthermore, assuming that the Defence is admissible, they merely admitted the claim. In all these circumstances the conduct of the Defendants is not fair to the Community at large.

In view of the above, the application for review of judgment fails on the grounds that the Applicants have failed to establish new facts justifying revision. Therefore, the earlier decision delivered in the substantive application remains.

DECISION:

The Court adjudicating in a public sitting after hearing the parties in the last resort, after deliberating according to law,

DECLARES;

That there is no basis to exercise the review powers of the Court in favour of the Defendants/ Debtors since they have not satisfied the conditions specified by the Rules of Court.

AS TO COSTS

Parties should bear their own costs.

Dated at Abuja this 07th day of February, 2018.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES;

1. Hon. Justice Friday Chijioke Nwoke ---------- Presiding
2. Hon. Justice Yaya Boiro ----------Member
3. Hon Justice Alioune Sall ----------Member

Assisted by Athanase Attanon ---------- Deputy Chief Registrar