



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 1336 OF 2001**

**ROSELINE MARY KAHUMBU.....PLAINTIFF**

**VERSUS -**

**NATIONAL BANK OF KENYA.....DEFENDANT**

**DIRECTIONS**

1. On 8<sup>th</sup> February 2016 the case came up for Formal Proof. On that date the plaintiff was represented by Mr. Oluoch Olonya and Mr. Rambu, whilst the defendant was represented by Mr. Ngaca and Mr. Wanjohi.
2. The first witness was **ROSELINE MARY KAHUMBU**, who is the plaintiff.
3. After she had given a portion of her evidence, Mr. Ngaca advocate raised some concerns, as the plaintiff was tendering evidence which was not included in her Witness Statement.
4. In answer to the issue raised, Mr. Olunya advocate said that the evidence being tendered was relevant because it touched on matters which were pleaded in the plaint.
5. At that stage the court gave the following directions;  
  

***“The Witness Statement does not comply with the current Practice Directions. Accordingly, the case is not ready for trial. It is stood over to 29/02/2016 for Case Management.***

***Meanwhile, each party may retrieve from the court file their respective Witness Statements and Bundles of Documents”.***
6. Regrettably, the Case Management Conference was not conducted on 29<sup>th</sup> February 2016, as scheduled. But it was conducted on 30<sup>th</sup> March 2016.
7. On that date, both parties informed the court that they had complied with all the pre-trial procedures.
8. However, Mr. Ngaca advocate raised one issue. The said issue was in relation to the Defence which had been struck out earlier, due to the defendant’s failure to comply with an order on Discovery.
9. According to the defendant, they had complied with the order on Discovery after the Defence was struck out.

10. Indeed, the defendant pointed out that they had provided the plaintiff with all the requisite documents on 14<sup>th</sup> December 2012. The defendant said that the total number of documents which they made available was 44, and that the said documents included all the ones which the plaintiff had asked for.

11. Even though the defendant concedes that they provided the documents later than they ought to have done, the plaintiff did not reject the documents.

12. As the plaintiff had had possession of all the documents for over two (2) years before the case first came up for hearing, the defendant was of the view that the plaintiff would not be prejudiced if the court reinstated the Defence.

13. Miss Mbonye, the learned advocate for the plaintiff, expressed surprise at the defendant's request for the reinstatement of the Defence. She pointed out that the case was scheduled to proceed by way of Formal Proof.

14. On his part, Mr. Ngaca, the learned advocate for the defendant, submitted that it would be a grave injustice for the plaintiff to oppose the reinstatement of the Defence, whilst the plaintiff was relying on the documents which the defendant had made available.

15. In my considered opinion, the element of surprise which the plaintiff alluded to, is understandable. I say so because the court had earlier started hearing the case, which was proceeding by way of Formal Proof.

16. If, as the defendant said, the documents had been in the plaintiff's hands for over 2 years before the case first came up for trial, I would have expected the defendant to have sought orders for the reinstatement of the Defence, before the process of Formal Proof commenced.

17. The defendant appeared content to allow the Formal Proof to proceed. And it was only because the evidence being tendered by the plaintiff was not included in the plaintiff's Witness Statement, that the defendant raised an objection. Therefore, even at that stage, the defendant's objection was not connected to the need for the Defence being reinstated.

18. But it is also true that it was the court which directed that the case should go through a Case Management Conference. As a prelude to the Conference, the court permitted the parties to retrieve their respective documents from the court file.

19. The parties have now informed the court that each of them has now complied with the pre-trial procedures. If the court is satisfied that there is compliance, it should now certify the case as ready for trial.

20. But before reaching that step, the court was asked to reinstate the Defence.

21. On 12<sup>th</sup> February 2013 Havelock J. delivered a Ruling in which he held that the case would proceed by way of Formal Proof because there was no Defence.

22. The Defence had been struck out by Mbaluto J. on 19<sup>th</sup> July 2002, pursuant to the defendant's failure to comply with an order requiring them to make Discovery within 14 days, as had been directed.

23. Thereafter, on 1<sup>st</sup> September 2003 Njagi J. noted, *inter alia*, as follows;

***“It is as clear as daylight that the defendant has not produced all the documents”.***

24. The learned Judge also expressed the view that the defendant has not been candid or forthright with the court. He added as follows;

***“A defaulter can only escape the consequences of judgement given against him if he can demonstrate both that there was no intention to flout or ignore a court order and that the failure to obey was due to extraneous circumstances.***

***In the present case, if there are extraneous circumstances, they are of the bank’s creation. They are self inflicted.***

....

***The conduct of the defendant in relation to Mbaluto J.’s order for production of documents, to my mind, shows a willful disregard of a court order. Such willful disregard of a court order merits the imposition of the penalty ordered by the Judge”.***

25. In conclusion, Njagi J. upheld the striking out of the Defence.

26. As far as I can see, the defendant did not lodge an appeal to challenge either the decision of Mbaluto J. or the decision of Njagi J.

27. The defendant has not demonstrated to this court that there is any basis, in law, to warrant a review of the position already stated and restated by other Judges, on the issue of the Defence which was struck out.

28. I also note that the defendant had already sought an order to review the decision made by Mbaluto J. It did so by the application dated 19<sup>th</sup> July 2004, which was then determined by Njagi J.

29. Pursuant to the provisions of Order 45 Rule 6 of the Civil Procedure Rules;

***“No application to review an order on an application for a review of a decree or order passed or made on a review shall be entertained”.***

30. Njagi J. had already held that the Defence remained struck out, as had been ordered by Mbaluto J., earlier.

31. A request for the reinstatement of the Defence would constitute a review of the order made by Njagi J.

32. Pursuant to Order 45 Rule 6 of the Civil Procedure Rules, the court should not entertain an application such as the one brought by the defendant.

33. However, I also find that, even if the application was considered on its merits, it would be unsuccessful. Accordingly, I reject the defendant’s application for the reinstatement of the Defence.

34. Secondly, the court cannot allow itself to fall prey to the defendant’s contention, that if the plaintiff is to rely on the documents which the defendant provided, then the plaintiff ought not to oppose the reinstatement of the Defence.

35. When striking out the Defence, Mbaluto J. did not hold that the Defence would stand struck out until the defendant made Discovery. The learned Judge gave to the defendant an opportunity to make Discovery. When the defendant failed to utilize that opportunity, it was well aware of the consequences that would befall it. Therefore, there is no basis for faulting the plaintiff for continuing to ask that the orders to strike out the Defence should not be reversed.

36. I therefore direct that the case will proceed by way of Formal Proof.

37. For the avoidance of any doubt, the defendant will be entitled to cross-examine the plaintiff and her witnesses.

**DATED, SIGNED and DELIVERED at NAIROBI this 9<sup>th</sup> day of June 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of:**

*Rambo for the Plaintiff*

*Ngaca for the Defendant*

*Collins Odhiambo – Court clerk.*