



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 108 OF 2014

NIC BANK LIMITED.....PLAINTIFF

VERSUS

1. DRACKO HAULAGE LIMITED

2. DINESH B PARMAR

3. FAIZAL AMIN HAJI

4. OSMAN ESMAIL ALI MOHAMED.....DEFENDANT

R U L I N G

1. For determination is the Application by the 2nd & 4th defendants seeking an order that the plaintiffs makes a discover an oath of all the 1st defendants letters to the plaintiff starting from 7/5/2007 to 2/01/2013 requesting for invoice discounting facility together with all the supporting documents. The basis and foundation of the application is given to be the fact that the documents forming the basis of dealings between the parties and the suit debt must be in possession of the plaintiff who has failed to availed same yet the same are relevant for the determination of matters in issue between the plaintiff one side and the said and 4th defendant on the otherside.

2. The Application was supported by the Affidavit of Mr. Nanji which says that the need for the request was aroused by the list of supplementary documents by the defendant on the 8.3.2018 when he, the counsel made a verbal request and he was promised of the same being availed. When the matter appeared in court 2nd, 3rd and 4th times, the documents were promised but were ultimately not availed with the plaintiffs counsel asserting that the same were irretrievable thus compelling the current application. To the counsel the documents are necessary for the 2nd and 4th defendants case because the same would show that while the two defendants were in the day today running of the 1st defendant, all the request for invoice discounting facilities were properly supported by invoices raised by the 1st defendant to World Food Programme and duly supported by Landside Transport Instructions and that the current debt was incurred after the two defendant were no longer involved in the day today running of the 1st defendants offers and was the consequence of the plaintiffs' failure to property scrutinize the documents in support of the requests for invoice discounting.

3. The application was opposed by the plaintiff on various grounds among them being that there was no ground advanced to warrant the orders sought; that the documents have been indicated to have been lost, misplaced or destroyed as the correspondence date to more than 10 years back and further that the defendants are engaging the plaintiff in a fishing expedition as the documents do not relate to the dispute between the parties.

4. It was then added that the Affidavit in support of the application demonstrate that the documents sought are not relevant to the dispute and fall outside the period contemplated in the suit; that all the documents in its custody have been filed but that in any event the documents were supplied by the 1st defendant to the plaintiff and thus were at such material time in custody of the applicants.

5. The application was argued orally with the counsel for both side urging their respective position on when an order for discovery may be made and when same cannot be made.

6. The rationale of court jurisdiction to issue orders for discovery under Order 11 Rule 3 of the civil procedure rules is to aid the just and fair determination of the issues in dispute by enabling a party to access documents which are vital to its case and which may be in the exclusive possession of his opponent. However discovery is not intended to engage the opponent in a wild goose chase or just fishing expedition^[1]. The documents must be relevant and necessary for the applicant's case^[2] and thus for the just determination of the dispute.

7. For this matter and application the plaintiffs suit is grounded and shown to be founded on the claim that the 1st defendant, at its request and instance was granted by the Plaintiff a facility for among others, an invoice discounting facility in the sum of USD 150,000 to finance the 1st defendant's working capital requirements at agreed interest rates. The same facility was guaranteed by an irrevocable guarantee and continuing guarantee by the 2nd and 4th defendants as directors of the 1st defendant.

8. It was then pleaded that there was a default in paying the invoice discounting facility resulting in the suit debt for which the two defendants are liable on the foot and basis of the guarantees executed by them.

9. When served the 2nd & 4th defendant admitted having executed the guarantees but only as directors of the 1st defendant and that both ceased to be such directors of the 1st defendant beginning 31/5/2011.

10. Now the test of relevance and necessity of the documents to be discovered is an objective one. The court must be satisfied that when it comes to the determination of the dispute, the documents sought must be of some help in shedding light on how the parties transacted.

11. Here the averment by the applicants that the request for invoice discounting facilities was to be supported with the invoice for World Food Programme and the Landside Transport instructions have not been denied. It would be to this court a relevant and necessary matter to establish if each of the requests made and related to their claim here was made and supported with a valid invoice that would attract payment to meet the finance extended by the plaintiff.

12. Once there is proved that the document sought to be discovered is necessary and relevant a court would be enjoined, if not for anything else but for the attainment of its overriding objective to determine the dispute in a just, expeditious and proportionate fashion, to order discovery.

13. The plaintiffs advocate having asked the court on more than three occasions for time to avail the documents, it was incumbent upon it to avail for some evidence that the documents were either misplaced or destroyed. I am not persuaded that the plaintiff, being a bank, would be casual with the custody of a document that would be its security and basis of pursuing a debt, by simply saying with an element of ambivalence that the document could be lost, misplaced or destroyed. That is not expected of an institution in the plaintiffs standing. I am hesitant to find and believe that the documents have been lost. I have read the notes taken on the 17/10/2018 when the counsel by consent afforded to the plaintiff a period of 14 days to not only avail other documents now sought but also file a substituted witness statement as its earlier intended witness had left its employment. Infact it is by that consent that the parties agreed that if the plaintiff did not avail the documents voluntarily then the defendant would have the liberty to bring the current application. I take it that a consent is a contract and that he who negotiates a contract must be prepared to be burdened by its terms as much as it would be entitled to benefit from the same terms. That the plaintiff entered the consent, is, to me, an acknowledgment that the document were within its reach. Having been in its possession, and the same being shown to be of relevance to the suit, the reason given by the plaintiff for inability to discover is not plausible.

14. Having so said, I do allow the application and order that the plaintiff shall within 30 days from today, discover on oath and avail to the 2nd and 4th Defendants all the letters by the 1st defendant to the plaintiff requesting for invoice discounting facilities between the period 7/5/2007 to the 22/01/2013.

15. Matter be mentioned in court on the 31/10/2019 to confirm compliance.

16. The Defendants/applicants are awarded the costs of the Notices of Motion dated 15/11/2019.

Dated and delivered at **Mombasa** this **23rd** day of **September 2019**.

P.J.O. OTIENO

JUDGE

[1] Concord Insurance Co. Ltd vs NCE Bank [2013] eKLR

[2] Halsburys Laws of England Vol. 13