



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. E031 OF 2020

SENDY KENYA FREIGHT LIMITED.....PLAINTIFF

VERSUS

MULTIPLE SOLUTIONS LIMITED.....DEFENDANT

RULING

[1] The defendant herein was granted leave to defend the suit vide the ruling dated **14 July 2021** and was consequently directed to serve the Defence within 7 days from the date of the ruling. The matter was thereafter certified ready for hearing on **27 September 2021** and fixed for hearing on **15 November 2021**. On the **15 November 2021**, **Ms. Adhiambo**, learned counsel for the defendant, appeared unprepared to proceed, contending that she was never served with the plaintiff's List and Bundle of Documents. The matter was accordingly stood over to **17 November 2021** for hearing, after **Mr. Kongere** for the plaintiff demonstrated that service of all the documents filed by the plaintiff, including its witness statement, had been effected via email. Thus, in the interests of justice, time was granted for the plaintiff's counsel to additionally serve hard copies of their documents on the defence.

[2] All this while, the defendant had filed no witness statement or documentary exhibit as directed. Consequently, **Mr. Kongere** was led into believing that the defendant intended to rely solely on its Defence. The matter accordingly proceeded to hearing of the plaintiff's case on that basis. After the close of the plaintiff's case, counsel for the defendant, for the first time, indicated that the defendant intended to call one witness and asked for adjournment for that purpose; notwithstanding that no witness statement of the proposed witness or any other witness for that matter, was ever filed or served on the plaintiff. Counsel for the defendant expressed the view that no prejudice would be suffered by the plaintiff as it would avail itself of the opportunity to cross-examine the proposed witness.

[3] Naturally, **Mr. Kongere** opposed the application. In his submission, the court has a duty to ensure, not only fair hearing, but also the expeditious disposal of the cases filed before it. He pointed out that it is a requirement of the **Civil Procedure Rules** that the Defence be filed together with witness statements, as well as bundles of documents that a party wishes to rely on. His posturing was that the defendant has itself to blame for its non-compliance. He added that he even reminded counsel for the defendant of the need to file witness statements and documents; but his reminder remained unheeded as of **15 November 2021** when the suit came up for hearing.

[4] Thus, it was the contention of **Mr. Kongere** that, since the plaintiff proceeded with the hearing of its side of the case on the assumption that the defendant was going to rely on the Defence as filed, it would be prejudicial to then allow the defendant to adduce oral evidence in the manner proposed by **Ms. Adhiambo**. He urged the Court to take judicial notice that this is a suit that has been pending since **March 2020**. He asked the Court to take judicial notice of the fact that the parent company, known as **Multiple Hauliers (EA) Limited** is presently the subject of administration proceedings; hence the need to expedite the resolution of this particular dispute. **Mr. Kongere** concluded his submissions by underscoring the fact that no explanation was proffered by **Ms. Adhiambo** for non-compliance. He consequently prayed for the dismissal of **Ms. Adhiambo's** application and for the defence case to be marked as closed so that directions can be taken on the filing of submissions.

[5] I have carefully considered the submissions by learned counsel from the backdrop of **Order 7 Rule 5** of the **Civil Procedure Rules**; which provides that:

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;**
- b) a list of witnesses to be called at the trial;**
- c) written statements signed by the witnesses except expert witnesses; and**

d) Copies of documents to be relied on at the trial.

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

[6] It is not in dispute that the defendant did not comply with this requirement when it filed its defence on **10 February 2021**. It failed to comply even after the ruling of **14 July 2021** aforementioned and therefore took no action at all by **15 November 2021** when this suit came up for hearing. This was in spite of a reminder by counsel for the plaintiff. In premises, it is important to pose the question, why pre-trial disclosure? The answer to that question is to be found in **Halsbury's Laws of England Volume 13** where the learned authors of the treatise opine that:

“The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.

[7] Thus pre-trial disclosure is not just a procedural edict; it is anchored in **Article 50(2)** of the **Constitution** and is therefore a cardinal requirement that ought not to be taken lightly, as counsel for the defendant appeared to do. The significance of pre-trial disclosure was emphasized by the Supreme Court in **Raila Odinga & 5 Others vs. IEBC and 3 Others** [2013] eKLR thus:

“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...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.”

[8] In the instant matter, timelines were set for compliance; particularly compliance by the defendant. The defendant failed to comply. On its part, the plaintiff has presented its evidence to conclusion and closed its case; and although **Ms. Adhiambo** posited that no prejudice will be occasioned since the plaintiff will have an opportunity to cross-examine the defence witness, the issue here is about fairness, a level playing field and equality of arms. It would go against all these tenets of natural justice to let the plaintiff grope in the dark and presume that the evidence to be presented against it will not be out of the ordinary; particularly in this instance in which no justification at all was given for non-compliance.

[9] It is therefore my finding that it would be unfair to grant the defendant's request and allow it to call a witness in its defence without prior compliance with **Order 7 Rule 5** of the **Civil Procedure Rules**. As was aptly stated by **Kiage, JA** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others** [2013] eKLR that:

“...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”

[10] In the result, the application by **Ms. Adhiambo** to be allowed to present oral evidence in support of the defence case without prior compliance with the applicable procedural law as to disclosure is consequently dismissed with attendant costs and the defence case treated as closed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF NOVEMBER 2021.

OLGA SEWE

JUDGE