

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT NO 543 OF 2001

MUTUAPLAINTIFF

VERSUS

ANWARALI & BROTHERS LTD.....DEFENDANT

RULING

By a plaint dated 28th September 2001, the plaintiff claimed from the defendant special damages in the sum of Ksh 18,150/=, general damages under Fatal Accident Act and the Law Reform Act plus costs and interest in respect of fatal traffic accident along Nairobi Mombasa road involving the deceased, Mutua Kanyite Nzaku and the defendant's motor vehicle registration number KAK 732 S and which occurred on 26th November 1998. The defendant filed a defence and within a short period of time the defendant also filed a request for particulars dated 12th March 2002 under order VI rule 8 of the Civil Procedure Rules. The plaintiff was served but has since then failed to supply the particulars thus making the defendant file a formal application by way of chamber summons under order VI rule 8 and 16 of the Civil Procedure Rules. The application basically seeks for an order to compel to supply the particulars requested by the applicant in their notice dated 12.3.2002.

The defendant has filed a supporting affidavit sworn by Hassan Sayani on 27.6.2002. The basis of the application is that the particulars are crucial to the defendant to enable them properly prepare for their defence and to avoid the element of surprise. However the plaintiff's response to the defendant's application is that the particulars cannot be supplied because they are within the possession of Makueni Police Station who can only be summoned to court to give evidence when the case is ready for hearing.

The defendant also attacked the replying affidavit of the plaintiff on the ground that the jurat was on a separate page, thus it was fatally defective. Mr Anjarwalla, the defendant's advocates urged this court to strike out the replying affidavit.

Basically this application raises two issues to be decided. First, whether the affidavit is fatally defective. Mr Anjarwalla quoted the case of *Central Bank of Kenya and Reliance Bank Ltd* (unreported) Nairobi HCCC Misc Application No 427 of 2000 in which Jeanne W Gacheche, Commissioner of Assize (as she then was) dismissed the affidavits in support because the jurat appear on separate pages from the main text. Of course this is an authority *per incuriam*. It is only persuasive to me. Before I decided on this point, it is worth to note that the defective affidavit surprisingly is no longer on record. It was mysteriously and unprocedurally removed or withdrawn from the Court record. Miss Munene who appeared for the plaintiff informed court that the offending affidavit had been withdrawn from the court record and a proper one filed 22.10.2002. This Court does not have the benefit of considering the issue of defective affidavits at this stage because the defective one has been withdrawn. I can only say that it is important for advocates being officers of this court to be honest and fair to court. It is improper, dishonest, deceitful and discourteous for an

Advocate to withdraw pleadings, documents or affidavits from court records without a Court order so to speak. This actually amounts to professional misconduct and such an officer is short of professional etiquette. This behaviour should stop and must cease. In fact had the Court been alerted earlier about the unlawful withdrawal of the defective affidavit, this Court could have refused to give audience to the particular advocate. This should be the practice by this Court in order to protect and safeguard the integrity of the legal profession.

The second and the main argument in this case is the issue of whether the defendant is entitled to be supplied with the particulars requested! Order VI rule 8(2) of the Civil Procedure Rules reads:

“The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.”

The plaintiff has provoked the defendant to make the request by failing to answer the request for particulars dated 12.3.2002. It is clear that the plaintiff has made generalized allegations at paragraph 5 of the plaint which may leave the defendant wondering on the nature of the defence they would raise during the trial. It is essential that each party should give his or her opponent a fair outline of the case which will be raised against him at the hearing. I have stated earlier that the particulars at paragraph 5 are vague. The plaintiff should have set out the particulars clearly to avoid other inferences being made. It is not just enough for the plaintiff to state that they are unable to obtain the particulars from Makueni Police Station.

An order for particulars will not be made where it is shown by evidence or submission that it would be unreasonable or oppressive for a party to supply the particulars requested. Secondly that, the party so ordered would incur great expense and face great difficulties and thirdly where the applicant seeks for particulars the last minute when hearing is approaching.

I have not been supplied with the necessary information by the plaintiff that they would suffer great prejudice, expense nor that the defendant applied too late. In order to prevent the element of surprise at the trial and to avoid some unnecessary expense on the part of the defendant. I will allow the application dated 27th June 2002 with costs to the defendant. Consequently the plaintiff is directed and ordered to supply the defendant with the particulars as per the request of particulars dated 12.3.2002 within 21 days from the date of this order and in default the defendant shall be at liberty to make the necessary representation to have the affected paragraphs of the plaint to be ordered struck out.

Dated and delivered at Mombasa this 26th day of June, 2003

J.K. SERGON

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JUDGE