



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**COMMERCIAL & ADMIRALTY DIVISION**

**COMMERCIAL CASE NO.E004 OF 2020**

**AHMED AHMED MOHAMED.....PLAINTIFF**

**VERSUS**

**MOHAMED KASSAM MOHAMED.....1<sup>ST</sup> DEFENDANT**

**ABDULGANI AHMED NURMOGHAMED ISSAK.....2<sup>ND</sup> DEFENDANT**

**YUSSUF AHMED NURMOHAMED.....3<sup>RD</sup> DEFENDANT**

**SIDDIK AHMED NURMOHAMED.....4<sup>TH</sup> DEFENDANT**

**ABDULATIF AHMED NURMOHAMED.....5<sup>TH</sup> DEFENDANT**

**ISSAK A. N. ISSAK ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**COAST CALCIUM LIMITED..... INTERESTED PARTY/RESPONDENT**

**RULING**

1. The application before court is a **Notice of Motion** dated 27<sup>th</sup> **October, 2020** and filed on the same day by the 5<sup>th</sup> Defendant, which seeks the following orders:-

***a) Spent;***

***b) That this court be pleased to grant the Applicant Leave to file and serve a further Affidavit in Opposition to the application dated the 28<sup>th</sup> September, 2020;***

***c) That this Court be pleased to issue any such further orders as it deem fit and just.***

***d) That the costs herein be provided for.***

2. The application is premised on **four (4) grounds** on the face of the application and supported by **Affidavit** sworn on 27<sup>th</sup> **October, 2020** by the 5<sup>th</sup> Defendant. He avers that his understanding of the Plaintiff's suit is that his signature was forged and the documents said to have been signed by him are forgeries. In order to clear the doubt, the 5<sup>th</sup> Defendant avers that he sought a second opinion from **Mr. Kenga** who is a renowned and experienced forensic examiner. Consequently, the 5<sup>th</sup> Defendant seeks leave to introduce the report by way of a **Further Affidavit**.

3. The application was opposed vide the Plaintiff's **Replying Affidavit** sworn on 10<sup>th</sup> **November, 2020**. He deponed that the **Forensic Report** intended to be produced by the 5<sup>th</sup> Defendant is misadvised and in bad faith since he had already produced a **Forensic Report** from the **Directorate of Criminal Investigations(DCI)**, which is not only a competent body for such works but was further under a public duty and obligation as to the correctness and quality of its findings. Consequently, the production of the **Forensic Report** by the 5<sup>th</sup> Defendant adds no value to the matter save to merely cast aspersions on the already produced report which the 5<sup>th</sup> Defendant did not object to or raise

questions over its veracity, in which case he was at liberty to introspect.

4. The deponent further avers that the Defendants have conveniently neglected to forward to the said private forensic analyst, the prior forensic report by the **DCI** and have him explain the reasons he disregarded the findings therein. Consequently, the Plaintiff seeks that the instant Application be dismissed with costs.

5. Both the Plaintiff and Counsel for the 5<sup>th</sup> Defendant filed written submissions, as per the directions of this court on **4<sup>th</sup> November, 2020**.

#### **Determination**

6. In considering the application, response thereto, submissions filed by both Counsel together with the annexures attached thereto, I find that the issue before me is whether the 5<sup>th</sup> Defendant ought to be allowed to introduce a report prepared by **Mr. Kenga**, who is a renowned forensic document examiner. A copy of the said **Forensic Examination Report** is annexed and marked **AA-2**.

7. The Applicant has deponed that the need to bring a **Further Affidavit** introducing **Forensic Report** is so as to clear the doubts created by the Plaintiff that this signatures were forged and documents said to have been signed by him being forgeries.

8. In response, the Plaintiff avers that the said **Forensic Report** by **Mr. Kenga** does not add any value given that there is a **Forensic Report** by the **DCI** on record, which is a competent body for such works and is also under a public duty and obligation as to the correctness and quality of its findings.

9. This Court has taken cognisance of the provisions of **Article 159(2)(d)** of the **Constitution** which require courts to administer justice without undue regard to technicalities and those of **Article 50(1)** of the **Constitution** that further guarantee all persons a fair hearing before courts or tribunals. There can be no fair hearing if a party is denied the opportunity to adduce evidence in support of its case.

10. In my view, and being guided by the provisions of **Articles 159(2)** as well as **Article 50** of the **Constitution**, a party ought to be allowed to adduce additional evidence for as long as no prejudice is caused to the opposing party by the same.

11. In the instant case, the Plaintiff is of the view that the **Forensic Report** that is being sought to be introduced adds no value to the matter. However, the Plaintiff has not stated the form of prejudice he is likely to suffer if the said report is introduced by the 5<sup>th</sup> Defendant. In any event, the Plaintiff will have an opportunity/room to cross-examine the witness on the report or counter the same through a response with regard to its probative value.

12. Furthermore, by allowing the production of the **Forensic Report**, this should not be equated to the admission of facts by the court, as it will not be taken to be gospel truth since the Applicant shoulders the burden of proving the authenticity of the report he seeks to introduce.

13. In the end, the court reiterates its earlier view that a litigant should not be barred from laying all he/she has in terms of documents or evidence before a court of law in furtherance of his or her case as this also goes on to assist the court in arriving at a just and fair determination for the parties.

14. I therefore direct that:-

*a) The 5<sup>th</sup> Defendant be and is hereby granted 3 days Leave to file and serve a Further Affidavit but only limited to the introduction of the Forensic Report annexed to the instant application.*

*b) The Plaintiff is granted 7 days Leave to file and serve a Further Affidavit, if need be, upon being served by the 5<sup>th</sup> Defendant.*

*c) For expeditious disposal of the pending application, parties to ensure that their responses and written submissions have duly been filed and served.*

*d) Mention on 16<sup>th</sup> December 2020 for highlighting.*

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 19<sup>th</sup> day of NOVEMBER, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**