



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 1287 OF 1999**

**KUGURU FOOD COMPLEX LTD.....PLAINTIFF**

**-VERSUS-**

**MASHREQ BANK P.S.C.....DEFENDANT**

**RULING**

1. The fact that in this case, which was filed in 1999, I am dealing with interlocutory applications is a travesty.

2. There are two applications before me for consideration.

3. The first in time was filed by Kuguru Food Complex Limited the plaintiff. It is a Notice of Motion application dated 15<sup>th</sup> August 2019. By that application the plaintiff seeks that the court do dispense with the personal attendance of its witness Dinesh Chandra Bhattesa. Further that the court do allow that witness, who currently resides in United Kingdom to give evidence through teleconferencing or video conferencing.

4. The second application in time is filed by Mashreq Bank P.S.C, the defendant. It seeks that the court do strike it out of these proceedings.

**ANALYSIS**

5. The application by the plaintiff, seeking leave of the court for its witness to adduce his evidence through teleconference videoconference was not opposed by the defendant. No papers in opposition were filed.

6. The background to the application is given by the affidavit of Peter Ngibuini Kuguru, the plaintiff's managing director.

7. This case was first part heard before the late Justice Hewett, upto May 2001, when the Judge received the evidence of the Plaintiff's witness number 3. Mr Dineshchandra Bhattesa was one of those witnesses who testified.

8. Justice Mbaluto (as he then was) ordered the case to start de novo after the death of Justice Hewett. Because the plaintiff experienced difficulty in tracing its witness Dineshchandra it sought a review of Justice Mbaluto's order. That order, of starting this case de novo, was reviewed by the order dated 18<sup>th</sup> November 2005. The defendant being aggrieved with that review order filed an appeal, at the court of appeal, being Civil Appeal No. 71 of 2011. The court of appeal by its judgment dated 26<sup>th</sup> November 2018 allowed the appeal and thereby set the stage for this case to start de novo. It is because of that state of being that the plaintiff seeks that the evidence of its witness Dineshchandra be taken by means of teleconference or videoconferencing.

9. The reason the plaintiff gives for seeking its prayer is because Dineshchandra no longer lives in Kenya, he is now permanently residing in the United Kingdom. He is presently undergoing treatment as he suffers from prostate infection and foot ailment. This has rendered him unable to travel. According to the plaintiff the evidence of Dineshchandra is vital to its case.

10. The overriding objective of the Civil Procedure Act, Section 1A, provides that the Act and the Rules are to facilitate the just expeditious, proportionate and affordable resolution of Civil disputes. One of the ways cases are to be expeditiously, proportionately and affordably resolved is by use of suitable technology. Videoconferencing is an audio-visual medium which can enable, as in this case, the plaintiff's witness to engage in virtual face-to-face interaction with the learned counsels and the court. There is no impediment either to the court or learned counsel's perception of such evidence, when received through videoconferencing. Allowing videoconference of the plaintiff's witness is vital because it means the difference between receiving that evidence and not receiving it. Videoconferencing is also one way of ensuring a party has access to justice.

11. In view of the above discussion, I find the plaintiff's Notice of Motion dated 15<sup>th</sup> August 2019 merited.
12. The second application under my consideration is dated 29<sup>th</sup> August 2019. The defendant by this application seeks its name be struck out of these proceedings.
13. The affidavit in support of that application is sworn by Idris Ahmed, an advocate in the firm that represents the defendant in this action.
14. By that affidavit that advocate referred to a judgment delivered by Justice Havelock (as he then was) in the case **HC Commercial & Admiralty Division Civil Case No. 55 of 2004 DUBAI BANK KENYA LIMITED V INSURANCE COMPANY OF EAST AFRICA LIMITED [2013] eKLR**. The deponent referred to various passage of that judgment which he stated showed that the assets and liabilities of the defendant were transferred to Dubai Bank. Learned counsel referred to the following passage from that case:
15. It is on the ground the defendant seek it be struck out of these proceedings.
16. I have considered the affidavit evidence of the parties and oral submissions made before court.
17. The defendant's learned advocate relied on the provisions of section 44 of the Evidence Act and argued that the decision made by Justice Havelock was binding on this court. That is the finding that the assets and Liabilities of the defendant had been transferred to Dubai Bank.
18. Section 44 provides:

(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.

(2) Such judgment, order or decree is conclusive proof—

***(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;***

***(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;***

***(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;***

***(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.***

19. Having considered the submissions by counsel in respect to the decision of Justice Havelock I find that Justice Havelock was considering issues surrounding a dispute of tenancy between Dubai Bank and Insurance Company of East Africa. The finding of the learned judge cannot, as the defendant attempts to do, be applied generally without actual evidence being produced to prove the acquisition of the specific Liabilities of the plaintiff by Dubai Bank. When one reads Section 9 (3) of the Banking Act it becomes clear, that a Bank can acquire some or all assets or liabilities of another Bank. In this case since all the defendant relied upon, as evidence of acquisition or transfer of the defendant's Bank by Dubai, was a reported decision of Justice Havelock, I am afraid that is not enough to move this court to reach such a far reaching decision as the defendant seeks. The defendant had an obligation as required under Section 107 of the Evidence Act to indeed prove that this specific debt in this case was acquired by Dubai Bank. The defendant did not do so.

20. What is of very great concern, moreover, is that the defendant's counsel have had the conduct of this case since 1999 and they waited until August 2019 to object to the defendant's continued participation in this suit on pretext that the assets and liabilities of the defendant were transferred to Dubai at sometime in the year 2000. The learned advocate for the defendant, as an officer of this court and the defendant itself had an obligation to inform the court when its assets and liabilities were transferred to Dubai Bank and particularly if this particular liability of this plaintiff was transferred. As I stated before there is nothing before court to confirm such transfer. Also as stated before this case has been pending since 1999, there has been several attendances in court during that time, upto the court of Appeal and back to the High Court, and yet the court was not informed of such transfer.

21. It is important to note that in the absence of evidence that the liability of this matter was transferred to Dubai Bank and because the learned advocate for the defendant confirmed that the defendant Bank is based and operating in Dubai. I will not accede to the application to strike out the defendant.

**CONCLUSION**

22. In view of the above finding the Notice of Motion dated 29<sup>th</sup> August fails.

23. In the end the following are the orders of the court:

*a. The Notice of Motion dated 15<sup>th</sup> August, 2019 is granted with costs in terms of prayers 2 and 3. To that end the Deputy Registrar shall facilitate the plaintiff in arranging for the telecommunication or video conferencing of its Witness Dineshchandra Bhattesa.*

*b. The Notice of Motion dated 29<sup>th</sup> August 2019 is dismissed with costs.*

**DATED and SIGNED at NAIROBI this 4<sup>TH</sup> day of OCTOBER, 2019.**

**MARY KASANGO**

**JUDGE**

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

**Sophie..... COURT ASSISTANT**

**..... FOR THE PLAINTIFF**

**.....FOR THE DEFENDANT**