



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO.13 OF 2013
M/S RAMJI MEGHJI.....APPLICANT
VERSUS
KISII UNIVERSITY.....RESPONDENT
RULING

Background

[1] On 12th July, 2013, the plaintiff/defendant herein sued the defendant/applicant seeking orders as follows:

- (a) Declaration that the Defendant has breached and/or violated the terms of the Letter of offer, duly signed and/or executed by the Defendant on 7th day of March 2012.**
- (b) Payment of the sum of Kshs. 96, 072, 716= only, being the outstanding rent arrears, accruals and damages for breach of Contract, which contract was to subsist upto and including the year 2017.**
- (c) Interest on (b) above at court rates (14%) w.e.f December 2012.**
- (d) Costs of this suit be borne by the Defendant.**
- (e) Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.**

[2] The plaintiff's case against the defendant is that on or about August 2011, at the defendant's request, it agreed to lease space in its building situate on LR No. Kisii Town/Block III /147 (hereinafter referred to as "the suit building").

[3] According to the plaintiff, it accepted the defendant's request and allowed the defendant to occupy the 1st and 2nd floors of the suit building in August 2011 while the 3rd floor was to be taken up later by the defendant in July 2012. The plaintiff thereafter issued the defendant with a letter of offer showing the extent of the lease and the monthly payable.

[4] The plaintiff's claim is that the defendant breached the terms of the letter of offer dated 7th March, 2012 by inter alia, failing to pay the agreed rent (s).

[5] The Defendant, on its part, denied the plaintiff's claim in its defence filed on 15th August 2013 in

which it admitted having approached the plaintiff to lease to it part of the suit building comprising of the 1st, 2nd and 3rd floors which building was at the time still undergoing construction and as a consequence thereof, the defendant took possession of the 1st floor only as the rest of the floors were incomplete up and until 31st December 2013 when the defendant vacated the suit building. The defendant/applicant's main line of defence is that the 2nd and 3rd floors of the suit building was incomplete and was not delivered to it by the plaintiff/respondent so as to justify the plaintiff's claim for the full rent and/or the enforcement of the conditions contained in the letter of offer which letter, the applicant contends could only take full effect upon the applicants occupation of all the 3 floors of the suit building.

[6] It is the allegation of non-completion of all the proposed leased floors of the suit building that has precipitated the instant application before the court.

Introduction

[7] By a Notice of Motion application dated 1st November 2013 brought under **Order II Rule 3 (2) (f) and (j)** of the **Civil Procedure Rules, Sections 1A, 1B, 3A and 22 of the Civil Procedure Act**, the applicant/Defendant seeks for orders that the plaintiff/Respondent do make and produce discovery on oath of the following documents.

- (a) Approval of Building plans by National Environment Management Authority (NEMA) over building on title number Kisii Town/block II/147.**
- (b) Receipts for payment to NEMA for approval of building plans on title number Kisii Town/Block III/147.**
- (c) Approval of building plans by Municipal Council over building on title number Kisii Town/Block III/147.**
- (d) Receipts for payment to Municipal Council of Kisii Municipal Council for approval of building plans on title number Kisii Town/Block III/147.**
- (e) Occupation certificate/permit by Municipal Council of Kisii and/or Kisii Municipal Council for building on title number Kisii Town/Block III/147.**
- (f) Receipts for payment to Municipal Council for occupation certificate/permit for building on title number Kisii Town/block III/147.**
- (g) Certificate of completion of the building and/or any other document relating to and/or any other document relating to and concerning the matter in issue in this suit.**

[8] The applicant further prays that the respondent's case be dismissed with costs should he fail to comply with the order on discovery or production of the aforesaid documents within the time specified by this court.

[9] The application is supported by the affidavit of CHRISTOPHER M. NYENZE sworn on 1ST November 2013 in which the applicant reiterates the grounds upon which the application is premised and avers that the applicant had made several requests to the plaintiff's advocate for discovery of all the documents relating to the matter in issue in this suit and that the plaintiff/respondent has failed, ignored and/or refused to avail the said documents.

[10] The applicant's deponent adds that it is necessary for the Defendant/Applicant to know the case it faces by reference to the documents touching on the facts pleaded by the plaintiff/respondent and/or that may be relied upon by the plaintiff in this suit in order for it to have an opportunity to defend itself.

[11] The defendant/applicant's case is that a proper consideration of the plaintiff's case against the

defendant will require the production of records showing completion of the plaintiff's building to habitable standards as required by the relevant authorities charged with the task of overseeing the construction and completion of buildings.

[12] The defendant's/applicant's defence is that despite having signed letter of offer it never took possession of the 2nd and 3rd floors of the building erected on Kisii town/block III/147 as the 2 floors had not been completed to habitable standard as at the time of signing the letter of offer.

[13] The defendant/applicant adds that the said relevant documents are in the possession of the plaintiff/respondent and are obtainable by them in their capacity as the proprietors of the suit building and it is thus necessary for them to make discovery and produce the said documents for the purpose of determination matters in issue and for the purposes of disposing of the suit fairly and justly.

[14] The plaintiff/respondent has opposed the applicant's application vide grounds of opposition dated 2nd December 2014 in which it states that the application is premature, incompetent, misconceived and legally untenable.

[15] The respondent further states that the application amounts to a fishing expectation contrary to rules of evidence on production and admissibility of documents.

[16] The respondent further contends that this court lacks jurisdiction to adjudicate upon the application and it ought to be struck out Ex-Debito Justitiae.

[17] When the application came up for hearing before my predecessor Justice Nagillah on 6th July 2015, parties agreed to canvass their arguments in respect therefore by way of written submissions.

Applicant's Submissions:

[18] Through its advocates M/s Nyairo & co. Advocate the applicant submits that the instant application was precipitated by the respondent's failure to heed its request to produce documents for purposes of discovery. The applicant maintains that despite having signed a letter of offer showing that it would lease the 1st, 2nd and 3rd floors of the plaintiff's suit building, it eventually only took possession of the 1st floor as the 2nd and 3rd floors were still incomplete and under construction.

[19] The applicant has cited **Sections 30 and 36 of the Physical Planning Act Cap 286** that relate to the delivery of building plans and Environmental Impact Assessment Report to the Department of Physical Planning before the commencement of construction.

[20] The applicant argues that the document sought in the discovery are in the custody of the respondent and it can only get access to them if the court orders for the discovery sought.

[21] The applicant has relied on the case of **Oracle Productions Ltd Vs Decapture Limited & 3 others [2014] eKLR** in which it was held 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.”

[22] The applicant also cited the holding by Havelock J in **Concord Insurance Co. Ltd vs NIC Bank Ltd [2013] eKLR** where he stated as follows:

“Pretrial 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. Order 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.”

[23] The applicant argues that the documents sought are crucial in assisting the court to properly determine all the issues pertaining to the suit and as such the respondent's claim that he applicant is on a fishing expectation is not true.

[24] On court's jurisdiction, the applicant argues that under **Section 22 of the Civil Procedure Act**, the court has powers, either on its own motion or on the application of any party to make orders that may be necessary or reasonable in all matters relating to delivery and answering of interrogatories, the admission of documents and facts and the discovery, inspection, impounding and return of documents or other material objects producible as evidence.

[25] The applicant adds that order 11 (2) (f) (j) grants court the powers to grant the orders sought in the instant application.

Respondent's Submissions

[26] Through its advocates M/s Oguttu Mboya Co. Advocates, the respondent isolates the issues requiring this courts determination as follows:

(a) Whether the Honourable Court is seized of jurisdiction to grant the Application for Discovery and Production of Documents?

(b) Whether the Discovery and Production can ordered when the Documents under reference do not form part and parcel of the Documents contained in the plaintiff's Bundle of Documents?

(c) Whether the Documents sought are relevant to the determination of the issue in Dispute?

(d) Whether the Application herein constitutes and/or amounts to a fishing expedition?

[27] The respondent argues that the coming into effect of the Civil Procedure Rules, 2010, substantially diminished the purposes of discovery and production of documents as parties are now deemed to rely only on the documents that they have tendered which, according to the respondent, is a radical departure from the provisions of Order X of the Civil Procedure Rules (now repealed). The respondent contends that the in line with the purport and import of the provisions of order 11 of the Civil Procedure Rules, 2010, it is not open to either party to seek to compel the opposite party to produce documents that do not form part of the party's bundle of documents.

[28] The respondent's position is that Order 11 of the Civil Procedure Rules does not give the court any jurisdiction or mandate to compel a party to produce a document other than the ones contained in that party's bundle of documents. In a nutshell, the respondent appears to suggest that order 11 of the Civil Procedure Rules effectively did away with the requirement for delivery of discovery and therefore the respondent is not obligated to produce any document that it had not captured in its bundle of documents.

[29] The respondent argues that the Kenyan jurisprudence, being adversarial in nature and the court being an impartial arbiter, must not descend into the arena of investigations and gathering of evidence for either party and more so, where the documents sought do not form part of the documents to be relied upon.

[30] The respondent's case is that the applicant willingly executed a letter of offer document that clearly spelt out the terms and tenor of the premises which were to be leased out and therefore it was not open for the applicant to purport to explain or deny the same by seeking to proffer documents which were not deemed important or necessary by the applicant in first instance. The respondent states that the applicant ought to have demanded the documents that he now seeks to discover before executing the letter of offer.

[31] The respondents adds that the applicant had a chance to view and assess the suitability of the demised premises including the completion thereof and consequently it cannot be seen to turn back and now purport to seek documents whose effect and meaning would be to dispute the habitability of the

demised premises.

[32] The respondent argues that the documents being sought for are irrelevant to the case and pleadings at hand since discovery must be limited to the matter in contention which is the non-payment of rents founded on a contract document duly executed by the parties.

[33] The respondent's case is that at the time the applicant executed the letter of offer it neither sought for nor demanded to be supplied with copies of documents it now seeks in the instant application as the applicant was satisfied with the suitability, completeness and habitability of the suit premises and is therefore bound by the terms and conditions therein which it had already started complying with by paying the covenanted rents only to fall in arrears later.

[34] The respondent submits that allowing the instant application will be tantamount to assisting the respondent better its case and this will violate the adversarial nature of the our jurisprudence.

[35] The respondent relied on the cases of **Concord Insurance Co. Ltd vs NIC Bank Ltd (Supra)**, **John Onyancha Zurwe vs Oreti Atinda, CA Civil Appeal NO. 217 of 2003 (unreported)** and **National Bank of Kenya ltd vs Pipe plastic Samkolit (K) Ltd and Another CA Civil Appeal No. 95 of 1999 (unreported)**.

Analysis and Determination:

[36] I have duly considered the application dated 1st November 2013, the respondent statement of grounds of opposition, the parties written submissions and the authorities cited. I discern the issues requiring my determination to be as follows:

- (a) Whether this court has jurisdiction to hear and determine the application.**
- (b) Whether discovery can be ordered when the documents under reference do not form part of the documents in the respondents bundle or list of documents.**
- (c) Whether the documents sought are relevant in the determination of the issues in dispute.**

[37] On jurisdiction, Section 22 of the Civil Procedure Act provides as follows:

“22. Power to order discovery and the like.

Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

- (a) 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;**
- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;**
- (c) order any fact to be proved by affidavit.”**

[38] It is my finding that the above section of the Civil Procedure Act speaks out clearly on the jurisdiction of this court as it empowers the court at any time on its own motion or upon an application of any party to make orders on discovery of documents.

[39] Turning to the question of whether discovery can be ordered when the documents referred to do not form part of the documents in the respondent's list of documents, I find that it would be self-defeating to

ask for discovery of documents that have already been identified and produced in the list of documents logically speaking, the rules on discovery of documents was intended to be in respect to documents that have not been availed to the court or to the opposing party. The respondent's argument that an opposite party is bound by and should live with, as it were, only the documents that have been availed to it by the respondent cannot be the correct legal position as, if that was the case, then the provisions of Section 22 the Civil Procedure Act would be rendered worthless. It is therefore my finding that by dint of the provisions of the said Section 22 of the Civil Procedure Act, a party is justified to seek the discovery of documents he believes to be in the custody of his counterpart that would be relevant in the determination of the issues before the court.

[40] Indeed, in the case of **Concord Insurance Company Limited vs NIC Bank limited (supra)** that has been cited by both the parties, it was held that:

“Discovery will not be ordered in respect of an irrelevant allegations in the pleadings, which, even if substantiated, could not affect the results of the action nor in respect of an allegations 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 cause. 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”.

[41] In the instant case, are the allegations in the pleadings relating to the habitability and/or suitability of part of the suit/leased premises relevant so as to be said that they can affect the results of the action? In determining the relevance of the said documents sought to be discovered, one needs to examine the pleadings in detail in order to understand the background of the case.

[42] Brief facts of the case are that the respondent sued the applicant seeking to enforce the terms of a letter of offer to lease out 3 floors of the suit building to the applicant. The applicant admits having accepted and signed the letter of offer before moving in to occupy, what it alleges, was only the 1st floor of the suit building as the rest of the floors, 2nd and 3rd were, at that time, allegedly still under construction.

[43] The respondent, on his part, acknowledges that it allowed the applicant to occupy the 1st and 2nd floor on August 2011 while the third floor was to be taken up by the applicant one year later in July 2012. From the above background of the case, it is clear that there is a dispute on whether or not the applicant actually took possession of and occupied all the three floors of the suit building in accordance with the terms of the letter of offer and if not, the reasons for the delay in the occupation.

[44] The main case is still pending hearing and therefore I will restrict my ruling to the application at hand and restrain myself from making findings that could prejudice the outcome of the main case or embarrass the trial court. The weight and veracity of each party's case will be tested fully at the trial of the main case when evidence shall be adduced before a decision is made.

[45] In the same breath, the relevance and admissibility of the documents sought in the discovery together with the documents already submitted by the parties in their respective list of documents will be tested in accordance with and based on the rules of evidence and the pleadings.

[46] The issue before me in the instant application is whether the plaintiff should be compelled to deliver the documents sought in the discovery before or at the trial. The purpose of discovery is captured in Halsburys Laws of England as follow:

"The function of 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 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.”

[47] In the instant case, as I have already observed in this ruling, the respondent does not disclose the reason for the late occupation of the 3rd floor by the applicant while the applicant contends that it only took possession of the 1st floor of the suit building. It is quite clear to me that while both parties are in agreement that the letter of offer was in respect to the lease of 3 floors of the suit premises, not all the floors were occupied by the applicant at the first instance and therefore the issue of whether or not the 3rd floor or any other floor that the applicant was to occupy in the suit was complete or was indeed eventually occupied would be a relevant issue in the determination of the main case.

[48] The relevance of the documents sought arises from the applicants claim in its defence that despite having signed a letter of offer in respect to a lease of 3 floors of the suit building, it eventually only took possession of the 1st floor of the said building. This aspect of defence is captured in paragraphs 4, 5 and 6 of the defence as follows:

“4. The lease was intended to be in respect of the 1st to 3rd floors of the building erected on title number Kisii Town/Block III/147. However at the time of the discussions referred to in paragraph 3 above, the construction of the aforesaid building had not been completed to habitable condition.

5. The defendant took possession of the 1st floor of the aforesaid premises from 1st august 2011. However, the Defendant was never given nor did it take possession of the 2nd and 3rd Floors of the said building as the construction of the same were incomplete up until 31st December, 2013 when the Defendant vacated the 1st floor of the said premises.”

[49] The plaintiff/respondent has argued that the letter of offer that was signed by the applicant was binding on him and that the applicant cannot be seen to turn around and seek to discover documents which it ought to have asked for before signing the offer letter. Once again, this line of argument can only be ventilated fully during the main hearing of the suit at which point the validity effect, tenor and import of the letter of offer will be deliberated upon. The lingering question as to the whether or not the letter of offer is valid and binding between parties will therefore have to await the full trial.

[50] The respondent has also alluded to the fact that the making of orders for discovery of documents would be tantamount to the court assisting the applicant in investigations and therefore fishing expedition. I do not accept this argument by the plaintiff/respondent because the applicant, as I have already observed in this ruling, has already laid a foundation for his claim for the documents in the defence in which he alleges that the suit building was incomplete as at the time he signed the letter of offer.

[51] The competing claims contained in the pleadings makes it necessary for the applicant to get a full discovery in order for the court to fully adjudicate on the dispute at hand. The documents sought are those that any proprietor of a building within a town should have in his custody and the respondent has not stated that he does not have the said documents or that obtaining and producing them would occasion him any inconvenience or prejudice. Clearly therefore, asking the respondent, who is the proprietor of the suit building, to avail documents of completion cannot be construed to be a fishing expedition. . It is therefore my finding that the documents sought are relevant and necessary in the fair determination of the case.

[52] The court is under an obligation to dispense substantive justice to all the parties before it in line with Article 159 of the Constitution as read with sections 1A and 1B of the Civil Procedure Act (See **Oracle Productions Limited Vs Decapture Limited & 3 Others** (supra)).

[53] The applicant served a Notice to Produce on the respondent which service has not been disputed. As I have already noted in this ruling, the respondent has conceded that part of the building (3rd floor) was to be occupied one year after he letter of offer was signed.

[54] It is my humble view that discovery would not have formed part of our Civil Procedure Rules if its main objective was to assist parties on evidence fishing expedition. To my mind, the mischief that the law on discovery intended to cure was inter alia, to enable a party gain access to vital documents that may be in and exclusive custody of his opponent.

[55] Accordingly, having considered the parties' pleadings, written submissions and the law, I come to the conclusion that the application dated 1st November 2013 has merit. I therefore allow it and order that the plaintiff/respondent shall make discovery, on oath, and deliver to the defendant/applicant, all the documents listed on the face of the said Notice of Motion application dated 1st November 2013.

[56] The costs of this application shall abide the outcome of the main suit

[57] It is so ordered.

Dated, signed and delivered in open court this 16th day of August, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Mose holding brief for Mr. Nyairo for the Applicant
- Mr. Ochwangi for the Respondent
- Omwoyo: court clerk