



**Agility Logistics Ltd & 2 others v Agility Logistics KY Ltd (Civil Case 840 of 2010)
[2021] KEHC 88 (KLR) (Commercial and Tax) (24 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 88 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 840 OF 2010
MW MUIGAI, J
SEPTEMBER 24, 2021**

BETWEEN

**AGILITY LOGISTICS LTD 1ST PLAINTIFF
AGILITY LOGISTICS INT'L BV 2ND PLAINTIFF
PUBLIC WAREHOUSING CO KSC 3RD PLAINTIFF
AND
AGILITY LOGISTICS KY LTD DEFENDANT**

RULING

1. The hearing of the suit halted upon application by the parties on presentation and admissibility of copies of licenses annexed to the application earlier heard and determined by the Court pending hearing of the suit.
2. At the cross examination of DW11, the parties through Counsel addressed the Court as follows;
3. Ms Raore stated that during the Defence Witness's DW 2 examination in chief, he indicated that he was not aware that licenses of the Plaintiff were filed in Court and they wanted to refer to the said licenses filed in Court during the hearing of the application under certificate of urgency for grant of injunction of 8th December 2010. The application was heard and determined and Ruling was delivered in January 2012.
4. The Supplementary Affidavit deposed by Dev Kumar Bij of 26th May 2011 through leave granted by the Court had/has annexed the licenses of the Plaintiff's business.
5. By a letter of 11th May 2021 to this Court, the Plaintiff wrote to Court and attached the licenses that are filed in Court for ease of reference and served the Defendant.



6. Ms Macheru stated that the Defendant opposed any introduction of documents at this juncture of proceedings. The parties are to disclose all documents to rely on during the hearing. Since the matter begun, there has never been any mention that the Plaintiff's wished to rely on the documents/pleadings of the application of 8th December 2010 specifically, the affidavit of 26th May 2011.
7. The Defendant's advocate indicated that the issue was not whether the application was served to the Defendant but whether the Affidavit will be relied on during the hearing.
8. The Plaintiff served the Defendant with several bundles of documents before the hearing of the suit and called witnesses who testified and were cross-examined and the Plaintiff closed its case on 10th December 2019.
9. The documents being introduced at this juncture the Defendant will never have the chance to interrogate the documents and cross examine the Plaintiff and witnesses. The Defendant witnesses have also testified and only cross examination of the last Defendant's witness is remaining.
10. The application now presented is moot as the orders granted then were lifted on 30th May 2018.
11. DW2 testified and was/is in Court for cross-examination and the documents now produced were not produced before and these documents are being introduced during cross examination.
12. The Plaintiff failed to seek leave to produce and rely on the documents and therefore this an ambush to the Defendant and an unfair way of practice.
13. Practice directions are very clear that parties should refer to the documents to be relied on before the hearing, these documents were not part of Plaintiff's statement and there will be no fair hearing under Article 50 COK 2010 to the Respondent if the Plaintiff relies on new evidence at this juncture. All persons are equal before the law and have equal benefit and protection of the law as provided by Article 27 COK 2010.
14. Ms Maore replied that the matter is for cross -examination procedure and to put the Defense Witness to task as DW2 alleged that he was not aware of the Plaintiff's license were filed in Court. That the Plaintiff is not introducing documents but the application filed in Court and served to the Defendant.

DETERMINATION

15. The issues for determination are;
 - a. Can Counsel cross examine the Defense Witness on documents in the Court record but are not part of the documents exchanged by parties before hearing?
 - b. Can Counsel cross examine the Defense Witness on documents that were not filed before the hearing and were not referred to during examination in chief?
16. The Applicant relied on Section 146 of Evidence that provides for the order and direction of cross examination as follows;
 - (2) 2) Subject to the following provisions of this Act, the examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief.
17. The Plaintiff referred to the case of *Evans Kidero & 4 others vs Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR which referred to the case of *Raila Odinga & 5 others versus IEBC & 3 other* [2013] eKLR



the Supreme Court stated as follows on the correct legal position where the Court has to consider whether to admit or reject additional evidence:

“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 characteristics 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 of the new material intended to be provided 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, [considering] 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 admissions of additional evidence.”

18. This Court also relied on the case of *Johana Kipkoech Too vs Hellen Tum* [2014] eKLR where the Court observed as follows;

The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of *Raila Odinga & 5 Others vs IEBC & 3 Others*, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

19. In this case ten years have lapsed since the filing of the documents; the Plaintiffs have already closed their case and two of the Defendant’s witnesses have testified. The said documents were well within the custody of the Plaintiffs from the time the suit was filed. The Plaintiffs did not refer or rely on the said documents during its testimony. The introduction of copies of licenses in the trial does not form new and compelling evidence that would persuade this court to exercise its discretion to allow the same to be relied upon by the defendant at this stage of the trial.
20. Whereas the Plaintiff is entitled to cross-examine the Defendant(s) and cross examination is wide and need not be only on what the Defendant stated in examination in chief, however, the Court finds that Fair Trial under Article 50 COK 2010 encompasses that a party is made aware of the case he/she faces and has ample time and access to relevant documents, statements, pleadings that shall be relied upon during the hearing of the matter.
21. The provisions of Order 3, Rule 2 of the CPR provides as follows:
- Documents to accompany suit.
2. All suits filed under rule 10) including suits against the government, except small claims, shall be accompanied by —
- (a) the affidavit referred to under Order 4 rule 1 (2);
 - (b) a list of witnesses to be called at the trial;
 - (c) written statements signed by the witnesses excluding expert witnesses; and



- (d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

22. It is also a legal requirement, that parties through Counsel undertake Case-Management Conference to prepare for the hearing of the dispute/matter in the suit. Therein, as provided by Order 11 of CPR 2010, the Pretrial Directions and Conferences, parties disclose, witnesses to be called as per witness List and Statements and List or Bundle of Documents with agreed/joint or each with issues for determination. That way each party knows/is aware in advance what is expected of them and what evidence shall be relied on, at the hearing and such disclosures facilitate preparedness. Any other documents introduced during the hearing would have to be by formal application for leave from the Court.

The documents sought to be produced were never referred to during Case Management Conference/ Pre-Trial Directions and the leave of the Court was not sought.

In the instant case, the hearing commenced and is almost through, at the tail end with only cross-examination of the last Defense Witness. To introduce the licenses after close of Plaintiff's case and Defendants examination- in-chief is prejudicial to the Defendant. The Defendant will not have time to verify these documents and prepare its rebuttal to the documents produced and referred to for the 1st time at this late stage.

DISPOSITION

1. For these reasons, I find merit in the Defendant's position and decline the introduction and reference to the licenses at this stage as the proceedings will be contrary to the tenets of fair hearing and in violation of Article 50(1) of the Cok 2010.
2. The parties/Counsel will be placed before HOD/PJ for directions on further hearing of the matter on 13th October 2021 as the Court is on transfer.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

MR. MUTHUI FOR PLAINTIFF

MS MASHERU FOR DEFENDANT

COURT ASSISTANT - TUPET

