



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 543 OF 2012

CANON ASSURANCE (K) LIMITED PLAINTIFF/APPLICANT

V E R S U S –

CHASE BANK (KENYA) LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Applicant **Cannon Assurance (k) Limited** took out a motion dated 8th October 2013 where it sought for orders to wit:

1. THAT the defendant be and is hereby ordered to produce and return to the plaintiff all the following documents which are or have been in its possession or power relating to this suit, namely:

a) The original loan agreement between Arusha Skyline Hotel Ltd and Union Project Capital AG dated 11th December 2006.

b) The original Memorandum of Understanding & Agreement between Arusha Skyline Hotels Ltd and Unionmatex Insustrienlagen GMBH dated 20th December 2006.

c) The original Deed of Agreement between Arusha Skyline Hotels Limited and the plaintiff dated 9th November 2009;

d) The 1st Deed of Variation of the Agreement dated 9th November 2006, dated 16th May 2007;

e) The 3rd Deed of Variation of the Agreement dated 9th November 2009, dated 31st May 2007.

f) The original charge dated 9th November 2006.

2. THAT the costs of this application be met by the defendant in any event.

2. When the motion came up for interpartes hearing, this court directed the learned counsels appearing in the matter to have it disposed of by way of written submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application.

3. The Applicant submitted that it had through a letter dated 13th March 2009 sent the Respondent certain

documents listed in the letter with a request to the Respondent to give the Applicant professional advice on the issuance of an intended guarantee in favour of Standard Chartered Bank, Tanzania. The Applicant contends that though the professional advice sought from the Respondent in the letter 13th March 2009 was not given by the Respondent and no facility agreement was entered into between the Respondent and Applicant for issuance of the intended guarantee, the Respondent retained the documents and illegally debited the Applicants fixed deposit account with a sum of £.448,000/= in a purported enforcement of the guarantee. The Applicant further contend that the actions of the Respondent prompted it to file a suit against the Respondent for payment of the sum of £.448,000. The Applicant averred that it filed this application where it is seeking for the production and return of the documents namely the Original Loan Agreement between Arush Skyline Hotel Ltd and Union Project Capital Ag dated 11th December 2006, the Original Memorandum of Understanding and Agreement between Arusha Skyline Hotels Ltd and Union Matex Industriean lagen GMBH dated 20th December 2005, the Original Deed of Agreement between Arusha Skyline Hotels Ltd and the plaintiff dated 9th November 2009. The 1st Deed of Variation of the Agreement dated 9th November, 2006 dated 16th May 2007 and the Original Charge dated 9th November 2006. It further claimed that despite the fact that the Respondent has admitted to being in possession of the documents, it failed to disclose these documents in its list and bundle of documents which it filed in court on 2nd September 2013 yet the documents are crucial. It added that the documents relate to the cause of action and the Applicant wishes to use the documents in its claim against the Respondent.

4. The Respondent in its response averred that production or inspection of the documents can be done in a pre trial conference under order 11 of the Civil Procedure Rules. It contended that it is unable to trace the said documents and that the court cannot order it to produce documents that are not in its possession or power. It further averred that the said documents do not relate to the matters in issue in this suit which documents are no longer in their possession. The Respondent argued further that despite filing its affidavit out of time the court is obligated by the constitution and the Civil Procedure Act Section 1A, 1B and 3A to consider the contents therein.

5. This application has been brought under section 22 of the Civil Procedure Act which provides for power to order discovery of documents. This provision gives the court the power to make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence.

6. I have looked at the plaint dated 17th October 2012 the cause of action arising therein is that the Respondent illegally debited the Applicant's fixed deposit account number 00010017004 with a sum of £.448,000 purporting it to be in the enforcement of a guarantee allegedly issued in favour of Exim Bank (Tanzania) Ltd and allegedly arising from a standby letter of credit allegedly issued by the Respondent to the Applicant. The Applicant denies having any facility agreement with the Respondent or having issued or authorised issuance of any letter of credit from the Respondent or having authorised issuance of any purported guarantee to the Respondent in favour of Exim Bank (Tanzania) Ltd. The Applicant claims that there are documents in possession of the Respondent that are crucial to its case.

In particular, it claims that the documents which includes the Original Loan Agreement between Arusha Skyline Hotel Ltd and Union project Capital AG dated 11th December 2006, the Original Memorandum of Understanding and the Agreement between Arusha Skyline hotels Ltd and Unimatex Insustriearlagen GMBH dated 20th December 2006, the original deed of agreement between Arusha Skyline Hotels Limited and the plaintiff dated 9th November 2009, the 1st Deed of Variation of the Agreement dated 9th November 2006, dated 16th May 2007, the 3rd deed of Variation of the Agreement dated 9th November 2009 dated 31st May 2007 and the Original Charge dated 9th November 2006 were forwarded to the Respondent. The Respondent has not denied that it had possession of the documents.

7. In fact the Respondent deponed an affidavit through the head of corporate one **James Mwaura** in response to the Applicants application admitting receipt of the documents in question. In addition to that,

the Respondents head of corporate was on 13th October 2014 cross-examined on this issue. During cross-examination, he testified that according to exhibit JN1 dated 13th March 2009, a forwarding letter from the applicant, the subject documents were annexed to the letter and delivered to the bank. He averred that the bank received the said documents which were in its custody. He claimed that the bank gave oral advise on the said documents and that it drafted professional advise to the Applicant, which draft he did not have in court. He advised that the bank has a system through which the service of the advise sought is rendered. He laid out the procedure which was that when a bank receives a documents it acknowledges the same before handing them over to the relevant department which department processes them and where the project or proposal is successful then, the bank uses the document to formalise the proposal and the legal team keeps the documents in a central system in the strong room or archives. He averred that in his opinion these documents were not primary documents necessary to be maintained by the bank and were documents that were received by officers who have since left. He admitted that though they have no letters forwarding the documents, the same were handed over to the Applicant. He further admitted that they had received several written demands from the Applicants requesting to be given the documents. He further admitted that the documents must be in the archive.

8. I have considered the material placed before this court including the evidence adduced by the parties and I note that the Respondent is not denying the fact that the Applicant forwarded to it the six (6) documents as listed in the first prayer. The Respondent however, claims that since these documents were not primary documents which are necessary for maintenance, then they must have been returned to the Applicant. It further maintains that though there are forwarding letters, the same must have been returned to the Applicant. On the other hand, the Applicant is firm that it needs those documents which it claims are its own and that it wishes to use them in advancing its current case. The Applicant is apprehensive that it will suffer prejudice in the prosecution of its case if the Respondent is not ordered to avail the documents to the Applicant.

9. I further note that the Respondent opines that the documents are not vital to the current suit. In my view, it is not the place of the Respondent to determine whether the documents are vital for the Applicant in this suit or not. The Respondent cannot purport to prosecute the suit on behalf of the Applicant. It cannot take the steering wheel of the Applicant's suit and steer it forward by ruling out the importance of the six documents to their case. This is the Applicants case and it has a right to produce whatever documents it deems necessary for the success of its suit generally. If the applicant feels that the documents are vital to the suit, then it should be allowed to include such documents in its list of documents.

10. Moreover, I fail to understand how a reputable bank like the Respondent herein can forward or return crucial documents enlisted herein to the applicant without a forwarding letter. The Applicant gave the subject documents vide a letter dated 13th March 2009, yet the bank failed to return the same courtesy and only claims to have forwarded the documents without a forwarding letter.

11. In the premises, I am not convinced that the Respondent Returned the documents enlisted in this application. In fact even the Respondents head of corporate in cross-examination intimated that there is a possibility that the documents could still be in the archive. The Applicant claimed it will be prejudiced in its suit moving forward if these documents are not availed. At this preliminary stage, I cannot overrule the importance of the documents which on the face of the plaint, it is evident that they are crucial documents. The Respondent should endeavour therefore to return the six documents which are clearly in its possession.

12. In the end, I hereby allow the application. Costs to await the conclusion of the suit.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant