REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Suit 42 of 2009

SAMUEL OTIENO OTIENO……..PLAINTIFF

VERSU

THE MUNICIPAL COUNCIL OF MALINDI

VICTORYCONSTRUCTION LTD. . ……..….DEFENDANTS

R U L I N G

Miss Aulo indicated to this court that, she inadvertently left out documents in her list of documents although they are referred to in the pleadings and she had explained the omission to Mr. Were who also had not noticed the omission.

However this attempt to refer to the documents has been objected to by the plaintiff's counsel (Mr. Were) who says he had noticed the omission and presumed that the defence had abandoned the documents. He says he is being shown some of the documents eg a letter dated 29-07-05, for the first time and that it is not good practice to ambush a colleague. He points out that the matter was adjourned five months ago, their offices neighbour each other in Nairobi, plaintiff has closed his case and will not have a chance to comment on the documents being produced against him.

He objects to DW1 being shown documents without an indication as to whether the makers will be called and he refers to the case of **Isaiah Oduor Ochanda v AG** which held that documents can only be produced either by the author, recipient or somebody to whom they were copied.

He urges the court to also consider the decision in **HCCC 284 of 2000 (Msa) Han Moeller v Festus Oganda** which refer to documents made specifically for a suit, which fits in with this scenario saying the letter under reference was prepared after the suit was filed and was already proceeding and on that basis the document ought to be rejected.
Further that **HCCC 1243 of 2001 Trustbank Ltd v Paramount Msa Bank Ltd** addresses the mode of producing secondary evidence and as he has not been shown the originals, the defence counsel cannot produce secondary evidence without observing legal procedure.
Miss Aulo has elected to respond to the issues raised under the following heads;

1) production of documents
2) inspection of documents
3) admissibility of documents
4) admissibility and contents of one document i.e the letter.

On production and inspection, Miss Aulo submits that under Order X Rule 11 – there is provision to make request and what happens if a party fails or neglects to make discovery, further, that Rule 13 gives the court power to order production of documents and Rule 14

recognizes that every party to a suit is entitled to give notice for inspection and the effect of non-compliance. It is her contention that, no notice for discovery has been given in this suit nor has there been any request for inspection of documents prior thereto as required by the rules.

She points out that there was no way the plaintiff's counsel could have been shown the originals before hearing. She maintains that since the plaintiff's counsel had notice of documents defendant intended to rely on, if he had required an earlier inspection, he ought to have made request for inspection formally.

(2) Admissibility – on this issue Miss Aulo submits that the Evidence Act makes clear provisions regarding admissibility of documents and she invites the court to consider section 170 of the Evidence Act bearing in mind that defendant is a corporate body and defence intends to call many witnesses, each dealing with different aspects of the case and so plaintiff's counsel is jumping the gun by raising the objection.

(3) With specific reference to the document under reference, Miss Aulo points out that it is No. 9 on the list of documents supplied both to court and plaintiff's Counsel on 24-11-09 and if its authenticity was doubted, then plaintiff's counsel ought to have raised the issue before the hearing date – which would also have brought to defence counsel's attention that some documents were missing instead of making presumptions that the defendants had abandoned the same. She urges this court to consider the fact that it is human to err, and the list shows every intention of relying on the documents referred to and its not as if the plaintiff's counsel requested for the document and met with refusal and in any event section 172 of the Evidence Act addresses what would happen in such a situation.

As for calling makers of the documents, Miss Aulo urges this court to be guided by provisions of section 65-69 of the Evidence Act especially with regard to production of secondary evidence or documents forming part of records of the local authority (Defendant).

She wonders why some of the issues raised concerning the documents cannot be addressed during cross-examination and final submissions. She distinguishes the present situation from the one that was in the **Trust Bank case,** saying in that case a notice to produce original documents had been served yet there was still reliance on photocopies.

As regards the letter purportedly tailored for this case, it is Miss Aulo's submission that there is no basis for that claim and all that plaintiff's counsel is doing is, trying to steal a match because that letter was clearly in the list of documents. It is her contention that the door is not closed to the plaintiff as there are remedies under section 146(4) of the Evidence Act such as recalling of the witness.

In reply, Mr. Were submits that by 23-11-09, when they came to court, he had not been served with the documents, so there was no way for him to raise notice to produce earlier and that all along he has been asking counsel for the originals, in vain, its not signed and is not the original. He explained that he was questioning most of the documents defendant intended to rely on because they are not signed i.e documents at page 16, 23, 27, 28 and 45.
In any event, he contends that under Order X Rule 11, they ought to have filed their documents within 30 days before close of pleadings and the manner in which the documents are being introduced makes him fear that defendant is using tricks to seal loopholes left by the witnesses hence the lack of originals – he needs the originals for comparison.

Order X rule 11 of the Civil Procedure Rules address the question on discovery of documents as follows;

> ***"(1) Any party may request any other party to the suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the suit.***
> ***2) If the party so requested refers or neglects within 14 days to make discovery, an application may be made to the court for an order directing such discovery…"***

Rule 11A sets a time frame within which discovery in the High Court should be done ie. Within one month after the pleadings are closed.

In the present instance, parties filed and served their list of documents (may be not within the prescribed time) but they were filed and served. However it is disputed that some of the documents on defendant's list were not served on the defendant and defence counsel requires the originals. What plaintiff's counsel should have done is captured under Order 11A (2) was to give notice to the defendant requiring the verification on affidavit of the list of documents – this did not happen.

Defendant concedes that those documents were not served on plaintiff but Miss Aulo argues that it was not a deliberate refusal calculated at ambushing the plaintiff during trial – rather it was a human error. The desire by plaintiff's counsel to inspect and verify the documents would have been taken care of if he had been guided by Order 11 rules 14 and 15 rule 14 states:

> ***"Every party to a suit shall be entitled at any time tot give notice to any party, in whose pleadings…reference is made to any document, to produce such document for the inspection of the party giving such notice, or his advocate and o permit him to make copies thereof"***

If such request is made and not complied with, then the "*offending*" party will not be allowed to use such document in evidence unless sufficient reasons is given for such non compliance.

It seems to me that both counsel operated under wrong presumptions – the plaintiff's counsel though aware that certain documents referred to in the list of documents were not served, made a presumption that defendant had abandoned them – instead of writing to defendant to seek clarification, or send notice as envisaged under the Civil Procedure Rules seeking to verify the documents – that applies even to the documents he says are not signed, and which he would like to compare copies with originals, for purposes of verification. The defence counsel on the other hand presumed that having listed the documents, all had been sent to the plaintiff's counsel. Both presumptions were of course wrong.

Should the defendant then be allowed to produce these *"omitted documents"* without the plaintiff's counsel having a chance to see and show and get instructions from his client about them. I think the whole principle behind filing a list of documents and exchanging them, is to avoid trial by ambush – so that each party can be adequately prepared and not have unfair advantage because of certain information played close to the chest.

Due to the wrong presumptions by both counsel – it cannot be said that defence counsel deliberately refused to avail the documents – and if there had been such refusal, then a formal notice ought to have issued, and not the oral request alluded to by Mr. Were. If that had happened, then the objection raised by Mr. Were would have found its footing, as matters stand, it doesn't.

This is what makes the present scenario different and distinguishable from the **Trust Bank case** – because in a latter scenario, there had been a notice to produce original documents. Now that it is apparent that some documents were inadvertently not served, then the first thing I will direct (so as to avoid what will end up looking like patch work) is that defence counsel must serve copies of all the documents listed within seven (seven) days from today's date.

Since Mr. Were has already specified which documents require inspection for verification, being, No. 16, 23, 27, 28 and 45 on the list, (then to reduce delay by insisting on information envisaged by Order 14 and 15) I direct that defence counsel under Order X rule 16 do avail the original for inspection within 3 (three) days by sending a notice to the plaintiff's counsel as to the place and time for inspection of those originals.

I think that will take care of issues of production and admissibility. With specific reference to the letter said to be tailored, I think Mr. Were jumped the gun – it had not even been established whether DW1 was the one producing it, or if so in what capacity. Further more the issue as to whether it is tailored is a matter that cannot be solved by submissions from the bar ab initio – I think its admissibility or non admissibility lies in it being put to test.

Indeed whether it was tailored for this case is a matter which counsel can address adequately in their final submissions.

Will the plaintiff suffer prejudice? No, because I grant leave to plaintiff's counsel to recall the witness for purposes of leading further evidence and even having him cross-examined in relation to those documents.

Of course it follows that now Miss Aulo having been put on notice as to which are the contested documents, must avail the originals and if that fails then the usual test for relying on secondary evidence as envisaged under section 68 of the Evidence Act will apply.

Delivered and dated this **14th** day of **June 2010** in Malindi.

H. A. OMONDI
JUDGE

Mr. Ogonya holding brief for Mr. Were
Mr. Matini holding brief for Miss Aulo