



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL CASE NO 154 OF 2014

ELIAB MUTURI MWANGI (practicing in the name & style of

MUTURI MWANGI & CO. ADVOCATE.....PLAINTIFF

VERSUS

LSG LUFTHANSA SERVICES

EUROPA/AFRIKA GMBH.....1ST DEFENDANT

LSG SKY CHEFS KENYA LIMITED.....2ND DEFENDANT

RULING

1. The issue for determination arise from the application filed by the Plaintiff dated 12th May 2015, brought under the provisions of Order 11 Rule 3(2) & 7(2) and Order 51 Rule 1of the Civil Procedure Rules, Sections 1(2), 1A, 1B and 3A of the Civil Procedure Act and Section 3 of the Judicature Act. The prayers made included;
 1. **THAT Mr. Tobias Diebold and Mr. Paul M.F Lyimo be jointly and severally compelled within fourteen (14) days (or such other period as this Honourable Court may order) to respond fully to all the questions put to each of them by way of interrogatories filed in this Honourable Court on 13th March 2015 and served on the Defendant's Advocate's on the same date;**
 2. **THAT the Defendants be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the Act;**
 3. **THAT this Honourable Court do make such order or further orders and give such directions as the circumstances in this case shall require; and**
 4. **THAT the Defendants be condemned to pay the costs of and incidental to this application.**
2. The application was premised on the grounds that this Court had on 27th February 2015 issued orders to the effect that the Plaintiff was to file and serve interrogatories upon Mr. Tobias Diebold and Mr. Paul M F Lyimo. On 9th April 2015, both parties aforementioned swore and filed objections to interrogatories, which the Plaintiff contended, was an indication that the Defendants were intent on misleading the Court, even after they had requested for time to file their responses to the interrogatories. These grounds were similarly adduced in the supporting affidavit sworn on 12th May 2015. Further, it was deponed to that there had been no objection by the Defendants' advocates for the answering of the interrogatories by the Defendants, and that they have willfully

- failed and/or omitted to comply with the order of this Court issued on 27th February 2015.
3. In opposing the application, the Defendants filed their Grounds of Opposition and Replying Affidavit both filed on 26th May 2015. In objecting to the interrogatories filed, it was contended that the same can only be directed to parties in a suit, and to which, therefore, the named persons in the interrogatories were not. It was further contended that the application was frivolous and misconceived, and that the interrogatories were filed as a fishing expedition. Further, it was deponed to that the interrogatories were not in relation with the issues arising from the pleadings, and that in any event, the Defendants had appointed the deponent, who had responded to the interrogatories on their behalf.
 4. This Court had on 27th February 2015 issued orders for interrogatories to be served on several named persons including Mr. Tobias Diebold and Mr. Paul M F Lyimo. The Defendants were served with interrogatories, to which they filed objections to the interrogatories on 10th April 2015 and 20th April 2015. The Plaintiff in his contentions, reiterated that the Defendants were in contravention of the orders of the Court as issued, and that they had deliberately and willfully failed to comply with the orders. Further, it was stated that during subsequent mentions in Court, the Defendants' advocates had not indicated that they were opposed to the interrogatories being issued upon the named persons, nor that they had any reservations to them being served with the same.
 5. The orders issued by the Court were thus;

“Mr. Nderitu to serve interrogatories, notice to produce and inspect documents in respect of the travel entries of Mr. Paul M F Lyimo, Dr. Stephan Zilles and Tobias Diebold in the month of May 2014, within 14 days.”

On 24th March 2015, the Court gave further directions to the orders issued on 27th February 2015 as follows;

“The Defendants to file answers to the interrogatories and notice to produce, and file witness statement by expert.”

The Court had issued orders to specifically named persons, and the Defendants, even though contending to be legal entities, were compelled to act through the officers named. The persons named were both officers in the Defendants.

6. The Defendants however, contended that the objection to the interrogatories was in itself a reply to the interrogatories, and that in any event, they had allegedly appointed Mr. Ndung'u Githinji, to respond to the interrogatories on their behalf. It was further reiterated that the purpose of the interrogatories in the instant was a fishing expedition by the Plaintiff, and as such was scandalous and vexatious and did not inquire into the relevant issues arising from the pleadings.
7. Turning to the purpose of interrogatories during proceedings, the ruling of Havelock, J (as he then was) in **Concord Insurance Co. Ltd v NIC Bank Ltd (2013) eKLR** in which he relied on **Halsbury's Laws of England**, Fourth Edition, Volume 13 at para. 1 where it was stated;

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

According to the sentiments of Havelock, J and in reference to the above cited quotation, the purpose of interrogatories is closely linked to the relevance of the facts or evidence that the interrogatories seek to find out. The key is that there should be relevance in the interrogatories for the Court to consider whether or not to compel an individual or party to respond to interrogatories. The relevance of such interrogatories was highlighted in the aforementioned case as follows in reference to para. 38

of Halsbury's Laws of England, Vol. 13 wherein it was stated;

“Relevance must be tested by the pleadings and particulars and when particulars have been served which limit a particular issue then discovery on that issue is limited to the matter raised in the particulars.”

8. The interrogatories issued by the Plaintiff were not limited *per se*, but their significance and relevance was to be illustrated in their content. On the other hand, the Defendants contended that it was not conclusiveness as to the duty to answer it, and that they indeed did respond to the interrogatories by filing objections to the same, and by allegedly appointing one Mr. Ndung'u Githinji to respond on their behalf. They referred to Halsbury's Laws of England 3rd Edition, Vol. 12 pg. 79 at para 115 where it was stated;

The fact that the Court has allowed a particular interrogatory to be put is not conclusive duty of the part to answer it. He can object to answer it on the ground that it is scandalous or irrelevant or not bona fide for the purpose of action or that the matters inquired into are not sufficiently material at that stage of the action, or any other ground of a like kind.

9. Further, the name persons contended that they were not party to the suit (see **Salomon v Salomon & Co Ltd [1895-97] All ER Rep 33**) and that they were a separate entity from the parties to the suit. It was stated in **Civil Litigation** 15th Edition Sweet & Maxwell at pg. 485 that;

As a general rule standard disclosure is obtainable only against persons who are properly joined as parties to an action. Information cannot be obtained from strangers to the dispute except by calling them as witnesses at the trial. This is often called the 'mere witness rule'. However, there are two major exceptions to the rule, namely: (1) disclosure of documents required from non-parties pursuant to SCA 1981 s.34 and CCA 1984 s. 53; and (2) disclosure of information under the principle established in the case of Norwich Pharmacal v Customs & Excise [1974] AC 133.

10. It was the Court discretion, in exercise of its inherent jurisdiction, to issue the orders as it did on 27th February 2015, compelling the name persons to respond to the interrogatories. Further, in the Statement of Defence filed on 17th July 2014 at para. 9(a) and 9(c) thereof, the named persons were referred to as the Defendants' representatives, including Mr. Ndung'u Githinji. Further, in his response to the interrogatories, the said Mr. Githinji reiterated that he answered the interrogatories on his behalf, and not on behalf of the other named persons. /he could therefore, not be deemed to have responded to the interrogatories on behalf of the named persons.
11. In so far as it is the general rule that interrogatories may not be issued to non-parties, the accepted exception in the present instance would be to enable the Plaintiff to obtain certain documents that would ordinarily be in the keep of the named persons. Itineraries in respect of travel would usually be in the custody of the named persons, and as such, they cannot be obtained from any other persons. It was therefore imperative for the Court to issue the orders it did on 27th February 2015 compelling the named persons to make available the documents as requested.
12. In the instant matter, the Court had considered the relevance of the documents that the Plaintiff sought, and in allowing its application, allowed further for the party to produce for inspection certain documents that were within its control. The purpose of interrogatories as highlighted above is in tandem with the provisions of Sections 1A and 1B of the Civil Procedure Act. For in order for there to be effective and efficient and expeditious disposition of matters, it is for the Court, and the advocates as officers of the Court, to comply with such orders as to enable the attainment of the objectives of the fore stated provisions under the Civil Procedure Act.
13. The orders issued by the Court have to be complied with, and the Defendants never raised question or query about the order. It was therefore onerous for them, and the named persons, to comply with the orders of the Court, whether they believe it to be irregular or not. Mabeya, J in **Africa Management Communication International Ltd v Joseph Mathenge Mugo & Another (2013) eKLR**, on the imperative duty of obeying Court orders, reiterated that;

“What is at hand is an allegation that an order issued by this court was not complied with. The explanation given by the Defendants for non-compliance thereof is that they think that the same was irregular as the Plaintiff was undeserving of the same. In my view, this is a strange argument. To answer the Defendants, I will reiterate the sentiments of Romer LJ in Hadkinson -v- Hadkinson (1952) 285 at 288 that: “It is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void” (Emphasis added) Further, Lord Donaldson MR said in Johnson -v- Walton (1990) 1 FLR350 at 352 stated: “It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place.” (Emphasis mine). To my mind therefore, a party must comply with an order whatever he thinks of such an order. What is important is that such a party has knowledge of the terms of the order. To my mind, if the Defendants were unsatisfied with the Order of 13th June, 2013, they should have attempted to get rid of the same through the proper course that is, either by setting it aside or through appeal.”

14. In consideration of the foregoing, it was the duty of the named persons to respond to the interrogatories as per the orders issued by the Court, failure to which they would be deemed to have willfully disobeyed a Court order. No appeal or application was filed by the Defendants to set aside or vary the said order, nor was an appeal proffered against it. In absence therefore, it was the duty of the named persons to respond and answer the interrogatories as filed.

15. The Court therefore allows the Plaintiff’s application in terms of paragraphs (1) thereof, and with regards to (3) thereof, the named persons file and serve responses to the interrogatories within fourteen (14) days of this ruling. Costs in any event are awarded to the Plaintiff.

Dated, signed and delivered in court at Nairobi this 29th day of January, 2016.

C. KARIUKI

JUDGE