



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 282 of 2007

X-CITE NETWORK LTD.....PLAINTIFF
VERSUS
CELTEL KENYA LTD.....DEFENDANT

RULING

The defendant seeks in its Chamber Summons dated 12th March 2010 and brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Order 27 Rules 11, 12 and 20** of the **Civil Procedure Rules** orders:-

- “1. That the Honourable Court do direct the Referee to consider the remaining 35,000/- sim packs in his reconciliation and examination of accounts in his final Report to the Court.
2. That the proceedings, the Report of the Referee dated 10/12/2009 and the final Report be adopted as evidence in this suit on the matters referred for his examination.
3. That the parties be at liberty to cross-examine the Referee on his Reports.
4. That the parties be at liberty to adduce additional evidence as they deem necessary to support their respective claims.”

The application is based on the grounds that:-

- (a) That the Report made on 10/12/2009 is not conclusive of the matters referred to the Referee.
- (b) That the procedure will save the limited judicial time as the documentation between the parties is bulky.
- (c) The Referee has undertaken considerable work and only needs limited time to conclude the matters referred to him.
- (d) It will be in the interest of justice that Advocates for the parties be allowed time to cross-examine the Referee at the hearing to clarify the Report.
- (e) That it will save the parties time and cost if the parties were to adopt those proceedings & Reports as evidence.

In the affidavit in support of the application, Njomo Kamau, a Legal Officer of the defendant deposed that on 4th December 2009 the Referee authorized by court to examine the records relating to this case wrote and requested documents in support of 35,000 missing sim packs. In response the defendants located those documents and sent them to him. He was, however, unable to include them in his report because the plaintiff refused to accord its consent to that. In the circumstances he concluded that the court should authorize him to include those documents and file a conclusive report.

The application is strongly opposed. In the replying affidavit sworn by its Managing Director, Mr. Peter Kinya, the plaintiff contends that the defendant squandered the opportunity it had to supply to the Referee with all the documents it required him to take into account. Having failed to do that, it has now come up with cleverly computer generated forgeries intended to bolster the defendant's case. In his opinion to refer the matter back to the Referee would cause grave injustice to the plaintiff as the 35,000 sim packs are not explained. They will alter the opening and the closing stock to fit the defendant's system. Besides that he further deposed that from his conduct of communicating directly with the defendant's officials, the Referee has shown bias and the plaintiff has no faith in him. In the circumstances he prays for the dismissal of the application.

Counsel for the parties submitted along their respective clients' above summarized averments.

Realizing the enormity of the documentation in this case, the parties themselves requested and a consent order was on 3rd November 2008 referring the issue of the disputed accounts to the Referee "to enquire, examine and ascertain the totality of the product sold by the defendant to the plaintiff and the remuneration and commission earned during the period December 2006 to December 2007." Both parties were directed to submit their respective records to the Referee within 7 days and thereafter to appear before him with their respective advocates to agree on the procedure that was to be adopted in conducting the inquiry. The Referee was to file his report within 21 days but that did not happen mainly due to failure by counsel for the parties and the Referee to get suitable dates for the exercise. As a result the court has had to extend, from time to time, the period for filing the report. Eventually the Referee filed an incomplete report because, as the defendant claims, the plaintiff refused to consent to the consideration of the documents relating to the 35,000 sim packs that the defendant submitted later.

Order 27 Rules 11 and 12 of the Civil Procedure Rules under which this application is made provide:-

- "11. On the application of any party or of its own motion in any suit in which the examination of accounts is necessary or desirable, the court may refer the accounts for examination to such person as it thinks fit.**
- 12. (1) The court shall furnish a referee appointed under rule 11 with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the referee is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.**
- (2) The proceedings and report (if any) of the referee shall be evidence in the suit, but where the court has reason to be dissatisfied with them it may direct such further inquiry as it shall think fit."**

I cannot at this stage determine whether or not the documents the defendants wish the Referee to consider are forgeries as claimed by the plaintiff. I, however, note that they have been sought by the referee himself.

From the inconclusive report that the Referee has filed I have no doubt in my mind that considerable time has been taken and enormous expense incurred on the issues referred to the Referee. That will all go into the drain if this application is refused. This apart, I think it will save considerable judicial time if the Referee is allowed to take into account all the parties' documents and complete the report. The Referee will of course testify and both parties are at liberty to cross examine him on his report. If the documentation relating to the 35,000 sim packs are forgeries as the plaintiff claims that should be proved at the hearing.

In the circumstances I do not think that either party will suffer any prejudice if this application is allowed. Consequently I allow this application as prayed save that the defendant shall pay the costs of this application and the referee's further fee, if any, in taking into account the documents relating to the said 35,000 sim packs.

DATED and DELIVERED this 29th day of June, 2010.

D. K. MARAGA
JUDGE.