



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 289 OF 2013

**CROWN PAINTS (KENYA) LIMITED.....PLAINTIFF/
APPLICANT**

VERSUS

**DRY ASSOCIATES LIMITED.....DEFENDANT
/RESPONDENT**

RULING

1. The applicant in the chamber summons dated 15th June, 2015. The prayers sought were as follows;
1. **That the Plaintiff do provide copies of the following documents for purposes of taking accounts and reconciliations by the Defendant which accounts and reconciliations are to be filed in court:**
 - a. **The Plaintiff's register of investors in relation to the commercial Paper programme.**
 - b. **The Plaintiff do provide copies of the print out of all payments (including withholding taxes deducted) by bankers cheque, company cheque or electronic transfer with regard to the following accounts:**
 - i. **Investment Advice Line**
 - ii. **Sirius Solutions Ltd (imperial Bank a/c no.7400000641)**
 - iii. **Meridias Capital Ltd (Bank of Africa a/c no. 030048200004)**
 - iv. **Bluecrest Holdings Ltd (Family Bank a/c no. 068682380)**
 - v. **Diefel Investments Ltd**
 - vi. **Gray Properties (Bank of Africa a/c no.03006800000)**
 - vii. **DAL Wealth Management Ltd (K-Rep a/c no. 003020000221)**
 - viii. **Daraja Retreat Centre (Equity Bank a/c no. 0870297051340)**
 - c. **Evidence of payment for the aforementioned transactions be availed to the Defendant for purposes of carrying out a forensic audit**
 - d. **The Plaintiff releases "Crown Berger CP Programme Diversions" reconciliation**

sheet.

- e. **The Plaintiff releases the Catholic Church receipts and payments (Including withholding taxes deducted) reconciliation sheet.**
- f. **The Plaintiff allows the Defendant to review documentation regarding the following Crown RTGS (Real Time Gross Settlement) payments into Sirius Solutions Ltd bank:**

Date	Amount (Kenya Shillings)
1. 26-Feb-09	1,811,384.20
2. 27-Apr-10	4,825,115.15
3. 12-Feb-10	3,056,285.00
4. 23-Aug-10	1,026,797.35
5. 1-Mar-11	1,510,989.00
7. The Plaintiff releases documentation and bank statements regarding the following payment from Sirius Solutions made on 17-March 2009 for Kshs. 188,244.20	
8. The Plaintiff releases to the Defendant copies of withholding ax certificates for the following Sirius Solutions Ltd deposits:	

Principal Amount (KES)	Deposit Date (On or about)
i. 4,867,126	19-Mar-09
ii. 1,028,970	15-Apr-10
iii. 1,555,218	07-Jan-11
ii. Costs of this application.	

2. The application is brought under Order 20 Rule 2 and Order 51 of the Civil Procedure Rules 2010. The application is grounded on the fact that the Plaintiff is claiming for sums of Kshs. 8,343,359.95/= from the defendant, which sum is not lawfully due. The application is supported by a lengthy affidavit of George Kenya, the Defendant's Chief Finance officer, sworn on 15th June, 2015.
3. In reiterating the grounds upon which the application is predicated, the deponent averred that the documents and accounts it seeks are pertinent to its defence. That further, the Plaintiff has prior to filing the instant case refused to allow the Defendant to reconcile the sets of registers of investors maintained by itself and the Plaintiff with regard to the commercial paper programme or avail documents to assist in reconciliation of the accounts. That without the same, the Defendant could not adequately defend itself. The main contention of the Defendant is that the register of investors maintained by the Plaintiff was fundamentally different from the one it holds, as the same contained secret entries that served to divert investor funds from the commercial paper programme (herein after the programme), particularly through a company called Sirius Solutions. The Defendant stated that no prejudice will be caused to the Plaintiff if the application is allowed as it is in the interest of justice and it will assist the court in determining the real issues in controversy.
4. In a rejoinder to the application, the Plaintiff filed grounds of application dated 22nd September, 2015. It was contended that the application has no merit and an abuse of the court process. The Plaintiff averred that the applicant has all the information that it seeks and that the same is contained in the Respondent's bundle of documents. In sum, it was the contention of the Plaintiff that the Defendant was on a fishing expedition and the orders sought are unwarranted.
5. The application was dispensed by way of written submissions. The Defendant filed its submissions on 2nd October, 2015, while the Plaintiff did so on 6th October, 2015.
6. The applicant argued that in the absence of any replying affidavit by the Plaintiff on its application, the facts contained in the supporting affidavit of Mr. George Keya were deemed admitted as held in the case of **Mohammed &Ano. Haidara (1972) E.A 166 at page 167**. The Defendant also submitted that its counterclaim involved the issue of fraud, collusion and damages of business and therefore the material sought ought to be disclosed by the Plaintiff. It was stated that the Plaintiff has not denied being in possession of the documents requested for and its assertion that the said documents are contained in the documents requested was incorrect. That in

- view of the foregoing, the Court should exercise its discretion and allow the application as the same will assist in the reconciliation of the accounts between the parties. The Defendant further denied being on a fishing expedition, as the documents requested were to aid in the determination of the dispute between the parties. That the documents requested were tied to the pleadings. The applicant therefore urged the court to allow the application and grant the prayers sought.
7. In opposition to the Defendant's submissions, the Defendant contended that the application was incompetent and bad in law. That the same seeks production of documents and not accounts and therefore under Order 20 of the Civil Procedure Rules, this court is not clothed with the jurisdiction to grant an order for the production of documents as called to do so by the Defendant. It was the Defendant's argument that the application has no merit, and the defendant was merely trying to delay the course of justice. The plaintiff further reiterated that the Defendant has all information that it was seeking as it has fully participated in the trial of its former employee and even providing evidence to court on how the employee stole while he was in its employ. The Defendant further contended that from the averments of its supporting affidavit, the Defendant was in possession of the documents sought, since it comparing information contained in the registers prayed for. That in any case, the information sought has no relevance to the matter, specifically prayer 1(b), which includes accounts and records of persons who are strangers to the matter. The Plaintiff maintained that the applicant has not stated that the documents of the entities tabulated in the payer 1(b) are in the possession or power of the respondent. It was pointed out that for the court to grant orders under Order 20(4), it had to consider whether there is some preliminary question to be tried before granting such an order. That in the instant case, the Plaintiff's claim and the Defendant's counterclaim have to go full trial since a preliminary questions to be tried does not exist. In conclusion, the Plaintiff urged the Court to dismiss the application as the same was an afterthought meant to delay the course of justice.
 8. I have carefully considered the Affidavits on record, the rival submissions by the parties and the various cited authorities. Having done so, I take the following view on this matter.
 9. There are two main issues for this Court's determination. One is whether the Defendant's application should fail for citing the wrong provisions of the law as submitted by the Plaintiff. The second issue is whether the Defendant's prayers are merited.
 10. With regard to the first issue, it is important to note that overriding objective of the Civil Procedure Act, Cap. 21 of the Laws of Kenya as enshrined in Section 1A thereof is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. This Court is mandated by Article 159 (2) (d) of the Constitution of Kenya, 2010 to administer justice without undue regard to procedural technicalities. The application herein is brought under Order 20 rule 2. The same deals with the order for accounts on counterclaim.
 11. According to the Plaintiff's submissions, the orders seek the production of documents as opposed to one for accounts. I have seen the prayers sought and I can discern that the Defendant seeks documents in relation to payments and transactions made towards the Crown Berger CP Programme. This also includes registers of investors. I have to agree with the Plaintiff that to a certain extent the Defendant is seeking production of documents that can help in the reconciliation of accounts between the parties. Does this in itself makes the application defective and bad in law? I do not think so. This position is backed by the decision in the case of **Thomas Ratemo Ogeri & 2 Others v. Zachariah Isaboke Nyata & Another Kisii High Court Environment and Land Civil Case No. 95 of 2004 [2014] eKLR**, where **Okong'o, J.** stated as follows:

“On the Defendants’ argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice pursuant to Article 159 (2) (d) of the Constitution of Kenya.”

12. The same position was adopted in the case of **Nancy Nyamira & Another V Archer Dramond Morgan Ltd [2012] eKLR** where **Ngugi, J.** held that:

“Next, the Defendant argues that the Plaintiffs’ application must fail because it cites the wrong provisions of law. The Enforcement Application cites Order XLIV, Rule 17. The Defendant correctly points out that there is no such rule. As many cases have now held,

and notwithstanding Sir Udoma's remarks SalumeNamukasa v YozefuBukya (1966) EA 433, invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in Gitau v Muriuki [1986] KLR 211 which I now follow to hold that in as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded."
(emphasis added)

13. It is therefore my view that the Plaintiff's argument that the application should fail for having cited the wrong provisions must therefore be rejected.
14. I now move to the second issue of whether or not the Defendant's prayers should be granted. A brief background of this case is as follows. The Plaintiff was licensed by the Capital Market Authority (CMA) to issue Commercial Papers for the purposes of raising capital from the public. A commercial paper according to the explanation of the Defendant, is a promissory note available to the public in minimum units of Kshs. 1,000,000/=. The defendant was at all material times an investment bank and fund manager duly retained by the Plaintiff for the purposes of the Crown Berger programme. It's duty in the concerned program was to source for investors to purchase commercial notes; promptly inform the plaintiff of the monies credited into the Plaintiff's account and to provide details of the investors; inform the plaintiff when the investor wanted to redeem the investment; keep custody of commercial papers and to prepare appropriate commercial notes in relation to investments made and forward the same to the Plaintiff for execution by the authorized signatories. However, the Plaintiff has sued the defendant claiming monies as a result of fraud perpetrated by Mr. Timothy Karanja who was the Defendant's employee. As a result of the fraud various investors in the program lost their funds. The said employee, was charged with various counts of theft in two criminal cases. The Plaintiff in due course compensated the various investors for their losses but continued to make demands to the defendant with regard to funds held.
15. Conversely, the Defendant in addition to denying the Plaintiff's claims, countersued for inter alia order for accounts and damages for loss of business. In both its oral and written submissions, the Defendant submitted that the documents it seeks are at the center of the matter before Court. In its pleadings and especially in the Supporting Affidavit of George Keya, it was averred among other things that the documents sought were pertinent to the Defence and counter claim and of high evidential value in determining whether there was any money owed the Plaintiff. The Plaintiff however contends that the application was an abuse of court process and was merely meant to delay the course of justice. That the said documents have been produced in court and the defendant had them in their possession.
16. The substantive issue raised for determination in the Plaintiff is with regard to Kshs. 24,715,564.45/= which it claimed is owed by the Defendant, after it compensated the investors to the programme to the tune of Kshs. 39,572,617.70/=. Of note is that the defendant admitted liability of Kshs. 14,857,053.25/= and had paid the same to the Plaintiff.
17. The Plaintiff filed a Bundle of Documents which it intended to rely upon in its case. The Defendant disputed such allegations, and thereafter, filed the present application seeking various documents, such as the register of investors in possession of the Plaintiff so as to ascertain whether it indeed was in possession of any investor funds as alleged by the Plaintiff. The Defendant, further argues that there was collusion between the Defendant and its former employee in channeling investor funds elsewhere. It is the Defendant's claim that if the documents sought were adduced or produced before trial, they would enable the expeditious, just and proportionate disposition of the matter.
18. In determining this application it is my view that this 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.”

19. Additionally, in the New Zealand Case of **Kim Margaret Van Gog v Owen Grauman [2013] NZHC 406**, the learned judge in making a determination on an application for discovery held inter alia;

“For the purposes of discovery, the particulars must be in sufficient detail to allow particular documents to be identified. The authorities are quite clear that in the absence of such particulars the defendant has no entitlement to discovery...the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know. Here the justification, for want of sufficient particulars is not a well-pleaded defence, and till there is such a defence there can be no right to discovery, in the absence both of the relationship of which I have spoken and of any special circumstances. The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery.”

20. As a consequence of the above authorities, the Defendant has to show in its application as to the relevance of the particulars it seeks, or the application will stand to be dismissed. Relevance must be tested by the pleadings and particulars. In my opinion, the Defendant has been able to show that the documents it seeks are relevant. Indeed there is a nexus shown by the Defendant as to the documents it seeks in its application in relation to its pleadings. The pleadings details that the defendant has sought a joint reconciliation of the amounts owed to the investors in vain. That further the Plaintiff has numerous documents that are not in the Defendant’s possession. The same will aid in its case, which is whether it indeed owes the Plaintiff the balance of the investor funds.

21. Further, the Defendant asserts that there were funds diverted to other accounts with regard to the commercial paper programme. It is due to this reason that they seek documents in connection to the details of the parties contained in prayer 1(b). I find that the prayers of the defendant are merited. It will also help the court determine the real issues of controversy between the parties. As such, the Court is can exercise its discretion in this application. Further, I find that no prejudice shall be occasioned to the Plaintiff that cannot be compensated by way of cost if the said orders are granted.

22. In the result, it is the courts holding that the Defendant’s application dated 15th June, 2015 be and is hereby allowed. The documents and information sought in the application should be delivered to the Defendant within 30 days of the court’s ruling. Costs in the cause.

Dated, signed and delivered in court at Nairobi this 30th day of October, 2015.

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C.KARIUKI

JUDGE