



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS

Civil Case 100 of 2007

SAMVO LIMITED PLAINTIFF

VERSUS

DELTA HAULAGE SERVICES LIMITED DEFENDANT

RULING

APPLICATION TO STRUCK OUT DEFENDANTS DEFENCE

FOR NON COMPLIANCE OF DISCOVERY ORDER XR 20

CIVIL PROCEDURE RULES NOTICE OF MOTION 14.8.2007

I: Background

1. A dispute has arisen over the ownership of land property LR 2/75 Endemic Road Nairobi between Samvo Ltd who claim to be the registered owners of land from 22 December 1999 and Delta Haulage Services Limited who are alleged to have moved onto the land and claim ownership.

2. The plaintiff filed suit on 31 January 2007 and sought declaration that they indeed are the rightful owners of the land. They prayed for an injunction to restrain the defendant from coming onto the land.

3. Inter parties hearing was heard on before Osiemo, J and on 19 April 2007 orders for injunction were made. The orders were issued on 8 May 2007. Within the orders was a direction that:-

“The parties do discovery within 21 days.

4. The parties failed to do discovery within 21 days. Thus, the plaintiff filed an application of notice of motion 14.8.07 seeking that the defendant who failed, neglected or ignored to do discovery, should have their statement of defence struck out.

5. The main file went missing. What I have is a re-constructed file.

II: Application of 14 August 2007

6. Order X r 20 Civil Procedure Rules is a unique order that provides:-

“Where any party fails to comply with any order to answer interrogations, or for discovery or inspection of documents he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence if any struck out, and to be placed in the same position as if he had not defended and the party interrogating or seeking discovery or inspection may apply to court for an order to that effect, and an order may be made accordingly.”

7. This rule is to be used **when pleadings are closed**. In the former days, when summons or directions are complete. The rules for summons for directions have since been done away with. Order 10 r II a Civil Procedure Rules requires that 30 days after close of pleading discovering or exchange of a list of documents to be relied on would be made.

8. Thereafter a notice is made by either party requiring the verification on affidavit of the lists of documents and the affidavit **shall** be served within 14 days of the request.

“On the default of party to comply with sub-rule (2) (the) application may be made in court for the fixing of a time within which the party must comply with sub rule 1 ie – discovery in the High Court.”

III: Opinion

9. In this matter before me, the file originally before court is missing. It is unclear whether between April 2007 to August 2007 that summons to enter appearance had been served upon the defendants. There appears to be no defence on the file. If per chance there is, there seems to be non in the reconstituted file.

10. If I presume there was a defence on record then there required to be 30 days after the close of pleading when the said discovery would commence according to the procedure outlined above and under order 10 r IIA Civil Procedure Rules.

11. The party seeking to use Order 10 r 20 Civil Procedure Rules must demonstrate through the history of the case their attempts to have the other side to do discovery. The letters and or notice written to the other side that thereafter neglects or keeps quiet and requests to answer any correspondence (This is of course a professional misconduct). Thereafter under order 10 r 23 Civil Procedure Rules the applicant seeking the discovery would file an application to court under order 10 r IIA (3) Civil Procedure Rules seeking orders from the court to make discovery. This is not an oral application but has to be a written application. All the correspondence and notices would then be annexed to the application. The court would then give a time limit to the other party in which to comply with the said orders.

12. It is only when the other side fails to comply, should an application under Order 10 r 20 Civil Procedure Rules be applied for.

13. This is a process that must show the other side deliberately and purposely rejected to do discovery. As the court of appeal held in one case law of:

Salim Mbarak & Others

V

Hadi Karama & Others

CA 971/19998

The defence was struck out as the advocate for defendant deliberately refused to do discovery after being informed severally to do so and appropriate orders given in which to comply was given by the court.

14. One cannot therefore come to court and demand an application under Order 10 r 20 Civil Procedure Rules without the laid down history and formal application to do the discovery.

15. I accordingly reject the application and dismiss it with costs to the respondents. Parties are to comply with order 10 r II a Civil Procedure Rules and follow the procedure outlined in the Civil Procedure act namely Order 10 r IIA (3) Civil Procedure Rule. Where there is default to comply.

DATED THIS 8TH DAY OF MAY 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

N. Thuku holding brief for Mwenesi instructed by Mwenesi & Co. Advocates for the plaintiff/applicant - present

M. Mubea instructed by Wetangula Adam Makhoha & Co. Advocates for the defendant/respondent – present