



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 548 OF 2013**

**SELECTA KENYA GMBH & CO. KG.....PLAINTIFF**

**VERSUS**

**MOHAMED ESMAIL .....1<sup>ST</sup> DEFENDANT**

**PETER WANDERI ..... 2<sup>nd</sup> DEFENDANT**

**RULING**

1. The application before the Court is Notice of Motion dated 2<sup>nd</sup> September, 2015 file by the Defendant. The application seeks to secure the following Orders;
  1. ***That an order do issue compelling the Plaintiff to produce on oath the following:***
    - a. *The Kenyan and German audited accounts for the year 2005-2012/13.*
    - b. *The Kenya Revenue Authority in-depth audit accounts for the year 2005-2012.*
    - c. *All monthly management accounts with notes for the year 2005-2012.*
    - d. *All sales records and price lists of all products form 2003-2012 including all local sales records undertaken by Aart Deleeuw from 2003-2012.*
    - e. *The local sales contracts dealing with Lathy Flora and Oserian.*
    - f. *All electronic data saved in its native form and e-mail correspondence in relation to any transactions undertaken by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their respective positions, prior to termination, as Finance Manager and Accountant, which information was saved in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants work laptops.*
    - g. *All records of all price changes and credit notes.*
    - h. *All investment reports and notes from the year 2005-2012 as well as expatriate German managers' contracts.*
  2. ***That an order do issue compelling the Plaintiff to afford the Defendants reasonable assistance in the inspection of all the above mentioned documents and electronic data.***
  3. ***That this Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the interests of justice.***
  4. ***That cost of the application be provided for.***
- 
2. The application is premised on the grounds set out therein and is supported by the affidavit of **MOHAMED ESMAIL AND PETER WANDERI** sworn on 2<sup>nd</sup> September, 2015.

3. The background of the application is as follows. The Plaintiff filed a suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants vide a Plaint dated 16<sup>th</sup> December, 2013 on a claim of an alleged conspiracy to defraud the Plaintiff Company of Kshs.175,875,501.84 plus interest on the said amounts from the dates of transfer to the date of full payment. It is the Plaintiff's averment that the said conspiracy was actualized when the Defendants authorized the opening of accounts Chase bank and on which accounts they carried on illegal transactions as well as transferring funds from its accounts with Middle East Bank to the alleged accounts with the 1<sup>st</sup> Defendant. The Defendants responded to the above allegations of conspiracy, damage and loss of the Plaintiff company vide their joint Statements of Defence dated 16<sup>th</sup> April, 2014 and filed on 17<sup>th</sup> April, 2015. In the said Statement of Defence, Defendants reserved the right to amend their Defence once the Plaintiff had furnished them with proper and better particulars especially in respect of the allegations the Plaintiff had set out in paragraph 9 of the Plaint whereat the Plaintiff tabulated various alleged illegal transactions and corresponding sums, whose loss it attributed to the Defendants. Notwithstanding the above reservations, the Plaintiff went ahead to file a Pre-Trial questionnaire dated 20<sup>th</sup> April, 2015 indicating under item 3 that it had given full disclosure and further negating the need for inspection of documents by the Defendants at the pre-trial stage under items 4 and 5 of the same questionnaire. The Applicant's case is that the rationale behind the Defendant's reservation was and still is premised on the fact that the relevant primary records they intend to rely on and for which they are seeking orders for discovery, production and inspection from this Honourable Court are in the possession of the Plaintiff who impounded the Defendants' work laptops thus denying them access to the said materials.
4. The application is opposed by the Plaintiffs through a Replying Affidavit sworn by **HENDRIKUS EIKENS** on 12<sup>th</sup> October, 2015. The Respondent's case is that the documents being sought are either irrelevant to the case before the Court or that the same are not in the possession of the Plaintiff.
5. Parties filed written submissions to the application, which I have considered. The only issue for determination is whether or not the said documents required are relevant to the case before the Court.
6. I will not belabour the law relating to either production or inspection of documents. Any party has a right to seek documents to support their case. However, those documents must be relevant to the case before the Court.
7. I have considered the prayers for documents herein. There is no denying that the list is expansive, wide, and obviously target matters which are not exactly before this Court, and with which this Court is not concerned. Any documents required must have some kind of relationship with the pleadings, so that if the Defendant requires certain document from the Plaintiff the documents sought must have some reference to the Plaint. I have carefully perused the Plaint herein. There is no single paragraph which resonates with the documents sought to be produced. That notwithstanding, the Plaintiff has availed for inspection the following documents.
  1. The Kenyan audited accounts for the years 2005 to 2012/13 and the monthly management accounts for the years 2005 to 2012.
  2. The sales records and price lists of products.
  3. The laptop that was being used by the 2<sup>nd</sup> Defendant while working at the company.
  4. The Plaintiff company's credit notes.
  5. Investment reports for the Plaintiff Company.
  6. Employment contracts for German expatriates working for the Plaintiff Company.
8. The pleadings in this matter do not warrant the production of the documents requested, but because the Plaintiff was magnanimous enough do allow the inspection of above documents, I will order that those documents be produced in satisfaction of this motion. It must be noted that rules of procedure are primarily aimed at facilitating a fair trial. Similarly, discovery of documents is centered on this purpose. The documents sought to be produced ought to be strictly relevant and necessary to the cause at hand.
9. In the case of **CONCORD INSURANCE CO. LTD VS. NIC BANK LTD [2013]eKLR**, the court quoted with approval the sentiments of the learned authors of the Halsbury's Laws of

England, Volume 13 para 38, that:

**‘Relevance must be tested by the pleadings and particulars and when particulars have been served which limit a particular issue then discovery on that issue is limited to the matter raised in the particulars. 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’.**

10. The applicants herein are merely on a fishing expedition, which is not helpful to the cause of Justice herein.
11. Since I have found that the documents required are not necessary or relevant to the matter before the Court, it is not necessary to delve into the issue whether or not the same are in the custody of the Plaintiff.
12. The upshot of the matter is that the application is denied except that the documents which the Plaintiff availed for inspection and which are mentioned in paragraph 7 herein shall be provided pursuant to the application. Parties to bear own costs of the application.

Orders accordingly.

**SIGNED,**

**E. K. O. OGOLA**

**JUDGE**

**READ, DELIVERED AND DATED AT NAIROBI THIS 11<sup>th</sup> DAY OF DECEMBER 2015.**

**C. KARIUKI**

**JUDGE**

**PRESENT:**

.....  
.....

Teresia – Court Clerk