



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 18 OF 2017

METHUSELAR KEYAH LUBEMBE.....APPELLANT

VERSUS

ALBINA KIPKEMOI.....RESPONDENT

J U D G M E N T

1. This appeal challenges the decision of the trial court, Hon. D. Ogoti, by which the court dismissed for an application by the Appellant, as defendant before it, leave to file and serve a supplementary list of documents. In the ruling now challenged the trial court delivered itself as follows:-

“The aim of Order 11 is to deal with preliminary issues well in advance so that the trial once commenced must proceed on a day to day basis without unnecessary interruptions. At pre-trial among other many requirement or actions to be taken is that the court ensures that the documents have been exchanged.

On 24/3/16 learned counsel for the plaintiff indicated that they have complied with Order 11 hence by their own actions they are estopped from dealing with anyother action that would have been dealt with under Order 11. The application is disallowed”.

2. The proceedings of 24/3/2016 grounding the decision is very clear. It record the plaintiffs advocate as saying:-

“Ms. Nasimiyu: We have complied then the court Directed:-

Order: Hearing on 26/5/2016 defence to comply within 30 Days”.

3. The foregoing record is to me a big lesson or how a court ought to be assisted by parties to handle and undertake case conference or what is normally called trial directions. It is taken for granted that it is enough to say that parties have filed witness statements and documents and therefore the matter can proceed to trial. It is even anomalously said that Order II has been complied with once parties have filed witness statements and bundles of documents.

4. By that casual approach the parties and the court lose a valuable opportunity to ask basic questions and provide basic answers that will guide parties once the trial commence. In my view based on the clear and an ambiguous words of the statute documents to accompany the pleadings, whether plaint or defence, are filed pursuant to Order 3 Rule 2 and 7 Rule 5 and not pursuant to the provisions of Order II.

5. The plain words of the Rules demand that the witness statements and bundles of documents as well as lists of witnesses ought to accompany the pleadings they support hence it should never be a question of compliance or not. The same may only become an issue for addressing the court where there is a justifiable reason not to have filed the witness statement in time which event the leave of the court is requisite before late filing. The other option is where there is need to file supplementary list of witness or documents. But all that is undertaken under the provisos to Order 3 Rule 2 and 7 Rule 5.

6. Once pleadings close the court is mandated to convene a case conference session at which it is expected to consider all preliminary issues including; whether or not parties have complied with Order 3 Rule 2 as well as Order 7 Rule 5, establish the contested and uncontested issues and narrow down the outstanding issues, explore prospects of resolving the outstanding issues including alternative dispute Resolution and an appropriate timetable to understand the tasks and consider consolidation of suits as well as choices of a test suit. It is also at the case conference when the court directs on how to deal with interlocutory applications, consider propriety of admission of statements filed without calling the makers, consider the need and encourage parties to negotiate or go for alternative dispute resolution and generally to adopt any step towards managing the case so as to meet the need for expeditious disposal of the matter before setting a date for hearing. These are just

but some of the steps to be undertaken at case conference the full details are set out under Rules 1&2 of Order 11.

8. Even though the order provides for a multiplicity of case conferences, the general purpose of Order 11 is to set a roadmap for expeditious hearing of the matter so that once a hearing begins, least time is employed and when so employed, employed efficiently for the overriding objectives of the court to be met. Case conference under Order 11 is a good tool for managing court files and demands time from the judicial officer in conduct as well as the parties or advances to understand the file sufficiently well so that every effort and endeavor is made to save every minute by agreeing on basic and mundane issues like the number of witnesses to be called, the need for cross examination of witnesses, any questions regarding admissibility of a document and how to have the filed documents produced. This is important so that prospects of objection upon objections which many times derail progress are avoided. It is also the period of the case conference that parties make disclosures and discoveries towards achieving fair trial devoid of ambush.

9. When done correctly the prospects of subsequently interlocutory applications like for amendments can wholly be arrested and dealt with before hand. It is a process that all players in Civil litigation have no otherwise but to internalize and approach with seriousness deserved because when properly undertaken a very huge step is taken toward expeditious disposal of the matter.

10. It is the failure by counsel to take the process seriously that has given rise to the current appeal. Had counsel for both sides asked themselves if what had been filed by the 24/3/2016 was sufficient for the just adjudication and conclusion of the matter, the objection raised by the defendants counsel on the 8/12/2016 would have been avoided.

11. Having said so, one may ask what was the document that was objected to and how important could it be to the appellant's case? Are documents in the category of papers to be filed pursuant to provisos to orders 3 Rule 3 and 7 Rule 5?

12. The words of those provision say that only witness statements may be filed with leave of the court and the filing ought to be made at least 15 days before the date set for trial conference. There seem to be no room for filing of additional documents later that the pleading the document is intended to support. However these provisions must remain what they are, handmaid of justice designed to aid its purposes and not to be employed in a defeatist manner against the hallmarks and norms of justice. The rules must always be applied to meet overriding objectives of the court so that in order to do justice and avoid injustice or just abuse of the court process the court in its inherent power has the power at all stages of litigation to grant leave to parties to file any pleadings and documents that would facilitate the just, proportionate and conclusive determination of the matter.

13. In deciding whether to grant leave or not, a court of law would weigh the benefit to be achieved by allowing the documents against the possible harm to be suffered by refusal. That question is asked and considered on both sides of the case – the plaintiffs case as well as the defendants case. That question is normally fashioned as to what decision would in the circumstances of each case serve the ends of justice.

14. In the context of this appeal, the documents objected to by the respondents counsel were marked MFI-PJ and MFI P7. From the trial court's proceedings the two documents were an X-ray P3 form, police abstract, Notice to insurer and a demand letter to the owner of the motor vehicle. The basis of the objection and rejection of request for leave was that the same had not been filed in the list of documents by the plaintiff. Looking at those documents even though I am not substituting my discretion for that by the trial court, I do consider them important for the just determination of the dispute and further that their inclusion would not have prejudiced the respondent in anyway.

15. The trial court appear to have applied the rules very strictly to mean that documents not filed by the commencement are never to be included in the trial without considering the benefit their inclusion would bring as opposed to the hardship their exclusion portended visiting on the just determination of the suit. To that extent I do find that the trial court failed to exercised its discretion judiciously and the decision thereby reached therefore invite interference by this court as a first appellate court.

16. That finding lead me to conclude that the appeal is merited and the decision by the trial court thus cannot stand but must be set aside. I do set it aside and in its place substitute an order granting leave to the Appellant as the plaintiff before the trial court to file and serve a supplementary list and copies of documents within 14 days from today.

17. On costs, I have said and now repeat that both counsel failed in their duty to assist court meet its overriding objective just like the court did not properly execute its mandate at case conference. In those circumstances to order that commends itself to me is that each party shall bear own costs.

Dated and delivered at **Mombasa** this **25th** day of **October 2019**.

P.J.O. OTIENO

JUDGE