



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 397 OF 2011

NORDIC AVIATION CAPITAL A/S.....PLAINTIFF

VERSUS

WESTERN AIRWAYS LIMITED.....1ST DEFENDANT

DOUGLAS ODHIAMBO.....2ND DEFENDANT

RULING

1. By way of a Notice of Motion application dated Before me is a Notice of Motion application dated 3rd April 2012, the Plaintiff seeks three substantive orders, namely, an order for enlargement of time within which to file pre-trial questionnaire and within which to hold the pre-trial conference; an order allowing it to amend its pleadings by filing a list of witnesses and an order for admission into the record of the court of an expert report.
2. The application is supported by the affidavit of Crispine Odhiambo, counsel for Plaintiff sworn on 3rd April 2012.
3. Essentially, the Applicant's case is that the time for filing the pre-trial questionnaire and for holding pre-trial conference had lapsed without compliance on the Plaintiff's part as it was awaiting an expert report detailing repairs that had been undertaken on an aircraft. That report formed a substantial part of the Plaintiff's evidence as it touched on the damage to the aircraft; actual repair and the remedies available to the Plaintiff. The report had since been received. In addition, the Plaintiff had inadvertently failed to file its list of documents. It was therefore fair and proper to allow the application as it was not bound to prejudice the Defendants.
4. In response to the application, there is a replying affidavit by Fredrick Okeyo, counsel for the 1st Defendant/Respondent in which it is contended that the application is bad in law as it is not founded on and provision within the Civil Procedure Act and the Rules made thereunder. The 1st Defendant contends further that the Applicant is through the application seeking to litigate in installments which would be highly prejudicial to the 1st Defendant. Further, counsel for the 1st Defendant in his oral submissions stated that the expert report sought to be filed was available as early as year 2010 before the suit in this matter was file. The Plaintiff had therefore no plausible basis to seek to file the report now. He argued that if the Plaintiff had brought a deficient suit, such deficiency could not be cured by sneaking in additional documents and the option available to the Plaintiff was to withdraw the suit and file a fresh competent suit.
5. I have carefully considered the application based on the material placed before me as well as the rival

oral submissions by counsel for the parties.

6. Order 11 of the Civil Procedure Rules 2011 provides the pre-trial requirements that parties have to fulfill before setting down a matter for hearing. These requirements have set timelines. The purpose of Order 11 is stated in Rule 3(1) thereof as being to further expeditious disposal of cases and case management. Parties are therefore expected to fully comply with Order 11 within the stipulated timelines before a suit can be fixed for hearing.

7. However, it is understandable that as parties move to embrace and implement the elaborate programme set out in Order 11, certain aspects of compliance would be overlooked. Other will be achieved outside the timescales provided under the Order. In the premises, the role of the court in the transitional epoch should be to accommodate parties who stumble while encouraging achievement of full compliance with Order 11 prior to setting suits down for hearing.

8. My view is that the present application as far as it seeks to achieve compliance with Order 11 should be allowed as I do not see what prejudice the Defendant stands to suffer if what the Plaintiff seeks is to achieve full compliance with Order 11 aforesaid, albeit out of time. The dictates of justice require that parties place before the court material that will assist the court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

9. As regards the expert report sought to be admitted as evidence in this court, Order 3 Rule 2 (c) of the Civil Procedure Rules exempt expert evidence from the witness statements that have to be filed contemporaneously with the Plaintiff's Complaint hence the expert report is not caught up in the timelines set out in Order 11 aforesaid.

10. In the result, I am inclined to allow the Plaintiff's Notice of Motion dated 3rd April 2012 with no orders as to costs.

11. I further direct that the parties do comply with Order 11 within 30 days from today and that the matter be thereafter fixed for pre-trial conference within 15 days.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5th DAY OF JULY 2012.

J.M. MUTAVA
JUDGE