



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 271 OF 2017

GAZEBO INDUSTRIES LTD.....PLAINTIFF

VERSUS

RIFT VALLEY RAILWAYS (K) LTD.....1ST DEFENDANT

EAST AFRICAN RAIL & HANDLING

LOTISTCS LTD.....2ND DEFENDANT

KENYA RAILWAYS CORPORATION.....3RD DEFENDANT

RULING

1. The court is giving directions on the said Notice of Motion following a disagreement between counsel for the Plaintiff/Applicant, Mr. Kanjama and counsel for the 3rd Defendant/Respondent, Mr. Agwara.
2. On 12/4/2021, Mr. Kanjama informed the court that, for now, he would only be pursuing prayer (3) before the rest of the prayers can be canvassed. He also stood ground that, additionally, prayer (2), (4) and (5) had not been canvassed. Prayer (3) seeks the summoning of the Managing Director of the 3rd Defendant for cross examination on the goods attached by this court's Ruling on 8th May, 2018 including traction motors armature with shaft, sleepers and e-clips.
3. On his part, Mr. Agwara submitted that the application had been dealt with by the Court's orders of 10/7/2019; that by a consent entered by the parties on 3/10/2019, the parties were directed to file submissions on the outstanding issues. Counsel referred the court to directions issued on 18/12/2019. As such, counsel submitted that the application could not be revisited.
4. To be able to give concise directions, the court must revisit the orders/directions issued on the dates referred to by Mr. Agwara hereunder.
5. On 10/7/2019, Mr. Simiyu holding brief for Mr. Kanjama moved the court on the application dated 5/7/2019. He then addressed the court stating that he was seeking an order for inspection of the 3rd Defendant's store in Nairobi, Mombasa and Busia.
6. Mr. Agwara for the 3rd Defendant had no objection save that the inspection in Nairobi be done jointly. The court then accorded that a consent had been entered by the parties that "Applicant be allowed access to Mombasa and Busia Stations of the 3rd Defendant for inspection of the property therein." In the meantime, the Respondent was ordered to file a response to the application within 14 days. The matter was then to be mentioned on 3/10/2019 for further orders on the application.
7. On 3/10/2019, Mr. Kanjama was in court for the Plaintiff/Applicant and Mr. Agwara for the 3rd Defendant/Respondent. Mr. Kanjama informed the court that although they had not carried out their inspection, they had agreed to do so on 4th and 6th November, 2019 for the Nairobi and Mombasa stations respectively.
8. The court then proceeded to record that by consent, the inspection of the two stations, Nairobi and Mombasa be done on 4th and 6th November, 2019 as agreed. A mention was fixed for 19th November, 2019 for further orders.

9. Come the 19/11/2019, Mr. Simiyu was on record for Kanjama for the Plaintiff and Mr. Kamande for Mr. Agwara for the Defendants. Mr. Simiyu informed the court that the joint inspection had been done. He requested for 7 days to file an Affidavit to attach the report. Mr. Kamande conceded to this position. The court then ordered for a mention on 18/12/2019 for further orders after the filing of the report.

10. On 18/12/2019, Mr. Simiyu was on record for the Plaintiff and Mr. Mwasalu holding brief for Mr. Angwara for the 3rd Defendant. Mr. Simiyu informed the court that the report had been filed and were ready to take directions from the court. Mr. Mwasalu stated that the affidavit attaching the inspection reports was served on them and requested for time to respond to the application.

11. The court then directed the 3rd Defendant to file a response to the application within 14 days. Further, that the applicant files skeleton (*the court did not complete this which I interpret was intended to read "skeleton submissions"*) and supplementary affidavit if need arises within 14 days and the 3rd Defendant to have a similar period to respond to the submissions. That upon the service, there was to be highlighting of the submissions on the 1/2/2020.

12. I wish to render myself based on the foregoing chronology of events. There is no doubt that the inspections of the 3rd Defendant's stores in Nairobi and Mombasa as requested by the Plaintiff was done and a report filed vide an affidavit sworn by Gurson Singh Bharara, the Director of the Plaintiff's Company on 15th December, 2019. After the filing of this report, parties agreed to dispose of the application dated 5/7/2019 by way of filing written submissions which were to be highlighted on 11/2/2020.

13. On the subsequent date in court which was 12/3/2020, the court noted that the hearing dated 11/2/2020, fell on a public holiday and the court pushed the date further to 26/3/2020. It is after this date that I took over the conduct of the matter.

14. As at this point, all what the parties ought to do in court is to highlight the submissions on the application dated 5/7/2019 and allow the court to do its ruling.

15. Without going into the substance of the application, it is very clear from the above stated events that some of the prayers in the application were overtaken by the event of inspecting the 3rd Defendant's stores.

16. Further, the other prayers ought to be hinged on the reports that were filed after the inspection of the stores of the 3rd Defendant, so much so that, if no goods/equipment or as the case may be, the Plaintiff is still at liberty to move the court on the prayers of contempt of court orders. In the same spirit, prayer (5) should be informed on the reply that the 3rd Defendant files to the application.

17. In my candid view, then, if the court were to order for the summoning of Managing Director of the 3rd Defendant at this stage would be tantamount to opening fresh wounds that were fully sealed off. I say so because the Plaintiff already knows what items/property/equipment are in possession of the 3rd Defendant by dint of the inspection of its premises and filing of the respective reports. The reports do indeed inform the Plaintiff if the 3rd Defendant is contemptuous of any court orders. Thus, the request at this stage for prayer (3) is superfluous and intended to delay the disposal of the pending application.

18. At the same time, I fault Mr. Agwara for submitting that there is nothing to revisit in the application dated 5/7/2019. This is because although parties were ordered and agreed to file written submissions the court is yet to render its determination.

19. I cannot say more. I accordingly decline to grant prayer (3) as requested by learned counsel, Mr. Kanjama. Consequently, I order that the Plaintiff files and serves its submissions within 7 days and the 3rd Defendant within 7 days of services by the Plaintiff. Parties to return to highlight on a date I shall give in court.

DATED AND DELIVERED THIS 26TH DAY OF APRIL, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Muoki h/b for Kanjama for the Plaintiff*

2. *Kamande h/b for Agwara for the 3rd Defendant*