

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2416 of 1998

GOODEARTH LIMITED.....PLAINTIFF

VERSUS

KARIBU MOTOR ENTERPRISES LIMITED.....DEFENDANT

R U L I N G

During hearing of the Defendant's case on 2nd March, 2006, DW2 (JOEL MAGERO) sought to produce in evidence certain documents which comprise invoices and delivery notes. Learned counsel for the Plaintiff, MR. SATISH GAUTAMA, raised objection to their production upon the ground that none of those documents had been brought to his and his client's attention before. He further argued that the Plaintiff's witness, PW1 was never asked a single question about these documents and none of them was shown to him. In his reply, learned counsel for the Defendant MR. MBICHI MBOROKI, pointed out that these documents were filed along with the Defendant's list of documents on 15th September, 2000 and served upon the Plaintiff's counsel on the same day. Mr. Mboroki further pointed out that PW1 had stated in his testimony that he was not involved in the day to day affairs of the Plaintiff, and that he knew nothing about the transactions between the Plaintiff and the Defendant. It would therefore have been futile for the documents to be put to PW1. Mr. Gautama's response to this was that the mere filing of documents in discovery does not mean that they become evidence in the suit until they are duly produced. Indeed this is so, and this is what the Defendant is now seeking to do, that is, to produce the documents in evidence. The main thing is that the Plaintiff should not be taken by surprise or ambushed. In this case, the Plaintiff is not being ambushed at all. The documents were served upon him five years ago together with the Defendant's list of documents, a fact that Mr. Gautama appeared to concede. He has had them all this time. He cannot choose for the Defendant how to use them in advancement of his case. The Defendant has chosen to introduce them in evidence through DW2. It is not necessary that they ought first to have been put to the Plaintiff's witness, PW1. The Plaintiff could have put them to PW1 if it thought it necessary.

I find no substance in the objection taken by the Plaintiff. The Defendant is entitled to introduce into evidence the documents in question as he had already made discovery of them to the Plaintiff, a discovery that was made five years ago. If he chooses to introduce them through DW2, that is his business. I must disallow the objection with costs to the Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF MARCH, 2006.