Case Number:	Civil Appeal 176 of 2007
Date Delivered:	19 Nov 2008
Case Class:	Civil
Court:	Court of Appeal at Malindi
Case Action:	-
Judge:	Riaga Samuel Cornelius Omolo, Philip Kiptoo Tunoi, John walter Onyango Otieno
Citation:	OMAR SHARRIF T/A KEMCO AUTO V FREIGHT FORWARDERS LIMITED & ANOTHER [2008] eKLR
Advocates:	-
Case Summary:	Civil Practice and Procedure - discovery - discovery of documents - dismissal of a suit for failure by the plaintiff to comply with an order for discovery - order to make discovery having been issued but High Court having declined to order that if the plaintiff failed to make discovery, the suit would be dismissed - whether it was proper for the court to later dismiss the suit on the ground of the plaintiff's failure to make discovery - dismissal of a suit a serious matter which should have been preceded by an inquiry as to whether the plaintiff had willfully failed to comply with the order of discovery - Civil Procedure Rules order 10 rule 11, 13, 20, 23
Court Division:	Civil
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	266 of 2003
Case Outcome:	-
History County:	Mombasa

Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CIVIL APPEAL 176 OF 2007

OMAR SHARRIF T/A KEMCO AUTO……..……APPELLANT

AND

1. FREIGHT FORWARDERS LIMITED

2. CONSOLE BASE LIMITED…….....……RESPONDENTS

(Appeal from a ruling and order of the High Court of Kenya Mombasa (Sergon, J) dated 30th March, 2007 in H.C.C.C No. 266 of 2003)

****

JUDGMENT OF THE COURT

In an amended plaint dated 31st January 2005, the appellant herein, **Omar Sharif**, trading as Kemco Auto, sued **Freight Forwarders Limited** and **Console Base Limited** (first and second respondents respectively), seeking against them jointly and severally, judgment for USD 85,000, general damages, costs of the suit and interest at court rates on USD 85,000 and general damages on grounds that due to the negligence of both respondents, the appellant lost part of his imported goods/cargo which he, under contract with the first respondent, the first respondent took into its custody but handed over to the second respondent which did not take serious precaution to protect it by failing to provide reliable security to guard the goods and/or failing to ensure that the same goods/cargo were beyond the reach of thieves and/or burglars.

Both respondents denied the claim and the first respondent filed its written statement of defence on first April 2005 while the second respondent filed an amended defence and counter-claim on 17th February 2006 and re-amended defence and counterclaim on 28th February 2006. A defence to counter claim was filed by the appellant on 28th February 2006. After close of the pleadings, the second respondent filed chamber summons dated 16th June 2006 under **Order X rules 11, 13, 20, 23** of the Civil Procedure Rules and **sections 3A and 22** of the Civil Procedure Act. In that application, the second respondent sought, among others, an order that:

"1 (a) ……..

(b) ……..……

(c) after the said inter-partes hearing to order that the plaintiff herein do make discovery on oath within such reasonable time as may be specified by this Honourable Court of all the documents relating to any matter in this suit and more in particular all documents including the

Customs Clean Report of Findings and the letters sent by the Customs and Excise Department to the plaintiff in respect of the plaintiff's claim and all other documents in respect of the plaintiff's claim; and

2. That in the event the plaintiff fails to comply with discovery within the time specified by this court, the plaintiff's suit be dismissed with costs; and

3. ……..."

That application was based on five grounds namely; that the second respondent, vide oral requests and vide a letter dated 9th February 2006 to the appellant's advocates, requested the appellant to make discovery but in vain; that it was necessary for the second respondent to know the case he was facing by reference to the documents relied on by the appellant in his suit; that the said documents were within the possession of the appellant and were related to matters in question in the case and were necessary for the effective disposal of the suit which was then set down for hearing on 22nd June 2006 as the facts raised in the plaint referred to a claim for damages in respect of the loss of cargo. That application was supported by an affidavit sworn by one Anita Shah, an advocate who was then having the conduct of the suit on behalf of the second respondent. Several correspondences exchanged between parties and other persons not parties to the suit were annexed to that affidavit. The appellant, through his learned counsel, Kiume Kioko, responded to the application by way of a replying affidavit sworn on 22nd June 2006 and filed on that day. In that affidavit, Mr. Kioko stated at paragraph 4 that he particularly wrote to the firm of Messrs Inamdar & Inamdar, the advocates for the second respondent, and he forwarded to them the list of documents as requested by that firm of advocates. He annexed a copy of his letter dated 14th February 2006. As to some two letters and the document Customs Clean Report of Findings Mr.Kioko had the following to say in that affidavit at paragraphs 7 and 8:

"7. That the two letters now requested by the 2nd defendant were written to Customs & Exercise (sic) Department and they dwelt on issues of payment of duty, which is not an issue in the present suit. I nevertheless attach true copies of the said letters and mark them as KK5.

8. That the Customs Clean Report of Findings, which document is also requested by the 2nd defendant only applies when goods in issue are inspected for duty assessment at the country of origin which is not the case herein. In the present case, the goods were inspected upon arrival at the port of Mombasa and an Import Declaration Form (IDF) issued. This is part of the documents served upon the defendants upon request."

That application came up for hearing before the superior court (Sergon J.) on 22nd June 2006. The ruling was reserved and delivered on 9th February 2007. In that ruling, the learned Judge stated, *inter alia*, as follows:

"What is not clear is whether or not copies (sic) the aforesaid documents were indeed forwarded to the defendants. The replying affidavit of Kiume Kioko does not assist because it is not categorical whether or not the documents annexed therein were the ones requested by the defendants' learned advocates. In view of the foregoing findings, I am satisfied that the summons dated 16th June 2006 is well founded. I allow the summons in terms of prayers 1(c) and 3.

For the avoidance of doubt, the plaintiff should comply with the order issued in terms of prayer 1(c) within 21 days from the date of this order. Costs of the application shall be paid to the 2nd defendant. The 1st defendant is denied costs in view of the fact that it failed to file a reply

to the summons. I am not sure whether or not the documents sought to be discovered would dispose of the entire suit. Because of that, I will not allow prayer 2 of the summons. I will in its place direct the parties to list the suit for mention after 21 days for further orders and directions."

Thus, by that ruling, the learned Judge, while ordering the discovery and ordering costs to be paid by the appellant to the 2nd respondent, refused to allow prayer 2 which was, as is clear above, a prayer seeking dismissal of the suit in the event the appellant failed to comply with discovery order within the period directed by the court.

In what would appear to us to be an attempt to comply with the order made on 9th February 2007, the appellant filed an affidavit sworn by him on 22nd February 2007 on that date. At paragraph 2 of that affidavit, he discovered and annexed to that affidavit twelve documents, ten of which were marked separately and two, being letters from Kenya Revenue Authority, were marked together. As to the Customs Clean Report of Findings, he stated:

"That I am not in possession of the Customs Clean Report of Findings as the goods herein in issue were locally valued/inspected and that is the reason I was issued with the import declaration forms annexed in paragraph 3 above."

The matter came up for mention on 14th March 2007 before the same learned Judge. On that day, the record shows that Mr. Inamdar, the learned counsel for the second respondent, addressed the court shortly stating that the discovery was not done, and thus the order for discovery had not been complied with. He then stated:

"The suit should be dismissed."

Mr. Kioko in reply to that, stated that the appellant had given all the documents in his possession and stated further:

"These are matters of evidence. We should be allowed to proceed for hearing. We have complied with the order."

Thereafter, Mr. Inamdar and Ms. Amarshi, the learned counsel for the first respondent, insisted that the appellant should produce Customs Clean Report of Findings (CCRF). The learned Judge of the superior court reserved his ruling on that day to 30th March 2007. At this juncture, we need to observe that the date 14th March 2007 was set for mention and further directions only. However, on 30th March 2007, the learned Judge delivered a ruling in which he stated, *inter alia*, as follows:

"I have considered the submissions of Mr. Inamdar and Miss Amarshi, learned advocates for the 2nd defendant and 1st defendants (sic) respectively. I have also considered the submissions of Mr. Kiume Kioko, learned advocate for the plaintiff. I have further perused the affidavit of Omar Shariff. It is clear from the submissions and the aforesaid affidavits that the plaintiff did not provide copies of the documents he was directed to avail via an affidavit for discovery. These documents were Customs Clean Report of Findings (CCRF) and letters sent by the Customs and Excise Department to the plaintiff."

The learned Judge then cited the provisions of **Order X rule 20** of the Civil Procedure Rules and proceeded as follows:

"The plaintiff does not deny that the documents requested to be discovered are in his

possession. It has not been alleged that the documents are lost or destroyed. What is clear from the position taken by the plaintiff is that it is not necessary to avail the documents. I have already stated that the consequences of a willful non-compliance is dismissal of the suit. Of course a court of law cannot compel the production of such documents. This court is entitled to pass the orders directing discovery to be made and if the orders are disobeyed, then the court will dismiss the suit. The plaintiff's act of filing an affidavit which did not contain copies of the documents to be discovered is regarded as willful disobedience of the court order. Courts exercise the discretion to dismiss sparingly. This is one of those cases where this court should crack the whip by dismissing the suit. For the above reasons, the suit is hereby ordered dismissed for want of prosecution with costs of the application and the entire suit to the defendants."

The appellant felt aggrieved by that ruling and hence this appeal before us premised on four grounds of appeal as follows:

"1. The learned Judge erred in law and in fact by finding that the appellant failed to make a discovery on oath as demanded by the 2nd respondent herein.

2. The learned Judge erred in law and in fact by not considering the entire affidavit as sworn by Omar Shariff on the 22nd February 2007.

3. The learned Judge erred in law and in fact by dismissing the appellant's suit for want of prosecution.

4. The learned Judge erred in law and in fact by not finding that the appellant had not pleaded the documents sought to be discovered by the 2nd respondent and neither did the 2nd respondent plead the same in its defence."

Before us, Mr. Omolo, for the appellant, submitted that the learned Judge of the superior court in his ruling of 9th February 2007 had specifically refused to allow prayer 2 of the second respondent's application; that prayer had sought dismissal of the suit in case discovery orders were not complied with. Having done so, Mr. Omolo contended, the learned Judge could not later on an oral application allow the same prayer. In his view, if the respondents felt the discovery order made on 9th February 2007 was not complied with, they should have moved the court a fresh by way of a notice of motion for dismissal of the suit. That would have allowed evidence to be adduced on whether the appellant had fully or partly complied or not complied with the discovery order and whether, if he had not complied fully or partly, then such non-compliance was willful or not. He argued further that factually, the learned Judge erred when he based his dismissal of the suit on reasons, *inter alia*, that the appellant did not make discovery of copies of two letters sent by the Customs and Excise Department to the plaintiff as copies of these letters were discovered on oath in the affidavit of the appellant sworn on 22nd February 2007 and filed in compliance with the order made by the court on 9th February 2007. As to the Customs Clean Report of Findings, Mr. Omolo submitted that that could not be discovered because, as stated in the same affidavit, it was not in possession of the appellant.

Mr. Inamdar, the learned counsel for the second respondent, in opposing the appeal, submitted first that it was not correct to state that the learned Judge of the superior court made his decision dismissing the suit upon an oral application and without any application before him. The chamber summons upon which he made the ruling on 9th February 2007 was still subsisting as according to Mr. Inamdar, the decision in prayer 2 of the chamber summons had been deferred pending the compliance or non compliance with the order for discovery made under prayer 1(c) of that application. Thus, the ruling

made dismissing the suit on 30th March 2007, was the court's decision on prayer 2 and it was made after the expiry of 21 days within which the appellant had been ordered to comply with the discovery order and after it was clear he had refused to so comply with the order. He further invited us to accept that the learned Judge, in dealing with the matter, was exercising his judicial discretion and that being the case, this Court should not interfere with that discretion except in specific circumstances and he referred us to the well known case of **Mbogo and Another vs. Shah (1968) EA 93** in support of his contention. Again, he referred us to several other authorities on other aspects of the matter. On our part, we have perused and considered all of them.

Ms. Amarshi, the learned counsel for the first respondent, adopted Mr. Inamdar's submission and also referred us to several authorities which we have also considered.

In our view, the main issue in this appeal is whether the learned Judge of the superior court had, in his ruling dated and delivered on 9th February 2007, dealt with prayer 2 of the chamber summons which sought dismissal of the suit in case of non-compliance with the orders sought in prayer 1(c) or whether he deferred his decision on that prayer to a later date after the time he gave for compliance had expired. The next issue closely related to the earlier issue is whether, if he had made a decision on that prayer, he could re-open the consideration of that prayer on an oral application and proceed to make a further and a different decision on it. We have extensively reproduced above the relevant parts of the ruling delivered on 9th February 2007. The learned Judge specifically allowed the summons in terms of prayer 1(c) and 3. There is no doubt about that and the parties have no dispute on those two prayers. Indeed, the learned Judge sought to avoid any doubt on those two prayers and ordered that the appellant was to comply with the order issued in terms of payer 1(c) within 21 days from the date of the order and costs of the application (presumably on that prayer) was ordered to be paid to the 2nd respondent. The first respondent was denied costs. When it came to prayer 2, the learned Judge stated:

"I am not sure whether or not the documents sought to be discovered would dispose of the entire suit. Because of that, I will not allow prayer 2 of the summons. I will in its place direct the parties to list the suit for mention after 21 days for further orders and directions."

(underlining supplied).

Mr. Inamdar submits that in making the above orders, the learned Judge was merely deferring the decision on prayer 2 to a date after 21 days so as to decide it on the basis of whether or not there was compliance. With respect, we do not agree. If the learned Judge was minded to do so, nothing would have been easier than to specifically state so. We would have expected him to say, for instance, that he would decide on prayer 2 after the period allowed for compliance was over. He did not say so. He specifically stated that he would not allow prayer 2 of the summons. Before he stated that, he said he was not sure whether the documents sought to be discovered would dispose of the entire suit, and it was because of that that he refused prayer 2 and directed instead that the matter be mentioned after 21 days for further order and direction. In our view, he could only make further order and direction after 21 days and after evidence was adduced to enable him know whether the documents sought to be discovered would dispose of the entire suit and, if they would, and the appellant failed to make the discovery, and if such failure was willful, then and only then would the court dismiss the suit.

It is clear to us that such requirement would have only been accomplished if on the date of the mention, it was found that no discovery was made by the appellant, the respondents or either of them would move the court, by way of a notice of motion, properly brought, for dismissal for failure to comply with the court order made on 9th February 2007. This would be necessary, in our view, because the

court had disposed of prayer 2 of the application for discovery and so could not revive it as it had not been allowed by the order of the court made on 9th February 2007. We therefore find that the learned Judge of the superior court, in entertaining an oral application and making a decision overruling his own decision made on 9th February 2007 in which he specifically did not allow prayer 2 without a proper application before him, acted out of jurisdiction. He, therefore, did not exercise his discretion properly.

Further, we find it difficult to appreciate the learned Judge's finding that all the documents the appellant was ordered to discover were not discovered. The appellant's affidavit sworn on 22nd February 2007 annexed the two letters from Kenya Revenue Authority and Customs and Excise Departments. Mr. Omolo felt the learned Judge could not have been right in his ruling that those two letters were not discovered. Mr. Inamdar did not dispute that. What is important to us on this aspect is that their discovery by the appellant was clear evidence that the appellant was not willfully disobeying the court order. He could not discover Customs Clean Report of Findings on grounds stated in his affidavit that the same was not issued in respect of the subject goods. The respondents and the Kenya Customs and Excise Department thought the value attached to the goods must have attracted that document. If that were so, then the more reason why a proper application should have been made for dismissal on account of disobedience of court order so that such issues could have been ventilated. Perhaps that is what Mr. Kioko was alluding to when he told the superior court on 14th March 2007, when the oral application for dismissal was made, that the appellant had given all the documents in his possession and "those were matters of evidence."

We think that the dismissal of a suit, such as was done here, is such a serious matter that would have required inquiry, for example, whether a party had willfully refused to make discovery, and those matters needed to be established by proper evidence. We note that the learned Judge was alive to the need to establish whether failure to comply with the discovery order was willful before the party was refused a hearing or before the suit was dismissed. We, however, note that he did not allow for the ascertainment as to whether the appellant in this case had willfully refused to make the discovery. This is an important element in a case such as before us where a party is being denied a right to be heard on grounds that he has failed to discover a document which he says was not issued to him by the relevant authorities. In the case of **Hytec vs. Coventry City Council (1997) I WLR 1666** to which we were referred by Mr. Inamdar, Auld, L.J, cited the remarks of Beldam, L.J in the case of **Caribbean General Insurance Ltd. vs. Frizzel Insurance Brokers Ltd.** [1994] 2 Lloyod's Rep. 32 CA as follows:

"Final, preemptory or "unless" orders are only made by a court when the party in default has already failed to comply with a requirement of the rules or an order, and the court is satisfied that the time already allowed has been sufficient in the circumstances of the case and the failure of the party to comply with the order is in excusable."

(*underlining supplied*)

That position in law is also well stated in the case of **Eastern Radio Service vs. Tiny Tots (1967) EALR 392** to which we were referred by Ms Amarshi. Sir Charles Newhold, then President of the Court of Appeal for East Africa, states at page 395 of that report as follows:

"It is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the court. Nor is it, I think, in dispute that willful means intentional as opposed to accidental."

And Sir Clement De Lestang, V.P. stated in that case:

"The authorities show, and there is no dispute about it, that a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the plaintiff is avoiding a fair discovery or is guilty of willful default."

As we have stated, we think, in order to establish willful default, a proper application should have been made since the learned Judge had in fact refused to allow prayer 2 in his ruling of 9th February 2007. We note with regret that that was not done.

In the result, this appeal succeeds and is allowed. The order of the learned Judge delivered on 30th March 2007 dismissing the suit is set aside. The suit is restored to hearing according to law. We award the costs of the appeal to the appellant.

Dated and delivered at Nairobi this 19th day of November, 2008.

R.S.C OMOLO

……

JUDGE OF APPEAL

P.K. TUNOI

……

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR