



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 678 OF 2010**

**HEADWAYS INVESTMENTS LIMITED.....APPLICANT**

**VERSUS**

**ABHIISHEK INVESTMENTS LIMITED.....1<sup>ST</sup> RESPONDENT**

**AJAY SHAH.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Headways Investments Limited, the Plaintiff, filed this suit against Abhiishek Investment Limited, the 1<sup>st</sup> Defendant and Ajay Shah, the 2<sup>nd</sup> Defendant on 12<sup>th</sup> October 2010. By that Plaintiff, the Plaintiff seeks judgment against both the Defendants, jointly and severally, for Kshs. 23,795,620.25.
2. The Defendants filed a joint defence dated 19<sup>th</sup> July 2012.
3. Before me are two applications for consideration. The first in time was filed by the Defendants, and is dated 2<sup>nd</sup> October 2018. The second one was filed by the Plaintiff and is dated 12<sup>th</sup> September 2018. That application seeks to set aside the Court's Order of 17<sup>th</sup> July 2018, referred to herein below.

**BACKGROUND**

4. After the pleadings closed, the Defendants filed an application dated 31<sup>st</sup> July 2013 and sought for the dismissal of the Plaintiff's suit for non prosecution. That application was dismissed on 30<sup>th</sup> October 2013 for non attendance in court of the Defendants' Learned Counsel.
5. The Defendants by an application dated 1<sup>st</sup> November 2013 sought to set aside the dismissal of their application, for dismissal of the suit for non attendance.
6. The ruling to that application was delivered on 4<sup>th</sup> July 2014. By that ruling, the Court declined to grant the Order of reinstatement of that dismissed application on noting that the Plaintiff had taken steps towards progressing the case. It does seem that by the time the Learned Judge issued that ruling, the Plaintiff had filed, list of witness statement; list of documents; and statement of issues.
7. The Court on 9<sup>th</sup> February 2018 ordered the parties to appear for Case Management Conference (CMC) on 7<sup>th</sup> March 2018. On that day, the Court adjourned CMC because parties had not complied.
8. On 17<sup>th</sup> July 2018, in the presence of Counsels for the parties, the Court made the following Order:-

***“The Plaintiff is hereby Ordered to give discovery of the letters attached to witness statement of Naran Pindoria dated 16<sup>th</sup> July 2018 by producing the original of those letters to the Defendants' Counsel within 14 days from today. Discovery shall be at Plaintiff's Advocate's office within 14 days from today. Plaintiff's Advocate to communicate to the Defendants' Advocate the place and time and date of such discovery.”***

**NOTICE OF MOTION DATED 2<sup>ND</sup> OCTOBER 2018**

9. This application is filed by the Defendants. By that application the Defendants seek following Orders:

a) That this suit be dismissed for want of prosecution, on account of willful failure by the Plaintiff to comply with the discovery/inspection Order imposed on it by this Court on 17<sup>th</sup> July 2018.

b) That the alternative to (1) above, the Plaintiff's Supplementary Bundle of Documents filed on 16<sup>th</sup> July 2018 as well as the Supplementary Witness Statement similarly filed on 16<sup>th</sup> July 2018, be struck out for failure by the Plaintiff to comply with the discovery/inspection Order imposed on it by this Court on 17<sup>th</sup> July 2018.

c) That costs of this application and/or the suit be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as against the Plaintiff.

10. The Learned Counsel, Daniel Ngaca Gacugia, on behalf of the Defendants swore the affidavit in support of that application. In that affidavit, he deponed that the Plaintiff filed, merely a list of documents, with the documents themselves, on 4<sup>th</sup> April 2014. The Defendants' Learned Counsel by various correspondence dated from 24<sup>th</sup> May 2016 to 3<sup>rd</sup> June 2016 requested the Plaintiff's Learned Counsel to provide the trial bundle. In one such letter dated 24<sup>th</sup> May 2016 the Defendants' Learned Counsel wrote as follows:-

**“Our Ref: WAM/L/021/2016 Date: 24/05/2016**

**Your Ref: TBA**

**MUGAMBI IMANYARA & CO. Advocates**

**Mpaka Plaza, 2<sup>nd</sup> Floor**

**Mpaka Road, Westlands**

**P. O. Box 28653-00200**

**NAIROBI**

**Dear Sirs,**

**RE: H.C.C.C NO 678 OF 2010-COMMERCIAL & ADMIRALTY DIV.**

**HEADWAYS INVESTMENTS LIMITED VS ABHIISHEK INVESTMENTS LIMITED & ANOTHER**

**Kindly refer to our Notice of Change of Advocates served upon you on 12<sup>th</sup> April, 2016.**

**Our review of the proceedings reveal that your client is yet to comply with the Court's direction made on 44<sup>th</sup> July, 2014, close to 24 months after the same were made.**

**Kindly let us have the Plaintiff's Trial bundle, complete with the Defence, issues, witness statements and documents, by 31<sup>st</sup> May, 2016, in default of which we shall move the Court appropriately for Orders without any further reference to you.**

**Yours faithfully,**

**(SIGNED)**

**Ngaca D. Gacugia**

**For: Wetang'ula, Adan & Co. Advocates”**

11. The Plaintiff's Learned Counsel responded by stating that it could not provide the trial bundle because it had not received back, from the Defendants' Counsel, agreed issues that had been forwarded to him.

12. The Plaintiff on 1<sup>st</sup> March 2018 filed the documents some of which the Defendants' Counsel stated had obvious alterations.

13. The Defendants' Learned Counsel deponed that the Plaintiff had, in disobedience of the Court Order on discovery of 17<sup>th</sup> July 2018, failed to grant him discovery of the filed documents. It is on that basis the Defendants seek Orders in the application dated 2<sup>nd</sup> October 2018.

**NOTICE OF MOTION DATED 12<sup>TH</sup> SEPTEMBER 2018**

14. That application is filed by the Plaintiff. The Plaintiff seeks the prayer:-

***“That this Honourable Court be pleased to set aside the Orders of ..... 17<sup>th</sup> July 2018.***

***That costs be provided.”***

15. The Learned Counsel for the Plaintiff, Mugambi Imanyara, deponed that the Order of 17<sup>th</sup> July 2018 was prejudicial and unfair to the Plaintiff since the Defendants had not filed and served their witness statement and documents. That he Order of 17<sup>th</sup> July 2018 is prejudicial to the Plaintiff because it amounts to “*trial by ambush for one party to attempt to make discovery of the other party’s documents, even before it made (sic) its own written statement and list of documents available to the other party.*”

16. That is the totality upon which the Plaintiff relies to seek to set aside the Order of 17<sup>th</sup> July 2018.

#### **ANALYSIS AND DETERMINATION**

17. I will begin by considering the Plaintiff’s application dated 12<sup>th</sup> September 2018, because if that application succeeds, the Defendants’ application will fail.

18. What the Plaintiff seeks by that application is the setting aside of the Order, of the Court, of 17<sup>th</sup> July 2018.

19. The Plaintiff relies on its contention that the Order of 17<sup>th</sup> July would be unfair and prejudicial, would lead to trial by ambush and because there has not been a close of pleadings.

20. The Plaintiff failed to clearly state what amounts to being unfair and prejudicial. Nor does the Plaintiff show how discovery as Ordered would lead to trial by ambush. Further, the Plaintiff erred because pleadings closed fourteen days after Defendants filed their defence dated 19<sup>th</sup> July 2012.

21. It needs to be restated that it is the Plaintiff who field this case against the Defendants. The Plaintiff bears the burden of proof to prove its claim as provided under Section 107 and Section 1109 of the Evidence Act Cap 80. What these Sections show is that the Plaintiff bears the burden of proof of its claim. The Defendants are not obligated to establish their defence. The Defendants even have no obligation to adduce evidence in Court, they can keep mum. The Plaintiff, even then, would be obligated to prove its case as required under Sections 107 and 109 of Cap 80.

22. Bearing the above in mind, the Plaintiff has failed to show to the Court why the Order 17<sup>th</sup> July 2018 should be set aside. Accordingly, the application dated 12<sup>th</sup> September 2018 is misconceived as it is hereby dismissed with costs.

23. The Defendant’s application dated 2<sup>nd</sup> October 2018 seeks dismissal of Plaintiff’s case for failure to comply with the Order of 17<sup>th</sup> July 2018, or in alternative, the striking out of Plaintiff’s supplementary bundle of documents filed on 16<sup>th</sup> July 2018.

24. The Plaintiff, as provided under Order 3 Rule 2 of the Civil Procedure Rules, was required to file its Plaint accompanied by the various documents notably documents in support of its claim.

Order 3 Rule 2 (d) provides:

***“All suits filed under Rule 1(1) including suits against the government, except small claims, shall be accompanied by:-***

***a)...***

***b)...***

***c)...***

***d) Copies of documents to be relied on at the trial including a demand letter before action.”***

25. The amendment to the Civil Procedure Rules, which amendment, for the first time brought the above provision into being, was on 10<sup>th</sup> September 2010. This case was filed by the Plaintiff on 12<sup>th</sup> October 2010. The Plaintiff, by not filing its documents at the time of filing the Plaintiff’s Plaint failed to abide with the mandatory rule.

26. The Plaintiff, by failing to make discovery of its documents, failed to obey a valid Order of the Court. That Order was issued, in Court, in the presence of the Plaintiff’s Learned Counsel. Plaintiff’s Learned Counsel does not deny knowledge of that Order. He justifies the disobedience of that Order on the ground that it was prejudicial and unfair. I will state in response to that contention that the Court issued a valid, unequivocal and direct Order on 17<sup>th</sup> July 2018 and the Plaintiff was obligated to obey it. This was restated by justice Mabeya in the case **AFRICA MANAGEMENT COMMUNICATION INTERNATIONAL LIMITED VS JOSEPH MATHENGE MUGO & ANOTHER [2013] eKLR.**

***“... I will reiterate the sentiments of Romer LJ in Hadkinson v Hadkinson (1952) P285 at 288 that:-***

***“It is plain and unqualified obligation of every person against or in respect of whom an Order is made by a Court of competent jurisdiction to obey it unless and until that Order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an Order believes it to be irregular or even void.”***

27. The Plaintiff as the background of this case above shows, has persistently failed to supply documents it intends to rely upon, at trial and when the Defendant persisted in their request, the Plaintiff at first only supplied a list of documents and later on further being requested supplied documents which the Defendants now wishes to have discovery, to enable the Defendants prepare for trial. It is that discovery the Plaintiff has failed to provide, despite Court’s Order of 17<sup>th</sup> July 2018.

28. It is due to that failure by the Plaintiff and the blatant disobedience of a Court Order that this Court will accede to the Defendant’s application and will strike out the Plaintiff’s suit.

29. The Defendants having, therefore, succeeded by its application dated 2<sup>nd</sup> October 2018, the costs will be awarded to the Defendants, of that application.

30. In summary, the Orders of the Court are:-

*a) The Notice of Motion dated 12<sup>th</sup> September 2018 is dismissed with costs.*

*b) The Notice of Motion dated 2<sup>nd</sup> October 2018 is allowed to the extent that the Plaintiff is hereby struck out due to the Plaintiff’s failure and willful disobedience of the Court Order to carry out discovery.*

*c) The Defendants are awarded the costs of Notice of Motion dated 2<sup>nd</sup> October 2018 and the costs of this suit.*

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>TH</sup> day of MARCH, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... COUNSEL FOR THE APPLICANT

.....COUNSEL FOR THE 1<sup>ST</sup> RESPONDENT

.....COUNSEL FOR THE 2<sup>ND</sup> RESPONDENT