



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 122 OF 2008

DALBIT PETROLEUM LIMITED.....PLAINTIFF

VERSUS

VICTORY CONSTRUCTION CO. LIMITED.....DEFENDANT

RULING

1. The application before the Court for Ruling is the **Notice of Motion** dated **17th March, 2015** filed by the Plaintiff, Dalbit Petroleum Ltd. It seeks orders that:
 1. **The Court be pleased to order the witness statement of Ephantus Karueria Mungai made on 5th November, 2014 expunged from the record;**
 2. **That the Court be pleased to grant any other order it deems fit to grant; and**
 3. **That costs of the application be borne by the Defendant/Respondent.**
2. The application is supported by the affidavit of **Margaret Mbaka** attached thereto and sworn on the **17th March, 2015**. The grounds relied on by the Plaintiff/Applicant are as hereunder:
 - a. **That the trial in this matter commenced on 26th February, 2013 and that the Plaintiff closed its case in April, 2013.**
 - b. **That the Defence case has also been heard with only one expert witness remaining to be heard.**
 - c. **That on 22nd October, 2014 the Court granted leave to the Defendant to call Ephantus Karueria Mungai as its witness in place of Engineer Anthony Mwai and directed that his witness statement be filed.**
 - d. **That the witness statement filed by the new witness contains scandalous, new and extraneous matters that cannot be responded to by the Plaintiff at this stage and therefore the said statement is prejudicial to the Plaintiff.**
 - e. **That the Defendant is under duty to comply with the provisions of the law in presenting its evidence and that its ineptitude herein should not be excused or visited upon the Plaintiff.**
3. For these reasons, the Plaintiff urged that the aforesaid statement be expunged from the record so as not to prejudice its right to a fair trial.
4. The application was filed pursuant to Article 50 of the Constitution of Kenya, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya as well as Section 35(3) of the

- Evidence Act as read with Order 51(1) of the Civil Procedure Rules, 2010.
5. The Defendant opposed the application on the basis of the Grounds of Opposition filed on 29th April, 2015 as well as the Replying Affidavit sworn on 24th May, 2015 by **Amritpal Singh Suri**. Those grounds are that:
- a) the application is not only based on wrong provisions of the law but also a complete misapprehension of the Constitution and the relevant law.
 - b) Section 35(3) of the Evidence Act relied on by the Plaintiff is inapplicable.
 - c) The Defendant has every right to call any evidence to aid its case and can substitute a witness, with leave of the court, at any stage of the proceedings. Likewise, the Plaintiff retains the right to subject any such witness to cross-examination and the court retains the last authority to weigh the evidence in making appropriate determination of the case and the Plaintiff cannot be prejudiced in any way.
 - d) The Statement of **Ephantus Karueria Mungai** is not scandalous and neither does it introduce any new issue to the case.
 - e) The application lacks merit, it is delaying the progression of the case and should therefore be dismissed with costs.
6. Thus, the Defendant's posturing is that the necessity to substitute the Defendant's witnesses was occasioned by the non-availability of their earlier listed witness, **Engineer Anthony Mwai**, who has since left the jurisdiction of the Court for further studies abroad; and that by in its order made on **22nd October, 2014**, their application was allowed. Thereupon the court ordered that the Defendant files the witness statement of **Ephantus Kameiria Mungai** and supplies the details of the witness to the Plaintiff. Thus it is the Defendant's case that it merely acted in accord with the orders of the Court, and that prior thereto no statement had been filed by **Engineer Anthony Mwai**, since he was an expert witness.
7. I have perused the Notice of Motion, the affidavits filed in respect thereof, the Grounds of Opposition thereto as well as the Written Submissions filed by the parties. I have also perused the pleadings and proceedings to date and noted that this is a part-heard matter in which the Plaintiff has presented and closed its case. The Defence case has been substantially presented and only one witness is remaining, namely **Ephantus Karueria Mungai**, whose witness statement is the subject of the instant disputation.
8. The record does show that initially, the Defendant/Respondent had given the indication that it would call two witnesses namely **Amritpal Singh** and **Engineer Anthony Mwai**. **Amritpal Singh** testified in 2014. It then became necessary for Engineer Mwai to be substituted with another witness for the reason that he had since left the jurisdiction of the Court. It was thereupon that **Ephantus Karueria Mungai** was identified as a replacement witness. The record shows that when this situation was presented to the Court on 22nd October, 2014 Counsel for the Plaintiff, **Mr. Nderitu**, had no objection and himself suggested that the statement of the new witness be filed. Accordingly, the Court granted leave to the Defendant to file and serve the witness statement of **Ephantus Karueria Mungai** within 14 days. Needless to say that, that order was complied with and the statement aforesaid filed on 5th November, 2014.
9. The Plaintiff thereafter took issue with that statement, particularly paragraph 5 thereof, contending that it is scandalous and that it introduced new and extraneous issues which fell outside the ambit of the statement of **Engineer Mwai**. Having perused the record with a view of ascertaining what **Engineer Mwai** stated in his witness statement, I did not find any such statement. I would take it, as I was urged to by the Defence Counsel, that Engineer Mwai, as an expert witness, did not prepare a witness statement by dint of Order 3 Rule 2(c) of the Civil Procedure Rules.

Accordingly, whether or not the statement of **Ephantus Karueria Mungai** introduces new matters would have to be determined on the basis of the pleadings, agreed issues and the evidence so far

adduced.

10. To that end, I have looked at paragraphs 5 and 6 of the impugned statement, in which **Ephantus Karueria Mungai** stated that while supervising the construction of the **Kitui-Kangondu Road** which was being built by the Defendant, he noted that a new section of the road had chippings peeling off the road's surface. He took up the issue with the contractor and they traced the fault to the quality of bitumen that had been supplied by the Plaintiff. He added that before coming to this conclusion, tests were conducted which indicated that the bitumen was rated at 66/100, which was below the acceptable penetration standard of 80/100. That ultimately the contractor was required to re-do the affected section of the road.
11. The statement thus boils down to an assertion that the quality of bitumen supplied by the Plaintiff was below the requisite standard, thus raising the question as to whether, in the circumstances of this case, it can be said that the statement is scandalous or that it introduces new or extraneous matters.
12. In the Defence filed herein on 4th April, 2008 at paragraph 4, the Defendant, while admitting that it was supplied with bitumen by the Plaintiff, pleaded that:

“...the products the subject of the suit were inferior in quality and the same did not meet the set out specifications which had been conveyed to the Plaintiff at the time of the order.”

13. In its Amended Statement of Defence filed on 2nd July, 2008 the Defendant reiterated the foregoing position and introduced a counterclaim in the sum of Kshs. 12,919,820/= on account of costs it incurred in reconstructing the affected parts of the subject road. The Plaintiff/Applicant responded to the Amended Defence on 8th July 2008 and at paragraphs 3 and 4, it denied the allegations that the bitumen it supplied was of inferior quality or underweight.
14. In the Plaintiff's List of Issues filed on 27th October, 2008 it listed the following as some of the issues for determination in this case:

“3. whether the Plaintiff supplied to the Defendant, in July, 2006 inferior petroleum products, namely, bitumen.

4)... whether the inferior bitumen was also underweight by 17.182 KG

5) whether the underweight bitumen was replaced by the Plaintiff...”

15. In similar vein, the Defendant, at paragraphs 2 to 5 of its version of the issues, raised questions as to the quality and weight of the bitumen supplied by the Plaintiff as appropriate issues for determination by the court.
16. A perusal of the evidence adduced by **PW1** and **DW1** also confirm that the twin issues of quality and weight of the bitumen supplied and for which the Plaintiff has filed this suit, featured prominently. I accordingly agree with the submissions of **Mr. Nyawara** for the Defendant that there is nothing new or scandalous in the statement of **Ephantus Karueria Mungai** to warrant its being expunged from the record.
17. Counsel for the Plaintiff urged the court to consider the stage of these proceedings and the fact that the Plaintiff has already closed its case and find that it would be prejudicial to the Plaintiff to admit the statement of **Ephantus Karueria Mungai**. He relied on the case of **Johana Kipkemei Too vs. Hellen Tum [2014] eKLR**, in support of this argument. It is noted however that in **the Johana Kipkemei Too case** (supra), the Defendant filed a supplementary list of witness and documents and wished to call three additional witnesses after the Plaintiff had closed his case. In this case, the impugned statement was filed pursuant to an order of the court and no new evidence is sought to be introduced. Thus the authority relied on is, in many respects distinguishable from the facts of this case. Accordingly, the proper procedure for the Plaintiff to challenge that state of affairs would have been by way of review.
18. On whether the Plaintiff will be denied a fair trial as envisaged by **Article 50 of the Constitution of Kenya**, it goes without saying that in an adversarial legal system such as ours, the Defence case is invariably presented after the close of the Plaintiff's case, whereupon, the Plaintiff is afforded

the opportunity to test the evidence availed by the Defence by way of cross-examination. That is the same procedure that was adopted in the case of **Amritpal Singh (DW1)**. It will similarly be the case that upon giving his evidence, **Ephantus Karueria Mungai** will be available to the Plaintiff for cross-examination. Hence, the Plaintiff's argument that it will be denied a chance to controvert the evidence of **Ephantus Karueria Mungai** is baseless.

19. I note that the application was also predicated on section 35(3) of the Evidence Act. That provision reads:

"Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

It has not been suggested herein that the impugned statement was made in the circumstances envisaged by the above provision. To the contrary, it is common ground that the statement was filed pursuant to an order of the court and that prior thereto, no other statement had been made which **Ephantus Karueria Mungai** is intended to produce on behalf of Engineer Mwai. I therefore take the view that that provision is irrelevant to the application.

20. In the premises, I find the Plaintiff's application dated **17th March, 2015** to be devoid of merit. The same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF APRIL, 2016.

OLGA SEWE

JUDGE