



contrary to the said terms of the Order.

- d) THAT the previous conduct of the Plaintiff/Respondent is such as to lead the Court's discretion being exercised in favour of the Defendants/Applicants.
- e) THAT it is just and equitable to grant the said Orders.

The application is supported by the affidavit of FIRDOSH EBRAHIM JAMAL, an Advocate on record for the Applicants.

The application is opposed. The Advocate for the Plaintiff JAMES GITAU SINGH filed a Replying Affidavit dated 14<sup>th</sup> July, 2008. That affidavit annexed a copy of particulars served on the Applicant's Advocate on 4<sup>th</sup> July, 2008, in answer to the Applicant's request for particulars dated 28<sup>th</sup> January, 2008.

The Applicant has filed a supplementary affidavit in response to the replying affidavit. The affidavit is sworn by the Defendant's Advocate, JAMAL, dated 25<sup>th</sup> September, 2008. I have considered its contents. The gist of the affidavit is that the particulars were supplied outside the 21 days period agreed upon between the parties in the consent order recorded on 8<sup>th</sup> May, 2008.

The application was argued by Miss Mungai for the Applicant. The Respondent's Advocate did not attend court despite service with the hearing notice.

Miss Mungai's contention was that as a result of service of the particulars outside the time agreed between the parties, the Respondent was in breach of a court order and was in contempt of pre-existing court order entered by consent. That in light of that breach the suit ought to be dismissed.

The Applicant has invoked Order L rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. These are general provisions of law. Order L Rule 1 of the Civil Procedure Rules provides that any application to court may be filed by motion where the rules do not expressly provide for a different procedure. Section 3A of the Civil Procedure Act gives this court inherent powers to make such orders as may be necessary for ends of justice to be met or to prevent abuse of the process of the court.

The Applicant herein first filed an application dated 28<sup>th</sup> February, 2008 in which it sought an order directed at the Plaintiff to supply particulars as sought in a request for particulars served on the Plaintiff on 28<sup>th</sup> January, 2008. On the date the application was to be heard, 8<sup>th</sup> May, 2008, both parties entered into a consent whose terms were that the Plaintiff was to provide particulars to the Respondent as per their request within 21 days from date of order.

From the pleadings before me, it is clear that the Plaintiff did not supply the particulars within the stipulated time. The Plaintiff supplied particulars on 4<sup>th</sup> July, 2008. That was 5 weeks after the time agreed.

Regarding the Respondent's contention that the suit ought to be dismissed for delay in supplying particulars. The Applicant has not relied upon any authority. All counsel said, which is true, is that court orders must be obeyed even those arising out of a consent order between the parties. It is clear the Plaintiff did not supply particulars within the period agreed in the consent order.

In HYTEC INFORMATION SYSTEMS LTD. V. CONVENTRY CITY COUNCIL [1997] WLR 1666, a persuasive authority, the Court of Appeal of England ruled on a similar case. In the case, the Defendant supplied particulars requested for by the Plaintiff. The Plaintiff being dissatisfied with the particulars filed an application seeking to have the Defendant's pleadings struck out. The Defendant's Advocate did not appear for the hearing of the application. The Court of Appeal held:

*“(2). That since an unless order was an order of last resort failure to comply would ordinarily activate*

*the sanction it imposed; that where there had been such failure the court would consider the overall justice of the particular case and would in general only exonerate a party in default where the circumstances of that default were outside his control; that, although it was not an invariable rule, a party was generally bound by the conduct of his legal representatives; and that, accordingly, since the conduct of the defendant's representatives could not excuse the failure to comply with the unless order the pleading had property been struck out."*

The general principle is that orders of the court must be obeyed and a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed.

I noted that Mr. Singh Gitau for the Respondent did not come to court to argue his client's position. He was content to swear an affidavit in reply to the application. That kind of conduct is disdainful to the court's authority and should be frowned at which I strongly do. The conduct of a representative of a party binds the party also. Unlike in the cited case where no papers were filed in reply to the application, and where the Advocate sent his pupil to seek adjournment, the Plaintiff's Advocate in the instant case filed a replying affidavit. Without excusing the Plaintiff's Advocate poor conduct, I have looked at it. In paragraph 4 and 5 of the Affidavit, the advocate avers:

*"4. THAT it was agreed that the Plaintiff would furnish the particulars sought, but I also informed the Judge that we had yet to receive all the files pertaining to the matter from advocates previously on record.*

*5. THAT pursuant to Defendants filing the present application, my firm served the Defendants' advocates with Particulars on 4<sup>th</sup> July, 2008 (Exhibit JGS 1)."*

There is an attempt to explain the delay. Mr. Gitau had informed the court of his difficulties in obtaining a copy of his client's file from the previous advocate. That is cited as reason for the delay herein. Indeed Mr. Gitau informed the court as much on 8<sup>th</sup> May, 2008 when the consent order was recorded. The explanation is not an afterthought. The explanation is both reasonable and excusable. The circumstances of the default have sufficiently been shown to have been outside the control of the Plaintiff and his Advocate.

The power to strike out proceedings for abuse of court process is discretionary. In this case, the abuse complained of was beyond Plaintiff/Respondent's control. Besides it has not caused any prejudice to the Applicants which cannot be compensatable with an award of costs. For that reason, I decline to strike out the Plaintiff's/Respondent's suit subject to the Respondent paying thrown away costs to the Applicant within 14 days from date herein assessed at Kshs.30,000/-

Dated at Nairobi this 5<sup>th</sup> day of December, 2008.

**LESIIT, J.**

**JUDGE**

*Read, signed and delivered in presence of:-*

Miss Muthee holding brief for Miss Mungai for the Applicant

Mr. Gitao for the Respondents/Plaintiffs

**LESIIT, J.**

**JUDGE**