REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 140 OF 1999

PAUL KINGOO KIOKO ::PLAINTIFF

VERSUS

AFRO TRAIN (TZ) LTD ::1ST DEFENDANT

SAMUEL G. KARINGA ::2ND DEFENDANT

RULING

The background information to this application is that the case is part-heard. The plaintiff is still presenting evidence on his side. Discovery preliminaries were done before trial commenced. The plaintiff has come back to this court under Section 3 A of the Civil Procedure Act, Order X Rule 11 and 11 A of the Civil Procedure Rules and all other enabling provisions of the law. The application is by way of Chamber summons dated 30th may 2006 and filed on 31st may 2006. The prayers sought are three namely:-

(a) That the honourable court be pleased to grant leave to the plaintiff to introduce in evidence all the documents listed under the supplementary lists of documents dated 11.10.03, 28.11.02 and 13.7.02 during the hearing of the suit.

(b) The supplementary lists be deemed as being duly served upon the defendants.

(c) The costs of the application be in the cause.

The grounds in support are set out in the body of the application, supporting affidavit sworn by counsel allegedly with the authority of the plaintiff and written skeleton arguments filed herein. The main ones are:-

(1) That an oral application seeking similar prayers had been made orally on 29.5.03 seeking, leave of court to discover more documents which he need to use in evidence in the course of the proceedings in support of the plaintiffs case which is still in progress. This move was objected to and after due consideration of the provision of law applicable, this court in a ruling delivered on 21.7.04 ruled that there is no jurisdiction to entertain an oral application on the subject. It dismissed the oral application but gave leave to the applicant to present a formal application hence the application subject of this ruling.

(2) That Order 10 Rule 11 does not bar discovery of documents after commencement of the proceedings so long as the defence is not ambushed. Herein the defence is not under ambush as they have

already been served with the subject lists.

(3) That though Order 10 Rule 11 A makes it mandatory for the parties do discovery one month after close of pleadings, it does not foreclose more discovery at any stage of the proceedings as justice may require and as such the plaintiff is perfectly within the rules in presenting the current application.

(4) They submit no prejudice will be suffered by the defence as the proceedings are on going, the documents relate to the issues subject of the proceedings and the defence will have an opportunity to cross-examine on the same.

(5) In response to the grounds of opposition, they maintain new evidence is not being introduced as the plaintiffs case is still on going, he has possession of the documents sought to be introduced and the affidavit sworn by counsel who was supposed to do discovery complies with the provision of Order 18 Civil Procedure Rules and lastly that the court has power and or jurisdiction to order the said discovery.

The second defendant filed grounds of opposition namely:-

(1) The application is incurably, defective and cannot give rise to the orders sought.

(2) The affidavit is incompetent to the extend that it is deponed on matters that are not in the knowledge of the defendant without any explanation whatsoever.

(3) That the application is seeking to introduce documents that have already been irregularly filed.

(4) That the defendants will be prejudiced by the production of the said documents which are sought to be introduced clear 5 years later after the initiation of the suit.

(5) No notice to produce or admit has ever been made to the defendant and the alleged new evidence has always been in the knowledge of the Plaintiff.

In their written skeleton arguments, Counsel, for the second defendant stressed the following grounds:-

(1) That the general rule is that discovery has to be made before the actual commencement of the trial and it is only in very exceptional circumstances that discovery can be allowed after commencement of the trial.

(2) The affidavit in support is silent as regards the relevance of the documents sought to be discovered, their impact and or effect on the case has not been shown.

(3) They maintain the documents sought to be introduced will not shade any light on the case as the move is just a mere attempt to repair the plaintiffs case which is already crumbling which brings to the fore questions as to:

(a) where the documents were at the commencement of the trial.

(b) Where the documents suddenly came from

(c) Whether the plaintiff had constructive knowledge of the existence of the documents.

(d) Whether the plaintiff made a full and frank disclosure of all the documents in his possession at the on set of the case.

(e) Whether the documents are genuine and can be relied upon.

(4) The Plaintiffs Counsel failed in their duty both as Counsel and an officer of the Court to ensure that his client makes a full and frank disclosure of documents before the trial commences in order to avoid

hardship, surprise or prejudice to the adversary as per principles of the case law cited.

Grounds of opposition to the application by the first defendant are not traced on record. Points raised in their written skeleton arguments are:

(1) The Plaintiff should not be allowed to introduce the evidence sought to be introduced thro ugh this application as the action amounts to litigation by installments thus prejudicing, embarrassing and delaying the conclusion of the trial.

(ii) The Plaintiff was stepped down to pave the way for other witnesses evidence some of which has already been concluded and introduction of these documents will amount to reopening the concluded evidence of these witnesses.

(iii) The plaintiff had made an attempt to introduce these same documents earlier on which attempt was turned down by the Court.

(2) They maintain that the court has no jurisdiction to grant the reliefs sought because order 10 rules 11 and 11A are concerned with discovery of documents and not introduction of evidence of documents and not introduction of evidence of documents.

(ii) The rule 11 concerns documents in possession of the respondent which is not the case here.

(iii) The substance of the plaintiff's application is a notice to admit documents which should have been served under Order XII rule 3.

(iv) Rule 11A qualifies rule 11 in so far as it makes the exercise a pre-trial issue within one month after the close of the pleadings.

(v) The application is without basis as notice to admit the said documents has not been given.

(vi) The documents sought to be introduced fall within the ambit of Section 33 and 35 of the evidence Act, Cap.80 Laws of Kenya a matter already ruled upon by the Court in its ruling of 30.7.03 and it is their stand that the plaintiff's move in the current application is to try and go round the courts ruling of 30th July, 2003.

(vii) The application is premature as the applicant should have sought leave for extension of time within which to do discovery and thereafter if leave granted, proceed to issue the requisite notice for discovery.

(3) In limited cases a party may be allowed to introduce new evidence in instances where such evidence was not within the knowledge of the party seeking to introduce the same. Those sought to be introduced are a certificate to show that the deceased was licensed to practice as a nurse within the State of New York dated 13th July 2002, certificate of foreign registration of a vehicle dated 24th April l998 all of which were within the knowledge of the Plaintiff as at the time of the commencement of the trial. Whereas the tax returns are meant to go round this courts ruling of 30.7.2003 and as far as they are concerned this matter is Res Judicata.

(4) Prayer (a) and (b) of the Chamber summons are contradictory and cannot stand.

On the courts assessment of the facts herein, there is no dispute that the Plaintiff herein commenced giving testimony in support of his case on 16.5.02, by which time each party had on record documents they intended to rely on in support of their version of the story. It is on record that as soon as the Plaintiff started tendering documents in evidence objections started flowing in with the first one being recorded on the first day of hearing as regards MFI (a) (b) (c) being copies nursing documentation issued by the nursing Council of Kenya. Next to be objected to was foreign documents on social security benefits for purposes of income tax. A ruling was made on 16.5.02 to the effect that all documents meant to lay basis

for the employment of the deceased in the states be assembled, marked for identification, objection be taken and then a ruling be made as regards their admissibility.

On 13.6.02 the Plaintiff was stood down to pave the way for the testimony of other witnesses with consent of all the parties concerned. The intervening witnesses namely P.W.2, 3,4,5,6 and 7 gave evidence and were fully cross examined by Counsels for the defence.

On 29.5.2003 following this courts advise of 16.5.02 regarding presentation of certain documents, Counsel for the plaintiff moved the court to admit certain documents under Section 33 and 35 of the Evidence Act, to admit them in evidence without calling the makers. The documents had been marked as MFI S 6, 7, 8 (a) (b), 9 (a) (b), 10, 11, 12, 13, 14, 15, 16, 17 and 18. After due receipt of arguments from both sides this court made a ruling dated 30.7.03 to the effect that.

(1) It is on record that the deceased was dead and therefore the only nearest person who could have had access and taken possession of whatever documents the deceased had as regards her employment in the USA was the plaintiff who was her husband.

(2) That it had noted that the said documents had been made by various people and as such despite, that no figures of what would be involved in bringing them to Kenya, in monetary terms had been given, the good common sense of those involved the proceedings is called into play to show that indeed expense and un reasonable delay will definitely be involved in an attempt to avail each of the makers to testify herein.

(3) The court accepted that most of the documents had been made by makers in the course of their professional duties with the exception of the income tax returns which had been filled in by the Plaintiff.

(4) The court was satisfied that evidence had been adduced to show that the deceased had trained as a nurse in Kenya and soon after qualifying moved to the USA with her family. The documents exhibited as MFI 6 social security card, MFI 7 an identity card, 8(a) (b) registration certificate, 9 (a) (b) a registration certificate and 15, 16, 17 at workshops attendance by the deceased were genuine as there was nothing to show that they were a fabrication. This court ruled the above outlined documents had satisfied the ingredients under Section 33 and 35 of the evidence Act Cap.80 Laws of Kenya same to the commendation certificates MFI 18.

The Court went ahead to reject the production of MFI 11, 12, 13 and 14 for the following reason.

(i) MFI 11 was rejected because it had not been signed by the maker neither was it backed by pay slip.

(ii) MFI 12, 13, 14 which were income tax returns customer's copies had been rejected because there was nothing to show that they had been received by the income tax authority, checked, verified and found to be correct.

(b) They had not been backed by backup information used to insert the figures in them.

This courts excursion into the ruling of 30/7/03 has been undertaken because Counsel for the first defendant has submitted that the current application is an attempt to go round the findings of this court in that ruling.

Also as mentioned earlier on in this ruling, the plaintiffs Counsel made an oral application for further discovery on 15.10.03. The matter was argued and in this courts ruling read on 21.7.04 as per the Court record by Wendoh J. the court ruled that there was no jurisdiction to entertain an oral application. The oral application was rejected with leave to the plaintiff's Counsel to present a formal one hence the current application under consideration. As such the oral application having been rejected on a point of technicality with leave to present a formal one, it means the merits of the issues raised were not ruled upon and the Plaintiff is entitled to ask this court to formally rule on the same. The doctrine of Res

judicata does not therefore apply.

The ingredients for Res judicata are found in Section 7 of the Civil Procedure Act. It reads "*no court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom claim, litigating under the same title in a court competent to try such subsequent or the suit in which such issue has been heard and finally decided by such court*."

In the case of **OMONDI AND ANOTHER VERSUS NATIONAL BANK OF KENYA LTD. AND 2 OTHERS [2001] KLR 579**, Ringera J, as he then was ruled thus:-

1. The doctrine of Res judicata ….objections of which it was … namely that is desirable that here be an end to litigation and that a person should not be vexed twice in respect of the same matter.

2. The doctrine of Res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction, but also to situations where either matter which could have been brought in were not brought in or parties who could have been enjoined were not enjoined.

The central them both in the provision and case law is that in order for Res judicata to hold parties must be litigating under the same title and the matter must have been finally determined between them. Here in parties come to court a second time while litigating under the same title. But the ingredient of issues between them having been finally determined was lacking as the oral application was dismissed on a point of technicality, with leave to file a formal one.

The documents sought to be discovered are one document indicated on the further list of documents dated 28th day of November, 2002 and filed on 2nd December, 2002. The documents is listed as:

(1) License number 1999399 for foreign private vehicle issued to Paul K. Mumo on 24th April l998.

The second document to be discovered is the one on the further list of documents dated 13th, July 2002 and filed on 16th July 2002. The document is listed as"

(2) License to practice as a registered professional nurse issued to Mary Kioko on 7th October, 1980.

The 3rd document to be discovered are those indicated on the further list of documents dated 11th October, 2003 and filed on 15th October, 2003.

(3) Record and information of tax returns dated 4th September, 2003 for Mr. and Mrs. Davik Kioko for the years l995 to l998.

(4) Letter dated 29th August, 2003 from the University Specialty Hospital authored by Cindy Nicholas Human Resource Assistant.

Each side has turned to legal provision and or case law for the courts guidance in trying to resolve the matter. Reference was made by the defence to Atkins Encyclopedia of Court forms in civil proceedings, second edition volume 15 London Butterworth's 1994. At page 94 paragraph 9 it is stated "*Because many litigants have little appreciation of the scope of discovery and of the importance of making full disclosure and neither know nor appreciate the obligation of requirement to search for and disclose to their adversaries all relevant documents, a solicitor should promptly after the issue writ take positive steps to ensure that his client appreciate the duty of discovery of documents and the importance of not destroying documents which might have to be disclosed ….. Indeed the solicitors' duty does not stop at explaining to his clients that they must disclose all relevant documents which are or have been in their possession, custody or power, for solicitors owe a duty to the court, as officers of the courts, carefully to go through the documents disclosed by their clients to make sure, as far as possible that no relevant documents have*

been omitted from their clients lists or affidavits of documents …..". (emphasis mine).

In **MYERS VERSUS ELMAN [1939] 4A ER 484**, in which the Court of Appeal held by a majority that the punitive powers of the court over solicitors are only exercisable when the solicitor himself has been guilty of some misconduct that misconduct by a clerk which cannot be brought home to the solicitor himself does not render the solicitor subject to the inherent jurisdiction of the court.

The Plaintiffs reliance was on Section 3A of the Civil Procedure Act and Rules 11 and 11A of the Civil Procedure Rules. Section 3A Civil Procedure Act reads "*Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse, of the process of the Court"*

Order X rule 11 Civil Procedure Act reads:

"*11(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 hi s possession or power relating to any matter in question in the suit.*

(2) If the party so requested refuses or neglects within fourteen days to make discovery aforesaid, application may be made to the court for an order directing such discovery, and at the hearing the court may either refuse or adjourn the application if satisfied that such discovery is not necessary or not necessary at that stage of the suit or make such order, either generally or limited to certain classes of documents as it thinks fit provided-

(i) *that discovery shall not be ordered when and so far as the court is of the opinion that it is not necessary either for disposing of the suit or for saving costs.*

(ii) *On an application by one party the court may make an order for discovery against that party.*

"***(3)*** *The affidavit to be made by a party either in response to a question under sub rule (1) or to an order under sub rule (2) shall specify which of the documents therein mentioned he objects to produce and shall be in form No.5 of appendix B with such variations as the case may require."*

"*11A (1) notwithstanding anything contained in rule 11, within one month after the pleadings are closed in a suit, in the High Court, every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power.*

(2) *Any party on whom a list of documents is served under sub rule (1) may give notice to the party making discovery requiring the verification on affidavit of the list of documents and the affidavit shall be filed and served within fourteen days of the request.*

(3) *On the default of a party to comply with sub rule (2) application may be made to the court for the fixing of a time limit within which the party must comply with sub rule (1)".*

These legal provisions as well as the legal principles in the text and case law referred to this court have been applied to the facts herein and the same considered in the light of the arguments presented by either side and after due consideration of the totality of the matter this court makes these findings:

(1) The court agrees entirely with the legal proposition in Atkins Encyclopedia of court forms in civil proceedings (supra) that it is the duty of Counsel to ensure that as soon as he serves the writ he embarks on the duty of assembling documents for discovery. This court agrees that the plaintiff's Counsel should have undertaken this role even before the trial began. The excise counsel has given is that documents have been coming to him piece meal as they mainly relate to transactions undertaken outside the jurisdiction of this court far away in the USA. With the exception of the document in the further list of documents dated 25th November, 2002 and filed on 2nd December 2002, the rest of the documents have their origin in the USA and therefore the possibility that they have been brought to Counsel piece meal

cannot be ruled out.

(2) It is correctly submitted by the defence that the addressee in Order X rule 11 (1) (2) is the opposite party believed to be in possession of documents sought to be discovered. It would therefore appear that the citing of this provision is misplaced. Although the plaintiffs Counsel has not explained clearly in the grounds, affidavit and written skeleton arguments the relevance of this provision, the court has doubt the same was cited due to the ingredients in the provisal to sub rule 2 in that "*discovery can only be ordered where the said discovery is necessary for the disposal of the suit and will be a saving on costs*". Secondly that provisional (ii) gives discretion to either party to apply to the opposite party for discovery a power that the applicant herein has moved to exercise.

The Court therefore is satisfied that the applicant was within the law as per provisal (ii) of sub rule 2 of rule 11 for an order of discovery. The provisal empowers the court to make an order of discovery against the party applying. The order sought herein is against a party applying who is the plaintiff.

As for relevance to the proceedings, the court, is of the opinion that the 4 documents sought to be discovered namely:-

(i) Certification of registration of a foreign registered motor vehicle.

(ii) License to practice as a registered professional nurse issued to Mary Kioko on 7th October, 1980 by the University of the State of New York.

(iii) Record and information of tax returns dated 4th September, 2003 for Mr. and Mrs Paul K. Kioko for the year l995 to l998 and

(iv) Letter dated 29th August, 2003 from University especiality Hospital authered by Cindy Nicholas, Human Resource Assistant are all relevant to the subject of inquiry herein namely death compensation for the deceased who trained as a nurse in Kenya but at the time of her death, she was working as a nurse in the USA. It therefore follows that any document which tends to show that the vehicle she was traveling in or driving as the case may be before she met her death is relevant to the proceedings. Like wise any document which tends to show that the deceased had been licensed and registered to practice as a nurse in the USA. Also income tax which tend to show that income came in through the employment of the deceased and if so how much it was is also relevant to the proceedings. It is therefore the findings of the Court that the documents sought to be discovered have passed the relevance test and may be discovered if the court rules that they be so discovery.

(3). It is correctly submitted by the defence that Order X rule 11A makes a mandatory requirement for every party to do discovery one month after the pleadings are closed. The central theme in this rule is found in the words "*within one month after the pleadings are closed every party shall make discovery". The stand of the defence is that time has run out on the plaintiff by effluxion of time as it is over four years since pleadings closed and trial commenced. While the stand of the applicant is that there is nothing in that rule that forecloses discovery outside the time stipulated. This court has construed this provision and finds that there is nothing in it which precludes discovery outside the period stipulated if the situation so demands. This is the point at which the provisions of Section 3A of the Civil Procedure Act is called into play to enable the court make orders to prevent abuse of the court process and for ends of justice to be met.*

(4). The defence further argued that piece meal discovery amounts to litigation by installments which is very inconveniencing to the opposite party. The Court is in agreement with this argument. However where the same is allowed to stand the inconvenienced party will be compensated for by way of costs.

(5). Arguments was raised to the effect that the process could have been shortened by the plaintiff resorting to the provisions of Order XII rule 2, 3 by serving a notice to admit document. This court's construction is that though notice to admit is preferable, where the other side has prior knowledge of the documents sought to be admitted, in a situation where the opposite party is a stranger to the documents

like in this case, discovery is the best method. In this case the applicant rightfully resorted to an application for discovery, in line with the courts' advise turning down an oral request for discovery.

(6). Issue was also raised about the advocate deponing to contentious matters. This court is alive to the guiding principle, that it is now trite law that it is un desirable for Counsel to depone to contentious matters within the knowledge of his client a fact likely to draw such an advocate as a partisan in the dispute thus eroding the privilege enjoyed by him as Counsel. The defence did not point out the offensive paragraph in the affidavit. This Court has on its own revisited that affidavit and finds that the deponments centre on matters within the knowledge of the Counsel as he is the one who has instructions from his client to deal with matters of discovery. All the activities mentioned are all attributable to Counsel and not the client.

The only offensive paragraph but not mentioned by the defence is paragraph 2. The Counsel depones that he has been authorized by his client to depone. The authority is not annexed. In ordinary situation the law would have required such an authority to be annexed. However in client/advocate relationship the presumption is that once hired and retained and before the retainer is terminated Counsel has ostensible authority to do all that is necessary in the furtherance of the clients interest in any proceeding. Counsel for the Plaintiff is seized of such authority and failure to annex the same does not invalidate the affidavit. Moving the Court for discovery in a measure taken to further the interests of his client in the case.

(7). As regards the argument that the current application is an attempt to go round the courts ruling of 30.7.03, this court has given due consideration to that argument in the light of the findings of this court, already set out herein with the exception of the income tax forms, the rest of the documents subject of this application were not subject of those proceedings and are as such not affected. As for the income tax forms they can only pass the test, if they have satisfied this courts observation in the said ruling.

(8). On prejudice to the defence, generally, the court, is of the opinion that introduction of the documents is not belated in so far as the main witness who is the plaintiff has not given evidence. There is therefore room for the defence to test their worth in cross examination. Further should any contradiction arise between the Plaintiffs evidence and evidence of witnesses who have already given evidence the right to recall witnesses is not lost. Where sufficient cause is shown a witness can always be recalled and availed either for further evidence or cross-examination.

In addition to the above, it is now trite law that rules of procedure are meant to be hand maids or vehicles of justice, where they become bad masters of justice a court, of law is enjoined to step in and prevent injustice from being caused to a litigant. In the opinion of this court, a rule which hinders a litigant from laying all he has in terms of documents before a court of law, in furtherance of his case, in a situation where the other side can be compensated for by way of costs is a bad master and in appropriate circumstances a court is entitled to decline upholding of the same.

For the reasons given above this court is inclined to allow discovery of the following documents.

(1) (i) licence number 199399 for foreign private vehicle issued to Paul K. Mumo on 24th April l998 as per the further list of documents dated 28th November 2002 and filed on 2nd December 2002.

(ii) licence to practice as a registered professional nurse issued to Mary Kioko on 7th October, l980 as per the further list of documents dated 13th July 2002 and filed on 16th July 2002.

(iii) A letter dated 29th August, 2003 from University Specialty Hospital authored by Cindy Nicholas, Human Resource Assistant, being document number 2 as per the further list of documents dated 11th October 2003 and filed on 15th October, 2003.

(2). The following documents have been rejected for discovery

(i) Record and information of tax returns dated 4th September, 2003 for Mr. and Mrs. Paul K. Kioko for

the years l995 to l998 because they do not comply with the requirements that this court said they should comply with as per the ruling of 30.7.2003.

(3). The defendants will have costs of the application dated 30th may 2006 and filed on 31st May 2006.

DATED, READ AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2008.

R.N.NAMBUYE

JUDGE