

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 18 OF 2009

POWERPACK HYDRALICS LTD.....PLAINTIFF/APPLICANT

VERSUS

JACINTA M. NDEGWA.....DEFENDANT/RESPONDENT

RULING

1. The matter herein is part-heard. On the 19th day of April 2018, when it came up for hearing, counsel for the Defendant raised an objection to the production of the notification of sale. The bone of contention is that the document produced and marked as **exhibit 13** is not the same as the one availed in the bundle of documents filed in court by the Defendant. He applied that the said document be expunged from the record.

2. The issue herein arose during the cross-examination of Moses Kariuki Macharia who testified as DW2 but who had to be stood down following the said objection. In his evidence in chief he applied to adopt his witness statement dated the 22nd November, 2016 which the court adopted as his evidence in chief. He also produced several documents as exhibits.

3. The reasons for the objection are that when the matter came up for pre-trial conference on the 20th September 2016, it was confirmed that the documents filed are the ones that would be produced at the trial. Counsel argued that it was a surprise for the Defendant to produce a document that is not on record. That in so doing, the Plaintiff would be prejudiced in that he did not have the opportunity to subject the document to the pretrial procedures and that would amount to unfair trial on his part.

4. In her response, counsel for the Plaintiff admitted that the document in the Defendant's list of documents filed on 24th November, 2016 is different from the one sought to be produced but averred that the document dated 31st July, 2009 was filed by error.

5. I have perused through the record and I note that the Defendant filed her list of documents on the 24th day of November, 2016 and the notification in issue is not among the documents listed therein.

6. Though the matter was filed way back in the year 2009, before the revised Civil Procedure Rules 2010, the parties herein complied with Order 11 by filing the list of documents and witnesses. Upon perusal of the two documents, it is clear that they are different and therefore the concern raised by the counsel for the Plaintiff is a genuine one.

7. I have considered the objection raised and the response thereto. It is common knowledge that errors do happen but on the other hand, an advocate ought to be careful so that he/she does not prejudice his/her clients case by filing the wrong documents like what happened in this case. I find that it is only fair and in the interest of justice that the Defendant be allowed to file the correct document to enable the court to effectually determine the issues in contention in the suit herein.

8. In the end, the objection is hereby dismissed but counsel for the Defendant is hereby ordered to personally pay costs of Ksh.5,000 to the Plaintiff. The document to be filed by way of a further list of documents within 14 days from today.

Dated, Signed and Delivered at Nairobi this **10th** Day of **May, 2018**.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*