



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO.310 OF 2013**

**BRITANIA SACCO.....PLAINTIFF**

**VERSUS**

**JAMBO BISCUITS LIMITED.....DEFENDANT**

**RULING**

1. For determination is the Notice of Motion dated 19<sup>th</sup> May, 2017 whose substantive Prayer is for an Order that:-

**“2. THAT the Honorable Court be pleased to strike out and or expunge from the Court’s Record, all copies of documents referred to in and filed together with the witness statement of one Joseph O. Maiko dated 3<sup>rd</sup> April, 2017 and filed on 21<sup>st</sup> April, 2017”.**

2. The events leading to the Application can be briefly stated. On 29<sup>th</sup> July, 2016, all parties herein had fully complied with pre-trials and hearing commenced on 21<sup>st</sup> March, 2017. On the hearing day the Plaintiff called one witness a Mr. Daniel Kaliku after which Mr. Muoki appearing for the Plaintiff informed Court that he had one more witness in whose respect no witness statement had been filed. Against the objection by Mr. Kibanya for the Defendant, this Court ruled as follows:-

**“Court:-**

***It is disappointing that the Plaintiff has not taken advantage of Pre-trials to exhaustively state its case. It frustrates the intended seamless trial that is contemplated by the Practice Rules and can on occasion result in disadvantaging the other side. I would have therefore rejected this request but in the interest of Justice will allow the calling of this further witness and allowing for the making and service of this statement within 30 days hereof. However so that the Defendant is not unduly prejudiced, it shall be at liberty to file further witness statements within 30 days hereof and shall be entitled to recall PW1 for further cross-examination.***

***As I frown upon the manner in which the Plaintiff has managed its case I make an Order that today’s costs shall be paid to the Defendant in any event.***

***Further hearing on 26<sup>th</sup> and 27<sup>th</sup> September 2017”.***

3. The witness statement filed was that of Joseph O. Maiko dated 3<sup>rd</sup> April, 2017 and filed on 24<sup>th</sup> April 2017. The Defendant is unhappy about this statement because attached to it are a new set of Documents, new because they were not part of the Documents originally filed by the Plaintiff. The Defendant complains that no leave was obtained by the Plaintiff to introduce these Documents which in its view constitute new evidence. It is asserted by the Defendant that some of the Documents in the impugned set were in fact rejected by Court during the testimony of Mr. Kaliku and there is therefore an attempt to sneak them in.

4. In addition, the Defendant argues that the Documents are sought to be introduced in a manner that affronts the provisions of Section 35(1) of the Evidence Act which reads;-

**“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—**

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

**Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable”.**

5. The Practice in this Division (The Commercial and Tax Division of the High Court) is governed by Practice Direction on Case Management. The object of the Practice Directions is to facilitate quick and expeditious Trial and Disposal of the Disputes. It also ensures that the adversaries to a matter get to know the cases they have to meet in advance of the Hearing date so as to prepare adequately and on time. Under Direction number 3 all Bundles of Documents and list of witnesses and statements of such witnesses to be called has to be filed prior to the Case Management Conference. Upon compliance with pre-trials, the Court holds a Case Management Conference and certifies a Matter ready for Hearing. Once a matter is certified as ready for hearing then unless there is good reason no new witness statements and documents ought to be introduced. The Ruling is even more unyielding when the hearing of a matter has commenced. And where a party has closed its case then the other should not be allowed to introduce new documents and witnesses as it may disadvantage the side that has closed its case.

6. In the matter before Court, the Plaintiff had, on 21<sup>st</sup> March 2017, after the hearing of one witnesses but before the close of its case, requested to call one more witness and to file his witness statement. The Court acceded to this request in the decision reproduced in paragraph 2 hereof. I would have to agree with Counsel for the Defendant that if the Plaintiff intended to introduce new Documents alongside the Statement, then it should have said so at the time of making the request for the filing of the Witness Statement of the new Witness.

7. That said, a Court of Law should always be concerned with substantive justice and the main hearing of a matter the golden opportunity for a party to a dispute to put forward all the evidence it can marshal. From the practice of this Court, it is to be expected that the evidence will have already been filed prior to the Case Management Conference. But as is sometimes the case, either out of oversight or for other reason, this does not happen. So as to give parties the furthest opportunity of presenting their case, a Court will allow introduction of new evidence if the failure to include it in the first place was bonafide and does not prejudice the adversary or where prejudice can be mitigated by allowing the adversary to file fresh evidence. Invariably therefore whether to allow fresh Statements and Documents will turn on the circumstances of each case.

8. In this matter I had allowed the filing of a new Witness Statement and the Defendants objection is limited to the Documents attached to the new Statement. Having allowed the filing of a new witness statement and therefore the possibility of new evidence, it may not be unreasonable to allow the filing of documents that would support the evidence in the new statement. This is so because in my Ruling of 22<sup>nd</sup> March, 2017 I had granted liberty to the Defendant to file further witness statements in reaction to the new evidence and to recall PW1 for further cross-examination. I would therefore be disinclined to expunge the documents because I am not told that by exercising the Leave this Court had granted the apprehension of prejudice is not addressed.

9. That notwithstanding documents whose introduction breach the provisions of the Evidence Act must be disallowed. Section 35(1) of The Evidence Act is clear on this. Mr. Maiko is the maker of Document JM1. There is no reason not to allow it. Document JM2 and 3 are Annual Returns prepared and filed by the Plaintiff. The Plaintiff is the maker of these documents and I see no reason why they should not have been produced by PW1. I expunge these two. Document JM 4,5,6 and 7 are cheques said to be issued to the Plaintiff Sacco. They would be in the custody of the Plaintiff. Document JM8 are Bank statements of the Plaintiff. These again are the Plaintiff's documents and would be in it's possession. Mr. Maiko is not an official or employee of the Plaintiff. He is a Civil Servant, the Co-operative Officer, Makadara District. He is not the proper person to produce these documents.

10. Document JM9 is a copy of a Notice of Transfer of Business by Jambo Biscuits to Kilimanjaro Foods Limited that appeared in the Standard Newspaper of 20<sup>th</sup> May, 2013. The Record of these proceedings show that the fact of Transfer of Business is common ground. The Document may not be controversial. For what its worth JM9 can therefore be produced by Mr. Maiko.

11. The only Documents that survives expungement are JM1 and JM9, and the Defendants objection has succeeded very substantially. The Defendant shall thereof have costs of the Motion of 12<sup>th</sup> May, 2017. For clarity Documents JM2, JM3, JM4, JM5, JM6, JM7 and JM8 attached to the witness statement of James Maiko signed on 3<sup>rd</sup> April, 2017 are hereby expunged.

**Dated, Signed and Delivered in Court at Nairobi this 29<sup>th</sup> day of June, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Kibanya for Defendant

Sinana for Muoki for Plaintiff

Nixon - Court Assistant