



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 16 OF 2006

RIFT VALLEY PRODUCTS LIMITED.....PLAINTIFF

VERSUS

PLEXUS COTTON LIMITED.....DEFENDANT

R U L I N G

1. On 29/11/2017, the plaintiff by a Notice of Motion dated 27/11/2017 sought an order that the court orders issued in this file on 25/10/2016 differing the matter to enable the plaintiff take out and deliver interrogatories upon the defendant together with all subsequent and consequent orders made thereafter and extending time for such delivery be set aside. That application was premised on some 4 grounds. Those grounds are to the effect that the defendant has a design to derail and impede the hearing of the matter, misled the court into believing that a delivery of interrogatories would disperse with the need of attendance by the defendants witness to attend court for cross examination when interrogatories can never be used to substitute cross-examination or to fish evidence from the adversary and the scheme is to achieve the sole purpose of evading cross examination with the attendant result of inability to test the credibility of the witness.
2. The application was supported by the affidavit of the advocate for the plaintiff, Mr. Khagram, whose thrust was that there had been clear attempts to hamper and impede the hearing of the suit including failure to file witness statements and documents within the timelines directed by the court.
3. It was highlighted then that at trial conference it was ordered that parties shall only rely upon witness statements filed and that the witness who had filed statements would be present in court for cross examination after the defendant confirmed that it would not rely on any documents save those filed by the plaintiff. To the counsel the orders made by the court on the 25/10/2016 were made following a misleading intimation to court that only paragraph 8 of the defendant's witness statement would require cross examination and that in that event the attendance of the witness would be dispensed with by delivery of interrogatories on the issues captured in the paragraph.
4. In additional, the court was referred to previous happenings in the file including an order setting aside a default judgment and granting conditional leave to defend as well as other applications targeted at termination the suit before hearing.
5. The defendant opposed the application by the affidavit of its counsel **Mr. Ushwin Khanna** which denies any design by the defendant to impede or hamper the hearing of the suit and blames the delay in hearing the matter upon the plaintiff by undue delay in bringing the application. The Affidavit proceeds to deny that the defendant intends to rely upon the interrogatories to substitute giving of evidence and cross examination but stresses the point that the defendants witness is a stranger to the allegation of theft or conversion as the witness was never in Kenya at the time the improprieties are alleged to have happened.
6. The counsel underscored the fact that the orders of 25/10/2016 were given after the court was convinced of the propriety of delivery of interrogatories and that the need for interrogatories was intended to save the defendants witness unnecessary expenses. The counsel pointed out that the question of whether or not the defendants witness could be availed for cross was left open to be determined upon the interrogatories being delivered and answer therefore being furnished.
7. To the defendant the plaintiff has occasioned delay by failure to deliver the interrogatories and therefore failure to comply with courts discretions.
8. Parties equally filed submissions complete with lists of authorities in support of their rival position. The plaintiff's submissions are dated 1/3/2018 while those by the defendant are dated 28/2/2018. On 30/5/2018 counsel attended court and highlighted the submissions.
9. The thrust of Mr. Khagram's submissions is that the court has been led to give orders for delivery of interrogatories in a manner that is intended to substitute the duty of a witness to attend court and be cross examined and therefore improperly. He stressed the purpose and importance of cross examination in civil litigation and cited to court the decision in **Bandari vs Gautama [1964] E.A. 606** in which a

judgment of the High Court was set aside on account of the fact that the defendant had been denied a chance to cross examine.

10. Both section 146 Evidence Act and the decision in **HFCK vs NSSF Board [2014] eKLR** were cited for the proposition that evidence is liable to be tested by cross examination. There was cited to court the decision in Wachira Kerauri vs Bildad Wachira on the application by court of the overriding objections of the court and the inherent powers of the court to do justice so that no action of the court is seen to cause any harm to any suitor before it. **Tulip Properties Ltd vs Mohammed Koriow [2007] eKLR** and **Carlo Vesta vs Apa Insurance Co. Ltd [2015] eKL** were cited for what purposes interrogatories are administered being that the purpose is to save time and costs and never to substitute evidence or the need for cross examination and therefore questions that go to credibility of the witness are not allowable on interrogatories.

11. For the Defendant/Respondent submissions were offered that the applicant has adopted an incorrect and inappropriate procedure and thus not entitled to the orders sought because the provisions cited, Section 1A, 1B and 3A of the Civil Procedure Act are inapplicable and only Section 80 and Order 45 Rule 1 could be applicable. It was then stressed that under Order 11 Rule 3(2) c & 7(1) d the court has a discretion to dispense with the attendance of any witness. The Defendant cited Tulip Properties Ltd (supra) on when account of law would order delivery of interrogatories. To the defendant the orders of 25/10/2016 were made pursuant to court's exercise of discretion which the defendant contends was properly done and deserve no disturbance.

12. In oral submissions, Mr. Khanna only added that the orders of 19/3/2016 were and have since been overtaken by the subsequent orders beginning with those of 25/10/2016. He contended that the order sought to be set aside visited no prejudice upon any of the parties nor does it shield the defendant's witness for being cross examined. Of the witness counsel said he was not averse to being cross examined and that the orders of 25/10/2016 left it to the decision of the plaintiff whether it desires to have the witness cross examined.

13. In his closing submissions, Mr. Khagram submitted that the court has no powers to impose upon the plaintiff an obligation to deliver interrogations where the plaintiff understands the defendant's case. He maintained that the plaintiff had no interrogatories to deliver and that issues of costs can be dealt with at the conclusion of the case.

Issues for determination

14. Having read the application and the responses thereto together with the written submissions citing decided cases as well as the oral highlights of such submissions, it is to me clear that the only question I must post and answer is whether the court was right in making the orders it did make on the 25/10/2018.

Analysis and determination

15. On the 25/10/2016, this file was scheduled for case inference by consent of the parties. On that day Mr. Khanna for the defendant made a request to court to allow the statement by the defendant's witness to be produced without having the witness having to attend court. He gave the justification and grounds for that request to be threefold:-

(i) The witness resides in Liverpool UK and it would visit substantial expenses to come to Kenya to give evidence only to produce his statement.

(ii) He was not present when the matters complained about took place hence his evidence would be largely hearsay.

(iii) The plaintiff had filed a bundle of documents which the defendant was agreeable to be produced by consent

13. By way of addressing the need to avoid attendance by the witness, the counsel stated that any matter that would demand the attendance of the witness could be dealt with by way of interrogatories pursuant to Order 11 Rule 3(2) c & d.

14. Mr. Ondego for the plaintiff express dismay for being taken back because to him the issue had been resolved by the directions given by court on the 19/5/2016 when the court directed that the witnesses who had filed witness statements would attend court for purposes of being cross examined. He maintained that the plaintiff's position was that the defendant's witness attends court for cross examination to test his credibility and that the defendant had no right to predetermine what questions the plaintiff would have for the witness in cross examination. On expediency to be achieved by interrogatories over cross examination, the advocate took the view that interrogatories would take longer time than a day of cross examination.

15. To enable me determine the application, I have had to peruse the file to enable understand the sequence of events and orders prior to the 25th October 2016. That perusal has revealed to me that having listened to the parties on that request, at the case conference, the court said:-

“The earliest date this court can give for hearing the suit is after 25/3/2017. That duration, to this court, is enough to deliver interrogatories if all parties were to act in good faith.

For that reason I give the following as further directions:-

i) Let the plaintiff deliver interrogatories to the defendant within 25 days from today.

ii) Upon delivery, let the defendant provide answers to the interrogatories within 30 days after service.

iii) Upon service of the answers, the plaintiff be at liberty to seek further and better clarification within 14 days after service and the clarification shall be delivered within 14 days after the request.

iv) This matter shall be mentioned on 14/3/2017 to confirm whether or not the plaintiff shall require the attendance of the defendants witness after the interrogatories shall have been delivered and compliance made.

Hearing on 3/4/2017

v) **Costs in the cause”.**

17. Now that decision is the object of the current application. It cannot be overemphasized that in coming to the directions it did give that day the court was persuaded that if interrogations be delivered, they would take the form and place for cross examination and therefore enhance expediency and reduce the costs of litigation and to determine whether the plaintiff would require the defendants witness for purposes of cross examination.

18. To the extent that the purpose the defendant required, unusually to be interrogated on a portion of the witness statement, was to obviate the need of its witness spending money to travel from United Kingdom to Kenya, to be cross-examined on the statement. I hold the view that there was an improper invocation of the procedure and purpose of delivery of interrogatories. It is unfortunate that the court proceeded on the incorrect appreciation that once interrogatories are delivered the need for cross examination may be dispensed with.

19. As structural interrogatories are intended to enable a party have clarified the pleadings and positions of the adversary. The known originator of the request for interrogatories is thus taken to have no clear view of the adversaries case. It is therefore such a party who makes a request to court to be granted leave to deliver interrogatories to help it either strengthen its case or attack that of the adversary by questions to be answered upon interrogation. It is to that extent unusual that a party would approach the court, as the defendant did herein, that he be interrogated. That pre-supposes that the defendant has placed itself in the position of the plaintiff as far as the pleadings and evidence to be adduced is concerned, has made a finding on its own that the plaintiff has not understood its case and needs some gratis intervention from the defendant so that the defendant helps the plaintiff understand the defense amounted against its claim. That to this court is unusual.

20. Parties must be left to prosecute their cases the way they deem best and it is never the duty of the court to counsel advise or come to the aid of any party on how to prosecute its case. That is the error this court found itself in by the orders of 25/10/2016 which I have said is quite unfortunate and regrettable.

21. That being my finding on the position of the law and the application before me not being one for review but setting aside, I accede to it by setting aside those orders, I may add *ex-debito justitiae*, so that the ends of justice may be met by the plaintiff being assured that nothing is being done to stop it for accessing its right, as a litigant, to cross examine the ‘defendants witness’.

22. The conclusion is that the orders of 25/10/2016 are hereby set aside, and the directions given on the 19/5/2016 are reinstated and shall be applied at the hearing of the suit.

Dated and delivered at Mombasa this 26th day of June 2018.

P.J.O. OTIENO

JUDGE