

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 202 OF 2008

SWANI COFFEE ESTATES LIMITED PLAINTIFF

VERSUS

TERRA FLEUR LIMITED DEFENDANT

RULING

1. When this matter came before the Court on 11th November, 2013 for the resumed hearing of the suit, Mr. Wandabwa, the learned counsel for the Plaintiff produced a Supplementary List of Documents dated 28th October 2013. This Supplementary List caught the Defendants by surprise and certainly, Mr. C.N. Kihara, learned counsel for the 2nd Defendant, sought time from the Court to seek instructions as regards thereto. For other reasons, the resumed hearing on that day came out of the list and the same was rescheduled for 12th November 2013 commencing at 11.00 AM. Again, it was no surprise to this Court that the parties came before it at 9.00 AM with Mr. Wandabwa appearing for the Plaintiff, Mr. Kariuki for the 1st Defendant and Mr. Wilson for the 2nd Defendant. Again it was agreed, more or less by consent, that the resumed hearing should not proceed as it was unlikely that the Court could complete the evidence of the three further witnesses that the Plaintiff intended to call.
2. Upon enquiry of the Defendants' counsel as to their position with regard to the Supplementary List and Bundle of documents produced to Court the day before by the Plaintiff, it was again not surprising that both counsel vehemently opposed the production of the same. Mr. Kariuki commented that the documents that the Plaintiff proposed to introduce dated back to the year 2011 and were within the Plaintiff's knowledge at that time. The Plaintiff had filed its original List and Bundle of documents in 2012. The suit was certified as ready for hearing. He noted that PW 1 had already given and closed his evidence but these documents had not been put to him or produced before Court. As a consequence, the Plaintiff was out of time and had established no basis as to why it wished to place such documents before the Court at this late stage. Counsel requested that the same be not admitted. In his turn, Mr. Wilson noted that the Plaintiff through its Counsel had sought the leave of the Court in February 2013 to put in a Supplementary List and Bundle of documents which had been allowed and the same had been filed in April 2013. He submitted that to put in a further Supplementary List and Bundle of documents after PW 1 had completed his evidence, amounted to an abuse of the Court's process. Counsel identified himself with the submissions of Mr. Kariuki and requested this Court that the documents be not allowed to be produced. There had been no reason put before this Court by the Plaintiff's counsel as to why the documents were not available at the time that PW 1 was giving his evidence.
3. In response, Mr. Wandabwa maintained that he had been taken by surprise by the Defendants' objection to the production of the Plaintiff's Supplementary List and Bundle of documents. He maintained that the same were key to the issues upon which the Court was to make its determination. He submitted that it was not too late in the day for the Plaintiff to produce such documents as it had not closed its case. He submitted that the said documents would be produced before Court by the Plaintiff's second, third and fourth witnesses, so that the Defendants would not be prejudiced. The first document in the said List was a Judgement in respect of Petition No. 226 of 2011 the same having been delivered by Justice Lenaola on 20th September 2013, after PW 1 had completed his evidence before this Court. The other documents were a series of letters dated May 2011 passing between various parties and which had been produced at the hearing of the said *Petition No. 226 of 2011*.

4. As per **section 79** of the *Evidence Act (Cap 80, laws of Kenya)*, the first document that the Plaintiff wishes to put before this Court is a public document in that it is the Judgement of Lenaola J delivered on 20th September 2013. As such public document, it may be proved under **section 81** of the *Evidence Act* by production of a certified copy thereof. What the Plaintiff has currently placed before the Court is not a certified copy of the learned Judge's said Judgement and as such cannot be admitted into evidence. However, the Court takes the point that the said Judgement was delivered after PW 1 had completed his evidence before this Court on 18th February 2013. In terms of which witness the Plaintiff chooses to put before Court the Judgement document, is entirely its privilege. However, the Court understands the position of the Defendants who would not have had an opportunity (presuming the Judgement document is produced properly before Court) of cross examining PW 1 as regards thereto. The Court considers that no prejudice will be suffered by the Defendants should the document be allowed in, as they may recall PW 1 for examination in relation to the same. Similarly, as the Defendants have objected to the other 4 documents being letters dated 10th May 2011, 12th May 2011, 16th May 2011 and 17th May 2011, should the Plaintiff wish to produce the same, it must prove such by having them produced before this Court by the authors thereof if possible, but in any event, in accordance with the provisions of Part III of the *Evidence Act*.
5. As a result, I dismiss the Objections of the Defendants to the production of the documents as listed in the Plaintiff's Supplementary List of Documents dated 28th October 2013 but with the clear proviso that such documents must be produced and proved before Court in accordance with the provisions of the *Evidence Act*. In the circumstances, I make no order as to costs.

DATED and delivered at Nairobi this 20th day of November, 2013.

J. B. HAVELOCK

JUDGE