



**Solvochem East Africa Limited v Comform Foam Investment Limited (Civil Case E009 of 2023) [2023] KEHC 27335 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 27335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL CASE E009 OF 2023  
SN MUTUKU, J  
AUGUST 3, 2023**

**BETWEEN**

**SOLVOCHEM EAST AFRICA LIMITED ..... PLAINTIFF**

**AND**

**COMFORM FOAM INVESTMENT LIMITED ..... DEFENDANT**

**RULING**

1. The defendant, through its advocates, brought a Notice of Motion dated 29<sup>th</sup> June 2023 and filed under certificate of urgency, seeking orders to strike out the Plaintiff's Complaint dated 17<sup>th</sup> January 2023 for reasons that it was filed in violation of order 3 rule 1 and 3 of the *Civil Procedure Rules* or in the alternative the court to compel the Plaintiff to forthwith and without condition serve and make available to the Defendant and its representative all the documents it wishes to rely on and the Defendant be granted 30 days to file its response.
2. The Notice of Motion was placed before me on 3<sup>rd</sup> July 2023. I did not certify it as urgent. I directed the Applicant to serve the application on the Respondent and both parties to attend court for directions on 10<sup>th</sup> July 2023. On that date, Mr. Munai for the Plaintiff told the court that he had not been served with the application. I directed that he be served. The matter was fixed for directions on 13<sup>th</sup> July 2023.
3. On 13<sup>th</sup> July 2023, Mr. Shadrack Wambui, representing the Defendant alongside Mr. Gathuo, informed the court that the Plaintiff had not responded to the Notice of Motion but has instead supplied them with the documents they had sought to be supplied with. He asked for the costs of the Application and hinted at their willingness to withdraw the application upon payment of costs.
4. Mr. Munai responded that the application had been unnecessary because the documents required had already been served and the suit had not been set down for pre-trial and that he had reached out to the defendant's counsel to withdraw the application.



5. This issue stayed alive and unresolved until 24<sup>th</sup> July 2023 when the parties made further submissions. Counsel for the Defendant maintained that they are seeking costs for the application in issue. It was submitted that the application was highlighting the Plaintiff's failure to obey the rules that require that the Plaintiff ought to be accompanied by all the documents to be relied on and that fair trial requires that a defendant be fully informed of the reason why he was sued.
6. Mr. Munai maintained that the application was unnecessary; that they did not have all the documents and that they had undertaken to file them 14 days before pre-trial. He submitted that the rules do not state that the documents be filed or served at the same time as the Plaintiff; that all that the defendant ought to have done was to enter appearance then wait to be issued with bundle of documents before filing their defence. He submitted that the defendant has not been prejudiced in any way and that Defence counsel was trying to frustrate this matter because the defendant does not have an arguable defence.
7. To my understanding, counsel for the defendant are willing to withdraw their Notice of Motion dated 29<sup>th</sup> June 2023 because they have been served with the documents they were seeking to be supplied with in that application. They are, however, seeking the costs of that application. The issue of payment of costs for that application is opposed by counsel for the Plaintiff who termed the application by the defendant as unnecessary.

8. Without belabouring the point, section 19 of the [Civil Procedure Act](#) states that

“Every suit shall be instituted in such a manner as may be prescribed by rules”.

The applicable rules are the [Civil Procedure Rules](#), specifically Order 3 rule 1 and rule 2 of the [Civil Procedure Rules](#). Order 3 Rule 1 provides that:

- “(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.
- (2) The claim shall indicate at the heading the choice of track; namely “small claims”, “fast track” or “multi-track”.

9. Order 3 Rule 2 provides the documents to accompany the plaint as follows:

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by— (a) the affidavit referred to under Order 4 rule1(2);

- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses excluding expert witnesses; and
- (d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

10. Mr. Munai submitted that he did not have the documents with him at the time of filing the plaint and that he undertook to file them 16 days before the pretrial conference. He further submitted that rules do not state that documents ought to be filed or served at the same time as the plaint. My reading and understanding of Order 3 Rule 2 are different. I understand this provision to be stating categorically that it is only written statements that can be furnished at least 15 days prior to the trial conference,



but with leave of the court. The rest of the documents: the verifying affidavit, list of witnesses and documents to be relied on during the trial, shall accompany the plaint, meaning they shall be filed together with the plaint.

11. Mr. Munai is wrong in his submissions, in my view. He ought to have filed all the materials he intended to rely on alongside the Plaint. His failure to do so necessitated the filing of the application under consideration. Counsel for the defendant felt the necessity to have all the documents the Plaintiff would be relying on served on them before filing defence, which is in order. Fair trial demands that a party sued must know what the claim is all about in order to prepare an appropriate defence.
12. My view on this matter is that, given that the defence has admitted having been served with all the documents, it will only delay this matter unnecessarily if parties were to proceed to argue the application after counsel for the defendant have indicated their intention to withdraw it upon payment of costs. For this reason and to avoid improper use of judicial time, I will and do hereby allow Mr. Shadrack Wambui and Mr. Gathuo to withdraw the Notice of Motion dated 29<sup>th</sup> June 2023 but order that the defendant shall be paid costs of that application by the Plaintiff.
13. Consequently, the Notice of Motion dated 29<sup>th</sup> June 2023 is hereby withdrawn. Costs of the application shall be borne by the Plaintiff.
14. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 3<sup>RD</sup> AUGUST 2023.**

**S. N MUTUKU**

**JUDGE**

