REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC APPLICATION NO. 4 OF 2018

NICHOLAS OCHIENG' AHENDA & OTHERS.....PLAINTIFFS

VERSUS

VEGPRO (K) LIMITED.....DEFENDANTS

RULING

1. The Application for consideration is undated but was filed in Court on 15/01/2018 ("Application"). It is an unusual one. The first inkling of its extraordinariness is the fact that it is grounded solely on the general omnibus enabling provisions of the Civil Procedure Act to wit sections 1A, 1B and 3A thereof and Article 50 of the Constitution. The latter is the article that guarantees fair trial rights for everyone who has a case before any Court of law or tribunal in Kenya.

2. The Application relates to proceedings before Eldama Ravine Senior Principal Magistrate's Court. These are ten civil suits filed by various Plaintiffs ("Respondents") against the Applicant. All the suits are personal injury claims involving an accident allegedly involving a tractor owned by the Applicant.

3. The Applicant denied all the claims and after a period of discovery, the suits proceeded to full trial. Although each of the Respondents had filed a separate suit, since they all arose from the same alleged accident, the Court, as part of its docket management obligation, directed that all the Plaintiffs give their evidence in the lead file – and that, instead of the Applicant having to call its defence witnesses in each of the separate cases, the evidence taken in the lead file would apply to all the cases.

4. Based on these directions, the case proceeded for hearing. The Respondents, who were all represented by the same counsel, testified, produced all their documents and closed their case. That was on 05/09/2017. The Applicant's counsel, Ms. Tarus, sought an adjournment in order to call his witnesses. After a number of adjournments, the defence hearing was eventually scheduled for 05/12/2017.

5. On 05/12/2017, the Applicant called its witness – its farm manager by the name Samuel Maina. After the witness had finished testifying, Ms. Tarus who was conducting the matter on behalf of the Applicant, sought to produce medical records generated by the Applicant's doctor, a Dr. Malik. Mr. Njuguna, for the Respondents, objected to the production. The Court upheld the objection noting that the parties had exchanged their documents after a long period of discovery and that there was no reason why the Applicant had not given the documents to the Respondents' counsel during that period. However, the Learned Trial Magistrate gave a short window of opportunity to the Applicant: if they could get the doctor who authored the medical reports on the same date taken for hearing (05/12/2017), then the Learned Trial Magistrate would allow the witness to testify even though his witness statement had not been supplied to the Plaintiffs.

6. Faced with this ruling, the Applicant's counsel chose to close the defence case. However, before the parties could finalize their submissions for the Learned Trial Magistrate to write the judgment, the Applicant fired off an Application under Certificate of Urgency. The Applicant wanted to be allowed to re-open their case so that they could call Dr. Malik and the Base Commander, Eldama Ravine Traffic Base, to testify.

7. The Learned Trial Magistrate considered the Application and dismissed it. Her view was that, in essence, what the Applicant was doing was stealthily appealing against the ruling she had made on 05/12/2017.

8. The present Application is the Applicant's next stop. The Applicant wants this Court to direct the Learned Trial Magistrate to re-open the defence case and permit Dr. Malik and the Trafic Base Commander to testify on behalf of the Applicant.

9. As I understand it, the Applicant has largely based its Application on fair trial principles. It believes that what has happened in the Court below is a violation of its fair trial rights. The argument seems to be that it is entitled to fair opportunity to call its witnesses.

10. The Applicant is, of course, right that it is entitled to a fair opportunity to call its witnesses. That is why Order 11 provides for an elaborate process of pre-trial procedures during which parties engage each other before perfecting the case for trial. In the present case, the Applicant asked for an adjournment in order to conduct the Defence case. In its list of witnesses, the Applicant had indicated that it would

call Mr. Samuel Maina and the examining doctor. It did not indicate that it would call the Traffic Base Commander. It was therefore to be expected that on the date scheduled for defence hearing Mr. Maina and Dr. Malik would have been available to testify. No reason was proferred why Dr. Malik was not available. The Applicant's counsel say that they expected the Respondents' counsel to reciprocate by admitting the medical records by Dr. Malik in evidence in the same way the Applicant's lawyer had not objected to the Respondents' medical records being admitted without calling the maker.

11. In other words, the Applicant now claims that it expected reciprocity from the Respondents in admitting the medical reports. However, it bears to point out that the Respondents' medical reports were filed in the Court records together with the Plaint. The Applicant's medical reports were not so filed. This is what the Learned Trial Magistrate was referring to when she stated, in essence, that pre-trial procedures are meant to serve a purpose – and that the purpose would be lost if a party was allowed to ambush the other party at trial by seeking to produce documents for the first time when a witness is on the stand. This is precisely what Order 11 was meant to cure. Parties are expected to disclose to each other their material evidence and narrow down the issues for determination.

12. In my view, all these exposition is not deeply relevant to the Application at hand. What is relevant is to understand the procedural posture of the present Application. What, exactly, is the Applicant asking the High Court to do? It is asking the Court to commandeer a trial that is taking place before a competent Judicial Officer in the Lower Court and give directions on how the Learned Trial Magistrate should proceed with the trial. Not even under this Court's supervisory powers under Article 165 of the Constitution can this Court seize such jurisdiction. This is not an interlocutory appeal against the Learned Magistrate's ruling dated 05/12/2017. Even if it were, there is a question whether the Court would, on prudential grounds, accept such an interlocutory appeal before the finalization of the case. This is simply a request for this Court to lurk behind the Presiding Officer of a Court which is seized of a matter; second guess her decision; and give directions on how she should proceed with the matter.

13. If this Court had any such jurisdiction, it would decline to do so on prudential grounds. If the Applicant is aggrieved by the decision of the Learned Trial Court, the proper recourse would be an appeal at the interlocutory stage or, as is ordinarily the case, at the conclusion of the case. There is simply no good reason to ask the Court to review the ruling and order of the Learned Trial Magistrate at this stage in the proceedings.

14. **I do not need to say more at this point. Indeed, it is inadvisable to do so – for the Appeal from the final decision of the Court could end up before this Court at a later stage. Suffice it to say that the undated Application filed in Court on 15/01/2018 is wholly without merit and it is hereby dismissed with costs.**

15. **The Lower Court file shall be transmitted back to the Eldama Ravine Magistrate's Court for conclusion of the civil suits**.

16. Orders accordingly.

Dated and delivered at Nakuru this 26th day of July, 2018

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J. M. NGUGI

JUDGE