

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 118 of 2005

DENNIS OUMA SIMOLO.....PLAIANTIFF

VERSUS

A.A. TRASPORTERS LTDDEFENDANT

RULING

The defendant took out the motion dated 20/11/2008 in which it sought for leave to file its list of documents out of time. The motion is stated to be taken out pursuant to sections 3A and 95 of the Civil Procedure Act and under order X rule 11A and order XLIX rule 5 of the Civil procedure rules. It is supported by the affidavit of Godfrey Mutubia. The plaintiff filed an affidavit in reply to signify his objection to the motion.

It is the defendant's submission that the orders sought in the motion should be given because the document it intends to rely on is a vital report prepared by a document examiner which report was prepared well after the time fixed for filing the defendant's list of documents had expired. It is said that the defendant received the plaintiff's notice to produce documents on 27/09/2008 but it inadvertently failed to file its list of documents.

The plaintiff opposed the motion on the grounds that the defendant had time to deal with the plaintiff's documents before the plaintiff testified. It is the plaintiff's submission that the defendant's application is an afterthought.

I have considered the two devengent arguments. Basically the defendant is seeking to file its list documents out if time. It is apparent from the record that the plaintiff has testified and has even closed his case. The record further indicates that the defendant was served with a notice to produce dated 20-09-2007 on 27-09-2007. Amongst the documents listed in the aforesaid notice is the letter dated 26th August 1997. That letter was produced as the plaintiff's exhibit. The defendant had urged this court to grant it leave to enable it file a list of documents which shall include a document examiner's report in respect of the letter dated 26.8.97. The purpose of the order X rule 11A of the civil procedure rules is to enable parties discover documents before a hearing commences. The law did not envisage a situation where parties discovered documents after a hearing. That ground alone disposes of the motion. The plaintiff had already closed his case. If the application is allowed it will mean that the case will have to be reopened again. Even if I were to be persuaded to grant the application, still the defendant may not convince me because it failed to annex a copy of the documents nor the list of the documents. It would appear the defendant is in a fishing expedition. In any case there are no good reasons why the defendant delayed to file its list of documents. I can only infer that the delay was well calculated to spring up a surprise against the plaintiff.

In the end and on the basis of the above reasons I dismiss the motion with costs to the plaintiff.

Dated and delivered this 6th day of May 2009

J. K. SERGON

JUDGE