



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL CASE NO. E008 OF 2021

HANGOVER KAAKWACHA HOTEL LTD.....PLAINTIFF

VERSUS

PHILIP ADUNDO & LEONARD ADUNDO

T/A HANGOVER KAAKWACHA HOTEL.....RESPONDENT

RULING

1. On 24/11/2021, this suit which had been stayed on account of an intended out of court negotiated settlement was certified as ready for trial in the absence of both parties and their respective advocates when it came up for Pretrial conference, with Notice issued to both parties' counsel.
2. The court then fixed the suit for hearing on 31/1/2022. On the latter date, both parties' counsel appeared and Mr. Anyul counsel for the Defendant informed the court that regrettably, he had just discovered that all his clients' documents were in his file and that he had been out of office for more than 2 weeks. He notified the court that his clients had not signed their witness statements but that the defendant's documents had been compiled. Counsel informed the court that in view of those circumstances, he was not ready to proceed with the hearing and sought for an adjournment.
3. Mr. Okoyo counsel for the Plaintiff stated that he was ready to proceed with the hearing. The Plaintiff's counsel nonetheless indulged the defence to enable the latter file their documents.
4. The court then adjourned the hearing to 16/2/2022 on account of counsel's previous bereavement that made it impossible to file their client's documents. I also directed that the said documents be filed and served on the Plaintiff's counsel within 3 days and in default, the leave granted would lapse.
5. On 16/2/2022, both parties were present virtually in court together with their counsel and Mr. Okoyo counsel for the Plaintiff sought leave to file and have the Plaintiff's supplementary list of documents filed on 20/1/2022 and already served upon the defence, without leave of court, to be admitted as duly filed and served.
6. According to Mr. Okoyo, the said documents were only obtained after 31/1/2022 when this suit was adjourned. He submitted that it was in the interest of justice that the documents be admitted on record and that no prejudice would be occasioned to the defendant if the documents are admitted as he had already served copies thereof to the Defence counsel Mr. Anyul.
7. Opposing the oral application on admission of the additional documents, Mr. Anyul counsel for the defendants submitted that he had been granted leave to file his documents within three days on 31/1/2022 and that he had complied with the court's directive. According to Mr. Anyul, the documents that he had filed were the same ones that he had filed as annexures on 15/9/2021, accompanying the Defendant's replying affidavit to the interlocutory application. He submitted that no new item or information was introduced. He submitted that the documents intended to be admitted were generated after the suit was filed, and that they are as new as 15/2/2022 hence the Plaintiff was fishing for the documents after filing suit. According to the defence counsel, admission of the documents at this stage would be prejudicial to the defendants.
8. In a brief rejoinder, Mr. Okoyo counsel for the plaintiff submitted that the documents in issue were not within their reach at the time of filing suit and that the document is an email and letter addressed to the Defendant by the Registrar of Business Registration Services, Nairobi. He also submitted that no prejudice had been demonstrated if the documents in question are admitted.
9. This court then reserved the ruling for today in order to consider the merits and demerits of the application and also directed that in view of the ruling to be delivered, the main suit could not be heard. I fixed the hearing for 22/3/2022.

DETERMINATION

10. I have considered the application for admission of additional documents intended to be relied on at the trial by the Plaintiff. This suit was filed on 23rd July, 2021 and the parties were encouraged to embrace alternative dispute resolution mechanisms which attempt did not materialize hence the court had to certify the suit for hearing. On the date when I certified the suit ready for hearing, the parties were absent yet they were both aware of the date. I also granted each party the opportunity to file and exchange all documents that they each intended to rely on at the hearing.

11. Even after fixing a hearing date for 31/1/2022, the Defendants did not comply with the pretrial requirements and they sought for more time to file their documents on account that their counsel forgot to have the statements signed and that he had been bereaved hence the delay. The court and the Plaintiff indulged the defendants and they were granted three more days to file and serve their documents.

12. On the hearing date fixed for 16/2/2022, it was the Plaintiff's turn to ask for leave to file additional documents which it was claimed, were not within their reach as at the time the suit was filed. On the part of the defendants, the document dated 15/2/2022 a day before the scheduled hearing should not be admitted as the Plaintiff was fishing for evidence after filing suit.

13. I have perused the documents intended to be relied on, and sought to be admitted by the Plaintiff. It is dated 15/2/2022. It is an email from Sarah Wainaina, the Assistant Registrar, Business Registration Services, a government office. The email and attached letter are addressed to kakwachahotels@gmail.com; odongoleo@gmail.com; padundo@yahoo.co.uk; copied to mauaassociatesoloo@gmail.com

14. The letter is in respect of KAAKWACHA HANG-OVER FOODS AND HOTELS LIMITED (PVT-KIAUZ6AM7) and a complaint received from Mauwa and Co. Associates concerning the alleged registration of a company using similar names with that of their client HANGOVER KAAKWAACHA HOTEL LTD (PVT-PJURJEA).

15. The letter calls upon the Directors of Kaakwacha Hang-over Foods and Hotel Limited to change their name of the company within 30 days from 15/2/2022 failure to which the Registrar would invoke the provisions of **Section 58(5)(6) and (7) of the Companies Amendment Act No. 28 of 2017** and strike off the said registration from the register on account that the name allocation was inadvertent.

16. **Article 50(1) of the Constitution** guarantees every person the right to access a court of law for determination of a dispute. In addition, under **Article 159(2) of the Constitution**, courts are mandated to administer justice without undue regard to procedural technicalities.

17. This suit has not been heard. The documents sought to be admitted were obtained on 15/2/2022, a day before the scheduled hearing. There is no law that bars a party from obtaining evidence after suit is filed in court. This is so because some evidence come to the attention or knowledge or possession of parties even after the hearing of the suit and it is on that account that law under section 78 of the Civil Procedure Act acknowledges that additional evidence can be adduced even on appeal.

18. The Plaintiff submitted that no prejudice would be occasioned to the Defendant if the leave sought is granted and the defendant's counsel submitted that they would be prejudiced. They however did not demonstrate what prejudice would be suffered if the documents in question are admitted. The defendants did not demonstrate that the new documents which are not yet admitted as evidence, would prejudice them. And if there would be any such prejudice which is not demonstrated, this court has power to grant leave to the defendants to file additional documents in their possession that may counter the documents intended to be admitted in favour of the Plaintiff.

19. It is the duty of this court to accord all the parties full opportunity to be heard to ventilate their grievances and in this regard, to file the documents that they intend to rely on during the hearing, before the hearing commences, unless it is demonstrated that the request is frivolous or intended to delay the just and expeditious determination of the suit.

20. In this case, the Plaintiff filed and served the intended documents upon the Defendants beforehand and only sought for validation of the filing and service of the filed documents. There is no evidence to show that the plaintiff intended to delay or frustrate the just determination of this suit as its witness was present in court virtually and ready to give evidence.

21. None of the parties had been heard on the main suit and neither had the Plaintiff nor the Defendants closed their respective cases when the application was made.

22. Furthermore, even under **Order 18 Rule 10 of the Civil Procedure Rules**, the court may allow a party to recall any witness at any stage of the proceedings. In addition, **Section 146 of the Evidence Act** provides that the court may permit a witness to be recalled either for further evidence - in chief or for further cross examination and if it does so, the parties have the right of further cross examination respectively.

23. Under **Order 11 of the Civil Procedure Rules**, even after the pretrial conference and the matter is set down for hearing, nothing prevents the court from exercising discretion and allowing parties to call further witnesses or filing further documents as stipulated in **Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the Evidence Act**, which provisions are intended to ensure that each party is afforded a fair hearing as guaranteed in **Article 50(1) of the Constitution** and an opportunity to present or defend their cases fairly. See **Raila Odinga & others v IEBC & 3 Others Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR**, where the Supreme Court considered whether to allow additional evidence filed outside the contemplation of the rules in a Presidential Election Petition and set the principles applicable as-materially:

“The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and

extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

24. I have seen the documents in issue and observe that the defence was given the said documents in advance. The said documents are not bulky. They are a one-page email and one-page letter. There is therefore no difficulty in pursuing and or responding to such a letter and neither is there trial by ambush as the defendant is made pretty aware of the documents in question. The suit has also not been heard. Further, in the instant case, should the plaintiff be allowed to file the documents objected to, the said documents are still subjected to the rules of evidence at the hearing. For example, the plaintiff may be required to call the maker of the stated email and letter to testify and produce the impugned document, if its production by the plaintiff becomes contentious.

25. For the above reasons, I hereby exercise discretion and invoke the overriding objective of the law in civil cases as stipulated in **Sections 1A and 1B of the Civil Procedure Act** and allow the application by the Plaintiff to have the documents filed and served on 15/2/2022 deemed as filed and served and forming part of the documents that the plaintiff shall rely on at the substantive hearing of this suit. Accordingly, the documents filed on 15/2/2022 are hereby admitted as documents to be relied on at the trial by the plaintiff who may also call the maker thereof to produce the said documents in which case, the said maker shall be listed as a witness in the matter. The defendant too is granted leave to file any supplementary or further list of documents within the next 5 days of this ruling. Hearing of the suit remains 22/3/2022 as earlier fixed.

26. Each party to bear their own costs of the oral application.

DATED, SIGNED AND DELIVERED AT SIAYA IN OPEN COURT THIS 28TH DAY OF FEBRUARY 2022 VIRTUALLY TO THE PARTIES' ADVOCATES.

R.E. ABURILI

JUDGE