



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.523 of 2015

IMPERIAL BANK KENYA LIMITED (UNDER RECEIVERSHIP).....PLAINTIFF

VERSUS

JANCO INVESTMENTS LIMITED.....1ST DEFENDANT

GULSHAN JANMOHAMED(Sued as a beneficiary and as a Legal

Representative of the Estate of Abdulmalek Jammohamed).....2ND DEFENDANT

MEHDI JANMOHAMED (Sued as a beneficiary and as a legal Representative of th

Estate of Abdulmalek Jammohamed).....3RD DEFENDANT

SALIM JANMOHAMED (Sued as a beneficiary and as Legal Representative of the

Estate of Abdulmalek Jammohamed).....4TH DEFENDANT

NAEEM SHAH.....5TH DEFENDANT

JAMES KABURU.....6TH DEFENDANT

ALIYA JAHAN ARA JANMOHAMED (Sued as a beneficiary of the

Estate of Abdulmalek Jammohamed).....7TH DEFENDANT

AMYNMOHAMED JANMOHAMED (Sued as a beneficiary of the

Estate of Abdulmalek Jammohamed).....8TH DEFENDANT

TASNEEM ABIDA JANMOHAMED Sued as a beneficiary of the

Estate of Abdulmalek Jammohamed).....9TH DEFENDANT

REHANA AFSHIN JANMOHAMED (Sued as a beneficiary of the

Estate of Abdulmalek Jammohamed).....10TH DEFENDANT

SHAISTA AMAL JANMOHAMED (Sued as a beneficiary of the

RULING

(1) Pursuant to a Notice to Make Discovery on oath dated **14th November 2018**, the 6th Defendant herein sought disclosure from the Plaintiff of several documents. Vide the letter dated **28th January 2019**, several of the documents requested were supplied by the Plaintiff to counsel for the 6th Defendant. However the Plaintiff declined to produce or disclose the following two documents:-

(i) The original letter of engagement between the directors of the **Imperial Bank Ltd** and **FTI Consulting**; and

(ii) Central Bank of Kenya's supervision, Regulatory and Inspection Reports of the Bank for **Imperial Bank Limited** for the period 2010 to 2014. (hereinafter collectively referred to as "**the objected documents.**")

(2) The grounds upon which the Plaintiff declined to avail the above documents were firstly that the Plaintiff did not have the objected documents in its possession, secondly that the objected documents were confidential, and thirdly that the 6th Defendant had failed to demonstrate the relevance of the objected documents to the suit in question.

(3) The Court directed that parties file written submissions in respect of this application. The Plaintiff filed their written submissions on **13th February 2019** whilst the 6th Defendant filed their written submissions on **7th February 2019**. **MS HANAN** Counsel for the 1st to 11th Defendants (excluding the 6th Defendant) indicated that her clients would not be submitting on the matter but would abide by the decision of the court.

(4) The 6th Defendants submitted that the documents being sought for production were crucial to their defence and cited **Article 35** of the **Constitution of Kenya, 2010**, in support of their contention that every citizen has a right of access to information. The 6th Defendant also relied of **Section 22** of the Civil Procedure Act which empowers court to make such orders as may be necessary regarding discovery, inspection, impounding and return of documents. The 6th Defendant submitted that the engagement letter between the then Directors of **Imperial Bank Ltd** and **FTI Consulting** was crucial to their defence as their Advocate wished to cross-examine the witness from **FTI Consulting** on what engagement they had with the 6th Defendant prior to the Bank being placed under receivership.

(5) It was further submitted that the personnel at **FTI Consulting** had engaged with the 6th Defendant on the understanding that said engagement was with a view to helping the Bank. That if the 6th Defendant in the course of that engagement had disclosed any information to **FTI Consulting** then, the same ought not to be used as part of the proceedings in this suit. In this regard the 6th Defendant relied on the constitutional protection against self-incrimination. The 6th Defendant insisted that the production of this letter was crucial as his Advocates would be applying to have the evidence and the letter produced by **FTI Consulting** expunged from the record for being unconstitutional.

(6) The 6th Defendant submitted that the Central Bank of Kenya Supervision Regulatory and Inspection Reports for the period 2010 to 2014 were equally crucial to their defence in order to show that during the entire period the 6th Defendant was employed by the Bank, the Central Bank as the sole regulatory institution, had always given the Bank a clean report. This would show that the 6th Defendant played no role whatsoever in the woes of Imperial Bank Ltd.

(7) Finally the 6th Defendant contended that privilege against disclosure could not be claimed on the ground that the objected documents were confidential or that they belonged to a third party and that the confidential nature of a document was not in and of itself a ground of privilege.

(8) The Plaintiff on their part submitted that the 6th Defendant had failed to prove the relevance and necessity of the objected documents and that it was not shown how the objected documents would aid the 6th Defendant in defending this suit.

(9) With regard to the Central Bank of Kenya Supervision, Regulatory an Inspection reports for **Imperial Bank Ltd**, for the period 2010 to 2014 the Plaintiff contended that this was a report prepared by the Central Bank of Kenya, an institution which was totally separate and distinct from the Plaintiff and the **Kenya Deposit Insurance Corporation (KDIC)**. As such the Plaintiff did not have this report in its possession and could not therefore be compelled to produce the same.

(10) With regard to the **FTI Consulting** letter, the Plaintiff submitted that said letter was not in the possession and custody of the Plaintiff since the agreement was concluded between **FTI Consulting** and the then directors of **Imperial Bank Ltd** who are totally separate and distinct from the Plaintiff in this suit. The Plaintiff further submitted that both objected documents contained highly sensitive information about the Plaintiff's business and operations collected and compiled in the course of engagement and as such it would be detrimental to the Plaintiff if the letter were to fall into the public domain and as a result into the hands of the Plaintiffs competitors.

Analysis and Determination

(11) In **CROWN PAINTS (KENYA) LIMITED –VS- DRY ASSOCIATES LIMITED [2015] eKLR**, it was held that:-

“...it is clear that the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial...”

In the case of **Oracle Productions Limited Vs Decapture Limited & 3 others [2014] eKLR Kimondo J** rendered himself thus:-

“...Pre-trial discovery is so central to litigation that the entire Order 11 of the Civil Procedure Rules 2010 ha been 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. Order 14 empowers the court to order for production, impounding and return of documents. I agree with the holding of Havelock J in the Concord Insurance case (supra) that discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided. Halsbury’s Laws of England (supra) paragraph 38. See also Kahumbu Vs National Bank of Kenya Limited [2003] 2 E.A 475, Oluoch Vs Charagu [2003] 2 E.A 649.”

Accordingly in application of this nature the Applicant is required to show the relevance of the documents being sought. It goes without saying that the relevance of the documents being sought must be tested by the pleadings and particulars.

(12) With respect to the **FTI Consulting** letter the 6th Defendant claims that he requires the same to enable him cross-examine the witness from **FTI Consulting**. The relevance of this document has not been satisfactorily demonstrated. The court is not told firstly whether a witness from **FTI Consulting** will be called, and secondly if that witness will be referring to this letter. The argument by the 6th Defendant that they require production of said letter, in order to apply for its expungement from the proceedings is also not persuasive.

(13) With respect to the Central Bank of Kenya’s Supervision, Regulatory and Inspection Reports for Imperial Bank from 2010 to 2014. I do agree with the Plaintiff that being a body separate and distinct from the Plaintiff, the Plaintiff could hardly be expected to be in possession of said report. The Plaintiff have submitted that despite the exercise of due diligence on their part they have been unable to locate and retrieve the annual appraisal in respect of the 6th Defendant for the period 2010 to 2014. In **RAFIKI MICRO FINANCE BANK LTD –VS- ZENITH PHARMACEUTICALS LTD [2016] eKLR Hon Justice Kariuki** stated as follows:-

“.....I also find that the Defendant has the onus of proving that the Plaintiff is in possession of the documents sought. Since the defendant has not offered any rebuttal to the above statement it is my opinion that the court cannot compel the Plaintiff to produce any material or document that is not in its possession.” [own emphasis]

The 6th Defendant have not rebutted the Plaintiff’s contention that the reports in question were not in its possession, nor have they proved that the Plaintiff was indeed the custodian of the said Reports. Accordingly the Plaintiff cannot be compelled to produce the Reports.

(14) Based therefore on the foregoing I find no merit in the above application.

The same is hereby dismissed with costs to the Plaintiff.

Dated in Nairobi this 26th day of April, 2019.

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Justice Maureen A. Odera