



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 105 OF 2002

LESLIE OKUDO AKUMU ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

I N T R O D U C T I O N

1. This Ruling relates to an Objection raised in court by the Plaintiff's counsel Mr. Mathews Oseko on 3rd April 2014 on the production of certain documents referred to herein during the continuing hearing of the suit herein.

2. The background to the said objection may be summarised as follows. The Plaintiff as a customer to the Defendant bank enjoyed certain financial accommodation from the Defendant from time to time for periods prior to the year 2002 when this suit was filed in court. Those financial accommodations were in the course of time secured by the security offered by the Plaintiff. Due to disagreements on payments due, and actual lack of payment by the Plaintiff the Defendant sought to realise the security which was offered by the Plaintiff. The Plaintiff challenged that process in court by filing this suit on 30th January 2002 seeking *inter-a-lia* injunctions against the Defendant's sale of the security and a sum of Kshs.15,271,237/43 on the grounds that he had allegedly fully repaid and indeed overpaid the entire advanced sums.

3. Parties had in compliance with the discovery procedures and rules under the Civil Procedure Act filed the lists and copies of documents and witness statements they intended to rely on in support of their respective cases.

THE PLAINTIFF'S CASE AND SUBMISSIONS

4. On 11th December, 2009, the Plaintiff sought leave of the Court to enable both parties to file their Amended List of Documents and Statements of Issues. Honourable Muga Apondi, Judge (as he then was) granted the said Application. Subsequently, in compliance with the coming into force of the Civil Procedure Rules, 2010, the Plaintiff filed and served his Amended List of Documents on 2nd February, 2010 and the Defendant filed and served its Supplementary List of Documents in Court, on the 4th of March, 2010.

Stemming from the above position, all the parties and in particular the Defendant proceeded to rely and adduce evidence on the contents of the documents listed in the Supplementary List of Documents dated 4th March, 2010, during the trial hearings both before Honourable Judge Muga Apondi and before me. Subsequently during the hearing process, three of the Plaintiff's Witnesses who included Mr. Leslie Okudo (the Plaintiff), Mr. Jimmy Kavilu and Mr. Wilfred Onono proceeded to produce evidence during the hearing stages of the Case based on the Plaintiff's Amended List of Documents dated 2nd February, 2010 and the Defendant's Supplementary List of Documents Dated 4th March, 2010. Similarly, the Defendant's Witness took to the stand to give evidence on 3rd April, 2014, and he sought to rely on his Witness Statement and the Defendant's Supplementary list of Documents dated 4th March, 2010.

5. DW1 took to the Witness Stand on 3rd February, 2014 when he gave his evidence in chief. On the material day, DW1 testified and confirmed his written Statement dated 5th October, 2012. He requested the Court to adopt his written Witness Statement dated and filed in Court on 5th October, 2012 and produced the Plaintiff's Supplementary List of Documents filed in Court on 4th March, 2010 which he tendered as his evidence in chief.

In his evidence in chief, DW1 testified that the Plaintiff was and still is a customer of the bank and operated a current bank account number 401021858 and a Loan Account Number 0201421900 with the Defendant (bank) at the Defendant's Eldoret Branch.

The evidence of DW1 was to the effect that the Plaintiff was advanced loan facilities by the Defendant but failed to pay in full prompting the Defendant to undertake recovery by way of disposing the security offered to the bank by the Plaintiff but the Plaintiff filed the instant suit. DW1 concluded his evidence in chief on 3rd February, 2014 and the matter was adjourned to 3rd April, 2014 when the Plaintiff's counsel began to cross-examine him. In the course of cross-examination, Mr. Oseko, counsel for the Plaintiff asked DW1 how many bank accounts the Plaintiff had with the Defendant bank to which DW1 confirm the two bank accounts being current account number 401021858 and loan account number 0201421900 and confirmed that the bank statements for the two bank accounts had been filed in Court with the Defendant's Supplementary List of Documents and supplied to the Plaintiff's counsel. Upon further cross-examination by the Plaintiff's counsel, DW1 reiterated that the bank statements for the Loan Account Number 0201421900 appeared from pages 338-341 of the Defendant's supplementary List of Documents which had already been supplied to the Plaintiff's Counsel, and produced in court.

6. It was at that juncture that the Plaintiff's counsel sought to raise objections orally in Court which culminated in these current proceedings on the objection to the production of the loan account bank statements forming part of the Defendant's Supplementary List of Documents at pages 338-341 which bundle had already been produced as the Defendant's evidence on 3rd February, 2014. The Plaintiff has sought in his objection submissions to have the said loan account statements expunged from the Defendant's Supplementary List of Documents and/or be disallowed on grounds which may be summed up as follows:-

i) That the Defendant's Supplementary List of Documents has never contained any bank loan account statements at pages 338-343 when it was served by the Defendant upon the Plaintiff's Counsel.

ii) That the Defendant's Supplementary List of Documents dated and filed on 4th March, 2010 differs substantially with the copy supplied to the Plaintiff's counsel more specifically that the said Loan Account Statements were missing from the copy supplied to the Plaintiff.

iii) That failure by the Defendant to disclose and avail the said Bank Loan Account Statements to the Plaintiff is an affront to the principle of discovery and disclosure of documents.

iv) That all the Plaintiff's witnesses whilst relying on the Defendant's Supplementary List of Documents filed on 4th March, 2010, gave evidence in Court and have denied there being any

bank loan account statements.

v) That the Plaintiff will suffer great prejudice as he has already closed his case and all his witnesses have already testified and tendered their evidence based on all the documents served on them by the Defendant excluding the “extra documents” sought to be introduced by the Defendant and that they had never been cross-examined on the same.

vi) That the Defendant never gave an indication that after listening to the Plaintiff’s evidence, it would controvert or challenge the Plaintiff’s witnesses on the issue nor that they would be relying on the subject documents as per the records.

vii) That the said Loan Account Statements were unreasonably and unjustifiably withheld from the Plaintiff.

7. The Plaintiff submitted that the pages (338-343) on the Defendant’s Supplementary List of Documents dated 4th March, 2010, **do not correspond** to the one served on the Plaintiff as the same document ends at page 339, that is also entirely different from the Defendant’s copy. The said pages refer to the Bank Loan Account Statements of the Plaintiff. The matter has since commencement, proceeded to full hearing with all the Plaintiff’s Witnesses having testified in Court, with three of them stating that they had examined documents provided by both the Plaintiff and Defendant and saw no Bank Loan Statements. The Plaintiff’s counsel Mr. Oseko submitted that the issue of whether or not the bank granted any loan facility to the Plaintiff has been critical to this case and the Plaintiff has always maintained categorically that no bank loan account statements were provided to him by the Defendant. Counsel submitted that parties to a suit are obligated to disclose the existence of relevant documents as was held in **Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No.2) [1973] 2 All ER 1169 at 1181, per Lord Cross of Chelsea**. Counsel submitted that the Bank Loan Account Statement is relevant to this suit as it entails questionable entries and amounts opposed by the Plaintiff, and further it is the basis upon which the Defendant is relying in their defence to prove that there was money owed to them.

8. Mr. Oseko submitted further that in cross examination of PW1, PW2 & PW3, the Bank Loan Account Statements were never shown to the Witnesses nor produced by the Defendant, although the said Witnesses always maintained there was no bank Loan Statement. There is no reason whatsoever as to why only the Defendant’s Supplementary List of Documents dated 4th March, 2014, and the Court’s copy should tally and somehow rhyme but differ substantially with the Plaintiff’s copy. Counsel referred to the court record of the copies of the Judges handwritten notes during the hearing of PW1, PW2 & PW3 testimonies, as follows:-

- *By Honourable Muga Apondi. J, at page 112,*
- *By Honourable E. K. Ogolla. J, at pages 121, 124, 129, 133,135 & 144*

Counsel observed that at no point did the Defendant’s side ever put it to the Plaintiff Witnesses during Cross Examination and neither did they produce the bank Loan Statements to counter the Plaintiffs Witnesses. It is evident that the Loan Account Statements are very central to this suit, and that one would reasonably expect them not only to be produced at the hearing had the Defendant sought to rely on them but also to be shown to the Plaintiff’s Witnesses who had vehemently denied their existence. Mr. Oseko submitted and maintained that a meticulous glance at the Defendants List of Documents dated 25th July, 2003, at No. 5 contains only statements of A/c No. 401 021 858 which has all along been the ‘overdraft account’ that the Plaintiff has all along stated. Fast forward to the Defendant’s Supplementary List of Document dated 4th March, 2010, and at No. 77 of it’s index are ‘Copies of the statements of the Plaintiff’s Account’, which does not mention ‘any of the Plaintiff’s Accounts nor the bank Loan Account Statements’, the Defendant seeks to now introduce and adduce new evidence. It is quite clear that the said Bank Loan Account Statements were never there from as early as 25th July, 2003, when the Defendant’s filed their List of Documents dated then. Counsel observed in his submission that an important question has been raised by the Plaintiff in regard to the documents he is objecting to. How could the Defendant begin to process a claim if the necessary documentation supportive of bank Loan Account Statements

claim was not availed to his (Plaintiff's) possession? Further, the Defendant's Supplementary List of Documents dated 4th March, 2010, served on the Plaintiff, even at page 338, refers to a Customer A/c No. 0103028103200, purportedly in the name of Mr. Leslie Okudo. The statement appearing on pages 338-339 (are documents appearing in Court's file as pages 336-337), which the bank mentions as A/c No. 0103028103200 and the same is repeated in the next document, headed as Customer's Statement as at 30/09/2010. The balances at pages 338 are substantially different as they show an amount of Kshs. -41, 428, 310.35 and also at page 339 an amount of Kshs. -338,199.05/-. The A/c statements produced differ from what Defendant's Witness has stated on oath. Mr. Oseko concluded that the totality of the above circumstances only leads to the conclusion that the Defendant's Supplementary List of Documents is not conclusive, the Defendant has not been candid and forthright with the Court, and the said Supplementary List of Documents and/or the Bank Loan Statements appearing on the said pages 339-343 should be struck out and/or expunged from the Court records, as was stated in **Kahumbu Vs National Bank of Kenya Limited [2003] 2 E.A 475**. Counsel also relied on legal writings in **Halsbury's Laws of England Vol 13, paragraph 40**, which states that,

“The party required or ordered to give discovery must make a list of documents in the prescribed form in which he must enumerate the documents in a convenient order and as shortly as possible, but describing each of them or in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it be identified”.

Counsel emphasized that there are no Bank Loan Statements in the Defendant's List served on the Plaintiff, as the Defendant failed to produce them. They however significantly and conveniently appear at the end of the Defendant's Bundle. This is an affront to the principle of discovery and disclosure of documents as was stated by Havelock J in **Concord Insurance Co Limited v NIC Bank Limited Nairobi, High Court Case 175 of 2011 [2013] eKLR**, where he held *inter alia* that;

“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”.

THE DEFENDANT'S RESPONSE AND SUBMISSIONS

9. In response, counsel for the Defendant Mr. Mose revisited the history of the case, and submitted that the Plaintiff's suit was initially filed vide Plaint dated and filed on 30th January, 2002 and the Rules of Discovery applicable then was Order X of the Civil Procedure Act and Rules, Revised Edition 1998 (1985) as amended by Legal Notice Number 36 of 2000 and Legal Notice Number 128 of 2001. Subsequently, the Civil Procedure Act and Rules 2010 came into effect and the Defendant filed its Supplementary List of Documents including the Bank Loan Account Statements for the Loan Account Number 020-1421900 contained in the Defendant's Supplementary List of Documents at pages 338-341 in compliance with Order 7, Rule 5(d) of the Civil Procedure Rules 2010.

10. The Defendant's Supplementary List of Documents was filed on 4th March, 2010 and served on the Plaintiff's counsel on the same date. The same were allowed by Consent of both parties and the consent to that effect adopted by the Court on 4th March, 2010 by Hon. Justice Muga Apondi (*Reference is made to the proceedings and order of Hon. Justice Apondi on 4th March, 2010 appearing at pages 87-88 of the handwritten Court proceedings*) whereupon the Plaintiff's Counsel confirmed to the Court that he had indeed been served with the Defendant's Supplementary List of Documents and that he had no objection to the same. Counsel submitted that in the premises, the Defendant's Supplementary List of Documents containing the bank loan account statements at pages 338-341 were served upon the Plaintiff's counsel during and before the Plaintiff (PW1) concluded his examination in chief on 16th June, 2010 and before he closed his evidence upon his re-examination by Mr. Oseko on 12th June, 2012.

Counsel submitted that during the proceedings of 17th October, 2011 by Mr. Mose (Counsel for the Defendant) , PW1 (Mr. Okudo) was referred to page 342 of the Defendant's Supplementary List of Documents (*Reference is made to proceedings of 17th October, 2011 particularly page 123 of the Court's handwritten proceedings*) wherein the Plaintiff confirmed the letter dated 8th April, 1994 from the Pensions Manager, Moi University, to the Plaintiff's regarding a Cheque Number 912594 for Kshs.450,000/= which the Plaintiff instructed the Defendant's Manager to credit to his account and utilize a sum of Kshs.250,000/= to reduce his indebtedness to the bank and the other sum of Kshs.200,000/= to his account for his use. The said letter is contained in the Defendant's Supplementary List of Documents at page 343 which bundle had been supplied to the Plaintiff and which letter is preceded by the Loan Accounts which are contained at pages 338-341 of the Defendant's Supplementary List of Documents. At that juncture, it was apparent and the Plaintiff confirmed through the copy of the Defendant's Supplementary List of Documents (bundle) supplied to his counsel that indeed the Defendant's Supplementary List of Documents had a page 342 in it. Neither the Plaintiff (PW1) nor his Counsel objected or raised complaints as the Plaintiff's counsel is attempting to allege now at pages 2, 4, 6, 7, 8 and 11 of his objections submissions filed in Court on 30th April, 2014, that indeed the Defendant's Supplementary List of Documents did not contain pages 338-341 or that the copy supplied to him substantially differ from the Defendant's and Court's copy.

The said pages 338-343 of the Defendant's Supplementary List of Documents tallied in the bundle filed in Court and with the copy supplied to the Plaintiff and the copy retained by the Defendant's Counsel. Counsel submitted that if the above were not true then it would be difficult to explain the Plaintiff's (PW1)'s admissions in pages 123 and the Plaintiff's Counsel's admissions at pages 87 and 88 of the Hand written copies of the Court Proceedings. Counsel found it quite curious and beyond comprehension that on 3rd April, 2014 and 30th April, 2014 , only the copy supplied to the Plaintiff counsel on 4th March, 2010 (now four years later) has miraculously changed and materially differ with the copy filed in Court and the copy retained by the Defendant's counsel. Mr. Mose submitted that the circumstances of the said disappearance in the face of the obvious interference and alterations with the binding of the copy supplied to the Plaintiff's counsel can only be explained by the Plaintiff's Counsel.

11. Mr. Mose submitted that the said Witness Statement was filed in compliance with Order 7, Rule 5 (c) and powers of the Court conferred by Order 11 of the Civil Procedure Rules 2010 regarding discovery and disclosure. The Plaintiff and his counsel never objected, nor sought any details or clarification on the Loan Account or Statements thereof which had been filed in Court on 4th March, 2010 and which is clearly stated in page 1 of DW1's written Witness Statements. In the circumstances, Mr. Mose submitted, the Defendant had made full and adequate discovery and disclosure of the bank statements for the Loan Account Number 020-1421900 and supplied the bank statements in respect of the said account both to the Plaintiff and to the Court by way of filing and service. Mr. Mose submitted and maintained that in fact DW1 expressly and candidly referred to Loan Account Number 020-1421900 in his examination in chief on 3rd February, 2014 and produced in Court both his written statements and the Defendant's Supplementary List of Documents and no objection was raised by the Plaintiff counsel who was present in Court and fully participated in the said proceedings.

ANALYSIS

12. From the foregoing submissions which I have carefully considered, it is the view of this court that the following are the issues for consideration in order to reach a finding:-

a) The role of discovery of documents in a suit process.

b) Whether the said pages 338 – 343 are actually missing as alleged by the Plaintiff, and if the answer is in the affirmative, whether the said missing was intentional on the part of the Defendant and calculated to mislead the court.

c) What orders can the court give in the circumstances.

13. In regard to issue number one as to the role of discovery in the suit process Mr. Oseko counsel for the Plaintiff has provided very useful authorities to this court, which will guide the court in this matter.

14. The Civil Procedure Rules of 2010 requires parties to furnish their evidence in advance before the commencement of the trial. These provisions, couched in mandatory terms, are found in Order 3, Order 7 and Order 11 of the Civil Procedure Rules. Under Order 3 Rule 2, when filing suit, one shall also file the following documents;

- a) Verifying Affidavit;***
- b) List of Witnesses;***
- c) Statements of Witnesses (excluding expert witnesses); and***
- d) Copies of Documents to be relied upon at the trial.***

The same applies to a Defendant when filing defence and counterclaim (if any) whose relevant provision is Order 7 Rule 5 that ought to apply to the Application herein and states as follows:-

Order 7 Rule 5:- Documents to accompany defence or counterclaim. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by:

- (a) An Affidavit under Order 4 rule 1(2) where there is a counterclaim;***
- (b) A List of Witnesses to be called at the trial;***
- (c) Written Statements signed by the witnesses (except expert witnesses); and***
- (d) Copies of Documents to be relied on at the trial.***

15. This in essence breathes into life the principle of Discovery of Documents under Order X. Rule 11 of the Old Civil Procedure Rules. Therefore the principle of disclosure of documents under which discovery of documents as enshrined wholly applies to this matter.

16. According to **Halsbury's Laws of England Vol 13**, paragraph 1, the true purpose of discovery is to level the litigation filed, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. It further goes to state;

“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”.

Halsbury's Laws of England Vol 13, paragraph 40, states that,

“The party required or ordered to give discovery must make a list of documents in the prescribed form in which he must enumerate the documents in a convenient order and as shortly as possible, but describing each of them or in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it be identified”.

17. At this juncture, the question that begs an answer is this: What happens where a party produces his Supplementary List of Documents which is inconclusive and/or missing some of the relevant documents to the suit? The subsequent discovery of other documents is basically the crux of the matter herein. On 3rd

April, 2014, the Plaintiff's Advocate herein embarked on the Cross Examination of the Defendant's Witness. As the Cross - Examination by the Plaintiff's Advocate proceeded, the Court and the Plaintiff were informed that there were additional pages, namely 338-343 in the Defendant's Supplementary List of Documents dated 4th March, 2010, which document did not correspond to the one served on the Plaintiff. **The English And Empire Digest Vol 18 (1975 Reissue), Sect. 9. At Sub-sect.7. (p.58)**, states that;

“Duty to Disclose- it is the duty of a party in an action who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by supplementary affidavit, the proper course, or at least by notice”.

Halsbury's Laws of England vol 13, paragraph 46; states that,

“If after the list of documents has been discovered of which the opposite party has a right to have discovery/disclosure, it is the duty of the party serving the list to give information to his opponent of the fact, either by supplementary list or by notice. A solicitor who discovers documents which his client has omitted must either inform the other side of the documents, or cease to act for his client as was inter alia held in Myers v Elman [1940] 4 All ER 484, HL”.

18. From the foregoing, and in answer to issue number one, it is clear, and this court needs not over emphasis the crucial role of discovery of documents. Discovery of documents is a requirement of our law of procedure, and is a process or concept which is adequately supported by legal practice and legal jurispendence. There is no short cut to this process. It must be done as by law required both in terms of the substantive law and procedural law. Where a party has failed to do, or to complete discovery of documents, that party must take full responsibility for the consequences, and lay the blame on its own door.

19. The second issue is whether the said pages 338 to 343 are actually missing as alleged by the Plaintiff, and if so, whether the same was intended by the Defendant or its counsel. This is not a very easy issue to deal with, considering that there are complete documentary discovery in the court file and in the Defendant's file. The said pages which are alleged to be missing are only missing in the Plaintiff's file. The court can make three clear conclusions from the above fact, one, that indeed the alleged missing pages were actually part of the copy given to the Plaintiff by the Defendant and that the Plaintiff or his agents intentionally plucked them away to found these proceedings. The second clear conclusion would be that the Defendant or its agents with intent to derail the Plaintiff's case withheld the said pages to deny the Plaintiff crucial evidence in the Plaintiff's case. I do not like the above two conclusions because they appear to cast aspersions on the character and integrity of the parties or their agents without any evidence and on that ground I reject those conclusions. The third conclusion is that the missing pages are indeed missing as a result of a genuine mistake on the part of the Defendant which occurred during the compilation process, and that the same was never intended. This conclusion is given credence by the fact that the discovery is complete in both the court's copy and the Defendant's copy. If the missing documents were intended by the Defendant, then there was never going to be a guarantee that the court would not by itself alone either during the hearing or the writing of the Judgement discover the fraud. I am persuaded to give a benefit of the doubt to the Defendant and to hold that the missing documentation is as a result of genuine mistake. The above conclusion notwithstanding, I have also carefully analysed the Defendant's submissions that indeed at the time of filing the Witness Statements of DW1 the loan account number 020-1421900 was mentioned, and at that time PW 2, PW 3 and PW 4 had not closed their evidence. Further, there are several references by the witnesses including those of the Plaintiff and DW 1 to the existence of a current account as well as a loan account. That it took the Plaintiff's counsel all this time to notice that there was something amiss only attests to the real possibility that the missing documentation was never intended, and is a fact which has surprised the parties and the court, and that it is the duty of this court to provide a solution to address the problem without visiting any harm prejudice or damages to any of the parties before the court.

20. This then leads me to the final issue herein, that is, what orders can this court make in the light of the

foregoing? I must first of all note and consider that this suit was filed in the year 2002, and that five witnesses have given evidence before two different judges. The justice of this suit cries for a conclusion sooner rather than later, and I will very reluctantly allow any orders which declare the trial a mistrial to commence afresh. I will equally not allow a situation which divests the Defendant of what it probably perceives to be a crucial substratum of its defence by denying the admission of the said missing pages, especially after I have found that the said missing pages may not necessarily be the result of intentional human effort.

21. In my Ruling therefore, I will allow the production of the said missing pages 338 – 343 in the Defendant’s bundle of documents, and at the same time give leave to the Plaintiff to recall any or all of its witnesses to respond to the testimonies contained in those missing pages.

22. These proceedings have been seriously contested, and in order to appreciate the efforts of the Plaintiff to bring the issue to the fore and to stringently seek redress thereof, I will give costs herein to the Plaintiff.

Orders accordingly.

READ, DELIVERED DATED AND AT NAIROBI

THIS 30TH DAY OF JANUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Wamwai holding brief for Oseko for the Plaintiff

Ngeresa holding brief for Ngugi for Defendant

Teresia – Court Clerk