



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. CASE NO. 548 OF 2013

SELECTA KENYA GMBH & KG.....PLAINTIF

VERSUS

MOHAMED ESMAIL.....1ST DEFENDANT

PETER WANDERI.....2ND DEFENDANT

RULING

1. By a **Notice of Motion** application dated and filed herein on 18th December 2015 the 2nd and 3rd Defendants/Applicant seeks as the main prayer an order that they be granted leave to appeal to the Court of Appeal against the whole of the Decision delivered by this court on 15th December 2015.
2. The application is premised on the grounds set out therein and is also supported by the affidavit of **MOHAMED ESMAIL** who is also the 2nd Defendant.
3. The application is opposed by the Plaintiff/Respondent through a Replying Affidavit sworn by **HENDERIKUS EIKENS** on 29th January 2015.
4. Counsel made Oral Submissions in court on 15th February 2016 after which the court reserved a ruling for 18th March 2016.
5. The brief history of the application is as follows. Vide a Notice of Motion dated 2nd September 2015 filed by the 2nd and 3rd Defendants, the said applicants sought for orders among them an order to issue compelling the Plaintiff to produce on oath certain documents identified in that prayer. They also sought an order to issue compelling the Plaintiff to afford the Defendants reasonable assistance in the inspection of all the said documents. However, the Plaintiff had without being ordered availed certain document for inspection.
6. This Court on 11th December 2015 made a ruling on that application, and, in dismissing the same, observed at paragraph 10 of the Ruling as follows;

“I do not find the application merited. The Applicants herein are merely on a fishily expedition hoping that they can find information which will support their case. That may be in order but the documents required will not assist the court in the search of justice herein”.

7. The Applicants, being not satisfied with the above ruling, now seek the leave of this court to appeal against that ruling to the Court of Appeal. Leave is required for appeal.

8. It is the Applicants' case that the amount claimed in the Plaintiff is huge and the documents they seek to rely on are in the custody of the Plaintiff and that the Applicants will be prejudiced if those documents are not produced. However, the Respondent's case is that the Applicants' have no arguable appeal and that leave should not be granted as to do that will merely prolong and delay the finalization of this suit and prove costly to the Plaintiff.

9. I have carefully considered the application and the submissions. This court raises the following issues for determination, that is, whether the applicant has an arguable appeal to warrant the grant of leave, and if this court can exercise its discretion to allow the application.

10. In an application such as before the court, an applicant must first seek the leave of the court to appeal, as the appeal does not lie as of right. A person seeking to appeal from such an order as was given on 11th December 2015 must first demonstrate to the court that indeed there is an arguable appeal. The leave to appeal is therefore discretionary, but must be judiciously exercised.

11. In order for this court to exercise that discretion either way, I refer back to the said ruling of 11th December 2015, at paragraphs 7 and 8 thereof, where the court observed as follows;

a. I have considered the prayers for documents herein. There is no denying that the list is expansive, wide, and obviously target matters which are not exactly before this Court, and with which this Court is not concerned. Any documents required must have some kind of relationship with the pleadings, so that if the Defendant requires certain documents from the Plaintiff the documents sought must have some reference to the Plaintiff. I have carefully perused the Plaintiff herein. There is no single paragraph which resonates with the documents sought to be produced. The only paragraphs in the Plaintiff which have semblance to some of the requested documents are paragraphs 9 and 10 of the Plaintiff. In relation to the said paragraphs however, the Plaintiff has availed for inspection the following documents:

- 1. The Kenyan audited accounts for the years 2005 to 2012/13 and the monthly management accounts for the years 2005 to 2012.*
- 2. The sales records and price lists of products.*
- 3. The laptop that was being used by the 2nd Defendant while working at the company.*
- 4. The Plaintiff company's credit notes.*
- 5. Investment reports for the Plaintiff Company.*
- 6. Employment contracts for German expatriates working for the Plaintiff Company.*

b. The pleadings in this matter do not warrant the production of the documents requested, but because the Plaintiff was magnanimous enough to allow the inspection of above documents, I will order that those documents be produced in satisfaction of this motion. It must be noted that rules of procedure are primarily aimed at facilitating a fair trial. Similarly, discovery of documents is centered on this purpose. The documents sought to be produced ought to be strictly relevant and necessary to the cause at hand.

12. I have no reason to change my mind about my sentiments in above ruling. I am satisfied that the Applicants have not demonstrated that they have an arguable appeal to enable me to grant them the leave to appeal. In fact, I believe that the effect of an appeal such as intended will delay the hearing of the suit and stall the proceedings for no good reason while visiting unnecessary costs to the parties. The Applicant should be content that this court allowed them to access documents mentioned at paragraph 7

of the Ruling of 11th December 2015.

13. Arising from the foregoing the 2nd and 3rd Defendant/Applicants' Application dated 18th December 2015 is herewith dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 18th DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Fundi for Plaintiff

M/s Jakaila for Defendant

Teresia – Court Clerk