



REPUBLIC OF KENYA



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**Nyanza Management Limited & another v National Bank of Kenya Limited & 3 others
(Commercial Case 68 of 2018) [2023] KEHC 19329 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 68 OF 2018
RE ABURILI, J
JUNE 27, 2023**

BETWEEN

NYANZA MANAGEMENT LIMITED 1ST APPLICANT

ROSE OLUGA 2ND APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT

JAMES SWAO 2ND RESPONDENT

COMMISSIONER OF LANDS 3RD RESPONDENT

HARJIT SINGH PANDHAL 4TH RESPONDENT

RULING

1. This suit is extremely old, having been filed in 2012 and handled initially by the Environment and Land Court before it was transferred to this court for hearing and determination in 2018.
2. This Ruling determines the Applicant's application dated 20th November 2022 seeking to compel the 1st and 3rd Defendants to produce a resolution to borrow passed by the 1st Plaintiff company and the charge dated 19th March 1991.
3. The application is predicated on the grounds on the face of the application and supported by an affidavit sworn by Mrs. Rose Oluga.
4. The Applicants assert and deny ever passing any resolution to borrow any money from the 1st Defendant and that they have not seen the charge instrument on property LR 3099 and 1618 of North East Kibigori Station within Nyando, Kisumu County which were lawfully registered in the 1st Plaintiff company name when the 2nd Defendant without authority of his co-director who is the 2nd Plaintiff, purported to execute a charge on 19th March 1999 in favour of National Bank of Kenya over the said



parcels as security for a loan advanced to him in his personal capacity, which charge was registered at the Lands office as Entry No. 465/42 as an encumbrance against the said properties.

5. That the said properties were sold on 5th October 2005 by the National Bank of Kenya, the 1st Defendant herein, in exercise of its Statutory Power of Sale, and by way of private treaty and transferred to the 4th Defendant Harjit Singh Pandhal.
6. That as directors of the 1st Defendant, they never executed any charge over the said property nor pass a resolution to borrow. That therefore this court should compel the 1st and 3rd Respondents to produce the two instruments to enable the court determine the real issues in controversy.
7. Only the 1st Respondent responded to the application by filing grounds of opposition dated 21st September 2022 contending that the application is fatally defective, misplaced and incapable of being granted as drafted, that the application is an abuse of court process since the documents are within the Plaintiffs'/Applicants' reach; and that the application is an afterthought and lacking in substance, unnecessary, vexatious and frivolous since it is not the 1st Defendant's obligation to avail documents in support of the Plaintiffs' case.
8. The parties' counsel argued the application orally, reiterating the grounds, supporting affidavit and the grounds of opposition.

Determination

9. I have considered the application, the grounds of opposition and the oral submissions for and against the prayers sought. In my view, the issue for determination is whether the application is merited.
10. The Applicant filed this suit challenging the Bank's exercise of Statutory Sale of the properties registered in the name of the 1st Plaintiff company where herself and the 2nd Defendant are directors, claiming that she was not aware of any resolution to borrow which is a legal requirement for borrowing by a company, and that as a co-director, she did not execute any charge instrument in favour of the bank for advancement of the money to the 1st Plaintiff company.
11. Without delving into the merits and demerits of that assertion, it is important to highlight that order 11 of the *Civil Procedure Rules* provides for discovery of documents prior to the hearing so as to aid the parties in appraising the strengths and weakness of the parties' respective positions. Our system of litigation, though adversarial, but trial by ambush was abolished by the enactment of order 11 of the *Civil Procedure Rules* where parties to a civil dispute file and exchange the documents that they intend to rely on during the hearing such that where a party fails to file and serve relevant documents in advance during pre-trials, they cannot be allowed to spring up those document at the hearing in support of their respective cases or position.
12. In addition, where documents which a party intends to rely on are solely in possession of the adverse party and the adverse party appears not to be keen to file or produce those documents in evidence, to the detriment of the other party, the party who wishes to rely on those documents can apply for discovery under section 22 of the *Civil Procedure Act* which provides that:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either on its own motion or on the application by either party-

- a. Make such orders as may be necessary or reasonable in all matters relating to the delivering and answering of interrogatories, the admission of documents and facts and the discovery and inspection, production, impounding and return of documents or other material objects producible as evidence.



- b. The court has the power to summon any person to produce such documents or adduce evidence as the case may be.
13. Discovery is a formal pre-trial process through which a party to litigation may seek to discover evidence and facts that are crucial to his case, and as can be seen from section 22 cited above, the scope of discovery is quite broad. A party may seek to discover any fact that is not privileged but is relevant to the subject matter in the suit. The emphasis should be that the documents sought are relevant to the issue before the court.
14. Regarding the centrality of discovery, the court observed in *Oracle Productions Ltd v Decapture Ltd & 3 Others* [2014] eKLR that pre-trial discovery is so central to litigation that the entire order 11 of *Civil Procedure Rules* (2010) has substantially devoted to it, including sanctions for non-compliance. orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings, while order 14 empowers the Court to order production, impounding and return of documents. The court was emphatic that discovery should be limited solely to matters in contention and relevance will only be gauged or tested by pleadings or particulars provided.
15. Discovery is also intended to aid a party access vital documents to his case that are solely in the custody of the opposite party, thus levelling the litigation ground. (See *Ramji Megji v Kisii University* [2016] eKLR). In *Concord Insurance Co. Ltd v NIC Bank Ltd* [2013] eKLR the court emphasized that only relevant documents should be disclosed and that relevance is to be tested in the pleadings, and that discovery should not be used as a fishing expedition. (See also in *Selecta Kenya Gmbh & Co Kg & another v Peter Wanderi* [2015] eKLR).
16. In *ABN Amro Bank N.V v Kenya Pipeline Company Limited* [2019] eKLR the Court of Appeal held that the court may order discovery of documents on application being made where those documents are related to the suit before it and the purpose of discovery is to ensure that all documents or information necessary for the just determination of the suit are made available to all parties as to the court.
17. In this case, the plaintiffs have not sought for discovery of the evidence or documents under section 22 of the *Civil Procedure Act*. Instead, they have sought orders compelling production of documents by the 1st and 3rd respondents. There is a whole difference between compelling production of documents and discovery in civil proceedings. the plaintiffs have cited article 35 of the *Constitution* and I will give reasons why this court cannot make orders in this suit pursuant to article 35 of the *Constitution*.
18. What a party in a civil suit needs to do is to read the law on discovery under section 22 of the *Civil Procedure Act*, Notice to produce under section 69 of the *Evidence Act* and order 11 of the *Civil Procedure Rules* and make an appropriate application under those provisions of the law. I say so for reasons that Article 35 of the *Constitution* can only be invoked in proceedings for enforcement of rights or where there is an allegation that the citizen's right to access information has been violated. In *Federation of Women Lawyers-Kenya & 28 others v Attorney General & 8 others* [2015] eKLR, Lenaola J (as he then was) stated as follows:

“... there are procedures known in law in which a party can compel another to produce any document which they have authored. For instance, if a document is of use to prove the Petitioners case, they can make an application for an order to compel the maker of that document to produce it in Court without recourse to article 35 of the Constitution.”[emphasis added]



15. The right to access information is provided under article 35 of the Constitution in the following terms:

- (1) Every citizen has the right of access to–
 - a. Information held by the state: and
 - b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to correction or deletion of untrue or misleading information that affects the person.
- (3) The state shall publish and publicize any important information affecting the nation.

19. There is no constitutional Petition here for enforcement of the right to access information. There are also clear procedures for seeking for discovery or production of documents and not through article 35 of the Constitution. Ngugi J (as he then was) in Nairobi Law Monthly v Kengen [2013] eKLR held that in order to enforce the right to access information as stipulated under article 35, a person must demonstrate that the information sought is required for the exercise of or protection of another fundamental right or freedom. In that regard, the learned judge held that:

“The Petitioner needs to show that it requires the information from the Respondents for the exercise or protection of another right. In this case, its rights to freedom of expression and of the media. Our courts have not yet had occasion to interpret the phrase ‘for the exercise or protection of another right’. However, the Constitutional Court of South Africa, in interpreting a similar provision of the Constitution of South Africa, has ruled that the information sought in an application for disclosure of information, must be such as is required for the protection or exercise of another fundamental right.”

20. Thus, to enforce the right to access information, one must file a constitutional petition. Furthermore, courts have held and I concur that a constitutional petition for enforcement of the right to access information must be filed by a natural person and not a limited liability company. In Famy Care v Public Procurement Administrative Review Board & another Petition No.43 of 2012, Majanja J. in declining to issue the orders sought by the Petitioner, a limited liability company incorporated in India, held, and I agree that the right to information under article 35 is limited in that it can only be enforced by natural persons. At paragraph 18 of the judgment, the learned Judge stated as follows:

“The right of access to information protected under article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to ‘every person’ or ‘a person’ or ‘all persons’ this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term ‘person’ and ‘citizen’ as applied in Article 35.”

21. The learned judge further observed at Paragraph 22 of the Judgment that:

“Though the term “citizen” is not defined in article 260, citizenship is dealt with under Chapter Three of the Constitution, articles 12 to 18. The purport and effect of these provisions is that citizenship is in reference to a natural person... A juridical person is neither



born nor married as contemplated by these Articles. Similarly, the provisions on citizenship by registration and dual citizenship set out in articles 15 and 16 of the Constitution negative an intention to define a citizen as including a juridical person.”

22. The learned judge then reached the following conclusion as reproduced by Lenaola J in the above cited case of *FIDA Kenya*:

“The rights protected under article 35(1) and 38 are essential for the purpose of organizing a democratic state. The exercise of these rights excludes juridical persons as they are not “the people” referred to in the Preamble to the Constitution. A reading of the constitution and an examination of words “person” and “citizen” within the Constitution can only lead to one conclusion; That the definition of a citizen in articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution. I therefore conclude that for purposes of Article 35(1), a citizen is a natural person who is a citizen of Kenya as defined by Chapter Three of the Constitution.”

“I am in agreement with the learned judge and in applying the above finding to the instant case, the Respondents have argued that some of the Petitioners, not being natural persons but juristic persons are not “citizen” for the purposes of Article 35 and are therefore not entitled to seek the enforcement of its provisions.”

23. In the instant case, the first plaintiff is described as a limited liability company incorporated in Kenya and not a natural person or citizen. It is therefore incapable of enforcing any right to access information. On the other hand, the 2nd plaintiff, natural person, claims to be a director of the 1st plaintiff and as I have stated above, has many avenues by which she can seek for production of the documents sought and not through orders of compulsion under article 35 of the Constitution. She can seek for discovery under section 22 of the Civil Procedure Act, order 11 of the Civil Procedure Rules and or through Notice to produce of the original documents in possession of the adverse party.

24. F.A.Ochieng J (as he then was) in Export Import Bank of America v Royal Media Services Limited & 4 others [2015] eKLR had this to say concerning a prayer to compel production of documents:

“... That would explain why the plaintiff was saying that the court should, first, compel the defendants to produce the original document before the court.

44. Section 19 (3) of the Stamp Duty Act spelt out what is to happen “upon the production” of any instrument which is chargeable with stamp duty.

45. As I understand it, the production of a document in evidence, takes place when a witness makes it available to the court.

46. If the document was not an original, and the party wishing to rely on it wants to persuade the court that it was admissible pursuant to section 67 of the Evidence Act, the said party would be required to satisfy the court why the secondary evidence should be admitted in evidence.

47. I do therefore agree with the defendants, that this application has been brought prematurely.

48. The application is therefore rejected.”

25. This court further observes that vide Request For Particulars dated 4th December, 2013, served upon counsel for the plaintiffs/ applicants on 25th March 2014, the 2nd defendant sought for particulars from



the applicants herein and when the same were not forthcoming, this was followed by Notice of Motion dated 10th April 2014, where the 2nd defendant James Swao sought from court orders for supply of particulars in respect of the plaint 16th dated December, 2011 being: the certificate of incorporation, the date and manner in which the 2nd plaintiff became director of the 1st plaintiff, the date upon which the charge purportedly executed by the 2nd defendant was signed by the second defendant and the name and designation of the witness who is shown to have attested to the execution of the charge by the second defendant.

26. Vide a ruling delivered on 20/9/2018. Ochieng J (as he then was) allowed the 2nd defendant's application for provision of particulars. That ruling has not been set aside or varied or appealed against and there is no contrary decision reversing that ruling.
27. I have perused the entire Court file herein and I have not seen anywhere where the 2nd plaintiff has complied with the above order for provision of particulars. Instead of complying with the orders of the court, the 2nd plaintiff has now sought orders to compel the 1st and 3rd defendants to produce documents which are the charge instrument and the resolution to borrow. The second plaintiff has not explained to court why she has not provided the particulars as ordered by the court and neither has she sought for discovery as stipulated in section 22 of the Civil Procedure Act. She has also not sought for particulars as was done by the 1st and 3rd defendants against her.
28. The 2nd plaintiff has also not issued upon the 1st and 3rd defendants any notice to produce documents as stipulated in section 69 of the Evidence Act, so that they are not held to have withheld crucial evidence in support of the plaintiffs' case. That is the purpose for which the provisions of Section 69 of the Evidence Act was enacted and if the Party issued with Notice to produce the documents does not comply and conceals the documents with the intention of not presenting them to court, then if the documents or part thereof (copies are in possession of the issuer of the Notice, the court will allow the issuer of the Notice to produce copies or secondary evidence.
29. I reiterate that the applicants have neither sought for discovery, particulars nor issued Notice to produce. Still on discovery and its centrality in civil proceedings, the Court Oracle Productions Ltd v Decapture Ltd & 3 Others [2014] eKLR stated that:

“pre-trial discovery is so central to litigation that the entire order 11 of Civil Procedure Rules (2010) has substantially devoted to it, including sanctions for non-compliance. orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings, while order 14 empowers the Court to order production, impounding and return of documents. The court was emphatic that discovery should be limited solely to matters in contention and relevance will only be gauged or tested by pleadings or particulars provided.

It should be added that discovery is also intended to aid a party access vital documents to his case that are solely in the custody of the opposite party, thus levelling the litigation ground. (Ramji Megji v Kisii University [2016] eKLR). The court emphasized in Concord Insurance Co. LTD v NIC Bank Ltd [2013] eKLR that only relevant documents should be disclosed and that relevance is to be tested in the pleadings, and that discovery should not be used as a fishing expedition. (Selecta Kenya Gmbh & Co Kg & another v Peter Wanderi [2015] eKLR).”
30. In addition, this court has power to make an adverse inference against a party who fails to produce or adduce evidence which is in their possession and is relevant to their case. The court too, is empowered



to summon any person to produce such documents or adduce evidence as the case may be. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others* [2012] eKLR the court held that:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.....where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.”

31. Further in *Kimotho v KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”
32. Off course, in law, such adverse inference can only be made if certain conditions are made. I need not venture deep into that area now.
33. In this case, the Applicant has not issued Notice to produce and neither have they sought for discovery and therefore it would be premature for this court to issue any orders compelling production of the stated documents. Orders of compulsion have penal consequences in case there is noncompliance and this would involve contempt proceedings, when in essence the 2nd applicant herself has not yet complied with the earlier orders of this court. She cannot to seek to compel the other party to comply with court orders of compulsion pursuant to article 35 of the *Constitution* when the particulars sought from her have been ignored. In my view, the applicant has not come to court with clean hands. However, in matters discovery and Notice to produce, if the party ordered to discover or to produce fails to comply, the court will make adverse inferences against such party including striking out of the defence or suit.
34. In this case, the applicants have legal avenues to have the documents sought availed. They can simply issue Notice to produce as required under section 69 of the *Evidence Act* or discovery under section 22 of the *Civil Procedure Act* and order 11 of the *Civil Procedure Rules*.
35. The application compelling production is unnecessary in that if the 1st Respondent relied on the Resolution to loan the money to the 2nd Defendant in the name of the 1st Plaintiff which resolution is a legal requirement and the 1st defendant cannot produce, or produce the charge instrument which is the contract between it and the loanee, the question will be, did the 1st defendant have authority to demand for the loan repayment, from whom and therefore did they have lawful authority to sell the property whose charge instrument is not available and its legality is in dispute?
36. These are questions which the court will determine and therefore it does not require an order compelling production of the documents which the defendants ought to have had in their possession and filed in court during pre-trials.
37. I hasten to add that no pre trials have been done and therefore the 1st and 3rd defendants have the opportunity to file into court documents which they will rely on in their defence. The plaintiffs too have the opportunity to file the documents or provide particulars as earlier ordered by the court.
38. For the above reasons, I find this application not merited. I decline the application and dismiss it. I order that each party shall bear their own costs of the application.
39. As this is a very old case which originated from the Environment and Land Court filed way back in 2012 being Civil Suit No. 15 of 2015, and as pre-trial conference has not been held, I hereby direct all parties to comply with pre-trial requirements in readiness for the hearing of the main suit within 60 days of today and pre-trial conference shall be held on 21/9/2023 in the next term.



40. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE, 2023

R. E. ABURILI

JUDGE

