REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 266 of 2007

EXP MOMENTUM LTD …..........…….…………………….…….. PLAINTIFF

1. **DAVIS OYAKAPELE . …………………….………… 1ST DEFENDANT**

2. NJOROGE KIMANI T/A

KIMANI & ASSOCIATES…………………….……… 2ND DEFENDANT

RULING

On 20th June, 2011, the Hon. Mugo J made an order to the effect that**; "The issues of discovery and inspection and the framing and filing of issues to be undertaken and completed within 60 days."** Sixty days passed and neither discovery and inspection was done nor were issues filed.

Accordingly, on 8th February, 2012, the Defendant filed a Notice of Motion expressed to be brought under Order 17 Rule 2 (4) and order L Rule 1 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act. The Motion sought for an order that the suit be dismissed for noncompliance of that order of 20th June, 2011. It was contended for the Defendant that in March, 2008 the Defendant had served a request for particulars but the same were not supplied, that the Plaintiff's Advocates promised to file a list of documents that would include the requested particulars but to date that list has not been filed or supplied, that it was two hundred and twenty five (225) days since the order of Hon. Mugo J was made and the Plaintiff had not complied with the same, that it is apparent that the Plaintiff had lost interest in the suit.

Mr. Githinji, learned Counsel for the Defendant submitted that it is clear that a suit is to be dismissed once a party fails to comply with an order made under Order 17 Rule 2(4) of the Civil Procedure Rules, that it is only on 5/3/12 that the Plaintiff purported to file and serve the list of documents and witness statements, that the said documents were filed without leave or the time for so doing being enlarged. Counsel urged that the Defendant could not comply with the said Order of 20/6/11 because the Defendant was completely a stranger to the Plaintiff's claim and that had the request for particulars been heeded to the Defendant would have either had or known the nature of the Plaintiff's claim. That in the premises, the Defendant could not have complied with the order until and unless the Plaintiff had first complied with the same and finally that the Replying Affidavit had not addressed the issue of non-compliance of the order. Counsel therefore urged the court to allow the application.

On behalf of the Plaintiff, a Replying Affidavit of Ms Karen Mate was sworn on 5th March, 2012 was filed. It was contended on behalf of the Plaintiff that before the order of 20/6/11, the Plaintiff had made several attempts to list the matter for trial, Ms. Mate swore that when she forwarded the witness statements to her client for execution, she found out that the Plaintiff's main witness, one Carol Abade was on maternity leave, that she decided to fix the matter for trial by inviting the Defendant to attend court on 9/2/12 for fixing a hearing date, that although the date fixed on the said 9/2/12 was 7/3/12 for trial the present application was allocated that date, that the Plaintiff was desirous of prosecuting the suit contrary to the assertions of the Defendant, that the Defendant had not on its part complied with the order of 20/6/11 and that the application was made in bad faith.

Ms Situma, learned Counsel for the Plaintiff submitted that the Plaintiffs could not comply with the order of 20/6/11 because its main witness was in maternity leave, that the Plaintiff decided to fix the matter for trial by which time it expected that witness to have returned but instead the current application was listed for hearing, that the Plaintiff's advocates could not have applied for extention of time within which to comply with the order because did not have the documents in their possession, that they have now filed the witness statements and bundle of documents, that under Article 159 (2) (d) of the Constitution the Court should consider the matter on merit without undue regard to technicalities. Ms Situma referred the Court to the cases of **Omar Shariff T/A Kemco Auto Freight Forwarders Ltd Mombasa CA No. 176 of 2007**, **Belgo Holdings Ltd –vs- Robert Kotch Otachi Nrb HCCC No. 64 of 2005 (UR)** and **Anne, Delorie –vs- Agakha Nrb HCCC No. 63 of 2005 (UR)** on the principles applicable when considering an application for dismissal of a suit for failure to carry out discovery. Counsel therefore urged that the application be dismissed.

I have considered the Affidavits on record, the submissions of counsel and the authorities relied on.

In the case of **Omar Shariff T/A Kemco Auto –vs- Freight Forwarders Ltd & Anor (Supra),** the Court of Appeal at page 3 thereof:-

"We think that the dismissal of a suit, such as was done here, <u>is such a serious matter that would have required inquiry, for example, whether a party had willfully refused to make discovery</u>, and those matters needed to be established by proper evidence. We note that the learned Judge was alive to the need to establish whether failure to comply with the discovery order was willful before the party was refused a hearing or before the suit was dismissed. We, however, note that he did not allow for the ascertainment as to whether the appellant in this case had willfully refused to make the discovery. This is an important element in a case such as before us where a party is being denied a right to be heard

on grounds that he has failed to discover a document which he says was not issued to him by the relevant authorities. In the case of <u>Hyten –vs- Coventry City Council (1997) I WLR 1666</u> to which we were referred to by Mr. Inamdar, Auld, L.J, cited the remarks of Beldam L.J, in the case of <u>Carribean General Insurance ltd –vs- Frizzel Insurance Brokers Ltd (1994) 2 Lloyod's Rep. 32 CA</u> as follows:-

Final preemptory or "unless" orders are only made by a court when the party in default has already failed to comply with a requirement of the rules or an order, and the court is satisfied that the time already allowed has been sufficient in the circumstances of the case and the failure of the party to comply with the order is inexcusable."

In **Belgo Holdings Ltd –vs- Robert Kotch Otachi & Anor (Supra),** Kariuki J held:-

"<u>The court's jurisdiction under Order 10 Rule 20 of the Civil Procedure Rules should not be exercised except in extreme cases</u> and as a last result and then only where the court is satisfied that a party to the suit is avoiding a fair discovery or is guilty of willful default."(emphasis mine)

In **Eastern Radio Service –vs Tiny Tots (1967) EALR 392** Sir Charles Newbold, President of the E.A C.A held:-

"<u>it is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be preluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the court.</u> Nor is it, I think, in dispute that willful means intentional as opposed to accidental." (emphasis mine)

In the same case, Sir Clement De Lestang, V.P stated:-

"The authorities show and there is no dispute about it, <u>that a Court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort</u> and should only do so where it is satisfied that the Plaintiff is avoiding a fair discovery or is guilty of willful default."

From the foregoing cases, it can be safely concluded that for an application for dismissal of a suit for failure to comply with an order of discovery to succeed, an applicant must show that an order for discovery has been made, that the party against whom the order was made must have willfully failed to comply therewith, the documents sought to be discovered must be in that party's possession, that such an order for dismissal is to be made in extreme cases and as a last resort where it is shown that the party's failure to comply therewith was an attempt to avoid a fair discovery. I will also add that the delay in

complying with such an order MUST be shown to have caused prejudice to the opposing party. See the case of **Anne Delorie –vs- the Aga Khan Health Services NBI HCCC No. 64 of 2005 (UR).**

How does the present application fit into these principles? It is not in dispute that an order for discovery was made on 20th June, 2011, it is also not in dispute that there has been default and/or non-compliance therewith.

The central issue here is, was the default willful? I note the explanation given that the Plaintiff's Advocates contacted the Plaintiffs to establish the identity of the witnesses, that the said Advocates forwarded the witness statements for execution but the main witness of the Plaintiff was away on maternity leave. Contrary to the assertion by Mr. Githinji, learned Counsel for the Defendant that witness statements were not ordered for, my view is that statements are a crucial part of discovery under the Civil Procedure Rules 2010. I am aware that sometimes it is crucial to interrogate and/or interview the potential witnesses before a party can prepare a final bundle of documents. It is therefore not correct to state that the reason of non-availability of the plaintiff's crucial witness to execute the witness statement is an excuse.

I do note from the Replying Affidavit that Ms Mate did disclose the name of the witness in question. I also note that under our current laws, maternity leave takes about three months which is approximately 90 days. Considering that the court had given 60 days to comply with the order, out of the 225 days complained of, the delay would be approximately 85 days (that is 225 days less the 60 days given by the Court as well as the 90 days maternity leave.). In my view, 85 days is not so inordinate as to result in a dismissal of the suit.

Further, I hold the view that since the Plaintiff has attempted to give an explanation, I do not think that the default was willful and/or intentional. I do not see any material on record to make me conclude that the Plaintiff was evading fair discovery. I am guided by the fact that those documents and witness statements have already been filed its bundle of by Plaintiff. However, I will take it that the fact that those documents and witness statements had been filed as at the time the application came up for hearing, it is a clear indication that the Plaintiff may not have deliberately failed to comply with the order of Mugo J of 20/6/11.

The other issue which militate against the application is that, the order of 20/6/11 was binding upon both the Plaintiff as well as the Defendant. The Defendant has not shown that it attempted to comply therewith. While I do agree that the Defendant may not have filed any bundle of documents in view of its request for particulars upon the Plaintiff and the response thereto, it has not been shown that the Defendant drew and sent any agreed statement of issues to the Plaintiff for approval or did file its own statement of agreed issues to show its readiness to comply with the order. The Defendant did not need the Plaintiff to take any action for it to deal with the issue of the Statement of Agreed Issues. Had it taken any such step, then this court would have held a different view of the matter.

Finally, I should note that it has not been alleged that the delay or failure by the Plaintiff to comply with the said Order of 20th June, 2011 has prejudiced the Defendant in any way. In my view, prejudice is the central determinant in any order to be made under Order 17 Rule 2(4) or Order 11 of the Civil

Procedure Rules.

In my view therefore, prejudice not having been shown to have been suffered by the Defendant and for the foregoing reasons, I am inclined to sustain the suit rather than terminate the same summarily.

Accordingly, the Defendant's application dated 7th February, 2012 is dismissed with the following directions.

1)Since the said application could not have been filed were it not for the Plaintiff's inaction, I am minded to penalize the Plaintiff by ordering it to pay the costs of the application assessed at Kshs. 5,000/- payable within 14 days.

2)The Defendant is to file and serve its bundle of documents, if any, within 14 days of this order.

3)The parties are to file a statement of agreed issues within 21 days of today and the Plaintiff is to list this suit for trial within 120 days of the date of this ruling.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of March, 2012.

……………………………

A MABEYA

JUDGE