



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 58 OF 2017**

**KENYA POWER AND LIGHTING**

**COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**SPEDAG INTERFREIGHT KENYA LIMITED.....DEFENDANT**

**RULING**

1. The application before me is dated 2<sup>nd</sup> March, 2018. It is premised on the provisions of Article 25(c) and 50(1) of the Constitution of Kenya, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 rule 10 (2) of the Civil Procedure rules. It seeks the following orders;

(i) Spent;

(ii) Spent;

(iii) That the Plaintiff be compelled to provide the particulars required by the defendant under the request for particulars dated 25th July, 2017 and served upon the plaintiff's Advocates on 28<sup>th</sup> July, 2017 within 14 days from the date an order in that regard is made;

(iv) That is the event that the plaintiff defaults in providing the particulars the plaintiff's suit be deemed to be struck out automatically with costs; and

(v) That costs of the application be provided for.

2. The Application is anchored on the grounds on the face of it and the supporting affidavit of Mr. F. Kinyua Kamundi, Advocate dated 2<sup>nd</sup> March, 2018. The respondent filed a replying affidavit through Zillah Moka, Advocate sworn on 8<sup>th</sup> May, 2018.

3. In arguing the application, Ms. Muyaa, Learned Counsel for the applicant indicated that following their request for particulars on 25<sup>th</sup> July, 2017 certain particulars were supplied on 4<sup>th</sup> May, 2018. She stated that the request was made for reasons that the plaintiff seeks Kshs. 52,992,394.85 yet the plaintiff does not give a breakdown of how the figure that is being claimed has been arrived at. In making reference to paragraph 8 of the plaintiff, Counsel stated that it is averred that there was power disruption in various places for three hours, which gave rise to the suit the subject of this application. She further stated that it was alleged that there was trespass in the premises in issue.

4. It was submitted that if particulars are not supplied there will be trial by ambush by the plaintiff but supply of particulars will narrow down the issues and it will inform the defendant if they will need to call experts.

5. Ms. Muyaa further argued that the particulars supplied are not sufficient. She contended that their request for particulars with regard to paragraph 9 was not responded to as the defendant's counsel stated that the issue did not arise from the pleadings. She further submitted that no response was received in regard to paragraphs 4 and 6 of their request for particulars. In citing the provisions of Order 2 rule 10(2) of the Civil Procedure rules, Counsel submitted that the said provisions allow the court to order for particulars to be supplied and to even request for the statement of the nature of the case on which a party relies.

6. She prayed for the suit to be struck out as per Order 15 rule (2)(c) of the Civil Procedure rules, the denial of particulars will occasion them an injustice. She argued that the defendant has a right to a fair trial under Articles 25 and 50 of the Constitution of Kenya, 2010.

7. She admitted that some of the particulars are borne out of statements of the plaintiff's witness. She however stated that Order 3 rule 2 of the Civil Procedure rules had not been complied with as the contents of witness statements are not sufficient, thus the request for particulars. She indicated that the plaintiff has had more than a year to put its act together. She prayed for prayer Nos. 4 and 5 to be granted.

8. Mr. Makori, Learned Counsel for the respondent submitted that the aim of request for particulars is to assist a party to respond to the issues raised in pleadings. He stated that the defendants failed to file a defence on 13<sup>th</sup> July, 2017 but answered to the suit sufficiently when they did. He pointed out that on 18<sup>th</sup> July, 2017 the defendant filed a witness statement and on 28<sup>th</sup> July, 2017 it filed a bundle of documents. Counsel therefore argued that the defendant is comprehensively aware of the suit brought against it and the evidence to be tendered by the plaintiff.

9. Counsel submitted that the request for particulars at paragraphs 7-32 are questions that can be posed during cross examination. He pointed out that the request made at paragraph 8 (i) on the time a call was received and stated that was a question for cross examination. In reference to paragraph 4 of the plaint, he stated that it contains answers to some of the particulars requested for. He further submitted that a request for particulars should be grounded on pleadings and not on the evidence to be tendered. He expressed the view that under Order 11 of the Civil Procedure Rules, parties are required to provide particulars of evidence.

10. Counsel took the position that under Order 2 rule 10(2) of the Civil Procedure Rules, no power is donated to the court to strike out a suit for failure to supply particulars as the power to strike out pleadings is provided under Order 2 rule 15 of the Civil Procedure Rules. He submitted that courts are slow in taking draconian steps of striking out cases. He relied on their list of authorities where they cited an extract from "Pleading without tears" by William M. Rose (Third Edition) p. 152, **Joshi vs Uganda Sugar Factory** (1968) EA 570 and Mulla, Code of Civil Procedure (18<sup>th</sup> Edition 2011) Vol. 2, p.1723, to support his arguments.

11. He further indicated that all the particulars the defendant is seeking are in the witness statements. He took issue with Ms. Muyaa's critique of the manner in which the plaintiff's Counsel had drafted the plaint and stated that their style of drafting is different. He prayed for the application to be dismissed.

12. Ms. Muyaa responded by stating that the statement of defence is detailed but in paragraph 13 thereof they have stated that the plaintiff failed to clarify certain information in the plaint. In referring to Mulla, Code of Civil Procedure (supra), she stated that it indicates that a suit can be struck out for failure to supply particulars. In responding to the authority of **Joshi vs Uganda Sugar Factory** (supra), she stated courts do not encourage trial by surprise.

#### **ANALYSIS AND DETERMINATION**

The issue for determination is if this court should strike out the suit for failure by the plaintiff to supply particulars to the defendant.

13. The provisions of Order 2 rule 10 (2) of the Civil Procedure rules do provide for supply of particulars. The said provisions state as follows:-

***"The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just."***

14. I have perused the plaint filed on 24<sup>th</sup> May, 2017. It is clear and concise on the subject matter of the claim. I have also perused the plaintiff's witness statements which bring out the finer details of the claim. I have perused the request for particulars dated 25<sup>th</sup> July, 2017 and noted that most of the information being sought falls in the ambit of evidence and will be best tackled through cross examination.

15. As submitted by Ms Muyaa, the defendant in paragraph 13 of its statement of defence expressed inability to plead fully on the alleged quantum of loss of the amount of Kshs. 52,992,394.85 claimed by the plaintiff for 2,609,180 kilowatt hours. In the said defence, the defendant avers that electricity bills from the plaintiff contain other charges such as fuel cost, forex adjustment, inflation adjustment, Energy Regulation Commission levy, Rural Electrification Program Levy and VAT. The defendant further avers that inability to plead fully is owing to the plaintiff's failure to clarify whether the average price of Kshs.20.3 per kilo watt hour is the cost of selling electric power to the consumers or the plaintiff's cost of purchasing power from the producers.

16. In the case of **Joshi vs Uganda Sugar Factory Limited**( supra) the court of Appeal held as follows;

***"The court will, however, order a defendant to furnish particulars where he is making positive averments and will also exercise its discretion to order particulars where it believes that by so doing it will narrow the issues and avoid surprise and so reduce expense."***

17. This court has noted that the plaint does not disclose the information that the defendant has pin pointed in paragraph 13 of the statement of defence. The pleadings herein reveal that the main dispute is technical in nature. It is this court's considered view that the defendant should be supplied with some of the particulars requested for. This will assist in narrowing down the issues rather than parties engaging in long drawn arguments and requests for adjournments so as to fill gaps in their cases. As submitted by Counsel for the defendant, the supply of particulars will inform their decision on whether they will need to call an expert witness and it will enable them to prepare adequately for their case.

18. In reference to the request for particulars dated 25<sup>th</sup> July, 2017 the plaintiff is ordered to supply particulars as sought in:-

(i) Paragraphs 13 (i), (ii) and (vi);

- (ii) Paragraph 14;
- (iii) Paragraph 17;
- (iv) Paragraph 20;
- (v) Paragraph 22;
- (vi) Paragraph 23;
- (vii) Paragraph 24;
- (viii) Paragraph 27;
- (ix) Paragraph 29;
- (x) Paragraph 30;
- (xi) Paragraph 31; and
- (xii) Paragraph 32.

19. It is also clear that by supplying the said particulars the plaintiff's witnesses will also be better prepared for the hearing of the case. I therefore grant the orders sought but only limited to the paragraphs of the request for particulars that I have outlined in paragraph 18 of this ruling. The foregoing therefore means that I decline to strike out the plaintiff's suit. Each party shall bear its own costs of the application as it is evident that some of the particulars that were sought by the defendant fall in the realm of cross-examination

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 27th July, 2018**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Mr. Muliro holding brief for Mr. Makori for the plaintiff/respondent

Mr. Muthuri holding brief for Ms Muyaa for the defendant/applicant

Ms Caren Otene - Court Assistant