



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE NO. 5237 OF 1987

MOHAN MEAKINS LTDPLAINTIFF

VERSUS

H G THANAWALLA LTD.....DEFENDANT

RULING

November 23, 1989 G S Pall Judge delivered the following ruling.

The plaintiff has sued the defendant for Kshs 1,334.50 on account of various discounts and claims allegedly due to it by the defendant. The defendant has denied liability and has counterclaimed a sum of Kshs 593,985.25.

By a request dated January 22, 1988 Mr Nagpal counsel for the defendant applied to the plaintiff for particulars of paragraphs 3,4 and 5 of the plaint. The plaintiff failed to supply the required particulars and also failed to take any steps to get on with its case. It also failed to file its defence on the defendant counterclaim with the result that on October 25, 1988 judgment was entered in favour of the defendant on the counter claim which was subsequently set aside on an application by the plaintiff. It was the defendant who on May 12, 1988 took out the summons for directions seeking (inter alia) the particulars as per its request dated January 22, 1988 and mutual discovery of documents. On the June 27, 1988 C K Njai Esq, deputy registrar of this court ordered the plaintiff to comply with the defendant's request for particulars within 15 days of his order. The parties were further ordered to file and serve their respective lists of documents relative to the issues within a period of 30 days.

The plaintiff did not comply with the said order. Consequently on November 29, 1988 the defendant took out a notice of motion seeking that the plaint should be struck out for non compliance with the said order of the court.

On January 19, 1989 only after the said application had been filed, the plaintiff filed particulars in answer to the defendant's request which had been made almost a year ago. Honourble Mr Justice Mbiti who heard the said application in his ruling delivered on June 6, 1989 deprecated the plaintiff's conduct and noted that the plaintiff's stand and the arguments advanced by the plaintiff's advocate during the hearing showed a willful disregard of the court's order. He also said that he would have dismissed the

plaintiff's suit but as it appeared to him that the plaintiff's advocate might not have drawn the plaintiff's attention to the court's order, the plaintiff should not be made to suffer because of the sins of its advocate. Thus he gave another opportunity to the plaintiff to comply with the said order of the court but awarded costs of the application to the defendant. He further ordered that in the event of non compliance with his order, the plaintiff's suit should stand dismissed with costs. The plaintiff filed the list of documents in compliance with the court order.

By a letter dated August 16, 1989 counsel for the defendant wrote to the plaintiff's advocates pointing out that the particulars supplied were grossly deficient and did not constitute compliance with the court order. His main complaint was that the plaintiff had failed to give an itemized breakdown of the sum claimed. The plaintiff was requested once again to give proper particulars within seven days, or else, it was warned, an application would be filed for appropriate orders. The plaintiff did not respond to that letter. This led to the defendant's present application which was filed on September 25, 1989 for further and better particulars. The defendant has further prayed in its application that in default of providing the said particulars the plaint should be struck out.

On October 2, 1989 as Mr Nagpal finished his submission on the said application before me emphasizing that the plaintiffs default in supplying proper particulars, particularly the breakdown of the sum claimed, was willful, Mr Kurgat for the plaintiff submitted as follows:-

"The particulars had been supplied. Not it is alleged tht the particulars are not sufficient. I undertake to give all the particulars within 7 days. I understand that if the particulars are still lacking the court can dismiss the suit." So, as his request further hearing of the application was adjourned to October 12, 1989. Instead of filing the further particulars within 7 days, the plaintiff field them on October 12, 1989 itself. Consequently the hearing of the application had to be further adjourned to October 17, 1989.

Mr. Nagpal submits that the particulars are still deficient and has urged the court to dismiss the plaintiff's suit. The defendant's request No 2.3 on paragraph 4 of the plaint was to specify each of various claims referred to. The plaintiff's answer in its first set of particulars filed on January 19, 1989 was:-

"A Photostat copy of the plaintiff self explanatory letter is attached".

However there was no letter attached to the said particulars. The letter was not even identified by its date. In the further particulars filed on October 2, 1989 the plaintiff has not at all mentioned about the said letter. On the other hand the plaintiff appears to have abandoned its original answer and has instead given a summary of details of the items of fleet discount and no claim bonus claimed by it. This obviously amounts to amending the original particulars which can only be done with the leave of the court and no leave had been sought by the plaintiff. Moreover the sum total of these two items ie the fleet discounts and no claim bonus comes to Kshs 277,054.00 according to Mr Nagpal. For the rest of the plaintiff's claim there is still no breakdown and it is totally unsupported by particulars.

By the defendant's request 2.4.1. the plaintiff had been requested to specify all things and matters relied upon for the assertion that the alleged claims were due to the plaintiff. The reply in the first set of particulars was "Photostat copies of the defendant's self explanatory letters are attached". Once again there were no such copies attached to the particulars or even identified by their respective dates. In the further and better particulars subsequently filed the original stand had been abandoned by the plaintiff and a completely different answer had been given namely "The plaintiff is entitled to the above mentioned discount as a matter of practice and customs in the insurance industry". This does not answer the defendant's request. Moreover the answer is vague and evasive. The practice and custom in the insurance industry have not been elaborated or defined. By request No 2.4.2. the plaintiff was

required to specify all things and matters relied upon for the assertion that the said discounts were due to the plaintiff. Its first answer was that as a matter of practice a fleet discount was allowed to any insured with a fleet of motor vehicles and that a "no claim bonus" was allowed as of right if any motor vehicles remained accident free for a year or more and that special discount was allowable as a matter of custom on all good risks. These particulars set out general principles but obviously do not answer the defendant's request as they do not state how these discounts were regarded due to the plaintiff and how the matters of insurance practice or custom were considered applicable to it. Further particulars on this request also do not answer the request. In answer to requests 2.4.3 and 2.4.4 the defendant has not been given the names of the underwriters from whom the said claims had discounts were due. This information too is material to enable the defendant to prepare its case for the trial.

Mr. Nagpal's main complaint is that the plaintiff has willfully avoided answering his request 2.5 where by he had required a breakdown of the plaintiff's lumpsum claim. In the first set of particulars the plaintiff had said that the details of its claim were being worked out and would be available during the trial. In the further particulars filed by the plaintiff this request has not been answered. However Mr. Kurgat in the course of his judgment has said that the plaintiff did not embark upon this action without having full facts and details with it. In other words he has the information but he is not prepared to disclose it. This is somersault and going back on the earlier undertaking given on October 2, 1989 to give all the particulars requested by the defendant. His present stand is that the defendant is not entitled to this information as it tantamounts to disclosing the plaintiff's evidence and that whatever information the defendant was entitled to has been given. He further submitted that insisting on more information was a fishing expedition on the part of the defendant who was allegedly trying to probe into the plaintiff's case in a questionable manner. But he has also said that he had given as much information as he could get from his clients which suggests that he is not in a position to provide any better particulars. But then he has again contradicted himself by saying that if the court ordered, he would give the breakdown of his clients claim. 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"

Mr. Nagpal has also submitted that the plaint was filed in peculiar circumstances. The defendant had given a winding up notice dated December 11, 1987 to the plaintiff demanding payment of Kshs 704,645.15 under section 230 of the Companies Act. A few days before the said notice expired the plaintiff instituted this action which according to Mr Nagpal was to forestall the threatened winding up proceedings against the plaintiff. I would not like to comment on this aspect of the matter at this stage. I am far from being satisfied with the conduct of the plaintiff regarding the prosecution of this action. But for the matters hereinafter mentioned I would have unhesitatingly struck out the plaintiff's particulars provided so far as being insufficient and evasive. However I have noted that in the application before me the defendant has not asked for further and better particulars on its request 2.5 of the request for particulars which requires the plaintiff to give a breakdown of its lumpsum claim. This item is by far the most important item in the request and the matter in this respect has been argued at length before me. It looks that the defendant omitted to mention this item in its application through some oversight. Strictly speaking the defendant cannot have what it, in its application has not asked for. But as the request in question has been argued before me I formally amend the defendant's application in order to include this item therein for further and better particulars. Moreover, this case has been confirmed for hearing starting on December 6, 1989 which is just two weeks away. I would not deprive the plaintiff of the opportunity to be heard on merits provided the plaintiff complies with my order. Accordingly instead of striking out the particulars straightaway I hereby give another opportunity to the plaintiff to provide full

and proper particulars and I order that the plaintiff shall answer the defendant's requests number 2.3, 2.4.1, 2.4.2, 2.4.3, 2.4.4 and 2.5 paragraph 4 of the plaint in the defendant's request for particulars dated January 22, 1989. Such particulars shall be provided by November 30, 1989. Unless the plaintiff gives full adequate and proper answers within the prescribed time, the plaint shall stand struck out as being frivolous and vexatious, and the plaintiff suit dismissed with costs.

The plaintiff will pay the defendant's costs of this application to be taxed and payable forthwith. The matter shall be listed before me on December 1, 1989 for any further order which in the circumstances may be called for.

Dated and Delivered at Nairobi this 23rd day of November , 1989

G.S PALL

JUDGE



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