



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 11 OF 2017

KENYA FILM CLASSIFICATION BOARD.....PLAINTIFF/APPLICANT

VERSUS

KENYA BREWERIES LIMITED.....1ST DEFENDANT/RESPONDENT

AFRICA SPIRITS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in relation to two applications. The first application is dated 21/12/2020 by the plaintiff/applicant and is brought pursuant to **Article 159(2) (d) of the constitution, Sections 1A, 1B, 3A of the Civil Procedure Act, Order 11 Rule 3(2) (c) and (d) and Order 51 of the Civil Procedure Rules**. The application seeks the following orders:-

- a. That this honorable court be pleased to dispense with the oral testimony of the witnesses in this suit.**
- b. That in the alternate this honorable court be pleased to grant leave for the parties evidence to be given on the basis of affidavit evidence.**
- c. That the costs of the application be provided for.**

The application was based on the grounds on the face of it and on the supporting affidavit of **Loice Shalakh**, the corporation secretary of the plaintiff/applicant. She deposed that the plaintiff filed the present suit vide a notice of motion on 18th January 2017 seeking injunctive orders against the 1st and 2nd defendants. Interim orders were granted vide a court order dated 23rd January 2017 restraining the defendants from continuing to run the impugned advertisements pending the hearing of the application interparties.

The present suit was however stayed pending the hearing and determination of **Constitutional Petition No. 10 of 2017, Alcoholic Beverages Association of Kenya vs Kenya Film Classification Board and 2 others**. The petition called for the determination of the board's mandate as stipulated under section 15 of the Films and Stage Plays Act. On 12th May 2017 the petition was determined and was dismissed with costs.

It is the applicant's contention that the matter raises purely points of law, it is necessary in the interest of justice and for the efficient disposal of this suit that the parties dispense with oral witnesses' testimony and instead dispense the suit on the basis of the pleadings, written witness statements, documentary evidence and affidavit evidence.

The matter has been scheduled for hearing twice but the same was taken out on both occasions as the court could not accommodate an open court hearing due to the Covid 19 pandemic. Time has lapsed since the filing of this suit and it is not known when the courts will resume open court hearings due to the pandemic. That if the orders sought in this application are granted, both parties herein will be accorded a fair opportunity to present their respective cases and the 1st respondent will not be prejudiced.

The 1st defendants filed grounds of opposition dated 12th February 2021. According to the 1st defendant, the application is aimed at stealing a match against the defendant by the proceedings determined prior to the hearing of Nairobi Civil Appeal No. 232 of 2017 **Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board & Others** thereby occasioning great prejudice to the 1st defendant by denying it an opportunity to exercise its constitutional right to a fair hearing as guaranteed under Article 50 of the Constitution. It is also contended that the plaintiff is seeking to rely on a judgement of this honorable court which is the subject of the appeal.

The 1st defendant contend that the application herein is a breach of the principles of confidentiality and inadmissibility of mediation

proceedings as prescribed under Rule 12 of the Mediation (Pilot Project) Rules 2015 hence ought to be struck out *in limine*. It was submitted that by virtue of Rule 12 (5) of the Mediation (Pilot Project) Rules 2015 the plaintiff is in contempt of the court by disclosing the communication made during the mediation proceedings in the current proceedings and should be denied audience until the said contempt is purged.

The second application is dated 15/7/2021 and was filed by the 1st defendant. It is brought pursuant to **Sections 1A, 1B, 3A & 6 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010 Articles 48, 50 and 159 of the Constitution 2010**. The application seeks the following orders:-

a. Spent.

b. That pending the hearing and determination of this application inter-parties the court do grant a stay of proceedings.

c. That all further proceedings herein may be stayed on such terms as this court may deem just and convenient pending the hearing and determination of Nairobi Civil Appeal No. 232 of 2017: Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board & Another arising from the Judgement of this honorable court in constitutional Petition No. 10 of 2017 Alcoholic Beverages Association of Kenya v Kenya Film Classification Board & another delivered on 12th May 2017.

d. That the costs of the application be provided for.

The application was supported by the affidavit of **Karen Mate Gitonga** sworn on 15th July, 2021. The defendant averred that prior to the institution of this suit, the plaintiff had repeatedly threatened to arrest and prosecute officers of the members of the Alcoholic Beverages Association for running advertisements without its sanction and license. The Association lodged constitutional petition No 10 of 2017 challenging as unlawful and unconstitutional the plaintiffs peremptory and illegal assertion of a nonexistent power to regulate and license advertisements for alcoholic beverages. By an application dated 26/1/2017 the 1st defendant did bring to the attention of this court of the said fact and on 2/2/2017 the parties in by consent agreed to stay all further proceedings. The High Court on 12/5/2015 did dismiss the constitutional petition lodged by the Association and upheld the plaintiff's mandate in relation to audio visual commercial advertisements which is the subject matter of this suit.

The plaintiff seeks to rely on the said judgement yet the matter is the subject of appeal namely Civil Appeal No. 232 of 2017 Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board before the Court of Appeal. The determination of the appeal will have direct bearing on the instant suit and if the orders sought herein are not granted, the 1st defendant will be denied an opportunity to exercise its constitutional right to a fair hearing.

The application was opposed through a replying affidavit of **Loice Shalakha** sworn on 15/9/2021. The respondent averred that the proceedings before the Court of Appeal are not an automatic stay of proceedings, that the 1st defendant's application does not satisfy the threshold for this court to exercise its discretion in its favor and that the application does not demonstrate substantial loss the 1st defendant is likely to suffer.

The plaintiff further contend that the facts relevant to the present case are not in dispute and the matter raises purely points of law covering the board's regulatory authority over audio visual advertisements and whether such advertisements should be submitted to the board for approval, rating and classification.

Analysis and Determination

The two applications raises the following issues:-

a. Whether this case should proceed by way of affidavit evidence.

b. Whether to stay these proceedings pending the hearing and determination of Nairobi Civil Appeal No. 232 of 2017; Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board & another pending before the Court of Appeal.

With regard to the first application the plaintiff/applicant submitted that Order 11 Rule 3 (2) (c) and (d) of the Civil Procedure Rules, 2010 empowers the court to admit witness statements without calling the makers where appropriate and order the giving of evidence in appropriate cases. Reference was made to the case of **Joseph Julia Rosario D'souza & Another v. Leo Investment Ltd [2013] eKLR** where the court held:-

“Under order 11 Rule 3 (2) (c) the court has power to order admission of statements without calling of the maker as a witness where appropriate. Under order 11 Rule 7 (1) (d) the court may at the Trial conference equally order the admission of statements without calling the makers where appropriate. It is therefore clear that the court may in appropriate circumstances order the admission of witness statements without the makers being called upon to testify.”

The plaintiff's position is that the case involves purely points of law relating to the plaintiff's statutory powers over audio visual advertisements. On its part, the 1st defendant contend that the alleged documentary evidence was produced in the mediation and its reliance by the plaintiff is contrary to the mediation rules. Counsel for the 1st defendant referred to the case of **Re Estate of BM (Deceased) [2019] eKLR** where the court stated that:-

“All information obtained orally or in writing in the course of mediation is treated confidentially and cannot be used in the evidence thereafter.”

It was therefore the 1st defendant’s argument that the plaintiffs conduct amounts to willful affront to the supremacy of the law and is tantamount to contempt and therefore the court should not hear the said application until the plaintiff has purged the contempt by removing or otherwise withdrawing all references made to the proceedings in the mediation.

Order 11 Rule 3 (2) (c) of the Civil Procedure Rules provides as follows.

“In addition to any other general power the court may at the case conference-

(c) Order admissions of statements without calling of the makers as witnesses and the production of any copy of a statement where the original is unavailable.”

Order 11 rule 7 (1) (d) of the Civil Procedure Rules provides that;

“At least thirty days before the hearing date of the suit a Trial Conference shall be convened by the court for the following purposes;

(d) Ordering the admission of statements without the calling of the makers as witnesses where appropriate and the production of any copy of a statement where the original is unavailable

Further Section 1A, 1B, 3 and 3A of the Civil Procedure Act on the basis of which this Application has been made provides that the grant of the Orders sought is discretionary. That discretion however is not to be exercised capriciously but with great circumspection. The court must consider all the relevant circumstances before reaching a determination whether or not to exercise that discretion.

In the present application the plaintiffs argued that the suit herein raises pure points of law and it would be in the interest of justice that the suit be dispensed with on the basis of the pleadings, written witness statements, documentary evidence and affidavit evidence. However, the 1st defendants have expressed that it is the intention of the plaintiffs to rely on mediation proceedings which is disallowed under Rule 12 of the Mediation Rules.

The courts have currently resumed open hearings despite the Covid 19 pandemic. The parties have the right to a fair hearing as engrained under Article 50 of the Constitution. The plaintiff can call its witnesses who shall rely on their witness statements. The issue relating to production of documents can be dealt with during the hearing so that whatever document is objected to, the court can make a determination as to whether it should be produced or not. Further, when the case is heard by way of oral evidence, parties have an opportunity to cross examine the witnesses. Such cross examination at times involves the veracity, authenticity and origin of some of the documents intended to be produced by a party. It is also in the court’s interest to see the witnesses testifying and determine whether the evidence being adduced is reliable and truthful while at the same time noting the demeanour and credibility of the witnesses. Reliance on witness statements and filed documents without further evidence can at times lead to unfair trial. The issues in dispute may not come out clearly.

On the second application the 1st defendant is seeking a stay of proceedings of this matter pending the determination of **Nairobi Civil Appeal No. 232 of 2017: Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board & Another**. It was the 1st defendant’s argument that prior to the institution of these proceedings the plaintiff threatened to arrest and prosecute officers of members of the alcoholic beverages association of Kenya (ABAK) for running advertisements without its sanction and license. Subsequently ABAK filed a constitutional petition challenging the plaintiffs preemptory nonexistent power to regulate and license advertisements for alcoholic beverages. On 2/2/2017 however the petition was dismissed. The said judgement is subject of an appeal being Nairobi Civil Appeal No. 232 of 2017 which appeal has great chances of success and that its determination will have a direct bearing on this suit.

The plaintiffs in their submissions argued that the application by the 1st defendant does not meet the threshold for the court to grant the order as they did not demonstrate any substantial loss they stand to suffer and therefore cannot hold the present proceedings at ransom awaiting an interpretation of the law favorable to itself.

In the case of **Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J** held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

The circumstances in the instant case do not present any compulsion that would make the court exercise its discretion to stay the proceedings. I have weighed the pros and cons of granting or not granting the order of stay of proceedings and I am of the view that granting the order would cause more harm than good. The provisions of Article 159 of the Constitution of Kenya as read with Sections 1A and 1B of the Civil Procedure Act, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties. It is not known when the Court of Appeal will determine the Appeal and this matter cannot be kept in the shelves pending the decision of the Court of Appeal.

In light of the above this court consequently makes the following orders;

- 1. The Notice of Motion dated 21/12/2020 is without merit and is therefore dismissed**
- 2. The Notice of Motion dated 15/7/2021 is found to be without merit and is consequently dismissed.**
- 3. Each party shall bear its own costs.**

DATED DELIVERED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

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S. CHITEMBWE

JUDGE