



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 738 OF 2017

PARAGON ELECTRONICS LIMITED.....PLAINTIFF

VERSUS

VELOS ENTERPRISES LIMITED.....DEFENDANT

RULING

The Plaintiff filed the application dated 21/9/2020 seeking leave to file the affidavit sworn by the Defendant regarding rental income earned from the Suit Property as an additional document and to have its witness, Mr. Bulent Gulbahar testify via video link. The application was made on the grounds that Mr. Bulent Gulbahar is currently based in Dubai, in the United Arab Emirates and was mainly premised on the prevailing Covid 19 global pandemic that had led to an increase in precautions with governments and health experts advising persons to avoid unnecessary travel. The Plaintiff averred that it wished to introduce the affidavit dated 13/3/2018 which the Defendant's director filed in **HCCC No. 289 of 2009** regarding the rental income derived from the Suit Property. The Plaintiff urged that the document was necessary and would assist the court in determining the loss of rent suffered by the Plaintiff as a result of the Defendant's actions. The Plaintiff contended that since the hearing of the suit had not commenced, the Defendant would have an opportunity to file any document in rebuttal and that it would not be prejudiced if the orders sought were granted.

The application was supported by the affidavit of Clemence Wakio sworn on 21/9/2020 who urged that it was desirable for the Plaintiff's witness who is based in Dubai to be allowed to testify and be cross-examined via video link during the main hearing. He averred that Mr. Gulbahar's exposure to contracting covid 19 would be greatly increased if he travels to Kenya to attend court. He relied on the Communique on the Resumption of International Air Travel issued by the Ministry of Transport and Infrastructure together with the requirements for re-entry into the United Arab Emirates and the travel warnings issued by the German Federal Foreign Office. He averred that Mr. Gulbahar is a German citizen and that his testimony was material in assisting this court meet the ends of justice. Further, he deponed that the Defendant's witness who is 74 years old was in the vulnerable population with pre-existing conditions despite the fact that he was willing to attend court and testify. He attached copies of documents relating to **HCCC No. 289 of 2009** consolidated with **HCCC No. 285 of 2010**.

The Defendant opposed the application based on the facts set out in the affidavit of Ramesh Jayantilal Sheth sworn on 14/10/2020. He deponed that the real reason why Mr. Bulent Gulbahar could not travel to Kenya free of worry had everything to do with an outstanding warrant for his arrest for assaulting guards at the main gate of the Suit Property on 3/3/2019 in the company of Mr. Valentine Ataka. He added that Mr. Ataka and Mr. Gulbahar filed **Nairobi High Court Criminal Application No. 112 of 2019** seeking to prevent their arrest and named the Defendant as the 1st Defendant in that application. He deponed that the court declined to grant those orders.

The Defendant contended that this court directed the Plaintiff to file a trial bundle containing all pleadings and documents when the matter came up on 13/7/2020 and the court fixed it for hearing on 30/9/2020. The Defendant contended that the Plaintiff had had ample opportunity to file documents in this case and that allowing the Plaintiff to file more documents was bound to delay the trial further. The Defendant contended that it had neither rented out nor received any rent from the Plaintiff's premises being Block 1C which it contended had remained vacant since 2010. He deponed that the Plaintiff's advocate wrote to the Defendant's advocate informing them that the Plaintiff's witness would seek to give evidence via video link in the letter dated 1/9/2020. The Defendant's advocate responded and indicated that Mr. Sheth would avail himself to testify on 30/9/2020 despite his advanced age of 74 years and a pre-existing heart condition. Mr. Sheth deponed that he believed that as long as the court took the necessary precautions of restricting the number of people in court and directing them to wear masks, he could safely testify in court in person and so could Mr. Bulent Gulbahar.

Parties filed submissions which the court has considered. The issue for determination is whether the court should allow the application dated 21/9/2020. In its submissions, the Plaintiff invited the court to take judicial notice of the existing risks and realities of covid 19 as a global pandemic and in particular the fact that the pandemic had made international travel a life threatening risk that should be avoided except in unavoidable circumstances. The Plaintiff submitted that the cost of travelling, accommodation, multiple covid 19 tests and quarantine would make justice very expensive for the Plaintiff if its witness were to travel to Kenya to testify. It submitted that the overriding objective of the court in civil proceedings was to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Further, that Section 1B of Civil Procedure Act enjoined the court to embrace the use of suitable technology and dispose of proceedings in a cost effective manner.

The Plaintiff argued that Section 63A (1) of the Evidence Act expressly empowered the court to receive oral evidence through teleconferencing and video conferencing. The Plaintiff relied on several decisions in which the High Court allowed the taking of oral

evidence through video conferencing. These are **In Re Estate of Roger Bryan Robson (Deceased) [2020] eKLR, Joan Marie Schultz v George Mburu Wachira and Another [2019] eKLR and Jubilee Holdings Limited and Another v Bupa Insurance Services Limited and Another [2019] eKLR.**

The Plaintiff implored the court to consider the fact that the hearing had not started and the Defendant would have an opportunity to file any document in rebuttal if it so wished in response to the affidavit that the Plaintiff wished to introduce as its evidence in the suit. It relied on the decision in **Joseph Mumbero Wanyama v Jared Wanjala Lyani and another [2019] eKLR** in which the court allowed the Plaintiff to introduce another witness after pleadings had closed while observing that justice should be administered without undue regard to procedural technicalities.

The Defendant submitted that when this matter came up for case conference on 13/7/2020 the Plaintiff confirmed to the court that the case was ready for hearing and the court went ahead to fix the hearing for 30/9/2020 and directed the Plaintiff to compile a bundle comprising the pleadings and documents for use during the trial. Then the Plaintiff filed the instant application on 21/9/2020 seeking to submit further documentation and to have its witness testify via video link ostensibly on account of travel restrictions necessitated by the covid 19 pandemic. The Defendant submitted that the Plaintiff failed to bring to the attention of the court that its witness was unable to travel to Kenya because of an outstanding warrant for his arrest for assaulting guards in the suit premises. The Defendant adverted to the decision by Kimaru J. when he declined to issue conservatory orders preventing the arrest of Mr. Valentine Ataka and Mr. Bulent Gulbahar in **Nairobi High Court Misc. Application No. 112 of 2019**. The Defendant argued that lack of candour by a party seeking relief from a court automatically disentitles it from the relief and relied on the decision in **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] eKLR** on that point. The Defendant further contended that its witness had availed himself in court despite being vulnerable to contradicting covid 19. The Defendant pointed out that the Plaintiff had had ample opportunities since 2017 to file all the documents it wished to rely on resting with the further list of documents which it filed on 24/2/2020. The Defendant contended that allowing the Plaintiff to file the documents late in the day would delay the conclusion of this matter more so if the Plaintiff will be seeking to file additional documents every time the case comes up for hearing.

The issue for determination is whether the court should allow the Plaintiff to adduce additional evidence. Looking at the plaint filed on 25/11/2015, the Plaintiff seeks among other prayers, damages of Kshs. 70,662,000/= against the Defendant being loss of rent from February 2010 to October 2015. Paragraph 7 of the plaint indicates that the sum which the Plaintiff seeks is based on the valuation report prepared by Topmark Valuers. The plaint does not indicate that the Plaintiff's claim is pegged on the rental income that the Defendant admitted in the proceedings in HCCC No. 289 of 2009 which was consolidated with HCCC No. 285 of 2010.

The affidavit the Plaintiff seeks to introduce was within the Plaintiff's knowledge at the time it filed its further list of documents on 24/2/2020 since it was a party to HCCC No. 289 of 2009 consolidated with HCCC No. 285 of 2010. From the long protracted dispute touching on the Suit Property which can be discerned from the pleadings annexed by the Plaintiff, the Plaintiff ought to have known which documents it would rely on to prove its claim at the time it filed this suit and when it filed a further list of documents. No explanation was given for the late introduction of the documents after pretrial was done and the suit set down for hearing. The court is not satisfied that the affidavit which the Plaintiff seeks to introduce will assist it in determining the reliefs the Plaintiff seeks which are based on the valuation report.

In the court's view, the application to have the Plaintiff's witness' evidence taken through video conference was overtaken by events when the hearing could not proceed on 30/9/2020. At the time of writing this ruling Kenya is experiencing the third wave of the Covid 19 pandemic and the government has put in place measures to curb the spread of the disease including scaling down court proceedings. The courts are not hearing cases at the moment. Several vaccines have been developed and put into use as a way of tackling the pandemic. It may well be that by the end of the year people will travel without the risk of contracting Covid 19 or suffering its worst effects. When that happens the Plaintiff's witness can travel to Kenya to testify.

The averment by Ramesh Jayantilal Sheth in his replying affidavit that a warrant for Mr. Gulbahar's arrest was outstanding was not controverted by the Plaintiff. The court notes that besides stating that Mr. Gulbahar was apprehensive of travelling to Kenya owing to the coronavirus pandemic, no mention was made of when he left the country and when he had been expected to return to Kenya before the pandemic engulfed the world.

The court is not satisfied that it ought to exercise its discretion in favour of the Plaintiff and allow its witness to give evidence through video conference.

The court declines to grant the orders sought in the application dated 21/9/2020. The Defendant is awarded the costs of that application.

Delivered virtually at Nairobi this 14th day of April 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Valentine Ataka for the Plaintiff

Mr. E. Rabut holding brief for Mr. G. Muchiri for the Defendant

Mr. V. Owuor- Court Assistant