



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 395 OF 2016**

**LEONARD MUNYUA MBUGUA**

**GRACE SIMALOI SAKUNTA T/A**

**MUNLEO HARDWARE AND METAL FABRICATORS...PLAINTIFFS/RESPONDENTS**

**-VERSUS-**

**EQUITY BANK LIMITED .....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated 3<sup>rd</sup> February 2020 wherein the defendant seeks leave to file and serve a witness statement by its witness one **Charles Mugenyu**.

2. The application is brought under Articles 50(1) and 159 of the Constitution and Sections 1(a) (b) and 3A of the Civil Procedure Act. The application is supported by the affidavit of the defendant's advocate **M/S Eunice M. Mwangi** and is premised on the grounds that:

*1. That the firm of IGERIA & NGUGI ADVOCATES took over the matter and filed a Notice of Change of advocates on 8<sup>th</sup> May 2019.*

*2. That the plaintiff served their filed List of Documents on the 28<sup>th</sup> May 2019 while the defendant filed their documents on the 8<sup>th</sup> July 2019 and matter was certified ready for hearing.*

*3. That it is only in the interest of justice that the defendant be allowed to file and serve a witness statement to help the court appreciate the case presented by all parties and no prejudice will be occasioned to the plaintiff as the plaintiff will have an opportunity to cross examine the witness.*

*4. That the defendant has not been indolent in this matter but due to the change in advocates and the various applications in the suit inadvertently failed to file a witness statement under the dictates of Order 7 rule 5 of the Civil Procedure Rule, 2010.*

3. The plaintiff opposed the application through the 1<sup>st</sup> plaintiff's replying affidavit who avers that the defendant's lawyers on record have had the conduct of the defence long before the matter was listed for pre-trial directions and that no plausible reasons have been advanced for their failure to comply with the rules.

4. He states that the allegation that numerous applications have been filed in the matter is not true and that the defendant has been indolent in filing its pleadings at the right time.

5. He further states that the plaintiffs have since closed their case and that the introduction of the defendant's witness statement after such closure will cause delay and great prejudice to the plaintiffs' case. He further avers that the intended statement addresses issues that were before the subordinate court in Nairobi CMCC 1046 of 2016 between the same parties which case has already been heard and is awaiting the delivery of judgment. It is he plaintiffs' case that the defendant is intent on embarrassing the court in introducing matters that have been handled before another court.

6. Parties canvassed the application by way of written submissions which I have carefully considered. Order 3 Rule 2 of the Civil Procedure Rules provides 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 Rule 1(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 the statement under sub rule (c) may with the leave of the Court be furnished at least fifteen days prior to the trial conference under Order 11.*

7. Order 7 Rule 5 of the Rules gives similar requirements where parties file their Defence and/or a counterclaim. Under Order 11 Rule 3 of the Rules, parties are required 10 days after the closure of the pleadings to complete; file and serve the pre-trial questionnaire as provided in Appendix B to the Rules. Under the broad provisions of Order 11, the Court can also make directions to ensure that parties comply with procedural requirements to enable a smooth take off of hearings and effective and efficient disposal of cases.

8. A perusal of this court file reveals that pretrial conference was conducted on 17<sup>th</sup> January 2019 in the absence of Kiithi & Associates Advocates on record for the defendant. I note that **M/S Chege**, learned counsel for the plaintiff intimated to the court that she was unable to comply with the pre-trial procedures as the defence had not served them with any documents. The Deputy Registrar then directed that the matter be placed before the judge for directions.

9. When the matter came up before me for mention on 6<sup>th</sup> June 2019, **Miss Mwangi** advocate for the defendant informed the court that they had only recently been instructed to come on record for the defendant and that she therefore needed 14 days to compile the defendant's documents. The court then listed the matter for further mention on 15<sup>th</sup> July 2019.

10. On the said mention date, **Miss Chege** for the plaintiff informed the court that she has since been served with the defendant's list of documents and sought a date for hearing on the said date, **Miss Kagena**, who held brief for **Miss Mwangi** informed the court that **Miss Mwangi** will be able to file the defendant's witness statement within 30 days after which the matter was listed for hearing on 1<sup>st</sup> October 2019.

11. When the matter came up for hearing on 1<sup>st</sup> October 2019, the defence counsel, **Miss Rutere**, once again sought an adjournment on the basis of non-availability of the defendant's witness due to engagement in official duties out of town. In granting the defence last adjournment, albeit reluctantly, this court noted that this is an old case that had been in the system for a long time and that it needed to be determined without any further delay.

12. The court went further to condemn the defendant to pay the adjournment costs after which the matter was listed for hearing on 14<sup>th</sup> November 2019 when the plaintiffs presented the testimony of their witness and closed their case.

13. The defence counsel then informed the court that she had one witness in court but counsel for the plaintiff objected to the presentation of the witness on the basis that she had not been served with the witness statement. The defendant's counsel explained that they had only recently come on record in the matter. The court then directed the defendant to file a formal application to be allowed to call a witness thus resulting in the filing of the present application.

14. From the foregoing overview of the sequence of proceedings that have so far been taken in this matter, it is clear that the defence was at 15<sup>th</sup> July 2019 aware that the defendant's witness statement had not been filed this prompting the defence counsel **Miss Kagena** to intimate to the court that the said statement will be filed within 30 days.

15. I note that the defendant's advocate currently on record took over the conduct of the case from the defendant's previous advocates on 8<sup>th</sup> May 2018 when it filed its notice of change of advocates. I therefore find that the defence counsel is not candid in the claim that they only recently came on record and were not aware that the witness statement had not been filed as they on 15<sup>th</sup> July 2019 made an undertaking to file the statement within 30 days.

16. What is clear to this court is that the failure to file the defendant's witness statement, on time or at all, is an advertence that can only be attributed to the fault by the defendant's advocate on record and not the client/defendant.

17. This court is alive to the adage that the mistake by an advocate should not be visited on the client. The court also takes cognizance of the provisions of Article 159 of the Constitution that emphasizes on substantive justice over procedural technicalities.

18. I note that apart from the inconveniences of the delay in the conclusion of the case herein, no prejudice will be caused to the plaintiffs should the defendant be allowed to file its witness statement as the plaintiffs will still get the chance to cross examine the witness on the contents of his/her statement. I also court grant the plaintiffs the opportunity to recall their witness or present further documents should they deem it necessary, upon receiving the defendants witness statement.

19. For the above reasons, I allow the defendant's application dated 3<sup>rd</sup> February 2020 but with a rider that the defendant pays the costs of

the application together with thrown away costs of KShs. 12,000 to the plaintiffs.

20. For avoidance of doubt and in order to fast track the hearing of this case, the defendant shall file its witness's statement within 7 days from the date of this ruling. It is so ordered.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 1st day of October 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Chege for plaintiff.

Mr. Ngotho for Miss Mwangi for the defendant.

Court Assistant: Silvia