

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1813 of 1998

NELSON MACHARIA MUHUUH.....
.....PLAINTIFF

VERSUS

PAUL MWANGI THIOMO

FREDRICK MWANGI MWAI
DEFENDANTS

RULING

The plaintiff by way of this Notice of Motion brought under the provisions of Order X Rule 20 and Order L Rule 1 of the Civil Procedure Rules seeks orders that the defendants defence filed herein be struck out with costs on the ground that the defendant has failed to comply with this court's order made on 23rd October 2003 requiring the defendants to file their list of documents within 14 days.

The application is supported by an affidavit sworn by G. Kamonde in which he avers that on 23rd October 2003 this Honourable Court made an order that the defendants do file and serve their list of documents within 14 days that; when he attempted to serve the order upon Messrs K. Mwaura and Co. Advocates on record for the defendant he declined to accept service on the ground that they were no longer on record for the defendant. But on perusal of the Court Record it is evident that the defendant did indeed file a Police Abstract under the Defendant's list of documents.

But that notwithstanding it is not a requirement that the court do order a party to make discovery and file and serve a list of documents.

What is required is that if a party intends to use certain documents in support of his case, then he is required to make discovery of the same, file them and serve the other party.

The consequences of failure to make discovery are that the party will not be allowed to refer to them or produce them in evidence during the hearing.

The plaintiff's application for orders that the defendant's defence be struck out for failure to file and serve a list of documents is not tenable and the same is dismissed. Costs be costs in the cause.

Dated and delivered at Nairobi this 13th day of September 2006.

J.L.A. OSIEMO

JUDGE