

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 483 of 1998

M.A. BAYUSUF & SONS LTD. PLAINTIFF

- Versus -

RELIABLE FREIGHT SERVICES LTD. ... DEFENDANT

R U L I N G

The trial in this case commenced on 9th December 2003 when P.W.1 partly testified in chief. When he attempted to produce a document that was not on the plaintiff's list of documents counsel for the defendant objected forcing the plaintiff to seek an adjournment to enable it file a supplementary list of documents. The matter was adjourned generally and the plaintiff filed a supplementary list of documents.

When the case came up for hearing on 10th February 2005 counsel for the plaintiff successfully applied to have the evidence of P.W.1 disregarded as he had not been cross-examined and has now left the plaintiff's employment and cannot be traced. The plaintiff called one witness who testified and was cross-examined and the case was adjourned to 16th March 2005. It was not heard on that date.

On 11th March 2005 the plaintiff had filed a further list of documents. When the hearing was to resume on 8th June 2005 counsel for the defendant objected to the filing of the further list of documents arguing that the plaintiff should have filed its final list of documents before the hearing commenced and that the further list of documents is new evidence which is ambushing the defendant. She further argued that the defendant had requested for particulars which were supplied and the plaintiff should confine itself to the particulars supplied. Citing the decision of this court (Hon. Justice Khaminwa) in **Pheneas Omwola Ndengu Vs Umoja Rubber Products Ltd. HCCC No. 337 of 1998** (unreported) she submitted that the plaintiff's further supplementary list of documents should be struck out.

In response Mr. Nyongesa for the plaintiff submitted that the objection is mischievous and is intended to stop the plaintiff from placing before court all evidence in support of its case. He further submitted that the filing of the further list was prompted by the defendant's act of filing a further list on 10th February 2005 after the hearing in this case had commenced. He said that the authority cited is distinguishable.

I have considered these submissions. To start with the authority cited I find that the same is distinguishable. The authenticity of the document struck off the list of documents in that case was questioned and the document was specifically prepared to answer the plaintiff's evidence which had been tendered. Counsel has not stated how the defendant will be prejudiced by the plaintiff's further list of documents. When the documents will be produced she will have an opportunity to cross-examine the witness or witnesses who will testify on it and if need be she can have P.W.1 recalled for further cross-examination.

The defendant itself has filed three lists of documents the last one being on 10th February 2005 long after the hearing had commenced. I agree with Mr. Nyongesa that the objection has no basis. It is accordingly overruled with costs to the plaintiff.

DATED and delivered this 17th day of June 2005.

D.K. MARAGA

JUDGE