



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 76 OF 2019

EAST GLOBAL LOGISTICS KENYA LIMITED.....PLAINTIFF

VERSUS

MAKUPA TRANSIT SHADE LIMITED.....1ST DEFENDANT

DENNIS KEISER.....2ND DEFENDANT

ABDIWAHID HAJI YEROW.....3RD DEFENDANT

TWALIB ALI MBARAK HATAYAN.....4TH DEFENDANT

RULING

[1] When this suit came up for hearing on **19 October 2021**, **Mr. Kinyua**, learned counsel for the defendant objected to the production of the two Bundles of Documents filed herein by the plaintiff on the ground that they are comprised of copies, as opposed to the original documents. It was therefore **Mr. Kinyua's** argument that the defendant's right to fair trial can only be guaranteed if the original documents are availed. He hinged his objection on **Articles 25(c), 48 and 50(1)** of the **Constitution of Kenya**.

[2] In respect of the contract on which the suit is premised, **Mr. Kinyua** took issue with the fact that parts thereof have been redacted, yet that document is the foundation of the plaintiff's claim. He therefore took the position that the defence is entitled to see the complete contract; and added that this was made clear in the Amended Defence filed on **15 December 2020** and the Defence Witness Statement filed on **2 February 2021**. Accordingly, **Mr. Kinyua** took the position that, if the plaintiff does not wish to disclose all the contents of the contract then he should not be permitted to rely on it.

[3] **Mr. Gikandi**, learned counsel for the plaintiff, countered **Mr. Kinyua's** objection by asserting that the plaintiff should be given the space to determine how best to present its case; and therefore that the defendant has no cause for concern as to whether or not sufficient evidence has been presented to support the plaintiff's claim. Counsel submitted that it would be absurd for the plaintiff to be compelled to avail content that is irrelevant to the instant proceedings. He reiterated the stance of the plaintiff that the redacted portions of the subject contract are not only irrelevant to the instant suit, but also contain confidential matters relating to 3rd parties. Hence, **Mr. Gikandi** urged the Court to overrule the objection. He pointed out that the pre-trial conference took place on four (4) different dates and that no such objection was ever raised during those sessions. In his view, the 1st defendant, being the plaintiff's competitor, is merely out to obtain undue advantage of the plaintiff, by seeking confidential trade information in the guise of disclosure.

[4] **Mr. Karega** on his part pointed out that no reference has been made in the Defence to the constitutional provisions relied on by **Mr. Kinyua**. He took the view that notice ought to have been given beforehand of the intention by **Mr. Kinyua** to object to production of the plaintiff's documents. He reiterated **Mr. Gikandi's** position that the objection ought to have been raised during the pre-trial conference and added that, the fact that **Mr. Kinyua** waited until the hearing date to raise his objection evinces an intention to overreach, which ought not to be countenanced by the Court. He likewise urged the Court to overrule the objection.

[5] The objection raises two main but related issues. Firstly, is the question whether or not the plaintiff should be allowed to produce copies as opposed to the original documents; and the second issue is the propriety of the plaintiff proceeding on the basis of a contract, parts of which have been redacted.

[6] There is no dispute that the documents that **PW1** proposes to produce as exhibits on behalf of the plaintiff are not the original documents but copies thereof. The primary bundle comprises the documents dated and filed on the **18 September, 2019**. There was a Further List and

Bundle of Documents dated the **1 November, 2020** and filed on the plaintiff's behalf on **2 November, 2020**. Needless to say that, under **Section 64** of the **Evidence Act** a document can be proved by either primary or secondary evidence. Primary evidence, for purposes of **Section 65 (1)** of the **Evidence Act**, is the document itself produced for the inspection of the court; while secondary evidence is defined under **Section 66** of the **Act** to be certified copies, copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies, copies made from or compared with the original, counterparts of documents as against the parties who did not execute them and oral accounts of the contents of a document given by some person who has himself seen it.

[7] While **Section 67** of the **Evidence Act** is explicit that documents must be proved by primary evidence and can only be proved by secondary evidence in the circumstances provided under **Section 68** of the **Evidence Act**, the primary purpose of pre-trial disclosure is to minimize objections to the production of original documents, such as the one raised herein, on the presumption that the parties have had ample opportunity to scrutinize all the documents and to raise such concerns, if need be, well ahead of the hearing. Thus, **Order 11 Rule 3(1)** of the **Civil Procedure Rules** provides that:

“The purpose of a case management conference shall be to

- (a) Promote the expeditious disposal of case;**
- (b) Afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case;**
- (c) Afford the parties an opportunity to settle the case;**
- (d) Determine any other matter relating to the management, hearing and disposal of the case;**
- (e) Deal with pre-trial applications at first instance or formulate a timetable to deal with them as the court may deem fit; and**
- (f) Identify the issues for determination.**

[8] Ordinarily, a party would be required to give notice under **Section 68 (1) of the Evidence Act**, of the intention to rely on secondary evidence, in compliance with the requirements of **Section 69** of the **Evidence Act**, which provides as follows: -

Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases

- (i) when the document to be proved is itself a notice;**
- (ii) when from the nature of the case, the adverse party must know that he will be required to produce it;**
- (iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;**
- (iv) when the adverse party or his agent has the original in court;**
- (v) when the adverse party or his agent has admitted the loss of the document;**
- (vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court**
- (vii) in any other case in which the court thinks fit to dispense with the requirement.**

[9] In the light of the aforesaid provisions of **Order 11** of the **Civil Procedure Rules**, it was imperative for the defendant to not only raise its objections at any of the 4 pre-trial conference sessions, but to also specify which of the documents in the two bundles it had an issue with. This is because, it is evident that some of the documents objected to are within the defendant's knowledge and/or emanate from the defendant. An objection should not be frivolous or made simply for the sake of it, but for good and sufficient cause; for instance, in circumstances of failure to comply with directions given under **Order 11 Rule 3(1)(d)** of the **Civil Procedure Rules** aforementioned. It should also be raised at the proper time for it and not as an afterthought.

[10] In the circumstances, it is my finding that the secondary evidence presented by the plaintiff is properly before court. At any rate, the defendant will have an opportunity to cross-examine the plaintiff's witness to establish the probative value of the documents produced; and therefore it stands to suffer no prejudice at all.

[11] The second limb of the plaintiff's objection is in respect of the subject contract document and its complaint that the same has been unnecessarily redacted. Apparently, the contract is between the Plaintiff and a third party (**CMEC Africa Development Limited**) and is attached as **Exhibit 1** in the Plaintiff's list of documents dated **18 September, 2019**. The Defendant averred that a fair trial cannot be achieved as anticipated under **Article 25(c), 48 and 50 (1) of the Constitution** without full disclosure of a contract that the suit herein is

based on.

[12] In rebuttal stated that the plaintiff asserted that it has a right to handle its case the best way it knows how; and that it stands to lose the most should the presumption that the documents would have been prejudicial to it should it be drawn if it fails to produce sufficient evidence in its possession in support of its allegations. Further, the Plaintiff maintained that the contract is confidential and its disclosure will cause substantial harm and expose it to unfair competition. Counsel for the plaintiff added that such confidential contracts are protected under the procurement laws.

[13] In ABN Amro Bank N.V vs. Kenya Pipeline Company Limited [2014] eKLR, in which a formal application was made for specific documents from the plaintiff, the view taken therein was that:

“Needless to state the primary devices of discovery are interrogatories, depositions, request for admissions, inspection of documents and requests for production of documents etc. But such application seeking information and documents is measured on a new yardstick; the Applicant must; a) identify the information and or documents; and the person holding the information; and d) show that the information and or documents are required for the exercise or protection of a right or fundamental freedom. The latter enjoins the Applicant to show the information is relevant and necessary to determination of the suit. This constitutional test must be met before orders of discovery are issued...”

[14] In this instance, the defendant did not take advantage of the window for discovery to make a request for the redacted parts of the subject contract. In fact, no formal request for information has been made thus far, let alone compliance with the pre-requisites set out in the authority above-mentioned. The Defendant concedes that the document in question is a contract between the plaintiff and a third party, **CMEC Africa Development Limited**. It has not demonstrated the relevance of the redacted parts to its defence.

[15] Moreover, it is evident from the pleadings that both the plaintiff and defendant have made reference to the subject contract as exchanged. In the absence of specific information in terms of content of the redacted parts, it cannot be said that the defendant has demonstrated that the redacted information is necessary for it to exercise or protect its right or fundamental freedom, as there is no correlation shown between the redacted parts of the contract and the defendant’s right to a fair hearing as enshrined under **Article 25(c), 48 and 50 (1)** of the **Constitution**.

[16] I find it unnecessary to determine the issue of confidentiality, principally because it would be a speculative undertaking, in the absence of an inkling about the redacted parts.

[17] It is in the light of the foregoing that I find no merit in the objection raised by counsel for the 1st defendant on the **19 October, 2021**. The same is hereby dismissed with attendant costs being awarded to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF NOVEMBER, 2021.

OLGA SEWE

JUDGE