



Alwakil Transference General Trading Company v SOS Kinderdorf International (Civil Case 2277 of 1998) [2021] KEHC 159 (KLR) (Commercial and Tax) (7 October 2021) (Ruling)

Neutral citation: [2021] KEHC 159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 2277 OF 1998
F TUIYOTT, J
OCTOBER 7, 2021**

**BETWEEN
ALWAKIL TRANSFERENCE GENERAL TRADING COMPANY PLAINTIFF
AND
SOS KINDERDORF INTERNATIONAL DEFENDANT**

RULING

1. The Notice of Motion of 5th February 2021 seeks the following prayers:-
 1. THAT the Honourable Court be pleased to grant to the Applicant leave for its Further Affidavit dated 21st January 2021 and filed on 22nd January 2021 be deemed to have been properly filed and served (hereinafter referred to as “the Further Affidavit”).
 2. THAT the costs of and incidental to this Application abide the main suit.
2. The applicant states that the documents sought to be produced in the further affidavit are not new and relate to documents already filed by the respondent in the affidavit of Ismail Abdillahi Siad dated 9th May 2020 and the bundle of documents filed on 23rd July 2010. It is also explained that the document marked “CC-1” is a summary of money exchange recorded in the documents adduced by the respondent, while the document marked “CC-2” are bank statements of bank transactions adduced by the respondent. The Court is told that the documents contain information that is relevant and concerns the fact in issue of payments allegedly made.
3. Counsel for the applicant states that he inadvertently omitted to include the missing documents at the time of adducing evidence and his mistake should not be visited upon his client.



4. In response, the respondent states that the documents are new and do not relate to the documents already produced by it on 9th May 2000. It is the respondent's further answer that the new documents are prejudicial to its claim as it is sought to be introduced after the close of its case. To demonstrate the acute delay in filing the documents, the respondent points out that the matter has been ongoing for two decades now.
5. The respondent argues that it is rather curious that the applicant seeks to introduce new documents to counter an agreement whose evidence it has continuously denied.
6. On the question of recalling its witnesses, the respondent states that it will be a major inconvenience, not just in additional costs, but of tracing witnesses who have long dispersed to different parts of the continent.
7. The Court has considered the oral arguments made for and against the application.
8. For a start, although the respondent argues that the filing of the document is unnecessary as it is merely a summary of what is already on record, it is not argued that the documents are in fact irreverent. What seems to be the main contention, and this was alluded to by counsel Okanga when he made arguments resisting the motion, is delay in which the application has been brought and the consequent prejudice it could cause to the respondent.
9. The respondent, who is the plaintiff, has closed its case after calling two witnesses. The first witness, Ismail Abdillahi Siad testified on 28th July 2010. The second witness, Abshir Mohamed Culusow testified on 29th July 2010 and after various starts and stops finalized his evidence on 9th August 2019. The plaintiff then closed its case in November 2019.
10. The delay in which the application is brought is evident when one considers that it is over 10 years since the first plaintiff's witness testified and even more profound because it is about 27 years after the commencement of the action.
11. Yet because the defence case has not commenced and the Court is not told that the two witnesses are not available, as opposed to the inconvenience in tracing and availing them, then the Court is inclined to accommodate the request by the applicant. This is motivated by the overarching need for a Court to consider all material and evidence that parties are able to marshal and willing to place before it. The costs of recalling the witnesses, if the plaintiff so elects, will have to be met by the defendant.
12. The Notice of Motion of 5th February 2021 is hereby allowed but on the condition that the plaintiff shall be at liberty to recall its witnesses to testify on the documents and that the defendant shall, in advance, pay to the plaintiff the reasonable costs necessary for securing such attendance. Each party to meet their own costs on the application.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

