



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 362 of 2012

CHINA WU YI CO. LTD. PLAINTIFF

VERSUS

EDERMANN PROPERTY LTD. 1ST DEFENDANT

ZE YUN YANG 2ND DEFENDANT

JING ZHANG 3RD DEFENDANT

RULING

1. For determination by this Court are two applications. The first application is a Notice of Motion dated 13th June, 2012 by the 1st Defendant brought under the auspices of **Order 2 Rule 15(1)(a)**, **Order 7 Rule 1** and **Order 51 Rule 1, 3, 4 & 10(2)** of the *Civil Procedure Rules* and **Sections 1A, 1B** and **3A** of the *Civil Procedure Act, 2010*. The 1st Defendant seeks for orders *inter alia* that the Plaintiff and Notice of Motion, both dated 4th June, 2012 be struck out. The application is predicated upon the reasons set out on its face namely: that the Plaintiff, a company incorporated in China, has not authorized the filing of the suit nor do the Advocates on record have instructions to institute the suit from the Plaintiff. Further, the 1st Defendant postulates that the Plaintiff did not authorize or instruct one Mr. Liu Hui, to file or institute or represent it in any court proceedings and is thus guilty of fraudulent misrepresentation.

2. The application is supported by the Affidavit of Ze Yun Yang, dated 13th June 2012 who deponed to being a Director of the 1st Defendant, and the 2nd Defendant in the suit. It is his contention that the suit was not validly instituted, and is motivated by malice and bad faith. Further, the suit was filed without authorization by the Directors of the Plaintiff Company and that the Plaintiff has no valid claim against the 1st Defendant. By filing the Affidavit in support of the Application, which is partly brought under the provisions of **Order 2 rule 15 (1) (a)**, the 1st Defendant seems to have ignored the provisions of **Order 2 rule 15 (2)** which reads:

“No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.”

3. The second application is also dated 13th June, 2012 by the 2nd & 3rd Defendants. It is brought under the aegis of **Order 1 Rule 10(2)**, **Order 2 Rule 15(b)** and **Order 51 Rules 1, 3 & 4** of the *Civil Procedure Rules* and **Sections 1A, 1B** and **3A** of the *Civil Procedure Act, 2010*. The prayers sought are similar to those sought by the 1st Defendant i.e. to have the suit struck out or, in the alternative, that they as Defendants should be struck out from the suit. Again, the application is premised on the grounds that

the Plaintiff has not authorized the filing of the suit, which suit is brought in bad faith and malice and is frivolous, vexatious and scandalous.

4. That application is supported by the Affidavit of Jing Zhang, who deponed to being a Director of the 1st Defendant, sworn on 13th June, 2012. It is her contention that there is no valid claim as between the Plaintiff and the 2nd & 3rd Defendants as they were not parties to the original contract or the supplementary contracts. The suit is frivolous and vexatious in that Mr. Liu Hui, an overall overseer, is not authorized by the Directors and stakeholders of the Plaintiff Company to file this suit.

5. Both applications are opposed. In the two Affidavits in response to the applications, sworn on 12th July, 2012 by the said Liu Hui, it was detailed that on 10th July, 2008, the Plaintiff and the 1st Defendant entered into a building contract for the construction and completion of several apartments along Beijing Road, Mlolongo, Mavoko Municipality from which there emerged several financial constraints on the part of the 1st Defendant. The Plaintiff and the 1st Defendant subsequently entered into a Supplementary Agreement (“the Supplementary Agreement”) dated 5 May 2009 for the establishment of a money (credit) line by the Plaintiff to assist the 1st Defendant. At the end of the main contract, both the Plaintiff and the first Defendant had agreed on a final account for the project in the sum of the Shs.

1,032,000,000/-. It was the Plaintiff’s contention that it has a valid claim in that amount as against the 1st Defendant as well as the 2nd and 3rd Defendants, jointly and severally. As regards the institution of the Plaintiff’s suit, Mr. Liu Hui stated that he was authorized by valid Resolution of the Board of the Plaintiff Company, as an overseer of its activities in Kenya, to exercise such powers, authorities and discretions of the Board of Directors and, as such, was authorized to institute and defend any legal proceedings on behalf of the Plaintiff. Further, he deponed that the Defendants’ applications are mischievous, brought in bad faith and a gross abuse of the Court’s process.

6. In their Further Affidavit, sworn on 6th August, 2012 through the said **Jing Zhang**, the 2nd & 3rd Defendants, contend that the suit by the Plaintiff is baseless and cannot be sustained in law as it had not provided the Court with any documentation that confirmed its legal status whether in China or Kenya. The deponent noted that by a letter dated 13 June 2012, the Companies Registry had confirmed as to who was the director of the Plaintiff company as well as the person authorised to accept service of court process on behalf of the Plaintiff. Mr. Liu Hui was neither of those people. It was also contended that the Plaintiff has not instructed or authorized Mr. Liu Hui to represent it or act on its behalf in any court proceedings in Kenya and that the Minutes submitted as “LH-1” were not in accordance to the Plaintiff’s Articles and By-Laws and thus his appointment is not valid.

7. Having considered the two applications dated 13th June, 2006, the Replying Affidavits dated 12th July, 2012 and Further Replying Affidavit dated 6th August, 2012, it is for the court to make a determination on whether the Plaint, filed on 4th June, 2012, is frivolous, vexatious and scandalous and thus liable to be struck out as prayed for by the Defendants. In an application to strike out pleadings, **Orders 2 Rule 15 sub-rule (1)** of the *Civil Procedure Rules, 2010* provide that:

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

The Applicants, therefore, have to satisfy the Court that the pleadings, which they seek to have struck out, are scandalous, frivolous or vexatious, disclose no reasonable cause of action or defence in law and that it may prejudice, embarrass or delay the fair trial of the suit. The applicants also have to show that the pleadings or suit as in this case, are an abuse of the process of the Court and as such should be dismissed. Does the application fall within the purview of the conditions set out in the Order? According to Person, J in **Drummod Jackson v British Medical Association (1970) 2 WLR 688** at p. 676, the definition of a cause of action was determined as;

“A cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.” (Underlining mine).

In this instance, the “cause” of the Plaintiff’s complaint arises from the disputed final account and the Supplementary Agreement. It is the Plaintiff’s contention, as was adduced in the Replying Affidavit dated 12th July, 2012, that the Defendants, jointly and severally, are liable to the Plaintiff to the tune of Kshs. 350,293, 389/- as at 15th December, 2009. It is also the Plaintiff’s contention that the parties signed the Final Accounts and a second Supplementary Agreement dated 23 May 2010 (“the second Supplementary Agreement”) and listed as “**LH 3a**” and “**LH 3b**” respectively. As such the Defendants could not claim otherwise. In its Plaint dated 4th June, 2012, the Plaintiff alleges at paragraphs 11, 12, 13, 14 and 15 thereof as to how the Defendants became indebted to it, and how the first Defendant breached the terms of the Supplementary Agreement which the parties had entered into in May, 2009. At paragraph 14 of the Plaint, the Plaintiff made the claim that:

“14. After several months of trying to solve the dispute in regard to this project, the Plaintiff and the 1st Defendant decided to agree on a final settlement amount for the project. In that regard, both parties entered into and executed a Second Supplementary Agreement to the main contract of this project on 23rd May, 2010 and agreed and confirmed the following with regard to payments;.....”

In a translated copy of the second Supplementary Agreement translated into English and vide a Notarial Certificate (2011) Min Zi No. 04735 dated 24th October, 2011, the parties at Clause 1. agreed that:

“1. As for the previous disputes arising from the final settlement of the Great Wall Apartment Project, the two parties have agreed to ignore the disputes and hereby confirm that the final settlement amount for this project is Kshs. 1.032 Billion (in words say: Shillings One Billion and Thirty two Million only) which amount is inclusive of the amounts for 630m long BEIJING Road constructed by party A, for civil works of sewerage treatment plant and the interest payable to party A up to the 15th day of December, 2010 based on the original contract and exclusive of the equipment and water and electricity installation works of the industrial workshops.”

The Plaintiff has stated that the Defendants had previously paid Kshs. 709, 406,161/- but had not paid the balance of Kshs. 300, 293,839/- thereby being in breach of the terms of the second Supplementary Agreement and thus attracted a penalty of Kshs. 50,000,000/- as per Clause 6 of the second Supplementary Agreement which reads in part:

“6. After signing this supplementary agreement, both parties shall not breach the Supplementary Agreement by default. Otherwise the defaulter is liable for making a breach penalty payment of Kshs. 50,000,000/- (Kshs. 50 Million) to the other party.”

8. Has the Plaintiff shown that it has a *prima face* case as against the Defendants? The principles set out in **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** are clear that if the pleading does not disclose *any reasonable cause of action* or defence or that the pleading is scandalous, frivolous and vexatious, or that such pleading may prejudice, embarrass or delay the fair hearing of the suit or that it is an abuse of the process of the court, then it ought to be dismissed. In that suit, it was held:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by

amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of Justice ought not to act in darkness without the full facts of the case before it. (Underlining mine).

The 2nd and 3rd Defendants in their Further Affidavit, contend that the person of Mr. Liu allegedly appointed by the Plaintiff had no locus in bringing this suit on behalf of the Plaintiff or against them and that the second Supplementary Agreement dated 28th May, 2010 was drawn in Chinese, and could therefore not be produced before a Court that conducts its proceedings in either English or Swahili. It is also the Defendants contention that the contract price agreed upon was vide the Contract dated 10th July, 2008 and that any variation would have to be made in accordance with the provisions of that Contract, particularly at Clause 8.5 which provides that:

“8.5. The Contract price shall not be adjusted or altered in any way whatsoever otherwise than in accordance with the express provisions of these conditions.”

The 2nd and 3rd Defendants, in their submissions, contended that they were wrongly enjoined in the suit as there was no privity of contract between themselves and the Plaintiff. They stated and relied upon the authorities of **Christopher Wanyike Ndung’u T/A Hotel Nomad Kitengela v Lyric Investments Ltd & Another (2007) eKLR** and **National Bank of Kenya Ltd v First Interstate Trading Co. Ltd (2005) eKLR** to buttress their contention.

9. From the foregoing, it is evident that there are causes in contention between the Plaintiff and the Defendants. On the one hand, the Plaintiff claims that there is the second Supplementary Agreement, albeit in Chinese, between the 1st Defendant and itself, and it is thus owed the amount of Kshs. 350,293,839/-. On the other hand, the Defendants contend that the Mr. Liu Hui has no *locus* in this matter as such and thus is not instructed or authorized to institute this suit or act on behalf of the Plaintiff and/or as against the Defendants. They maintain that in any event, the second Supplementary Agreement, from which the instant suit emanates, is invalid and a sham. The Plaintiff maintains that the amounts in dispute are colossal and therefore, the Court ought to have the matter heard and finally determined on its merits. For the Court to issue to the Defendants/Applicants the Orders prayed for at this juncture, would be tantamount to terminating the suit at an interlocutory stage. The Court should also take cognizance of the fact that in exercising its unfettered jurisdiction and inherent powers, it should act with extreme caution and as reiterated in the **D.T Dobie** case(supra) ‘...*sparingly and only in exceptional cases.*’ The Plaintiff herein maintained that the issues raised by the parties are weighty, and can only be canvassed with the opportunity of addressing them in a trial. I note that in making its determination in the **D. T. Dobie** case, the Court of Appeal, followed the finding of Sellers L.J in **Wenlock v Maloney & Others (1965) 1 W.L.R 1238** where at 1242 he held that:

“...at this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at trial as the court itself is not usually fully informed so as to deal with the merits.”

For the Court to make a fair and just determination on the issues raised by the parties, including but not limited to contracts, privity thereof and breach thereof, corporate law and directors liability and *locus standi*, the court has to set down the matter for hearing.

10. However, what of the 2nd and 3rd Defendants’ adopted position in relation to Mr. Liu Hui having no *locus* authority to bring this suit before court? Their submissions in that regard were that no independent evidence had been provided by the Plaintiff to show that Mr. Liu Hui was its authorised representative. They simply stated that the Plaintiff’s Board Resolution attached to Mr. Hui’s Replying Affidavit left a lot to be desired. However, they further state that they have demonstrated that the said Board Resolution is not a valid one for the reasons stated at paragraphs 10 to 14 of the 2nd and 3rd Defendants’ Further Affidavit dated 6 August 2012. I have perused both that Further Affidavit and the document exhibited at pages 80, 80A and 81 of the Exhibit thereto marked “LH 4”. The latter document, although the same is a photocopy, is written in English dated 6 December 2011 and appears to be sealed by the Company Seal of

the Plaintiff company and duly signed by 2 directors thereof. As regards the said paragraphs 10 to 14 of the said Further Affidavit, I see no objection to Mr. Hiu confirming his own authorisation to act on behalf of the Plaintiff. Further, I see no reason why his authorisation should be confirmed by those officers of the Plaintiff whose names appear at the Companies Registry as the last return made thereto would appear to have been in 2003. It is quite apparent and likely that the directors of the Plaintiff Company have long since changed in 10 years. Further, I see no relevance in relation to the said Board Resolution in reference to the Plaintiff's Articles and By-laws and I consider the 2nd and 3rd Defendants' averments in this connection to be no more than a somewhat desperate attempt to discredit Mr. Hiu's representation of the Plaintiff in relation to these proceedings. As regards the law in this connection, the 2nd and 3rd Defendant have submitted before court the High Court Ruling delivered by **Emukule J** in the case of **East African Safari Air Ltd v. Kegode & Anor (2006) eKLR** in support of their submissions that the parties filing suit had not follow the lay down procedure as detailed in the Articles of Association of the plaintiff company therein. The Plaintiff herein however, submitted to court the decision of the Court of Appeal in relation to the **East African Safari Air** case being **East African Safari Ltd v. Kegode & Anor. (2011)eKLR**. The Court of Appeal in that matter reversed **Emukule J's** decision as to the appointment of advocates instructed to file suit by detailing the following:

“We agree with Mr. Gachuhi that the Rule in Turquand's case (supra) applies in this situation. The rule says:

“While persons dealing with a company are assumed to have ready the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called “the indoor management” and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained”. (emphasis added).

Gower's Principles of Modern Company Law has summarized the rule in Turquand's case as follows:

“this rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf”. (emphasis added).

11. I was somewhat surprised that the 2nd and 3rd Defendants took issue with the translation from the original Chinese text of the 2 Supplementary Agreements in referring to **section 65 (1)** of the *Evidence Act (Cap 80)*. Surprised because prayer 2 of the Notice of Motion dated 13 June 2012 seeks an alternative prayer to the Plaint being struck out as against all 3 Defendants in that it asks of the Court to strike out the 2nd and 3rd Defendants from the suit. In support of that prayer, the 2nd and 3rd Defendant has submitted that there is no privity of contract established as between the Plaintiff and them. The 2nd and 3rd Defendants maintain that they were not parties to the 2 Supplementary Agreements hence no privity of contract involving them. However, they want the Court to take no cognizance of the 2 Agreements arising out of the technicality of translation. One wonders how this Court can appreciate the fact that the 2nd and 3rd Defendants are not parties to those 2 Agreements if it is being asked not to take the same into account. The 2nd and 3rd Defendants stated that where no privity of contract exists, the suit cannot stand. Further, they have referred this court to the cases of **Christopher W. Ndung'u t/a Hotel Nomad Kitengela v. Lyric Investments Ltd & Anor. (2007) eKLR** and **National Bank of Kenya Ltd v. First**

Interstate Trading Co. Ltd (2005) eKLR. Both those cases involved applications to strike out defendants from suits on the grounds that the Plaintiffs disclosed no reasonable cause of action against them. Such is their application before this court. Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of **Saloman v. Saloman & Co. Ltd (1897) AC 22 HL** the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Court's attention was drawn to the finding of **Ringera J** (as he then was) in **Corporate Insurance Co. Ltd v. Savemax Insurance Brokers Ltd & Anor.** HCCC No. 125 of 2002 (unreported) when he stated:

“The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company.”

12. In response to the 2nd & 3rd Defendants' submissions in this regard, the Plaintiff maintained that there was a case for lifting the corporate veil of the first Defendant. It maintained that there was a reasonable cause to believe that the funds that were intended to finance the said building project were diverted to other uses by the 2nd and 3rd Defendants for, as the executive directors of the first Defendant, they had absolute control of funds, operations and the management of the affairs of the first Defendant. The Plaintiff's gave details of its case as against the 2nd and 3rd Defendants by submitting:

“d) As earlier stated, the 1st Defendant obtained a sum of \$16.7. million as a loan from China Development Bank through the Development Bank of Kenya for the implementation of the Great Wall Project. The Original contract sum for the project was at Kshs.920,000,000/=. This sum was varied via supplementary agreement dated 23rd May, 2010 based on an actual work done to Kshs.1,032,000,000/=. Out of this final account the 1st defendant has paid Kshs.731,706,130.69 (Kshs.709,406,130.69 to China Wu Yi and Kshs.22,300,000/= to KPLC). The 1st defendant therefore still owes the Plaintiff an amount of Kshs.300,293,869.69 (inclusive of interests up to 15th December, 2009). On top if the said balance the Plaintiff is also entitled to a penalty for breach of contract of Kshs.50,000,000/= as agreed in the supplementary agreement referred to above.

e) The only explanation offered for non payment of the aforementioned sum is an allegation that that all the money for the project has been paid in full. It is notable that this allegation of full payment is based on a unilaterally arrived at final account by the 2nd and 3rd Defendants in total disregard of the various supplementary agreements mentioned hereinabove.

f) Of great concern however to the Plaintiff is the conduct of the 2nd and 3rd Defendants immediately after the Plaintiff demanded payment that they started shifting blame on the Plaintiff alleging that the Plaintiff had occasioned unwarranted delay of the project, which allegation is not true.

g) The 2nd and 3rd Defendants caused the Plaintiff to enter into various supplementary agreements which were geared towards settling the outstanding amount only to turn against them and fail, refuse and/or neglect to pay as agreed. As a matter of fact, they now allege that even if they signed those supplementary agreements, they did so without following what is stipulated in the Memorandum and Articles of Association of the 1st Defendant, thus rendering the said agreements invalid. Indeed, this was fraudulent on their part nothing that they accrued a benefit out of those agreements.

Indeed, there is a cause of action against the 2nd and 3rd Defendants herein, not because they are directors of the 1st Defendant, but because they committed acts of false misrepresentation and/or fraud on the Plaintiff. If the Plaintiff is allowed to prove its claims against the said two defendants at trial, they may well be found personally liable”.

13. The Plaintiff submitted that this case is very much along the lines of **Jones & Anor.v. Lipman &**

Anor. (1962) 1WLR 832 where **Russell J.** had held:

“...if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgement even against the person behind the said company.”

It had also referred to the local case of National Social Security Fund Board of Trustees v. Ankhan Holding Ltd & Ors. (2006) eKLR as per **Ochieng J.** quoting from the decision of **Lord Hoffman** in Standard Chartered Bank v. Pakistan National Shipping Corporation (2002) UKHL 43 as follows:

“And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.

This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for its fraud by saying ‘I wish to make it clear that I am committing this fraud on behalf on someone else, and I am not to be personally liable.’”

14. I have perused the Complaint herein more particularly paragraphs 22, 23, 24, 25, 26 and 27. These are the paragraphs upon which the Plaintiff relies in its claim as against the 2nd and 3rd Defendants. They detail particulars of negligence and/or recklessness on the part of those two Defendants as well as particulars of fraudulent conduct. I have also perused the Defence of the 2nd and 3rd Defendants dated 13 June 2012. It seems to me that the 2 Defendants have merely denied negligence and/or recklessness in paragraph 13 thereof. Similarly, in paragraphs 14, 16 and 17 the 2 Defendants had denied the particulars of fraud as against them putting the Plaintiff to strict proof thereof. The main point raised in defence as against the particulars of negligence and fraud raised as against the 2nd and 3rd Defendants, are that they were not parties to either the main contract nor indeed the 2 Supplementary Agreements and thus invoking the doctrine of privity of contract. In my opinion, there are definite triable issues thus not warranting that the suit as against the 2nd and 3rd Defendants be struck out.

15. Finally, I should comment upon the submission by the Plaintiff that it had been alleged by the Defendant that the Plaintiff had not complied with the provisions of the *Civil Procedure Rules, 2010* in filing the suit. Such matters were not in fact raised by the Defendants in their submissions to their Application. However again upon perusal of the Complaint as well as the Verifying Affidavit thereto, I am satisfied that the Plaintiff has detailed that there is no other suit pending between the parties hereto and that there had been no previous proceedings in court. Further, the Defendants had alleged that the Plaintiff had not filed the documents which it intended to rely upon at the trial on perusal of the Court file, it is quite clear to me that the Plaintiff in fact filed its list and bundle of documents in 2 large volumes on 14 June 2012. I am also satisfied as detailed above, that Mr. Hui has been duly authorised not only to swear the Verifying Affidavit to the Complaint but also to Institute this suit on behalf on the Plaintiff. To my mind, the said Plaintiff company’s Resolution dated 6 December 2011 which is under seal, fully covers the authority extended by the Plaintiff company to Mr. Hui. The only area where I can see that the Defendants may have a valid point as regards procedure is in connection with the documents required to accompany the Complaint upon filing. **Order 3 rule 2** reads as follows:

“3. 2. All suits filed under rule 1 (1) including suits against the government, except small claims, shall be accompanied by –

- (a) the affidavit it referred to under Order 4 Rule 1 (2);**
- (b) a list of witness to be called at the trial;**
- (c) written statements signed by the witnesses excluding expert witness; and**

(d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at lease fifteen days prior to the trial conference under Order 11”.

It is correct as admitted by the Plaintiff in its submissions that it has not filed its witness statements as per **Order 3 rule 2 (c)** together with the Plaintiff herein. However, the Plaintiff's submissions have drawn attention to the proviso to **rule 2**. In my view, the Plaintiff still has time to apply to this court for leave that it do furnish its witness statements to be relied upon at the hearing, at least 15 days prior to the trial conference provided for in **Order 11**.

16. The outcome to all the above is that I dismiss the 2 Notices of Motion filed by the 1st Defendant on the one hand and the 2nd and 3rd Defendants on the other, both dated 13 June 2012. The Plaintiff will have the costs of both the applications.

DATED and delivered at Nairobi this 9th day of May, 2013.

**J. B. HAVELOCK
RULING**