REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 2763 of 1997

NATION NEWSPAPER LIMTED ……..…… PLAINTIFF

VERSUS

SIMON MURUCHI THINGA ……..……..……. DEFENDANT

RULING

Introduction

1. The Issue before the Court is on the admissibility of certain documents comprising a running account. In this context the question is whether (a) the documents must be produced and (b) whether the Defendant may cross-examine upon the content of the documents produced and/or the failure to produce.

2. This suit was filed in 1997 which was nearly 10 years ago. It first came before this Court on 5th November 2014, having previously been before various other Judges of this Division. It was listed for a Final Hearing on 1st December 2014 by Consent. On that date the Parties' respective Advocates opened their cases and the Hearing was adjourned by Consent. On 6th July 2015, the Hearing resumed and the Court heard oral evidence from the Plaintiff's witness, Sekou Owino, firstly in Chief and then there was Cross-Examination which was part way through when the issue now before the Court arose.

Background

3. The Plaintiff, Nation Media Group, is a large conglomerate with interests in newspapers, magazines, radio and television. This case relates to newspaper distribution. The Defendant was one such distributor of newspapers between around 1995 to 1997. The evidence before the Court suggests that the agreement was effective from 1st January 1996 until 30th June 1997; the full picture of evidence is yet to emerge. The arrangement was that the Plaintiff would supply a certain number of newspapers to the Defendant on credit. The Defendant would sell what he could and then return the unused copies while accounting for the sales less commission. The Plaint relates to those alleged unpaid sums. The Plaint also includes sums alleged to have been received by the Defendant in relation to competitions run by the Plaintiff. The Distribution Agreement was terminated by the Plaintiff on 30th June 1997 by Notice of Termination. The Plaintiff states that the sum of Kshs: 5,463,169.68 is outstanding for the newspapers supplied and sold. The Plaint prays for the sum of Kshs.5,585,328.80. There is also the question of the Banker's Guarantee instituted by the Defendant. It is clear from the foregoing that quantum is in issue and goes to the heart of the dispute between the Parties.

The Objection

4. The Evidence of PW1 under cross examination was that the Distribution Agreement lasted between 1st July 1996 and 30th June 1997 which is 12 months. However, under cross examination, he agreed that the contract period was 1.5 years. The cross examination then moved onto which of the weekly statements and/or consolidated account had been taken into account in calculating the claim. During cross examination, the area being investigated was whether the Defendant had been up to date with his payments at any time during the Distribution Agreement and in particular in relation to pages 31-38 of the Plaintiff's Bundle. The question asked of the witness was "***Where in the evidence is the figure of Kshs 4,798,888.88, /="*** Mr K'Opere for the Plaintiff raised an objection on which he seeks a Ruling before the trial proceeds. The Defendant's Advocate invites the Court to dismiss the objection and allow him to proceed with the cross-examination.

5. The Court heard oral argument from both sides after which they also filed written submissions and their respective Lists of Authorities. It is worthwhile setting out the oral arguments relating to the issue as set out in the Court record of 7th July 2015. Mr K'Opere raised the Objection on which he said "*I want a Ruling*". That meant that the proceedings had to be interrupted to allow for that intervention to be resolved first. He told the Court that the Plaintiff had served a Notice to Admit documents on the Defendant on 18th August 2000. The Notice was served under the previous ***Order 12 Rule 3 of The Civil Procedure Rules***, which has become/been replaced with ***CRP Order 11***. The Notice is at page 11 of the Bundle (page 13 of Court's Copy). It is instructive to consider how the argument developed before Court. The Proceedings show as follows:

Court: Where is the document adduced, it is not before the Court.

Mr K O'pere: Adduced means that a summary – not documents. The purpose of older ***Order XII*** and the current ***Order 11*** is not to bring before the Court the Documents which are enormous and not disputed. The purpose is to bring any party who disputes a document to notify the other side – then produce copies and the law requires that in such Notice the… Party to indicate the documents upon which they want strict proof. That is why even on bank statements when a dispute arises and there is a running statement the Bank is required to produce only the last page of the statement of account. And that may reflect accounts carried forward so if a Party requires part evidence, the evidence on Notice to Admit comes into effect because it may not be possible to put millions of transactions before the Court. In this case only last month prior to termination is 18 pages. Multiply 18 previous months. It may not be practical to produce. 15 years ago [we] served the Notice. If anyone doubts any portion the Defendant is put on Notice to inspect within our office or documents set out in Schedule annexed to the Notice. Accordingly, the last statement showing the last transaction showing what has been carried forward in law and under the Civil Procedure Rules suffices to discharge the burden which the Commercial Division has not imported in a case management process which removes the need for such objections during the trial process. It is therefore impractical at this particular point to require of a witness which is available and was made available for inspection by that Notice. That is why the burden again shifts – ***Section 69*** of the ***Evidence Act*** where the Defendant requires a specific document can – take advantage of ***Section 80*** to produce those particular documents. Even where the authenticity [of it] may be doubted. Request therefore at cross examination stage to show to the Court the previous invoices and accounts are uncalled for and untenable in law. If no Notice, incumbent upon us to produce everything. Where documentation is very lean there may be no need to serve a Notice to Admit. In that case every sing document required to be proved. Counsel urged the Court to find what is produced is what is carried forward is deemed to have been accepted in absence of compliance with the Notice already served. What the cross-examination seeks to achieve would therefore be called ambush that is to show what ought to have been accepted. If want to go back on the Notice ready and willing to produce 1st date to last date however much inconveniencing.

Mr Njenga: Will be brief. The Objection has no basis. I urge you to disallow the same. What my learned friend is trying to do is to shield the witness from answering question in cross-examination, he should otherwise answer. It is true was served with a Notice to Admit back in 2000. We all know the purpose of the Notice to Admit and the purpose cannot be what my learned friend submitted to you. Look at the Notice, it states "proposes to adduce" in evidence the documents specified, object to reduction. At item 2 they are saying they adduce/produce monthly statements from 24 October 1995 to

31 December 199… Item 3 is statement from 30th June 1997 and the document we are looking at p.31 and following. The Plaintiff listed 8 documents and only 1 item of those itemised has not been produced – Item 2. They told use come the hearing we are to going to produce the document. In that Notice to produce nowhere is it indicated that in the circumstances Item 2 is so bulky we are not going to produce it. Had they indicated that we would have objected and said they must produce it. My Learned Friend has submitted a Notice to Admit – law diff required instead of whole, 1 page summary. My learned friend has not quoted any law where out of a 300 page document you pluck one page and leave 299. No law that says if a document is so bulky it should not be produced in Court. Taking into account Item No 2 – not produced. I submit I have the right to ask a question in cross-examination on that. I am not telling the Witness to produce; I am asking him why it has not been produced. That is not my point if they do not produce; it is well and good…. Lastly we have been told we omitted to serve a Notice to produce, we did not because you cannot serve a Notice to produce against a party who states that they are going to produce. Said other things… Urge you to disallow the objection and proceed with cross-examination.

Mr **K Opere** stated that he thought Counsel for the Defence had misunderstood the difference between adduce and produce. In oral testimony can adduce that is the distinction. He felt that because his client is a big institution with many departments that co-ordinate into one statement. Where a party prposes to challenge an entry or authenticity or otherwise of any entry you serve a notice requiring the document – you go to the maker for it. He says it is wrong to say that there is not balance carried forward. The Court then asked Mr K'Opere to turn to the top of page 31 of the Plaintiffs bundly and show the Court where the words "carried forward" appeared. The first such reference he could find was on page 8 of that sequence. The page indicated was not part of the running account by a summary. Mr K'Opere argued that the Plaintiff would have produced the documents if the Defendant would have notified it by Notice that to produce. The Plaintiff was producing the evidence through the witness. The Court was not sure that Mr Owino (PW1) was able to remember each and every transaction between 24th October 1995 and 31 December 1999. When the Court asked Mr K'Opere his interpretation of the phrase "unless the Court states otherwise" at the end of the Notice, he said that was the reason the Notice was separated into 3 Lists. The Court gave directions for the Plaintiff to file the Authorities on which it relies for the interpretation put forward.

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7. Following further directions both Parties filed Written Submissions and Case Law on the Effects of a Notice to Admit Facts. The Plaintiff relies on the following:

(1) Order XII Rules 2 and 3 of the Old ***Civil Procedure Rules*** and ***Form 9 Appendix B***

(2) Order X Rules 14, 15 and 16 of the Old Civil Procedure Rules, Cap 21 Laws of Kenya (Forms 7 and 8 – Appendix B)

(3) Order 11 Rules 2, 3(2)(d) and 7(3) and Appendix B of the New Civil Procedure Rules, 2010

(4) Gazette Notice 5179 og 25 July 2014 and No 6301 of 5th September 2014 and No 6807 of 26 September 2014

(5) Section 1A and 1B of the Civil Procedure Act Cap 21, Laws of Kenya

(6) The Evidence Act, Cap 80 Sections 61, 65(5)-(9), 66(e) and 68(g

(7) Mulla,Code of Civil Procedure, 16th Edition, page 2137.

(8) Wycliffe Sigani Analo v Bernard Musyoki & Another [2006] eKLR para 26 page 4

(9) Margaret Nduta Kamithi & George Njenga Kamithi v Kenindia Assurance Co Ltd[2001] eKLR pp7-9

The Plaintiff argues that there is no obligation upon the Plaintiff to call any witness to prove any document which is subject to the Notice to Admit because that Notice was served on the Defendant and the Defendant did not file any Notice of Non-admission before the trial.

8. ***Order XII Rules 2 and 3*** of the Old ***Civil Procedure Rules*** and ***Form 9 Appendix B*** provides:

2. *(1) Any party to a suit may by notice in writing call upon any other party to admit any document, saving all just exceptions, and if the other party desires to challenge the authenticity of the document he shall, within fourteen days after service of such notice, serve notice that he does not admit the document and that he requires it to be proved at the hearing.*

(2) If such other party refuses or neglects to serve notice of non-admission within the time prescribed, he shall be deemed to have admitted the document, unless the court otherwise orders.

(3) Where a party serves notice of non-admission and the document is proved at the hearing, the costs of proving the document shall be paid by the party who has challenged the document whatever the result of the suit may be, unless at the hearing the court certifies that there were reasonable grounds for not admitting the authenticity of the document."

8. The Interpretation that the Plaintiff puts on those provisions and authorities is that once a Notice to Admit is served upon the opposing party and the opposing party fails to file a notice of non-admission, the first party is "*not even obliged to call a witness to produce or prove the last statement of accounts*." The further consequence is that the second party is then barred from disputing the veracity of those documents or cross-examining on the correctness or authenticity thereof. It is said the Defendant should have inspected the monthly statements for the Period from October 1995 to December 1999. The Plaintiff's argument then prays in aid Mulla on Code of Civil Procedure to then pray in aid the object of the discovery process as a whole, being to obviate the necessity to produce documents to expedite disposal of cases. However Order X rule 14 of the CPR 1998 provides *"Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for inspection of the party giving such notice, …. And permit him to take copies thereof and any party not complying with such notice shall not afterwards be at liberty to put such document in evidence on his behalf in such suit unless he shall satisfy the court that such document relation only to his own title…or cause or excuse which the court deems sufficient for not complying with such notice…"*

9. The Defendant's Submissions filed on 18th November, 2015 are equally succinct. They clarify that the Defendants position is that despite service of a Notice to Admit documents having been served on an opposing party, the party serving the notice must:-

(a) File and serve the documents covered by the Notice to Admit and

(b) Avail a witness in Court to produce the documents.

The Defendant correctly points out that "the process of discovery is a creation of law used to expedite the process of dispute resolution. It dispenses with the need to call witnesses to prove a document in the course of litigation where a document is not contested by the adverse party. A notice to admit documents and a notice of non-admission are techniques of discovery. Referring to the Plaintiff's extract from Mulla at p 2137, it is argued that that "*the object of discovery is stated as eliciting admissions, obviating the necessity to produce lengthy evidence and expediting disposal of the suit. However nothing the in extract relied upon by the plaintiff shows that the adverse party is barred from seeking to cross-examine a witnesses as to the contents of any document covered in the Notice to admit after discovery"*

10. The Defendant also relies on the following arguments:

At the discovery stage in litigation, as stated in ***Mulla*** *in* ***Code of Civil Procedure*** *at pg 2137 (annexed to the Plaintiff's submissions and highlighted), the object of discovery is stated as eliciting admissions, obviating the necessity to produce lengthy evidence and expediting disposal of the suit. However, nothing excerpt relied on by the plaintiff shows that the adverse party is barred from seeking to cross-examine a witnesses as to the contents of any document covered in the Notice to admit after discovery.*

The defendant respectfully submits that the case of ***WYCIFFE SIGANI ANALO v BENARD MUSYOKI & another [2008]*** *and which is relied on by the plaintiff's Counsel is distinguishable from the case at hands as the issue for determination in the case cited by Plaintiff's counsel was the proper procedure for reimbursement of witnesses. The issue in this case is the effect of service of a notice to admit documents. These are two different scenarios and the court should reject the Plaintiff's contention and direct itself to the main issue in this case, which is the effect of a notice to admit documents and examination of witnesses.*

Even if the plaintiff's advocates' interpretation of paragraph 26 of the authority cited is correct which is denied, the Learned Justice Ang'awa (as she then was) stated that ***"….if within 14 days no admission of documents or facts are made, it is an indication to the other side that they need not call witnesses to prove the document in question and the Plaintiff or Defendant whichever the case may produce his evidence by producing the document in court without calling the maker thereof through litigation"***

The Defendant urges the Court to dismiss the Objection.

11. The Court is grateful to the Parties for their written submissions and the work that has obviously gone into them, no disrespect is meant in not repeating them here. Were the Defendant to now serve a Notice to inspect this matter has to potential for going around in circles. In the circumstances, the Court is of the view that this is an issue that must be decided on first principles on the law as it stands now, when the matter is being heard and decided. The starting point is that each party before the Court must prove its case and the components thereof. ***Section 107 of the Evidence Act*** provides:

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability? Dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the Burden of proof lies on that person.

Facts can either be admitted, not admitted or denied. If facts are not admitted they must be proved to the satisfaction of the Court to the relevant standard. The Rules of procedure have changed and evolved over time but that is the constant factor. To whit see ***Sections 108 and 109:***

"108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Also Section 59;

59. No fact of which the court shall take judicial notice need be proved."

12. The historical procedure applicable to this suit is very relevant but not to the exclusion of the gains made by the CoK2010.

Article 159(2) of the Constitution provides:

> *In exercising judicial authority, the courts and tribunals shall be guided by the following principles-*
>
> *(a) Justice shall be done to all, irrespective of status;*
>
> *(b) Justice shall not be delayed;*
>
> *(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
>
> *(d) Justice shall be administered without undue regard to procedural technicalities; and*
>
> *(e) The purpose and principles of this Constitution shall be protected and promoted.*

Article 50(1) of the ***Constitution of Kenya*** provides:

> *(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."*

13. It follows that any issue on the Duty for disclosure and burden of proof cannot be decided without consideration of the ***Evidence Act Cap 80*** the very relevant Sections governing this issue are ***Section 35, 59 and 60*** which provide:

> *"35. Admissibility of documentary evidence as to facts in issue*
>
> *(1) In any civil proceedings where direct oral evidence of a fact would be Admissible, any statement made by a person in a document and tending to Establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—*
>
> *(a) If the maker of the statement either—*
>
> *(i) Had personal knowledge of the matters dealt with by the Statement; or (ii) Where the document in question is or forms part of a record Purporting to be a continuous record, made the statement (in so Far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information Supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and*
>
> *(b) If the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be Called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable*

14. The Plaintiff prays in aid, Section 61 of the Evidence Act which provides;

> We move then to Section 64 which provides "**Proof of contents of documents**
>
> **The contents of documents may be proved either by primary or by secondary evidence**"(emphasis added). The Plaintiff relies on Section 65 (5)-(9) but the whole is relevant and so set out below

65. (1) Primary evidence means the document itself produced for the inspection of the court.

(2) Where a document is executed in several parts, each part is primary evidence of the document.

(3) Where a document is executed in counterpart each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

(4) Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.

(5) Notwithstanding anything contained in any other law for the time being in

force—

(a) a micro-film of a document or the reproduction of the image or images embodied in such micro-film; or

(b) a facsimile copy of a document or an image of a document derived or captured from the original document; or

(c) a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a "computer printout"), shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(6) The conditions referred to in subsection (5) in respect of a computer printout shall be the following, namely—

(a) the computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;

(b) the computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;"

15. The Section that deals directly with the Notices relied on by the Plaintiff is ***Section 69 of the Evidence Act*** which provides: "*Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case: Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—*

(i) When the document to be proved is itself a notice;

(ii) when from the nature of the case, the adverse party must know that he will be required to produce it;

(iii) when it appears or is proved that the adverse party has obtained

possession of the original by fraud or force;

(iv) when the adverse party or his agent has the original in court;

(v) when the adverse party or his agent has admitted the loss of the document;

(vi) when the person in possession of the document is out of reach of, or

not subject to, the process of the court;

(vii) in any other case in which the court thinks fit to dispense with the requirement.

Reasoning and Decision

16. It is clear the Plaintiff's case is based on a running account between the Parties. The Plaintiff is claiming a given quantum. The running account that pertains to that was created by the Plaintiff is and in the Plaintiff's possession and control. The duty to produce that document therefore rests with the Plaintiff. The Plaintiff has not demonstrated or even pointed to any justification in law that suggest the bigger an organization the lower the duty to produce. That submission cannot be right. Further, the Plaintiff's case rests squarely on (a) the existence of those accounts and (b) the veracity of those accounts. Again, that is information that is in the Plaintiff's knowledge power and control saves where it has been shared with the Defendant. The proposition can be put simply as, how is a party to know what he is to pay if the payee does not set out a demand that can be understood and complied with in the event of non-payment. That Payee then has to demonstrate to the Court that such amounts are properly due .

17. The Constitution enshrines the right to a Fair Trial. It is a fundamental of a fair trial that a party should know the case against it. Anything less is prejudicial. The Plaintiff knows the case against the Defendant. Has the Defendant be told and/or be provided with the information to be able to deduce that claim. It seems from the arguments now before the Court that he has not. It is clear from the arguments, that both Parties have identified the distinction between producing a document and adducing evidence. However, it is also clear that the Plaintiff has not addressed sufficiently or at all the issue of proof. Each Party must prove its case. It is the Court that must be satisfied in the final analysis. In this case producing a partial statement without any oral evidence as to the source or mode of creation can only be of limited evidential value.

18. Whatever the interpretation given to historical rules of procedure, the issue for resolution now is ensuring a fair trial. For that reason and the reasons set out above, The Defendant must have access to the documents relied upon by the Plaintiff. If those document are not produced whether under a Notice to Admit or otherwise, there is a risk that the Defendant will not have a fair trial by reason of not knowing the case against him.

19. The Objection is therefore dismissed. The Defendant has a right to know the case against him as provided by the ***Constitution 2010*** or *Rules of natural justice.*

20. However, in the interest of case management and efficient use of Court time, it is imperative that the process the Plaintiff started reaches its sensible conclusion. Therefore, in accordance with ***Order X Rule 17*** which states, "(1) Where the party served with a notice under 15 omits to give such notice of a time of inspection, or object to give inspection or offers inspection elsewhere… the court may, on the application of the party desiring it, make an order for inspection is such place and in such manner as it may think fit; …". That demonstrates that the Court has wide powers to direct certain procedures to be followed when they arise in the interests of a fair trial.

21. In the circumstances, this Court makes the following Order:

(1) The Defendant shall inspect the Documents .

(2) The Plaintiff shall make the documents available at a time and place that is mutually convenient

(3) The Defendant to then signify which documents it wishes to cross-examine the witness;

(4) Thereafter the Parties to take a date for resumption of the Trial where cross examination upon those will not be restricted

(5) Costs Reserved.

Order accordingly,

FARAH S.M. AMIN

JUDGE

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF

NOVEMBER 2016.

In the Presence of

Court Clerk: I. Otieno

Belinda (Pupil with Noting Brief) – Plainatiff

Miss Kiragu HB Mr Njenga