



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Suit 451 of 2010

**THE STANDARD GROUP LIMITED.....PLAINTIFF**

**VERSUS**

**SIGNON FREIGHT LTD.....1<sup>ST</sup> DEFENDANT**

**BASH HAULIERS LTD..... 2<sup>ND</sup> DEFENDANT**

### **RULING**

By a Notice of Motion dated 3<sup>rd</sup> April 2012 expressed to be brought under the provisions of Order 2 rule 10 of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure and all enabling provisions of the law, the 2<sup>nd</sup> defendant seeks an order that the plaintiff be compelled to supply and provide particulars of the plaint filed and set out in the request for particulars prepared by the 1<sup>st</sup> Defendant within 14 days in default of which the plaint be struck out. There is also an order for provision of costs.

The application is supported by an affidavit sworn by **Taib Ali Taib**, the advocate for the second defendant. According to the deponent he caused to be prepared and served upon the advocates for the Plaintiff under cover of a letter dated 6<sup>th</sup> June 2011 Request for Particulars in duplicate copies which the plaintiff's advocate was required to file in Court together with their answers to the Request for Particulars. The plaintiff, however, failed, refused and or neglected to file its answer to the request for Particulars in court despite several reminders hence the filing of this application.

In opposition to the said application the plaintiff filed grounds of opposition dated 28<sup>th</sup> June 2012 which grounds assert as follows:

- 1. Pleadings are to contain the necessary particulars of the claim and are to contain only a statement in summary form of the material facts on which the party relies, but not the evidence by which those facts are to be proved – Order 2 Rule 3 and 10 of the Civil Procedure Rules, 2010.**
- 2. The requests which the second defendant has made in respect of paragraphs 4,5,8,10,12,15 and 16 seek evidence and not facts. As such the requests are improper and should not be allowed.**
- 3. Paragraph 6 of the Plaint sets out the contract between the plaintiff and the first**

defendant. There are no allegations relating to the second defendant in the paragraph and the particulars requested are irrelevant to the second defendant as well as seeking evidence.

**4. Paragraphs 9, 11 and 14 of the Plaintiff plead:**

- a. That it was the first defendant who loaded the plaintiff's property on the second defendant's vehicle;
- b. That the second defendant thereby became a bailee of the plaintiff's property;
- c. That the plaintiff's claim against the second defendant is as such bailee and in negligence.

**5. In the circumstances the requests which the second defendant has made in respect of paragraphs 11 and 14 of the Plaintiff are irrelevant and do not arise from the matters pleaded in the Plaintiff.**

In prosecuting the application **Mr Taib**, learned counsel for the 2<sup>nd</sup> defendant who was also holding brief for **Mr Wananda** for the 1<sup>st</sup> defendant, submitted that the litigation herein cannot be described as trivial as it revolves around a sum of Kshs. 70 million. According to counsel, contrary to what is normally argued that pleadings are inherently required to be brief and summarized and cannot and should not contain facts or details, there is no legal requirement for those facts which are normally demanded in further particulars. Yet these applications are not uncommon and though brevity in pleadings is required, it is recognized that facts and particulars may be called for to be provided where they are based on positive averments in the pleadings. It is submitted that parties should not be ambushed either in the prosecution or defence of claims. Referring to **Bupal Corporation vs. SOS Kinderdorf International High Court at Nairobi (Milimani Commercial Courts) Civil Case No. 792**, it is submitted that the requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprise and as far as possible to minimize costs. Looking at the particulars sought, the plaintiff and the position taken in the defence vis-à-vis the issues raised which include but not limited to carriage of goods, bailment, negligence, contract, subcontract and privity of contract as well as damages and quantification, it is submitted that it was necessary to seek the particulars sought which are based on the positive averments in the plaintiff. According to counsel they need to be informed of the case to face to avoid surprise and to know what evidence they should prepare and define the issues at this juncture before discovery. According to him, the plaintiff seeks to avoid the rule by not having its hands tied and would prefer to face the trial with options. Counsel also relies on **Kenya Anti Corruption Commission vs. Kapsoen Estates Limited [2008] eKLR**, **Highlands Mineral Water Company Limited vs. Kenya Commercial Bank Limited [2006] eKLR**, **Mamicha & Co. Advocates vs. City Council of Nairobi [2006] eKLR**, **Amin Electoral Services vs. Ashok Theatres Limited [1960] EA 298** and **Mutua vs. Anwarali & Brothers Limited [2003] KLR 415** which authorities, it is submitted shows the aims and mechanisms for the request for Particulars. The fact that a provision exists for supply of better and further particulars, it is submitted, negates the argument that the particulars are in the complaint and that the plaintiff has complied with Order 2 rule 10.

On her part **Ms. Bubi**, learned counsel for the plaintiff submitted that Order 2 rule 10 is not meant to allow a party to go on a fishing expedition so as to try and defend its case which is what the second defendant is trying to do. Each and every authority specifically states that the decisions were based on the facts of each case. None of the facts therein, it is submitted, are similar to the case before the Court. With specific reference to the case of **Mutua vs. Anwarali & Brothers Limited** (supra), it is submitted that in that case the application seeking to strike out the plaintiff was dismissed. According to counsel, the request for particulars falls in three categories. The first category, it is submitted, is that the defendant is requesting evidence and this is in respect to paragraphs 4, 5, 8, 10, 12, 15 and 16. It is submitted that they are not seeking facts while under Order 2 rule 3 only the statement of material facts is to be stated which is what the plaintiff has done. It is trite, counsel contends, that particulars once furnished form part of the pleadings and hence should not be evidence which the rules require should not be in the pleadings. Secondly, is the request with respect to paragraph 6 of the plaintiff which sets out the contract between the

plaintiff and the 1<sup>st</sup> defendant and not the 2<sup>nd</sup> defendants hence, according to counsel, unnecessary for the preparation of the 2<sup>nd</sup> defendant's defence. If anything, paragraph 16 of the defence accepts receipt of the goods and hence the 2<sup>nd</sup> defendant has no interest in the contract. The third category, according to counsel relates to a cause of action which is not pleaded. According to counsel, the particulars requested for do not arise since the claim is clear that the 2<sup>nd</sup> defendant became a bailee by virtue of possession and negligence. It is contended on behalf of the plaintiff that the defendants have been shown the case they have to meet and should not expect to be supplied with the mode of proof. To compel the plaintiff to supply the particulars sought, it is contended, will tie the plaintiff's hands in revealing the mode in which it intends to prove its case and hence the application ought to be dismissed.

In rejoinder, **Mr Taib** referred to the Court to Mutua vs. Anwarali & Brothers Limited (supra), and submits that the case deals with the intention of the law with respect to the use of particulars in particular page 300 paragraph C line 5. Counsel further submits that they are not seeking the means but only the facts to enable them find out their own means of preparing their defence. The number of particulars requested, it is submitted, is necessitated by the nature of the case. It is also contended that if the contract between the plaintiff and the 1<sup>st</sup> defendant is of no consequence to the 2<sup>nd</sup> defendant there would have been no basis for joining the 2<sup>nd</sup> defendant as the joinder of the 2<sup>nd</sup> defendant raises the issue of privity of contract and nexus. Accordingly, it is contended that the contract is highly relevant to the 2<sup>nd</sup> defendant's case.

Having considered the application, the supporting affidavit, grounds of opposition as well as the submissions by counsel I could not help noticing that there is a muddle in these proceedings. For example, the application is indicated to be drawn by **Taib A Taib** as advocates for the 1<sup>st</sup> defendant. The supporting affidavit as already indicated is expressed to be drawn by **Taib A Taib** who states that he is an advocate practicing in the firm acting for the second defendant. Again the motion itself states that it is to be heard on the part of counsel for the 2<sup>nd</sup> defendant seeking particulars requested by the 1<sup>st</sup> defendant. However, a copy of the particulars annexed show that they were requested on behalf of the 2<sup>nd</sup> defendant. However, as no issue was taken with respect to this muddle, the less said about it the better.

What are the principles guiding the grant of the orders sought herein? In the case of Joshi vs. Uganda Sugar Factory Ltd. [1968] EA 570 Spry, JA (as he then was) citing the case of Weinberger vs. Inglis [1916-17] All ER at 844, stated as follows:

*“Rules 3, 3A, 7 and 9 of Order 6 of the Civil Procedure Rules provide for the ordering of further and better particulars; that an allegation of fact in any pleading if not specifically denied, is to be taken to be admitted; that every allegation of fact must be dealt with specifically by a defendant; and that a denial must not be evasive...As a general rule, the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him... Looking at the matter on the simplest footing, the appellant has made certain allegations which he must prove to succeed. The respondent company has made his task somewhat easier by admitting certain of those allegations but the onus remains on the appellant to prove those that are not admitted. 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. The question is not whether a denial could have been expressed in a positive way but whether the defendant's intention is merely to deny or to set up a positive case in contradiction. A defendant is perfectly entitled, if he wishes to adopt an entirely negative attitude, putting, the plaintiff to proof of his allegations and if he does so, the plaintiff cannot, by asking for particulars, compel him to make positive assertions. On the other hand, of course, when a defendant adopts a purely defensive attitude in his pleadings, he will not be allowed to conduct his case on a different footing, or at least only on terms”.*

In the case of Salmin Mbarak & 2 Others vs. Hadi Karama & 2Others Civil Appeal No. 97 of 1998 the Court of Appeal held that whereas a dismissal of an action for failure to supply particulars

imposes a drastic penalty and further the dismissal of any action at interlocutory stage is a very serious matter and may well work serious injustice, an arrogant party who does not comply with Court orders does not deserve the Court's indulgence. A similar view was taken by the same Court in the case of **Bhandari Construction Company vs. Standard Jonery & Building Company [1983] KLR 111.**

In Mahida vs. Khetani Civil Appeal No. 32 of 1975 [1975] EA 306 Trevelyan, J sitting in the East African Court of Appeal stated as follows:

“Particulars will never be ordered of an allegation as to which the burden of proof lies on the applicant. However, in this case, this is not what the plaintiff was seeking to obtain; he was not looking for information to support that the plaintiff's assignor had lent money to the defendant. Exactly why he wanted the particulars is open to question, but it may be that with them before him, he would re-appraise his case and if that were so, the particulars were, of course, not for ordering. On the other hand, the particulars were not for withholding on the ground that what the plaintiff wanted was evidence by which the defendant was proposing to prove his case, for that is what he wanted. Assuming that he wanted information to help him prove his case, that is not the same as saying that he wanted to know how the defendant was going to prove his, and, in any event, the defendant has no case to prove... The particulars should then not be ordered. In relation to the plaintiff, the additional pleading set up no answer to the claim made and is not, and is not intended to be, a defence to it. It is as is conceded immaterial to the defence as pleaded; and particulars will never be ordered in respect of immaterial allegations”.

From the foregoing, it is clear that in order to decide whether or not to grant the orders sought in this application, the court must look at the nature of the orders sought in the plaintiff and the defence filed.

The plaintiff's claim in summary is that it purchased a printing machine from a manufacturer in Germany and tasked the 1<sup>st</sup> defendant with clearing and transporting to the same from Mombasa to Nairobi. While the said machine was being transported using a vehicle belonging to the 2<sup>nd</sup> defendant, the said vehicle overturned and the said printing units were damaged beyond economic repair. According to the plaintiff the said accident was caused by the negligence of the 1<sup>st</sup> and/or 2<sup>nd</sup> defendants whose particulars of negligence are pleaded. In its defence the 2<sup>nd</sup> defendant denies knowledge of the particulars of the plaintiff's purchase of the said machine and the clearing and transportation contract with the 1<sup>st</sup> defendant. That the said goods were delivered and entrusted to the 2<sup>nd</sup> defendant by the plaintiff is also denied who similarly denies the existence of a contract between the plaintiff and the 2<sup>nd</sup> defendant and contends that no claim can hence arise between the two parties. The fact of accident and negligence is likewise denied as well as the resulting damage. It is, however, contended in the alternative that the damage or loss was occasioned by the fact that the goods were packed insufficiently and negligently and in unstable manner and that the damage complained of arose from such packing. It is further pleaded in the same alternative that the goods though delivered as ordinary goods were special goods that required special handling and care as well as insurance cover. In the alternative, the defendant pleads inevitable accident and blames the plaintiff and the 1<sup>st</sup> defendant for the accident. The 2<sup>nd</sup> defendant further pleads that as the goods were delivered at “Owner's Risk” none of the defendants is liable as they are exempted from liability. The 2<sup>nd</sup> defendant further pleads that the Vehicle Inspection Report discloses that its vehicle had no pre-accident defects and that the accident occurred as a result of wrong packaging.

From the foregoing, one can immediately see that the 2<sup>nd</sup> defendant's defence is made up of two parts. The first part is a complete ignorance of the knowledge of the plaintiff's cause of action. The second part, though in the alternative is a denial of liability either resulting from non-disclosure or inevitable accident or exemptions. Whereas there is nothing inherently wrong in a party pleading in the alternative, pleadings, which set up inconsistent and embarrassing defence are prohibited. See **Ragbir Singh Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996.**

The importance of precise pleading cannot be overemphasized. The overriding objective in section 1A(1) of facilitating the just, expeditious, proportionate and affordable resolution of the civil disputes cannot be achieved unless parties' pleadings are specific. Not only does it put the other party on notice but it reduces the issues to be tried and assists the Court in setting its timetable as required under Order 11 and this is important because it enables the Court to identify contested and uncontested issues; explore methods to resolve the contested issues; where possible secure parties' agreement on a specific schedule of events in the proceedings; narrow or resolve outstanding issues; create a timetable for the proceedings; and change the track of a case. Under section 1A(3) a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. When

a party crafts its pleading in such a manner that it is impossible to decipher the exact case that the Court is required to resolve, that party is definitely not interested in achieving the overriding objective as stipulated in section 1A of the Civil Procedure Act. From the brief summary above, it is clear that one does not have to be a genius to see that the defendant's defence is clearly evasive and imprecise. To plead in such a manner and then seek particulars on all denials including those in the alternatives may not find favour with the Court of law when it comes to an exercise of discretion.

Having perused the particulars sought, I am of the view that most if not all the particulars sought can be answered if the parties comply with the provisions of the Civil Procedure Rules, 2010 with respect to witness statements and list and copies of documents.

Accordingly, I decline to grant the particulars sought at this stage. The order that commends itself to me is a direction to the plaintiff to file and serve its list of witnesses together with their signed statements as well as complete list and copies of documents within 21 days of this decision. Upon service of the said documents the defendant will, likewise file and serve their list of witnesses as well as list and copies of documents within 21 days. Thereafter the parties to file issues, agreed or otherwise, within seven days. Liberty to apply granted.

In the circumstances the costs of this application will be in cause.

**Ruling read, signed and delivered in court this 26<sup>th</sup> day of July 2012**

**G.V. ODUNGA**  
**JUDGE**

**In the presence of:**  
**Miss Bubi** for Plaintiff/Respondent

Miss Ashibwe for Mr Taib for Defendant/Applicant