



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 21 OF 2009

RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED.....1ST PLAINTIFF

MAVIPA FARMERS LIMITED (MFL).....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION (AFC).....2ND DEFENDANT

RULING ON THE PLAINTIFF'S APPLICATION DATED 7TH JANUARY 2019

BRIEF BACKGROUND TO THE APPLICATION.

1. Parties to this suit, originally filed on the 21st January 2009 and Amended severally, are as stated in the **Further Amended Plaintiff** dated 17th November 2011, filed on even date. The 1st Defendant National Bank of Kenya however contests the legality of the several amendments as having been effected without leave of the court. This issue is not before this court now and therefore a matter for another day.

2. The parties shall therefore, for purposes of this application, remain as they were, prior to the filing of the application before me thus, in the Further Amended Plaintiff dated 17th November, 2011.

3. National Bank of Kenya shall remain as the 1st Defendant while Agricultural Finance Corporation (AFC) shall remain as the 2nd Defendant. I state so because upon perusal of the proceedings, I have not seen an order for leave having been granted to the plaintiffs to **Further Amend the Further Amended plaintiff** by this Court (Mulwa J) on the 2nd October, 2018. None has been produced before the court.

4. The plaintiffs claim against the Defendants arose from alleged fraudulent loan disbursements in the sum of Kshs. 42 million granted to the plaintiffs by the 2nd Defendant (AFC) but disbursed through the 1st Defendant (National Bank) fraudulently by Bank Drafts which fraud is alleged to have been discovered in the year 2003 leading to the reliefs the plaintiffs seek for thus;

a. A declaration that the refusal by the Defendants to release the amount disbursed is unlawful.

b. An order of mandatory injunction to compel the Defendants jointly and severally to disclose where the amount is. In the alternative, the defendants jointly and severally be compelled to pay the Defendants – (ought to be the plaintiffs) the sum of Kshs.42 million with interest at commercial rates.

5. The Defendants in their separate statements of defences deny all and singular the plaintiffs claims, and put the plaintiffs to strict proof.

THE APPLICATION DATED 7TH JANUARY 2019.

6. By the application, the plaintiffs sought:

1. Spent

2. Spent

3. That the Honourable court be pleased to issue witness summons against the individuals listed hereunder to secure their attendance in court at the trial of the suit to not only lead evidence but also produce crucial documents (15 persons stated).

4. That the court be and hereby pleased to order for Discovery, Inspection and Production forthwith of the following documents in the possession of the 1st and 2nd Defendants/Respondents and the respective Government entities mentioned hereunder (16 documents enumerated).

5. Costs of application be provided for.

7. Grounds for the application are stated, and supported by an affidavit sworn on the 7th January 2019 by one **Benson Thiru Karanja** who describes himself as the 1st Director/Shareholder of the plaintiffs Companies.

8. On the 10th January 2019, an ex parte Order was granted to the Applicants by the Hon. Justice Ndungu J, allowing all prayers No. 1,2,3,4, and 5 of the application.

9. For the record, the above application and the Orders triggered the parties to file several other applications, in opposition to the application. There are 8 Notices of Motion applications dated, and filed on various dates thereafter as follows, among others:

- **Notice of Motion dated 28/1/2019 – by National Bank.**
- **Notice of Motion dated 12/2/2019 – by National Bank.**
- **Notice of Motion dated 12/2/2019 – by the plaintiffs**
- **Notice of Motion dated 28/2/2019 – by National Bank.**

10. The above applications have not been heard for various reasons. The 10th January 2019 ex parte orders have been seriously challenged by the Defendants through the applications filed thereafter and replying affidavits by the Respondents. Justice Ndungu J. is no longer in the Nakuru High Court Station. It is as a result thereof that I have to hear and determine the application dated 7th January 2019.

11. On the 17th February 2020 the parties advocates agreed that determination of this application, will resolve the issues raised by the parties in the various applications filed post the ex parte orders, upon which they filed their respective submissions.

12. I have considered the application, affidavits and submissions filed by the parties in support of their respective positions as well as the Court Orders dated 10th January 2019.

ISSUES FOR DETERMINATION.

1. Whether this Court granted Oral leave or any leave to the plaintiffs to Further Amend the Further Amended Plaintiff on the 17th February 2019, or any other date; and if not, the fate of the Further Further Amended Plaintiff dated the 7th January 2020 and filed on even date.

2. Whether this court has the requisite jurisdiction and power to interfere and interrogate the final orders of a court of concurrent jurisdiction without being moved for either review, variation or setting aside of the said orders.

13. ISSUE NO. 1

I have considered the court record and proceedings of the 2nd October 2018. The parties were duly represented by their advocates. Ms. Badhia for the plaintiffs/Applicants sought oral leave from the court to file supplementary documents, and adjournment of hearing of the case. The case had been scheduled for hearing. The defendants opposed the application and the adjournment.

Upon consideration, **this court gave liberty to all the parties to file any documents they may wish and exchange within 30 days, and come back for hearing on the 4th February 2019.**

14. I agree with the 1st Defendant that the Court did not grant leave for further Amendment of the plaintiff on the 2nd October 2018 or any other date. No such order has been exhibited by the applicant.

15. It is trite that a party may only amend its pleadings after close of the pleadings with leave of the **Court – Order 7 rule 7 (1) of the Civil Procedure Rules.**

The pleadings had clearly closed, and the case was scheduled for hearing. On the 2nd October 2018, this court directed parties to file any documents they wished to rely on during the hearing, and gave them a hearing date. These directions/orders cannot be interpreted to mean that amendment of a plaintiff was one such document.

Had such oral application to Further Amend the plaintiff was made, the court would have sought the defendant's responses. The record does not attest to any such application.

16. I therefore, without further interrogation find and hold that the Further Further Amended Plaintiff dated 7th January 2019 and filed on even date offends all known legal provisions on matters of amendments of pleadings as provided **Under Order 8 of the Civil Procedure Rules.**

17. In the case **Eastern Bakery Vs. Castillo (1958) EA, the Court of Appeal, held that**

“-----it will be sufficient to say that amendments to pleadings sought before the hearing should be freely allowed; if they can be made without injustice to the other side and that there is no justice if the other side can be compensated by costs”.

18. Having found that no application to amend; and no leave granted to the applicant to so amend, the Further Further Amended plaintiff will cause injustice to the Respondents, as it was upon the said Amended plaintiff that the Court (Ndungu J) relied on to grant the offensive orders.

I therefore find and hold that the plaintiff's Further Further Amended Plaintiff dated 7th January 2019 was so amended and filed without leave of the court. I have no option but to expulged the Further Amended Plaintiff filed on the 17th January 2019 from the court records. There was indeed misrepresentation of material facts by the applicant to the court.

ISSUE NO. 2

19. The plaintiff's application dated 7th January 2019 was filed under a certificate of urgency and placed before the Duty Judge (Hon. Ndungu J) on the 10th January 2019, under vacation rules. The court record shows, and indeed the extracted order confirm that the Honourable Judge considered the application in it's entirety in chambers, in the absence of both counsels, and allowed all the prayers from NO. 1 to 5.

I have carefully considered the Orders, Vis-à-vis the prayers sought in the application. The applicant did not seek for interim/interlocutory Orders but substantive Orders and final. upon considering the application, the court granted all the orders sought; issuance of witness summons upon the persons stated, and Order of discovery, Inspection and Production of the documents by the defendants.

20. The court orders issued therefore, in my considered opinion, were not interlocutory. No order for service to the respondents was issued by the Court. They were final in nature.

That being the case, does this court of concurrent jurisdiction have authority to interrogate whether or not the judge was in order to issue such orders without giving the respondents an opportunity to be heard?

21. I agree with the 1st Defendant's submissions that the plaintiffs, by their application dated 7th January 2019, in the manner it is coached, did not intent to have it heard inter-parties, but only ex-parte.

That position is clearly supported in the affidavit of **Benson Thiru Karanja** when at paragraph 124, he depones that “the Respondents/Defendant will not suffer any harm if the orders sought herein are granted ex-parte”.

22. Aggrieved by the said Orders, the Defendants moved quickly and on the 28th February 2019 filed an application seeking orders that the orders issued on the 10th January 2019 be set aside on grounds that they were irregularly issued exparte, without serving the defendants, and are prejudicial to the defendants.

23. Jurisdiction to a court is conferred by the Constitution, Statute or both **Samuel Kamau Macharia & another Vs. Kenya Commercial Bank Ltd & anoher (2012) e KLR Supreme Court.**

The application dated 7th January 2019 as drafted, was not subject to further interrogation in inter-parties proceedings as no such order was issued by the court. The orders thereto were not interlocutory, pending inter-parties hearing. Had it been the case, the court issuing the orders would have pronounced itself thus, and order for service and return for interparties hearing on a specific date.

24. To that end, this court cannot purport to re-visit the application an interparties hearing or proceedings. There is nothing to re-hear, the application having been fully determined, abate exparte.

To do so would be unprocedural and illegal.

So that when the plaintiffs served the application upon the defendants, and expected responses from them, though procedural, it was quite out of order, save for the orders issued on the 10th January 2019, as no order to serve the defendants was issued, nor an interparties hearing was ordered by the judge.

25. **What then is the Defendants remedy in the circumstances?**

I have alluded to an application dated 28th February 2019 filed by the 1st Defendant, National Bank.

The application if heard will no doubt give clear orders as to whether or not to set aside or vary the 10th January 2019 orders.

A court must be moved properly by application to interfere with orders of another court, or the same court, through various methods; setting

aside, variation, review or appeal.

26. Re-hearing of a concluded matter, be it an application, suit or appeal would be res-judicata, and the result would be a dismissal without a doubt, unless for good reasons, upon application by parties, the court orders for such re-hearing.

Having rendered myself as above, I am afraid I cannot mover or take a step further to look at, and/or interrogate the merits or demerits of the application dated 7th January 2019 and the Orders issued therefrom on the 10th January 2019.

27. I comment the parties advocates for their well-researched and detailed submissions, but on **NO** competent application. They would very well be good for the 1st Defendants application dated 28th January 2019, which unfortunately is not before me for determination at the moment.

Consequently, I make no orders on the application dated 7th January 2019 as it is concluded.

28. Any of the parties is at liberty to move the court for hearing of the relevant applications to resolve the dispute at hand.

Orders accordingly.

DELIVERED, SIGNED AND DATED ELECTRONICALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2020.

J.N. MULWA

HIGH COURT JUDGE.

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