



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

Civil Case 1471 of 2001

UNITED PARCEL SERVICES OF AMERICA INC.....PLAINTIFF

VERSUS

GEORGE GABRIEL OTIENO RAFUA1ST DEFENDANT

KENNETH KITSAO2ND DEFENDANT

RULING

This is an application pursuant to the provisions of Order 18 rule 1 of the Civil Procedure Rules.

Essentially, the Plaintiff is asking for leave to have the affidavit of Mr. JOHN L. GOULD admitted in evidence, after being read in court, at the trial.

The Plaintiff contends that it would be very expensive to bring the witness from the United States of America, so as to testify in the case. The said witness is said to be the Divisional Manager of the Plaintiff, which is a company incorporated in the United States of America.

In support of the application, Mr. George Gitonga Murugara, advocate for the Plaintiff, has sworn an affidavit. He depones that Monique Ribando of King & Spalding LLP, who are the Plaintiff's attorneys in the United States of America had informed him that the expenses of bringing out Mr. Gould to Kenya, to testify at the trial would exceed Kshs.500,000/-.

It is said that the said sums were prohibitive. Therefore, as the contents of the affidavit were not controverted by the defendant, the Plaintiff feels that there was no justification for incurring such expense.

Order 18 rule 1 of the Civil Procedure Rules reads as follows;

"Any court may at any time for sufficient reason order that any particular fact of facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable;

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

Clearly, the rules allow for evidence to be given by way of affidavit. But, before the court can grant leave for evidence to be given by way of an affidavit, it must be satisfied that there is sufficient reason to allow it. Secondly, where such leave is granted, it may be in relation to the proof of any particular fact of facts.

In this case, the defendants were duly served with the application, but they did not file any response thereto. They also failed to attend court on the date when the application was scheduled to be heard. Consequently, there is no material before the court from which it could be gauged whether or not the defendants desire the production of Mr. John L. Gould for cross-examination.

I have also perused the affidavit which the Plaintiff wishes to have adduced in evidence at the trial. The affidavit gives the history of the Plaintiff, ranging from its incorporation in the United States of America in 1907; its registration in Kenya, in 1989, and the registration of the trade name "UNITED PARCEL SERVICE" and the trade mark "UPS". The affidavit also gives information regarding the manner in which the Plaintiff became aware of the defendant's actions which are said to constitute the infringement of the Plaintiff's trade name and mark.

From my perusal of the pleadings on record, I have found nothing that controverts the depositions in the affidavit of Mr. John L. Gould, which was sworn on 21st July 2005. In the circumstances, I am satisfied that there would be no need to compel the Plaintiff to incur such an excessive expense to bring the witness from the United States of America, for the sole purpose of testifying at the trial of this suit.

I also believe that the defendant will not be prejudiced in any manner whatsoever by the absence of the witness, for purposes of cross-examination. If anything, it is the Plaintiff itself which risks having nobody to elaborate on some points which the defendants may raise. But, as it is the plaintiff's desire to make do without its Divisional Manager as a witness testifying from the witness box, they cannot complain if ultimately the absence of Mr. Gould was detrimental to the Plaintiff's case.

In the "Law of Evidence" by S. K. Sarkar & Ejaz Ahmed 5th Edition, it was recognised that affidavit evidence may be admitted in evidence at a trial if the expense and delay would be unreasonable,

"When the facts spoken in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for the prosecution to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and to which witnesses are produced at the trial."

As I have already said herein, I understand the evidence of Mr. John L. Gould to be in the nature of formal evidence. I also believe that witnesses will be made available to supply some link between what Mr. Gould has said was his source of information about the defendant's wrongful actions, and the actions of the defendants in Kenya.

In the circumstances, I am satisfied that the plaintiff's application is well merited. Therefore, I direct that the affidavit of Mr. John L. Gould, which was sworn on 21st July 2005, shall be read out in court, and be admitted in evidence, at the trial of this case.

However, the trial judge shall retain the discretion of determining the weight which shall be given to the said affidavit, after weighing it within the context of the rest of the evidence which will be adduced at the trial.

As regards the costs of the application dated 31st August 2005, the same shall be in the cause.

Dated and Delivered at Nairobi this 9th day of November 2005.

F. A. OCHIENG

JUDGE