



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 512 OF 2013

MWEHA ENTERPRISES LTD.....PLAINTIFF

- VERSUS -

KENYA TRADE NETWORK AGENCY.....DEFENDANT

DIRECTIONS

1. These Directions have arisen during the pre-trial Conference.
2. Mr. Munгла, the learned advocate for the plaintiff, asked the court to make an order compelling the Defendant to produce in evidence a Report dated 28th June 2016.
3. The said Report was allegedly prepared by the **BOARD OF REGISTRATION of ARCHITECTS & QUANTITY SURVEYORS**, at the defendant's request.
4. It is the considered opinion of the plaintiff that the Report in question would enhance justice, if it was produced in evidence.
5. On the other hand, if the court felt unable to order for the production of the Report, the plaintiff asked the court to make a note of the said Report.
6. In answer to the application, Mr. Kaniaru, the learned advocate for the defendant, submitted that his client was entitled to privacy. In the exercise of its right to privacy, the defendant reasoned that every person had a right to keep his own documents private.
7. In this respect, the defendant did not supply the Report to the plaintiff. Indeed, the defendant said that it was unaware about how the plaintiff got a copy of the Report.
8. In any event, the defendant believes that the plaintiff had failed to lay any foundation which would justify its request for the production of the Report.
9. According to the defendant, there are very few issues for determination in this case. And the Board could not possibly give an opinion on the legal issues. As far as the defendant was concerned, it is only the advocates acting for the respective parties, who could give their respective opinions on legal issues.

10. Thirdly, the defendant asserted that the party who wishes to have the other party forced to produce evidence, must demonstrate the relevance of the evidence in question.

11. If the Report is in existence, the defendant says that the report had been sought for the consumption of the defendant. It was not intended for use in this case.

12. Considering that our legal system is adversarial, the defendant submitted that no party can be compelled to produce such evidence as the other party could not be forced to produce. That submission was said to be grounded on Section 139 of the Evidence Act.

13. Mr. Kaniaru submitted that the court cannot be used as an investigative organ, to help one party against the other. Therefore, the defendant asked the court to refrain from assisting the plaintiff on its fishing expedition.

14. In a brief reply, the plaintiff submitted that pursuant to Section 5 of the Evidence Act, documents speak for themselves. Therefore, if the Report was produced, the court would then determine whether or not it was relevant.

15. Section 5 of the Evidence Act provides as follows;

“Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant?.

16. At this stage of the proceedings, it has not yet become clear to the court what the Report in issue contains. Therefore, the court cannot tell whether or not the said Report was relevant. Secondly, for as long as the court is unaware of the contents of the Report, I am unable to make an informed decision as to whether or not the Report could assist the court to prove either the existence or non-existence of any fact which is in issue in the suit.

17. I agree with the defendant, that it was incumbent upon the plaintiff to demonstrate to the court that the Report was relevant to the matters in issue. The plaintiff has not yet satisfied the court that the Report will be useful in helping the court to determine the matters in contention in this suit.

18. I also hold the view that if the plaintiff is already in possession of the Report, it should be possible for it to produce it, provided that it was not evidence which had been acquired irregularly or in an unlawful manner.

19. The defendant appears to suggest that the Report constitutes privileged communication between the defendant and a professional person whom the defendant had consulted.

20. If the Report was prepared within the context of privileged communication, the plaintiff cannot persuade the court to circumvent the law governing privileged communication.

21. Section 139 of the Evidence Act stipulates that;

“No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such other person consents to their production?.

22. In the final analysis, I find that the plaintiff has failed to persuade the court that there is a sound basis in law, for compelling the defendant to produce in evidence the Report dated 28th June 2016. Therefore, I decline to order the defendant or the Board of Registration of Architects and Quantity Surveyors, to produce the Report.

23. However, I wish to make it clear that this Ruling does not constitute an absolute bar to the plaintiff

later laying foundation to try and persuade the court to have the Report made available in evidence.

24. It is so ordered.

25. Finally, the costs of this application shall be in the cause. I so order because the application was made within the process of the pre-trial Conference, which is a mutual attempt to make the case ready for trial.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff

.....for the Defendant

Collins Odhiambo – Court clerk.