



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 617 of 2009

COMZTEK EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

JANE WANJA MURIITHI.....DEFENDANT

R U L I N G

By a Chamber Summons dated 30th March 2012 and filed in this Court on 30th March 2012 expressed to be brought under the provisions of Order VI rules 8(2) & 16 of the Civil Procedure Rules, 2 rule 10 of the Civil Procedure Rules the plaintiff seeks the following orders:

a) That this Honourable Court be pleased to order the Defendant to give the following particulars of the Defence dated 8th December 2009 requested in the Request for Particulars dated 29th October 2010, namely:

1. Of Paragraph 8 of the averment “she informed the plaintiff in clear terms that she was resigning to start her own business as she did not want to be in a situation of conflict of interest with the Plaintiff Company”, please provide:

- (i) The name of the business the Defendant was resigning to start.**
- (ii) The names of any business partners (if any) that would establish the business with the Defendant.**
- (iii) A description of the products and or services that this Business was to sell and or provide.**
- (iv) Details of the potential conflict of interest that was likely to arise or that had been foreseen as likely to arise.**

2. Of Paragraph 9 of the averment “It is on the basis of this representation and assurance that the Defendant proceeded as she did”, please provide:

- (a) The name of the Company and or Registered business name of the Company or Business that the Defendant currently works for and/or worked for in the year 2010 or has and/or had an interest in 2009 and 2010 either as a Director and or shareholder or partner.**
- (b) The date of incorporation of the aforementioned Company.**

- (c) **The particulars of the Defendant's interest in the said Company.**
- (d) **The date when the aforementioned Company and or Business started trading in Kenya.**
- (b) **That in default of the Defendant supplying the said particulars within the period stipulated by this Honourable Court the defence be struck out with costs.**
- (c) **That the costs of and occasioned by this Application be provided for.**

The application is supported by an affidavit sworn by Mathew Rudd, the regional Manager of the plaintiff on 30th March 2012. According to the information obtained from the applicant's advocates, it is deposed that the defendant's advocates were served with a request for in paragraphs 8 and 9 of the defendant's defence dated 8th December 2009 but despite having had more than sufficient time to furnish the particulars sought for, they have failed and/or neglected to give the same. According to further information obtained from the applicant's counsel, the defendant's counsel intimated that the issues to be touched upon in the particulars will be addressed in the Defendant's witness statement. It is further deposed that the said particulars are necessary to enable the plaintiff to know the precise nature and extent of the defendant's defence; to enable the plaintiff prepare a comprehensive witness statement and prepare for trial and prevent surprise during the trial.

In opposition to the said application the defendant filed grounds of opposition dated 4th May 2012 which grounds assert as follows:

- 1. The orders sought under the Application contravene the Respondent's rights as provided under Articles 31 (c) and 50 (2) (1) of the Constitution.**
- 2. By the orders sought under the Application the Plaintiff/Applicant seeks to relief itself of its burden of proof as imposed upon it under Section 107 of the Evidence Act Cap. 80 of the Laws of Kenya.**
- 3. The orders sought under the Application go beyond what is contemplated under Order 2 Rule 10 of the Civil Procedure Rules 2010 (Order VI Rule 8 of the old Civil Procedure Rules).**
- 4. The orders sought have the potential of going against certain aspects of the learned Justice Waweru's Ruling in this matter and which ruling is dated 21st January 2010.**
- 5. The Application has been brought under the old Civil Procedure Rules contrary to the mandatory provisions of Order 54 of the Civil Procedure Rules, 2010.**

The application was prosecuted by way of written submissions. In its submissions, the plaintiff reiterated the contents of the supporting affidavit and added that the plaintiff has in its application sought particulars in respect of two paragraphs in the Defendant's Defence in respect of which the Defendant has made certain positive averments which on the face of them are fairly vague, thus necessitating the filing of application for particulars by the plaintiff. The particulars sought, it is submitted, will be of great aid to the Plaintiff as it prepares its case for hearing, as this will prevent unfair surprise and will thus then mean that the plaintiff will not have to be weary that should it file a Witness Statement, the same may be wanting due lack of clarity in the defence. Citing Mohamed Bashir Rehemtulla vs. Hamzaali Jiwaji Mombasa HCCC No. 209 of 1997, it is submitted that the requirement to give particulars reflects the overriding principle that litigation between the parties, and particularly the trial should be conducted fairly, openly, without surprise and as far as possible to minimize costs. The function of particulars according to the said decision include (a) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case has to be proved; (b) to prevent the other side from being taken by surprise at the trial; (c) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial; (d) to limit the generality of pleadings; (e) to limit and define the issues to be tried and as to which discovery is required; and (f) to tie the hands of the party so that he

cannot without the leave go into matters not included. Quoting **Joshi vs. Uganda Sugar Factory [1968] EA 570**, it is submitted that whereas the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed especially where the defendant confined himself to putting the plaintiff to the proof of allegations in the statement of claim the onus of establishing which lies on him, the Court will, however, order a defendant to furnish particulars where he is making positive averments and will also exercise its discretion to order particulars where it believes that by doing so it will narrow the issues and avoid surprises and to reduce expenses.

According to the plaintiff, the defendant had sufficiently responded to the averments made in the plaint in his first 8 paragraphs by denying them and challenging the plaintiff to prove the allegations. However, the three paragraphs in issue, according to the plaintiff, make positive averments which render them amenable to an order for particulars by imputing knowledge on the plaintiff about the reasons for dismissal of his suit and refers to certain documents whose particulars the defendant has contrary to the decision in **Salmin Mbarak and Others vs. Hadi Karuma and Others Civil Appeal No. 97 of 1998** declined to provide. Accordingly, on the authority of **Bubal Corporation vs. SOS Kinderdolf International [2006] eKLR**, it is the plaintiff's view that the generality of the pleadings in paragraphs 8 and 9 ought to be particularized to firstly limit it and enable the plaintiff know with what evidence they ought to be prepared to prevent surprise. As the said paragraphs make positive averments, it is submitted, they are, on the authority of **Mohamed Bashir Rehemtulla vs. Hamzaali Jiwaji** (supra), amenable to an order for particulars in order to serve the objective of ensuring that this prevents unfair surprise during the actual hearing and this will also have the effect of preventing the Defendant from going off tangent and thus lengthening or making the suit more complex than it ought to be. It is the plaintiff's opinion that the said paragraphs are not inclusive of the necessary particulars are required under Order VI rule 8(1) of the pre-2010 Civil Procedure Rules hence the necessity for the present application.

On behalf of the defendant, it is submitted that as the application is brought under Order VI Rules 8(2) and 16 of the old Civil Procedure Rules, by dint of section 81 of the Civil Procedure Act and Order 54 rule 1 of the Civil Procedure Rules, 2010, the application is incurably defective and liable to be struck out. As it has not been demonstrated what peculiar difficulties which informed the decision to abandon the adoption of the new rules, on the authority of section 22 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya, ***Halsbury's Laws of England***, 4th Edn. Vol. 44 at page 616 as well as section 107 of the Evidence Act, Cap 80, the applicant is not relieved from applying the new rules notwithstanding the fact that the request for particulars was made while the old rules were in force. According to the defendant, the application which was non-existent at the time of the repeal has no force and basis in law and should be struck out. With the coming into effect of the new rules requiring filing of witness statements, conducting of case conferences, mode of making applications etc, the defendant will be prejudiced if the application is granted since she will be at loss on which procedure to adopt in advancing its case against the plaintiff and will compromise its right to fair hearing as envisioned under Article 50 of the Constitution.

On the merits of the application, it is submitted that following the dismissal of the application by the plaintiff dated 13th November 2009 seeking injunctive orders on 21st January 2010, the only pending substantive prayer as against the Defendant is that seeking damages for breach of the contract. According to the defendant, based on ***Mulla, 16th Edn. Vol. 2 page 1780***, a request for particulars upon an application will be ordered where it is intended that the particulars will prevent surprise at the trial by informing the opposite party what case he has to meet to define and narrow the issues to be tried and so save unnecessary expense but will be denied where the request seeks to ascertain the evidence by which an opponent proposes to prove his/her case. The particulars requested according to the defendant are to the effect that the Defendant/Respondent left the Plaintiff Company/Applicant to start a business which was not in conflict with that of the applicant and to require the respondent to disclose the name of the business she was going to start amounts to requesting of her to provide the evidence by which the applicant's allegation for breach of contract is to be proved which is contrary to Order 2 rule 10 of the Civil Procedure Rules, 2010 (formerly Order VI Rule 8). On the authority of ***The Digest, Annotated British, Commonwealth and European Cases, Vol. 37(1) 1982 Reissue*** at page 218 paragraph 1497 and **Joshi vs. Uganda Sugar Factory** (supra), it is contended that it is an accepted rule that a party is entitled to an order for particulars only for the purposes of ascertaining the nature of his opponent's case that he

has to meet, and not for the purposes of ascertaining the evidence by which his opponent proposes to prove it. According to the defendant the particulars which the plaintiff seeks are meant to provide it with evidence which will assist it in having the only subsisting prayer in the plaint granted in its favour, which onus under section 107 of the Evidence Act falls on the plaintiff. As the parties are aware that the question of what business/company the respondent joined is in issue, it is submitted on the basis of **Joshi vs. Uganda Sugar Factory** (supra) that the applicant cannot purport that it will be caught unawares on the issue. In the defendant's view, the making of a positive averment is not a sine qua non to a party being compelled to give particulars especially where the giving of the particulars amounts to the giving of evidence. In its view, there is a discretion in the court based on the assessment of the peculiar factors attendant to each case to decide whether a positive averment in a defence will invite an order for particulars. Since it is admitted by the applicant that it seeks the requested particulars in order to use the same as evidence against the respondent, on the authority of **Mae Properties Ltd vs. Olotch Nrb Milimani HCCC No. 331 of 2003** and **Amos Muhinga vs. Peter Anyang Nyongo [2007] eKLR**, it is submitted that the application is misconceived.

In its rebuttal submissions the plaintiff submitted that the defendant cannot rely on the Constitutional provisions cited in the grounds of opposition having partially made disclosures in the defence. I do not intend to waste time on these submissions since the said Constitutional provisions were not addressed by the defendant and in my view they are inapplicable to application for particulars. It is, however, contended that the furnishing of the particulars sought will in no way lighten the plaintiff's burden when it comes to establishing to the Court the veracity of the averments made in the plaint. With respect to **Mulla**, it is submitted that in light of the provisions of Civil Procedure Rules 2010 as well as the provisions of sections 1A and 1B of the Civil Procedure Act. On the issue of reliance on the old Rules, the applicant's response, is that the right to ask for particulars accrued to the applicant before the new rules came into effect and therefore the application is properly covered by section 23(3)(b) and (c) of Cap 2. In the applicant's view the issues raised are technical issues which are contrary to Article 159(2)(d) of the Constitution and ought to be disregarded and the matter decided on merits.

I have considered the application, the supporting affidavit, the grounds of opposition, the submissions made as well as the authorities cited.

The first issue for determination is the competency of the application. As already indicated this application was filed on 30th March 2012. On 17th December 2010, the Civil Procedure Rules, 2010 came into force thus repealing the existing Rules and some of the changes which were introduced by the new rules were the re-arrangement of the various Orders with the result that the Order 6 cited now deals with appearance of parties while the former Order VI is now Order 2. The other change was the replacement of the Roman numbering with numerical ones. Apart from the aforesaid, the procedure of making application by way of Chamber Summons was largely done away with. It has been argued by the applicant that since it had put in motion the request for particulars before the new rules came into force it was entitled to fall back on the old rules. Whereas this argument may sound attractive, under **Order 54** it is expressly stated that the Civil Procedure Rules, 2010 apply to pending proceedings. Accordingly the said rules are expressed to apply retrospectively unless the court orders otherwise. If there is any doubt as to the retrospective operation of the said rules the same must be dispelled by the fact that it is a rule of statutory interpretation that amendments to procedural rules operate retrospectively unless indicated otherwise. In the case of **Said Hemed Said vs. Emmanuel Karisa Maitha & Another Mombasa HCEP NO. 1 of 1998** it was stated as follows:

“The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication. But in the case of an enactment, which alters or affects only procedure or practice of the Court, the general principle is that it has a retrospective effect unless it has some very good reason against it”.

Again in the case of **Mistry Jadva Parbat & Company Ltd vs. Ameer Kassim Lakha & 2 Others Civil Appeal (Application) No. 296 of 2001** the Court of Appeal stated *inter alia* as follows:

“It is also a rule of construction of statutes that prima facie, if a provision of legislation affects procedure only, it operates retrospectively. Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction and one of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation, which has to be ascertained, and the rule of construction is only one of the factors to which regard must be had in order to ascertain that intention”.

It is clear that in the present application, the applicant completely failed to appreciate the fact that there has been a positive alteration in the terrain of Civil Procedure. Whereas it is true that rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish, it must similarly be appreciated that Rules of procedure are aimed at safeguarding the rules of natural justice and equality of hearing and that it would make no sense to have express rules of procedure, which are not enforced and enforced with consistency. In Alicen J R Chelaite vs. David Manyara Njuki & 2 Others Civil Appeal No. 150 of 1998 Pall, JA expressed himself as follows:

“It is true that the primary duty of a court is to do substantial justice but there are certain fixed rules of every game. They are there to ensure fairplay and avoid miscarriage of justice. No law can survive without necessary rules of procedure. They are important instruments in the administration of justice. They cannot be ignored particularly when legislature makes them mandatory”.

This must be balanced against the position that rules of procedure are meant to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that a party has attempted to comply with the rules of procedure but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the pleading. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue. Rules of procedure, it has been said, are designed to facilitate fair demonstration of justice hence their being handmaidens of justice. Where, however, despite trying his best to comply a party has fallen short of the expectation, there is room for atonement of sins and appropriate orders will be made to ensure the ends of justice are met. However, a party who sets out to ignobly ignore the procedural rules laid down does not deserve the court’s exercise of discretion. In the present case, I do not understand the reason behind the applicant’s action of ignoring most of the rules in the Civil Procedure Rules, 2010.

In my view the resort to the old rules in the circumstances of this case is inexcusable. Whereas the overriding objective of the Civil Procedure Act and the Rules made thereunder as provided under sections 1A and 1B of the Act enjoins the Court to investigate whether there are available options before striking out a process, the court is not barred from taking such punitive measures as are adequate against parties who fail to comply with procedural requirements and this may include such measures as declining to award costs where costs would otherwise have been awarded to the party in default as well as penalizing the party in default in costs even if successful. The defendant has alleged that in light of the new Civil Procedure Rules it stands to be prejudiced since it would be at loss as to which procedure to adopt. In my view that would not be a reason to decline the grant of an otherwise meritorious application since the court always reserves the inherent jurisdiction to do justice and may make such orders as are appropriate for the ends of justice.

Accordingly, I decline to strike out the application based on the legal regime upon which it is based.

On the merits of the application, I do not wish to reproduce the authorities cited by the parties which in my view set out the legal parameters for the grant of an order for particulars

From the foregoing, it is clear that in order to decide whether or not to grant the orders sought in this application, the court must look at the nature of the orders sought in the plaint and the defence filed. The plaintiff's claim is based on the allegation that the defendant, its former employee who in course of her employment with the plaintiff became privy to the plaintiff's business strategy, terminated her employment with the plaintiff and joined a direct competitor of the plaintiff contrary to the restraining provisions in agreement between the two parties. According to the plaintiff, the defendant has subsequently endeavored to induce the plaintiff's customers to cease dealing with the plaintiff but instead deal with the said competitors as a result of which the plaintiff has suffered loss and damage.

In paragraphs 8 and 9 of her defence the defendant pleaded as follows:

8. That I am informed by my Advocates on record M/s Daly & Faggis Advocates, which information I verily believe to be true that since I proceeded on the basis of the plaintiff's representation that my intention to start my own business would not breach my employment contract this application is not in good faith and the doctrine of estoppels would operate to bar the Plaintiff/Applicant's claims herein.

9. That I am also advised by my Advocates, which advice I verily believe to be true that Clauses 11.4.4; 11.4.4.1 and 11.4.4.2 ("the restraining clauses") of my employment contract with the Plaintiff Company makes the employment contract to be a contract in restraint of trade.

It is the contents of these paragraphs that provoked the present application. According to the supporting affidavit these particulars are necessary to enable the plaintiff to know the precise nature and extent of the defendant's defence; to enable the plaintiff prepare a comprehensive witness statement and prepare for trial and prevent surprise during the trial.

With respect to paragraph 8 aforesaid the plaintiff is seeking particulars of the name of the business the Defendant was resigning to start, the names of the defendant's business partners, the description of the products and service that the business was to be engaged in and the potential conflict of interest that was likely to arise. On whether these particulars are necessary to enable the plaintiff know the nature of the defendant's case, the plaintiff's case is clearly that of infringement of the agreement between the two parties by engaging in activities which have adversely affected the plaintiff's business. The defendant is charged with diverting some of the plaintiff's customers to the plaintiff's competitors. Some of those who have been diverted are well known to the plaintiff. The suit is not about any other business that the defendant was going to engage in but is all about the activities in which the defendant has engaged in contrary to the agreement between the parties and for which the plaintiff has suffered loss and damage. In my view the request for particulars as framed amounts to a fishing expedition. The provision for furnishing of particulars is not meant to enable parties go on a fishing expedition but to enable parties adequately prepare for the case. With respect to the need for the particulars to enable the plaintiff prepare its witness statement, it is my view that to order the defendant to furnish the plaintiff with particulars in order to enable plaintiff to prepare its witness statement would amount to ordering the defendant to furnish the plaintiff with material on which to build its case against the defendant. The rules of procedure require parties to file their witness statements with their pleadings. Therefore a plaintiff who files a plaint without statements runs a risk of having the plaint struck out. Whereas in appropriate cases a party may be allowed to file further or supplementary statements where the justice of the case demands, there is no justification in my view for a plaintiff to seek particulars from the defendant in order to enable him file witness statements. Whereas I appreciate the fact that these proceedings were commenced before the coming into force of the Civil Procedure Rules, 2010, in my view as soon as the new rules came into force the parties should have striven to comply with the new rules before adverting to application for particulars since in my view the new rules if properly followed have the effect of minimizing on such applications. Accordingly, I am not satisfied that the particulars requested in respect of paragraph 8 of the defence are necessary.

With respect to paragraph 9 of the defence, the plaintiff seeks that name of the company and or registered Business name of the Company or Business that the Defendant currently works for and/or worked for in the year 2010 or has and/or had an interest in 2009 and 2010 either as director and or shareholder or

partner; the date of incorporation of the aforementioned company; the particulars of the defendant's interest in the said Company and the date when the aforementioned Company and or Business started trading in Kenya. Again from the pleadings, the plaintiff's complaints against the defendant are directed at certain actions of the defendant subsequent to her leaving the plaintiff's employment which has occasioned loss and damage to the plaintiff. One would understand the plaintiff's concern if it was directed to the activities of the defendant in respect of the company the subject of the dispute. The particulars as framed suggest that the plaintiff is not sure of the defendant's activities since leaving employment and may suggest that the particulars sought are meant to acquaint the plaintiff with the said activities and hence enable the plaintiff build its case against the defendant. From the authorities cited by the parties herein that is not the purpose of an order for furnishing of particulars. The purpose of the particulars is to enable the party know exactly how far he is supposed to go in collecting its evidence so that the evidence is relevant to the issues in dispute thus reducing time by narrowing down the issues.

Accordingly, it is my view that had the parties herein complied with the new rules, the present application may well have been rendered unnecessary.

In the premises, I decline to grant the particulars sought. Instead I direct the plaintiff to file and serve its list of witnesses together with their signed statements as well as complete list and copies of documents within 21 days of this decision. Upon service of the said documents the defendant will, likewise file and serve her list of witnesses as well as list and copies of documents within 21 days. Thereafter, the parties to file issues, agreed or otherwise, within seven days. Liberty to apply granted.

In light of the plaintiff's failure to adhere to the provisions of the Civil Procedure Rules, 2010, the costs of this application will be borne by the plaintiff.

Dated at Nairobi this 3rd day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Mr. G G Muchiri for Plaintiff

Mr. G M Muchiri for the Defendant