



Registered Trustees of Catholic Archdiocese of Kisumu v Awad Auto Limited (Environment & Land Case 146 of 2023) [2024] KEELC 5469 (KLR) (16 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 146 OF 2023**

**JA MOGENI, J
JULY 16, 2024**

BETWEEN

**REGISTERED TRUSTEES OF CATHOLIC ARCHDIOCESE OF
KISUMU PLAINTIFF**

AND

AWAD AUTO LIMITED DEFENDANT

RULING

1. The plaintiff/applicant seeks orders under Order 2 Rule 10 (2) for the defendant to be ordered to serve upon the plaintiff the particulars requested on 13/02/2024. In default of compliance within 14 days, the plaintiff seeks order that the defence filed on 11/12/2023 shall be struck out with costs and the suit listed for formal proof and costs awarded to the plaintiff.
2. The plaintiff’s counsel has sworn an affidavit deponing that the plaintiff requires the requested particulars for the purposes of shedding light on all the matters in controversy. The court was urged to issue the orders sought so that discovery may be finalized.
3. The subject Application is premised on the grounds contained at the foot thereof, and same is further supported by the Affidavit of the applicant’s counsel Paul Amuga sworn on 26/03/2024.
4. The defendant, objected to being ordered to provide the necessary particulars. The defendant in their Replying Affidavit dated 5/04/2024 sworn by Peter Maina Kingori Director of the Defendant opposed the application and deponed that it was incompetent and bad in law. He averred that the particulars sought are provided in the defendant’s bundle at page 37. Further that the defendant is trying to retrieve form its bank copies of the document that may not be legible.
5. That based on the Notice of Assignment dated 19/10/2018 and the consent annexed to the defendant’s bundle the plaintiff has no claim owed of Ksh 100,000,000 and that Ecobank payment is still ongoing and that Ecobank has not complained of any default in payment of Kshs. 100,000,000.



6. That the plaintiff advocates have confirmed payment of Kshs 57,000,00 in the sale transaction as 1st instalment and Kshs. 173,430,000 was to be paid within 150 days from 1st January 2018. It is the defendant's contention that the documents filed are adequate to sustain the defendant's claim.
7. Having considered the application, I find that neither the 1st and 2nd defendants nor the 3rd defendant object to the request for particulars served upon them by the plaintiff. In the circumstances, I do order that the defendants shall file an answer to the plaintiff's request for particulars and supply the required particulars within 14 days from today.

Analysis and Determination

8. The issue for determination is if this court should strike out the defence for failure by the defendant to supply particulars to the plaintiff.
9. The provisions of Order 2 rule 10 (2) of the Civil Procedure rules do provide for supply of particulars. The said provisions state as follows: -

“The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.”
10. I have perused the defence 11/12/2023, It is clear and concise on the subject matter of the claim. I have also perused the plaintiff's witness statements which bring out the finer details of the claim. I have perused the request for particulars dated 13/02/2024 and noted that most of the information being sought falls in the ambit of evidence and will be best tackled through cross examination.
11. As regards the documents requested by the plaintiff, they are all documents which are relevant to the issues before the court. The plaintiff and his advocate are entitled to inspect the original documents. The fact that copies may have been availed to them is not sufficient to negate that right.
12. As submitted by defendant in its submissions dated 31/05/2024, the defendant submits that the plaintiff admits having received Kshs. 155,930,000 and cannot seek proof of payment. Further that the plaintiff can also not claim the Kshs 100,000,000 assigned to Eco Bank. Through the Legal Assignment the Defendant was bound to pay Eco Bank the said amount of Kshs. 100 Million.
13. In the case of *Joshi vs Uganda Sugar Factory Limited*(1968) EA 570 the court of Appeal held as follows;

“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 so doing it will narrow the issues and avoid surprise and so reduce expense.”
14. This court has noted that though the defendant stated at paragraph 4 of the Replying Affidavit that the documents sought by the plaintiff were provided at page 37 of the defendant's bundle, the same were not attached. Further, the defendant has stated that he is trying to retrieve the information sought from the bank for copies that are not legible. In essence it is the defendant's own admission that indeed there are copies that are not legible.
15. It is this court's considered view that the plaintiff should be supplied with some of the particulars requested for. This will assist in narrowing down the issues rather than parties engaging in long drawn arguments and requests for adjournments so as to fill gaps in their cases.



16. It is trite law that when a lumpsum is claimed, particulars of its breakdown should be given. This proposition is very ably discussed in the Supreme Court Practice 1985 edition at page 287 as follows: -

“Where the claim is lumpsum particulars of its items must be given ... where a writ is issued claiming a lumpsum for work and labour done, the defendant is entitled to particulars showing how that lumpsum is arrived at by reference to the several items of the bill”
17. In the instant application it is about payment of purchase of a suit property and not work done but it is still a request for documents that show the payments. Infact it is about the defendant supplying legible documents. This is also important not just for the parties but also for the court. Courts overall do not encourage trial by surprise.
18. Accordingly, instead of striking out the defence I hereby give another opportunity to the defendant to provide full and proper particulars which are legible.
19. In reference to the request for particulars dated 7/02/2024 the defendant is ordered to supply particulars as sought therein. The plaintiff and his advocate are entitled to the original documents. The fact that copies may have been availed to them is not sufficient to negate that right.
20. It is also clear that by supplying the said particulars the defendant’s witnesses will also be better prepared for the hearing of the case. I therefore grant the orders sought but only limited to the request for particulars that are outlined in the plaintiff’s request dated 7/02/2024. The foregoing therefore means that I decline to strike out the defendant’s defence. Each party shall bear its own costs of the application as it is evident that some of the particulars that were sought by the plaintiff fall in the realm of cross-examination.
21. In default of the defendant complying with these orders within 14 days from the date of issuance of this order the defence will stand struck out and the suit shall be listed for formal proof. The plaintiff is at liberty to apply.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH JULY 2024.

.....

MOGENI J

JUDGE

In the virtual presence of:

Mr. Amuga for the Plaintiff

No appearance for the Defendant

Ms. C. Sagina - Court Assistant

.....

MOGENI J

JUDGE

