



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 255 OF 2002

FESTUS MUTUA & 51 OTHERS.....
.....PLAINTIFFS

VERSUS

EVEREADY BATTERIES (K) LTD.....
DEFENDANTS

RULING

The plaintiffs in this case have made an application under the provisions of **Order X Rule 11 (2) and 23 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the orders of this court that the defendants be ordered with a period to be specified by the court to produce, make an affidavit of documents stating what documents are in their possession relating to the matter in dispute and more particularly the following documents:-

- (a) Gate entry security register for the period from January 1988 to January 2002.
- (b) Computer payroll print-out of the same period signed by the plaintiffs.
- (c) Plaintiffs clocking cards indicating hours worked by the plaintiff of the same period.
- d) Plaintiffs master-roll register of the same period. (
- e) Plaintiffs letters of employment.
- (f) Any other relevant document.

The application is based on the grounds that the defendant having employed the plaintiffs had in the its possession the documents related to their contract of employment. The application is supported by the annexed affidavit of Charles Inyasa Igumilu, one of the Plaintiffs. The defendant did not file any papers in opposition to the application. However during the hearing of the application, this court allowed Mr Musangi, Learned Counsel for the defendant to address this court on points of law only.

The thrust of the plaintiffs application as submitted by Mr Ndolo, their counsel on record is that a request for particulars under **Order X Rule 11 (1) of the Civil Procedure Rules** was made to the defendant. A copy of the said request was filed in court on the 15th of February 2005. The particulars requested are in pari materia to the documents requested under paragraph (a) to (f) of the application. The plaintiffs' complain that even after the defendant was duly notified, the defendant has neglected or ignored to avail the said documents to the plaintiffs. It was submitted that unless the said documents are

availed to the plaintiff, they would be unable to prove their case. In response, Mr Musangi submitted that the application was fatally defective and premature. He submitted that it was not certain whether the plaintiffs were seeking to make discovery, inspect the documents or issue interrogatories to the defendant. He further submitted that the parties to the suit had not yet finalised discovery. It would therefore be premature for the court to grant the application sought by the plaintiffs.

I have considered the arguments made before me. I have carefully read the application filed by the plaintiffs. In essence, what the plaintiffs are seeking from the defendant is their employment records; without it, they would not have a case against the defendant. Order X rule 11 of the Civil Procedure Rules provides as follows:-

(i) Any party may request any other party to the suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the suit.

(ii) If the party so requested refuses or neglects within fourteen days to make discovery as 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, 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 fairly of the suit or for saving costs.

(ii) that on application by one party the court may make an order for discovery against that party.” Order X Rule 11A(1) of the Civil Procedure Rules provides that: “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 filling and serving on the opposing 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.”

Under **Order X Rule 11 A of the Civil Procedure Rules** discovery is a must. Each party to the suit must supply the opposing party with the documents “relating to any matter in question in the suit which are or have been in (their) possession or power”. Litigants have no choice about the matter. The application made by the plaintiff is therefore unnecessary. The plaintiffs should wait for the defendant to serve them with the list of documents that the defendant intends to rely on during the hearing of the case. It is then, and only then, that the plaintiffs can make an application seeking an order of this court to compel the defendant to make further discovery. The application made by the plaintiff is therefore premature. In any event, I do not think that the rule of procedure as related to discovery were meant to aid a litigant who does not have evidence to prove his case. Discovery is meant to assist in the fair disposal of suits and to save the costs of litigation

For the reasons stated, the application lacks merit. It is dismissed with costs to the defendant.

DATED at NAKURU this 18th day of February 2005.

L. KIMARU

JUDGE