



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MISC. CIVIL APPLICATION NO. 607 of 2014**  
**RAFIKI MICROFINANCE BANK LTD .....PLAINIFFS/RESPONDENT**  
**VERSUS**  
**ZENITH PHARMACEUTICALS LTD .....DEFENDANT/APPLICANT**

**RULING**

1. By a Notice of Motion dated 23rd February, 2015, the Defendant herein prays for the production of documents, either original and/ or certified copies, in connection to account numbers 0019010000360 to 0019010000211 to 3000012020003553 and 0012020000354. The said documents are listed as;
  - a. *the duly executed account opening forms;*
  - b. *up to date statements of account from the date the individual accounts were opened up to the date the present suit was filed i.e 19<sup>th</sup> December 2014 and*
  - c. *duly executed letters of offer and loan application forms.*
2. That should the court allow the aforesaid order, the said documents should delivered within 14 days, failure to which the Plaint should be struck out.
3. The said application is supported by the affidavit of Gregory Kivuva Muinde sworn on 23<sup>rd</sup> February, 2015. It was deponed that the Plaintiff in this case instituted a case on 19<sup>th</sup> December, 2014 , seeking Kshs. 21,437,898.82/= at an interest rate of 1.75% per month and a further default interest at 1.5% per month until full payment was made by the defendant. The Defendant did not contest that it had a customer bank relationship with the Plaintiff, where the Plaintiff had extended various loan facilities to it, including a cheque discount facility between the year 2011 to 2014. According to the Deponent, no terms were agreed upon by the parties including the applicable interest rates, repayment periods and security documentation with regard to the aforementioned financial facilities. The Defendant also insists, that no documentation was signed or executed by the Defendant with regard to these facilities. That the bank balances in the stated accounts are what was allegedly consolidated to the liability totaling Kshs. 18,925,964/= in a new account 0012020003553 which form the basis of the present claim by the Plaintiff against the Defendant. The Defendant insisted that it did not make any application to the Plaintiff for opening account number 0012020003553. That further, the Plaintiff irregularly, unprocedurally and in breach of statutory provisions lumped all the responsibilities arising from loan facilities into account number 0012020003553. In the opinion of the Defendant the said account seemed to have been opened long before the purported loan facilities extended by the Plaintiff to the Defendant were

- restructured. Accordingly, it is the Defendant's case that the documents sought are relevant and necessary for the proper determination of the issues in dispute between the parties. Further the Defendant deponed that the information contained in the documents is pertinent to the Defendant and the Defendant is unable to properly ventilate its defence without the said documents. It was also alleged that the Defendant has verbally sought the said documents from the Plaintiff, including making personal visits to the Defendant's Managing Director, but the same was an exercise in futility. In the Defendant's opinion the proposed production of the documents shall not occasion any prejudice to the Plaintiff.
4. In a rejoinder to the application, the Plaintiff filed the replying affidavit of Paul Ouma, described as the Plaintiff's Head of Recoveries, sworn on 23<sup>rd</sup> September, 2015. It was contended that the application before the court has no merit and is an abuse of the court process. In line with this, the plaintiff stated that it was untrue that it declined to supply the documents sought. To support this stance, the Plaintiff produced loan statements for loan account numbers 0019010000360 and 0019010000211 to 300 as supplied to the Defendant's advocates. With regard to the account opening forms, it was the Plaintiff's position that as per banking practice, no account opening forms are required for the opening of loan statements. That accordingly, the loan accounts listed did not require any kind of account opening forms. The Plaintiff further insisted that the account number 0012020003553 was opened and operated by the Defendant, since the same was utilized for many purposes including the extension of the loan facilities to the Defendant by the Plaintiff. Likewise, the Plaintiff averred that account number 0012020000354 was the personal account belonging to the Director of the Defendant, Mr. Gregory Kivuva. That accordingly, the same did not require a resolution to open. In sum, the Plaintiff pleaded that the application herein was misplaced and the suit herein should not be struck out for the perceived non-production of the documents sought as the same would amount to condemning the Plaintiff unheard.
  5. The application was dispensed by way of written submissions. The Defendant filed its submissions on 17<sup>th</sup> November, 2015, while the Plaintiff did so on 18<sup>th</sup> January, 2016. That in line with this Article 35 of the Constitution of Kenya provides every citizen with the right to access any information that is held by another. Further to this, the Defendant cited that Section 22 of the Civil Procedure Act also provides the court with the power to make such orders as maybe necessary in relation to matters regarding discovery, inspection, impounding and return of documents. In support of this argument, the Defendant cited the case of **Concord Insurance Co. Limited vs. NIC Bank Limited Nairobi, High Court Case 175 of 2011 (2013) eKLR** . The Defendant further argued that the documents sought are not only relevant to its case, but also contain information relevant to the Defendant's case. That the same have a high evidential value with respect to ascertaining the sums of money advanced to the Defendant, if at all and on what terms. The Defendant relied on the case of **Oracle Productions Limited -vs- Decapture Limited & 3 others HCCC No. 567 of 2011** to the effect that discovery is limited solely to the matters in contention , whereby relevance can be gauged or tested by the Pleadings or particulars provided. The Defendant therefore urged the court to allow the orders sought.
  6. In opposition to the Defendant's submissions, the Plaintiff argued that it was not opposed to discovery. That as a matter of fact, the Plaintiff has complied with prayers 1 (a) and (b) of the application, since it provided the sought statements and respective account opening forms. That further, the loan accounts are internally generated and do not require account opening forms as a matter of banking practice. In the same vein, the Plaintiff added that it did not have a problem supplying loan applications forms. That in regard to the letter of offer, the Plaintiff has provided a letter of offer which in its view is sufficient to support the Defendant's case. In so doing, it was submitted that if the Defendant had issues with the letter of offer, the same can be raised in its defence. With regard, whether the orders sought are capable of being granted, the Plaintiff asserted that the application herein is premature as it has been demonstrated that it is willing to provide the documents sought. Further, the Plaintiff urged the court to assess whether the documents sought are in possession of the Plaintiff before making its orders. In addition, the Plaintiff complained that the prayer for striking out a suit is unwarranted since the grounds for striking out a suit are well set out in the Civil Procedure Rules and non- production of documents does not fit this criterion. On the issue of costs, the Plaintiff argued that since the Defendant did not issue a notice to produce before filing this application, the Defendant is disentitled to costs. In sum, the Plaintiff submitted that it had substantially complied with the prayers sought in the

- application and the same, should therefore be dismissed.
7. I have considered the pleadings, depositions and rival submissions. I take the following view of the matter. It is important to note that this matter is pending hearing. There is consequently a general caution on making findings that would embarrass the trial court. The veracity of the plaintiff's claims and the rebuttals by the defendants will be tested by evidence which in mind is the true province of the trial court. As a result, the relevance and admissibility of the documents, will depend on the rules of evidence and the pleadings by the parties. The issue for determination in the instant application is whether the Plaintiff's should be compelled to deliver the impugned materials to the Defendant as prayed.
  8. In determining this application it is my view that the Court has to consider the facts of the present case and direct its mind to the relevance and necessity of the documents which the Applicant seeks in this matter. As illustrated by the learned authors in **Halsbury's Laws of England, Volume 13 at para 38**, the Court will not make any orders for documents which have no significance or relevance to the matter. The learned authors state:

***“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”***

9. Also see the case of **Crown Paints (Kenya) Limited v Dry Associates Limited [2015] eKLR**. From the above, 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 the trial. See the case of **Oracle Productions Limited v Decapture Limited & 3 others [2014] eKLR** where **Kimondo J** rendered himself thus;

***“.....Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules 2010 has 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.”***

10. From the foregoing case, it goes without saying that relevance of the documents sought must be tested by the pleadings and particulars. After examining both the Plaintiff and Defence of the respective parties, it is my opinion that from the competing claims disclosed in the pleadings, the Defendant obviously requires full discovery of the disputed materials to get a fair trial. I thus find the materials sought on discovery are relevant and necessary. I say so because, the dispute at hand involves various facilities purportedly taken out by the Defendant, which are now in arrears. The instruments in which these facilities were advanced including any letters of offer are therefore important for the court to do substantial justice between the parties.
11. Be that as it may, I also find that the Defendant has the onus of proving that the Plaintiff is in possession of the documents sought. Fortunately, the Plaintiff has indicated in its affidavit that it does/did not have any objection in producing the said documents except the loan account opening forms. Further, the Plaintiff Company has gone even a step further and produced the loan statements in connection with Account No.s 0019010000420-440; 0019010000360-420; 0019010000211-300 and Account number 0012020000354. To this end, I find that the only other documents that need to be delivered to the Plaintiff are the duly executed letters of offer and loan application forms in connection to the facilities in contention between the parties.
12. With regard to the duly executed loan account opening forms, I take note of the deposition of Paul Ouma in his Replying Affidavit, specifically paragraph 4, where he states;

***“4. As per banking practice, no account opening forms are required for the opening of loan statements. In respect to the loan accounts listed in paragraph 3 above, there are therefore no account opening forms”***

13. 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. From the forgoing, it is my finding that the Plaintiff cannot comply with the order of producing the duly account opening forms as requested by the Defendant, since as indicated, banking practice does not require loan accounts to be opened in the same way as other ordinary accounts i.e. through account opening forms. In the result, prayer 1(a) must fail.
14. In the result, it is my opinion that the Defendant’s application dated 23<sup>rd</sup> February, 2015 partially succeeds in terms of prayer 1 (c) be and is hereby allowed. The documents and information sought in the application in terms of the executed letters and loan application forms should be delivered to the Defendant within 14 days of the court’s ruling.
15. Costs of this application should be in the cause.
16. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 19<sup>th</sup> day of February, 2016.**

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**C. KARIUKI**

**JUDGE**