



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 300 OF 2013

PARKER HOUSE RADIO LIMITED.....PLAINTIFF

VERSUS

SONY CORPORATION JAPAN.....1ST DEFENDANT

SONY GULF FZE-DUBAI.....2ND DEFENDANT

SONY GULF FZE-NAIROBI.....3RD DEFENDANT

RULING

1. The Notice of Motion dated 2nd November 2018 and brought under the provisions of Order 16 Rule 1 of the Civil Procedure Rules seeks the following orders:-

1. THAT this Honourable Court be pleased to issue summons for Mr. Sanjay Aidoor or any of the Defendant's authorized officers to attend Court and/or produce documents specifically denoting the volume of sales made in Kenya by the Defendant through third parties from January 2003 to date.

2. THAT the Plaintiff is prepared to furnish travelling and /or other expenses of the person, or officer summoned under paragraph 1 hereinabove.

3. THAT the costs of the Application be provided for.

2. The Plaintiff's case in this suit is that it and the Defendants entered into an Agency Contract for purposes of promotion and sale of the Defendants' products in Kenya since 1987. It is asserted by the Plaintiff that part of the Agency Contract is that it would be entitled to payment of 2% commission on account of any products the Defendants would sell through parties other than the Plaintiff in Kenya.

3. The Plaintiff avers that, as was the practice, the Defendants would after computation of the commission payable avail to it the records of the volumes of sales made in a given period. The Plaintiff seeks that the Defendant's produce the record of sales made from January 2003 to the date of the affidavit of Mukhtar Parker which was sworn on 2nd November 2018 to enable it prove its losses herein.

4. The Defendants oppose the application. In an affidavit sworn on 25th February 2019 by Mr. Munaswany Dinakaran, the General Manager of the 1st Defendant, the Defendants inform Court that the officer against whom the summons is sought, one Sanjay Aidoor, passed away in the year 2010.

5. Further that no written agency was entered between the Defendants and the Plaintiff. He was aware, however, of a repair and parts replacement agreement entered into between the Plaintiff and Sony International (Singapore) Ltd on a non-exclusive basis. The agreement allowed the Plaintiff to effect repairs on products sold by the Sony subsidiary.

6. The agreement to pay the Plaintiff 2% commission is denied. It is, however, asserted that the 2nd Defendant had a scheme where it agreed to pay 2% commission on the sales of the Sony products when the Plaintiff was displaying Sony products at its Nairobi show room at Giro House but that the scheme was terminated from January 2003. The position of the Defendants is that the Plaintiff is not entitled to the Defendants' sales records after the termination of the scheme.

7. The Defendants state that the Plaintiff trades in products of the Defendants' competitors and it would be prejudicial and damaging to them if its sales records were revealed to the Plaintiff. The Defendants fear that the Plaintiff could place these records in the hand of their competitors.

8. It is also stated that the Plaintiff seeks records almost 19 years later and it was unlikely that they would have been kept all this while.

9. This Court has considered the application and the oral arguments made by Counsel. Order 16 Rule 1 of the Civil Procedure Rules reads:-

“At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents”.

10. As would be clear from the Rule, an application of this nature ought to be made at any time before the trial conference under Order 11. It is the type of an application that ought to be made as early as possible in the proceedings. Ordinarily, this type of application will be allowed by the Court as a matter of course as the party applying will merely be seeking a formal and legally binding order to compel a witness to attend Court. However, there will be occasion when the Court will refuse to issue summons. This would be where the application is not made in good faith or is otherwise an abuse of Court process.

11. In the matter before Court the summons sought by the Plaintiff is to compel an officer of the Defendants to produce some records. In other words the Plaintiff is seeking to summon the attendance of Court of an officer of its adversary. In circumstances as this, the Court has to be satisfied of the bona fides of the application before granting it.

12. There is an assertion and a denial of the existence of an agency agreement after the year 2003 and if so, the scope of that agency. Those are matters to be tried by the Trial Court.

13. What however is curious about the application is that while the Plaintiff asserts that the attendance of the officer and the production of the information is necessary for it to prove commission, the pleadings filed by the Plaintiff tell a somewhat different story. In paragraph 14 of the Amended Plaintiff the Plaintiff seeks loss of commission '*from Kshs.410,040,000.00*'. In the prayers it seeks, inter alia, '*an order for the payment of the Plaintiff's outstanding commission to be particularized at the hearing hereof or Kshs.410,040,000.00*'.

14. If the Plaintiffs' case is that it was to be paid a commission of 2% of the sales made by the Defendants in the Kenya market, then one must wonder how the Plaintiff arrived at the claim of Kshs.410,040,000/= without knowing the volume of sales?

15. In addition, there is an issue raised by the Defendants which is not a trifle. The Defendants allege that the Plaintiffs are dealing with its competitors and that the information sought risks getting into their hands. This may not be an unreasonable apprehension. This Court would have thought that the first order of business for the Plaintiff would be to prove the existence of an agency and that a commission was due and payable. If upon proving the twin issues, the Plaintiff is handicapped from proving the quantum of the claim, then it can seek the order it now bespeaks or the taking of accounts.

16. These reasons led to find that this is one of the instances when a clear basis for an order under order 16 Rule 1 of the Civil Procedure Rules has to be established.

17. Another issue of concern is why it would take 13 years to bring this application. This long delay is not explained at all.

18. The Court finds no merit on the Notice of motion dated 2nd November 2018. It is hereby dismissed it with costs.

Dated, Signed and Delivered in Court at Nairobi this 5th Day of July, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Ojiambo for Defendant

Mwenesi h/b Odera for Plaintiff

Nixon – Court Assistant