



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 115 OF 2009

KENYA COMMERCIAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT

RULING

1. The Defendant's Notice of Motion application dated and filed on 3rd October 2013 was brought under the provisions of Article 35 (1) (b) of the Constitution of Kenya, Section 22 (a) of the Civil Procedure Act and Order 11 Rule 2 of the Civil Procedure Rules. It sought for orders **THAT:-**
 - a. **An order do issue compelling the Plaintiff to produce on oath an account of the total amount received by the Plaintiff during the receivership of Triton Petroleum Company Limited (In Receivership).**
 - b. **An order do issue compelling the Plaintiff to produce on oath all the documents, statements and records provided to it or filed by the Joint Receivers appointed by the Plaintiff to manage the affairs of Triton Petroleum Company (In Receivership).**
 - c. **An order do issue compelling the Plaintiff to produce on oath an account of the total amount received or recovered by the Plaintiff from the directors of Triton Petroleum Company (In Receivership) or its affiliate companies as guarantors of the debt owed by Triton Petroleum Company (In Receivership).**
 - d. **Such further and other orders as this court may deem fit to grant.**
 - e. **Costs of the application be provided for.**
2. The grounds under which the Defendant relied upon in support of its application can be summarised as follows:-
 - a. **The Plaintiff had sued the Defendant on account of monies which were to be paid by Triton Petroleum Company (In Receivership) but said to have been secured by petroleum products allegedly held by the Defendant.**
 - b. **The Plaintiff put Triton Petroleum Company (In Receivership) in receivership and appointed Joint Receivers but the Plaintiff had not disclosed the monies the said Joint Receivers recovered during the receivership.**
 - c. **The Plaintiff obtained a preliminary decree against a director of an affiliate company of Triton Petroleum Company (In Receivership) in HCCC No 1 of 2009 for the sum of Kshs 2,072,500,000/= which had guaranteed the debts owed by Triton Petroleum Company (In Receivership) to the Plaintiff, which guarantee was for debts which have been sued for herein.**
 - d. **The Plaintiff, the directors of Triton Petroleum Company (In Receivership) and guarantors of the debt owed by Triton Petroleum Company (In Receivership) entered into a Deed of**

Settlement but the Plaintiff had refused to make any disclosures on the monies recovered under the Deed of Settlement.

- e. **The said information would directly impact on the amount that could be found due and owing to the Plaintiff from the Defendant hence the need for the Defendant to obtain the said information to enable it defend its proprietary rights and the public property belonging to the people of Kenya and to ensure that the Plaintiff does not unjustly enrich itself by recovering the same debt twice.**

AFFIDAVIT EVIDENCE

3. The Defendant's application was supported by the Affidavit of Gloria Khafafa, a Legal Officer in its company. The same was also sworn on 3rd October 2013. The averments therein were the same as those set out in the grounds on the face of the application herein. It exhibited copies of the aforesaid Preliminary Decree and Deed of Settlement.
4. In response thereto, on 22nd January 2013, the Plaintiff filed its Grounds of Opposition dated the same date and on 20th February 2013, also filed a Replying Affidavit sworn by John Oringo, its Relationship Manager on the same date.
5. He deponed that the receivership of Triton Petroleum Company (In Receivership) was on going and conclusive results could not be rendered. He added that the Plaintiff could not give the information sought as it was in the possession, control and knowledge of the Receivers and that in any event, the Defendant could obtain the information it was seeking from the Companies Registry.
6. He pointed out that the Defendant ought to have filed the present application in HCCC No 1 of 2009 as there were other parties who were beneficiaries of the proceeds of the sale of assets of Triton Petroleum Company (In Receivership). It was the Plaintiff's case that the present application was an improper fishing exercise and the same should therefore be dismissed with costs. It raised the same contentions in its Grounds of Opposition.

LEGAL SUBMISSION BY THE DEFENDANT

7. In its written submissions dated 28th January 2014 and filed on 29th January 2014, the Defendant submitted that the Plaintiff had already recovered the sum of USD 13,993,388.70 and the suit herein was an attempt by the Plaintiff to unjustly enrich itself by recovering the said debt twice. It argued that the Plaintiff was under a duty to disclose the information and documents sought for the determination of the suit herein. It argued that as was provided under Section 107 of the Evidence Act Cap 80 (laws of Kenya), it was required to prove the existence of the particulars of the set off as it desired the court to give judgment based on the said set off.
8. It was its contention that the Plaintiff was obligated under Section 112 of the Evidence Act to disprove or prove the facts which it had special knowledge of. It said that the said section applied in its favour as:-
 - a. **The Defendant was not a party to HCCC No 1 of 2009 and only the Plaintiff could tell the court the monies that had been recovered; and**
 - b. **The Defendant was not a party to the Deed of Settlement.**
9. It relied on the case of **Joginder Auto Services Ltd vs Mohammed Shaffique & Mohammed Parvez Saroya [2001] eKLR** where the court observed that the Defendants were obliged by dint of Section 112 of the Evidence Act to disclose the price or value of the suit car therein as that was a matter within its knowledge and that having not done so, it could be inferred that they withheld the information to gain material advantage.
10. It submitted that its application was unopposed as the Plaintiff's Grounds of Opposition for the reasons that :-
 - a. **the averments therein contained matters of evidence that could only be deponed in an affidavit;**
 - b. **the parties mentioned therein would not be prejudiced if the orders sought were granted and that the disclosure by the Plaintiff did not required the enjoining of the said parties in the proceedings herein;**
 - c. **the grounds were inconsistent with the overriding objective of Section 1A of the Civil**

- Procedure Rules which mandated the expeditious, proportionate and affordable resolution of disputes as there was no good reason why the Defendant should be directed to another forum when the information it had sought could be disclosed by the Plaintiff in the proceedings herein; and**
- d. **the grounds had only addressed Prayer No 1 of the Defendant's application leaving Prayer No 2 with no response at all.**

LEGAL SUBMISSION BY THE PLAINTIFF

11. In its written submissions dated 11th March 2014 and filed on 12th March 2014, the Plaintiff contended that the information sought was in the hands of Triton Petroleum Company Limited (In Receivership) which were not party to the proceedings herein and as a result no orders could be issued against them. It referred the court to the cases of **HC Misc Case No 2 of 2008 Republic vs Ministry of Housing and the AG Ex parte Mary Chemtai Chepkonga & 2 Others and [2014] eKLR** and **Mandeep Chauhan vs Kenyatta National Hospital & 2 Others [2013] eKLR** where the common thread that no party should be condemned unheard.
12. It argued that the court should not issue orders in vain as was held in the case of **HC Misc Case No 82 of 2004 Karania Shah vs Kaplan & Stratton Advocates [2005] eKLR**. It said that the Receivers were required to file returns in respect of Triton Petroleum Company Limited (In Receivership) as stipulated under Section 353 of the Companies Act and that there were penalties if they failed to do so. It was its submission that the Defendant had not demonstrated that it had been unable to access the information it was seeking from the Companies Registry.
13. It was also its submission that the nature of the documents and confirmations sought by the Defendant were contentious and ambiguous it was possible to provide the information sought when the receivership of Triton Petroleum Company Limited had not been concluded. It raised the questions as to whether:-
- a. **the monies recovered by the Plaintiff were inclusive or exclusive of monies recovered by third parties;**
 - b. **the monies recovered by the Plaintiff were inclusive or exclusive of monies still held by Receivers of Triton Petroleum Company Limited and not released to any party;**
 - c. **the monies recovered by the Plaintiff were inclusive or exclusive of monies recovered by third parties, ongoing expenses of the receivership, the auditors, advocates fees and so on;**
 - d. **there was any statutory requirement for the releases of the information sought; and**
 - e. **there was the issue of whether it was possible to provide the information sought without involvement of all the parties to be affected by the order.**
14. A further argument by the Plaintiff was that the Defendant had failed to disclose that there was in existence **HCCC No 762 of 2008 Triton Petroleum Company Limited vs Kenya Commercial Bank Limited & Others** in which Triton Petroleum Company Limited was represented by the Defendant's advocates herein. It contended that the court found that Triton Petroleum Company Limited had failed to show that it had any other assets other than the oil which appeared to be held in trust for Kenya Commercial Bank Limited. The Plaintiff averred that the Defendant ought to have filed the present application in that suit.
15. It was the Plaintiff's contention that its claim was specifically against the Defendant for loss of oil it had financed and secured and which the Defendant released to third parties without its authority. It said that the documents being sought were totally inconsistent with its claim and the Defendant's claim thereto and termed the Defendant's application as a fishing expedition. It referred the court to the case of **Comztek East Africa Limited vs Jane Wanja Muriithi [2012] eKLR** where the court observed that furnishing of particulars was not meant to enable parties go on a fishing expedition but rather for the parties to prepare for their cases.

LEGAL ANALYSIS

16. Article 35 (1)(b) of the Constitution of Kenya, 2010, under which the Defendant based its application, provides as follows:-

“Every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom...”

17. In the mind of this court, the right to access of information envisaged under the said Article relates to the protection or exercise of any right or fundamental freedom contemplated under Chapter 4 Part 2 of the Constitution of Kenya, 2010. The matter before this court is a commercial one. In the absence of any proof that the Defendant’s rights or fundamental freedoms would be infringed upon by failure to access the information it seeks from the Plaintiff, the court finds that an order for production of documents to prove payment of monies does not fall within the realm of Article 35 of the Constitution of Kenya.
18. The other provision relied upon by the Defendant was Order 11 Rule 2 of the Civil Procedure Rules, 2010. The same stipulates as follows:-

“After the close of pleadings partes shall within ten days complete, file and serve the pre-trial questionnaire as provided in Appendix B.”

19. The Order does not appear to be relevant in the application herein as it merely prescribes what is to happen at the close of pleadings. The parties herein have not reached the Pre-trial stage and in the circumstance, the court does not find that any relevance of the said provision in the present application or that it can grant an order can be granted pursuant to that provision. It raises a question that is sought to be answered in the Pre-Trial Questionnaire under the said provision as seen in Appendix B of the Civil Procedure Rules, 2010.
20. However, the court can grant an order for discovery or production which may be appropriate to the case under Order 11 Rule 3(2) (d) of the Civil Procedure Rules, 2010 and order striking out of an action or defence, make an award of costs or strike out any document or part of it under Order 11 Rule 2 (o) of the Civil Procedure Rules, 2010.
21. Be that as it may, a reading of the prayers sought by the Defendant and Section 22 (a) of the Civil Procedure Act points to an application for discovery of certain information. The said section provides as follows:-

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, (emphasis court) either on its own motion or on the application of either party (emphasis court) **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 and inspection, production, impounding and return of documents or other material objects producible as evidence.”**

22. The objective of discovery has been captured in Halsbury’s Laws of England Vol 13 Paragraph 1 which states as follows:-

“The function of discovery of documents is to provide the parties with the relevant documentary material before trial so as to assist them in appraising the strength and weakness of their relevant cases, and thus provide the basis for the fair disposal of the proceedings before it or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary evidence material to support or rebut the case made against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

23. As can be seen from hereinabove, the purpose of this discovery is to avoid ambush when parties are prosecuting their cases. Discovery allows parties to analyse what their opponents’ case is and hence adduce evidence to rebut such a case. In this case, the Defendant sought discovery of an account of monies received by the Plaintiff from the Receivers, directors, former directors or affiliate companies as guarantors of the debt owed by Triton Petroleum Company Limited (In Receivership) during its receivership and documentation provided to the Plaintiff or filed by the Receivers in respect of the said company.
24. The Plaintiff argued that the Defendant could obtain from the Registrar of Companies it required

- as the Receiver was required under Section 351 (2) of the Companies Act Cap 486 (laws of Kenya) to send to the said Registrar, any trustees of the debenture holders of the company on whose behalf he was appointed, to the company and all debenture holders an abstract in the prescribed form showing his receipts and payments and the aggregate amount of his receipts and his payments during all preceding periods since his appointment.
25. The Plaintiff's claim against the Defendant was for sum of USD 13,993,388.70. It was not in dispute that there were other pending cases relating to Triton Petroleum Limited Company (In Receivership) and that there was a Deed of Settlement of which the Defendant herein was not a party to.
 26. In its submissions, the Plaintiff did point out that the nature of information and documentation sought by the Defendant were contentious and ambiguous as it was not clear whether the same included and excluded monies released or yet to be released to third parties and other ongoing expenses. The Plaintiff did also state in its submissions that the Plaintiff's claim was specific and did not involve any third parties. Nothing would be easier than for the Plaintiff to furnish the Defendant with the information that related to it alone without the involvement of the other third parties.
 27. Evidently, the Defendant was not a debenture holder as envisaged under Section 351 (1) of the Companies Act as it would have, in any event, been expected to have been receiving the information that it was seeking from the Plaintiff within the periods stipulated therein. It would therefore cause great hardship to the Defendant to obtain the information it was seeking from the Registrar of Companies as was suggested by the Plaintiff.
 28. While the court has noted the Plaintiff's submissions that the firm of M/S Mohammed Muigai & Co Advocates are also on record for Triton Petroleum Company Limited (In Receivership) in **HCCC No 762 of 2008 Triton Petroleum Company Limited vs Kenya Commercial Bank Limited & Others** (Supra), the court cannot ignore the fact that the Defendant herein is a distinct and separate entity which has its own distinct case.
 29. It is for this reason that the court finds that there would be delays in the determination of this matter if the Defendant was to be expected to apply to be enjoined as a third party in the aforementioned matter with a view to seeking the orders it sought herein in as had been proposed by the Plaintiff when the information can be availed by the Plaintiff in this matter.
 30. A party who sought further and better particulars is not estopped from requesting the court to make an order for discovery. Indeed, a prayer for a request for further particulars and that of discovery are distinct and can be applied for by parties separately and at different times. In this regard, this court is not persuaded by the Plaintiff's submissions that the application for the information on the total amount it has received in respect of the Receivership is a "fishing expedition" or that such a request was totally inconsistent with the nature of its claim against the Defendant.
 31. The details of the total amount the Plaintiff may have received in HCCC No 1 of 2009, the amounts, if any, it has been paid pursuant to the receivership or under the Deed of Settlement are pertinent issues as any amounts received would have to be set-off from its claim.
 32. It is not necessary for the Plaintiff to avail the register of accounts contemplated under Section 351 (1) of the Companies Act as it either has or has not received any monies pursuant to the said receivership. This is a fact that is solely within its knowledge and not required from another party. It is for that reason that this court finds the case of **V.V. Karania Shah vs Kaplan & Stratton Advocates** (Supra) relied upon by the Defendant to have been distinguishable from the facts of this case as the documents that had been sought therein were in possession of Cannon Assurance Company Limited, a third party who was not a party to the suit therein.
 33. Notably, although the Defendant attached the case of **Madhupaper International Limited & Another vs Kenya Commercial Bank Limited [2003] eKLR**, it did not allude to the same in its written or oral submissions. However, the court agrees with the holding therein that a party should not unjustly enrich himself by being paid twice. While the court has no inclination what the respective cases of the Plaintiff and the Defendant are, it would be in the interest of justice that the Defendant be given a level playing ground to prosecute its case the best way it knows how.
 34. The request for the account of monies does appear to be premature as the Plaintiff contended that the receivership is ongoing which might be of little assistance to the Defendant as it may receive partial information. However, the court cannot speculate on how the Defendant intends to

- prosecute its case in which case, it should be provided with the said information in the state and stage that it requires.
35. Having said so, the court is inclined to agree with the Plaintiff's submissions that an order for discovery of all documents, statements and other records provided to it or filed by the Joint Receivers it appointed to manage the affairs of Triton Petroleum Company Limited (In Receivership) does appear to be a fishing expedition by the Defendant. The Defendant has not provided this court with any justification whatsoever to show how that information would assist its case for setting off any monies that would be awarded against it in this case, if at all. This request does not appear to be one that would enable the Defendant prepare its case as had been observed in the case of **Comztek East Africa Limited vs Jane Wanja Muriithi** (Supra).
 36. In the absence of a plausible explanation which was not provided by the Defendant, the court finds that no useful purpose would be served in making an order for discovery in this respect as the interrogation of the said documentation would not be achieved unless the said Receivers were parties to the suit herein.
 37. Having considered the pleadings herein, the Grounds of Opposition, the affidavit evidence, the written and oral submissions by the parties, the court finds that the Plaintiff has not provided any tangible evidence that it will not suffer any prejudice if it complies with the order for discovery which this court finds, it can grant under Section 22 (a) of the Civil Procedure Act or that it will suffer hardship in providing part of the information sought by the Defendant. The court has come to the conclusion that discovery on the terms shown hereunder be done to accord the Defendant an opportunity to present and ventilate its case in a fair manner.
 38. It is important to point out that the court noted the oral submissions by counsel for Defendant that filing and serving of the Replying Affidavit by John Oringo was an attempt to steal a match and her request that the court strikes it out entirely. She had added that if the court was minded not to strike the same out, then they would be asking that she be allowed to cross-examine him on the same. Her argument was that they had addressed the issues the said deponent had raised in paragraph 7 of the Defendant's submissions.
 39. On his part, counsel for the Plaintiff orally submitted that the Plaintiff was entitled under the law to file both the Grounds of Opposition as well as the Replying Affidavit and that the Plaintiff had filed its written submissions before the said Replying Affidavit could be filed. The counsel did not, however, have any objection to the said deponent being cross-examined on the contents of the said Replying Affidavit.
 40. It is evident from the court record that on 3rd December 2012, Havelock J who was dealing with the matter then, had given the Plaintiff fourteen (14) days from that date to file its Replying Affidavit. It did not do so but instead filed the same on 20th February 2013 after the Defendant had filed its written submissions.
 41. While the Plaintiff was entitled to file a Replying Affidavit, the court finds that the same was intended to respond to the Defendant's submissions and thus had the effect of stealing a match from the Plaintiff.
 42. However, in view of the fact that the court has partially found in favour of the Defendant, the said Replying Affidavit notwithstanding, it does not find it necessary to strike out the said Replying Affidavit or order for the cross-examination of the said deponent as the same will be purely an academic exercise.

DISPOSITION

43. In the circumstances foregoing, the upshot of this court's ruling is that Defendant's Notice of Motion Application dated and filed on 3rd October 2013 is hereby granted in the following terms:-
 - a. **The Plaintiff shall make discovery on oath by producing an account of the total amount received it has received during the receivership of Triton Petroleum Company Limited (In Receivership).**
 - b. **The Plaintiff shall produce on oath an account of the total amount it has received or recovered from the directors of Triton Petroleum Company (In Receivership) or its affiliate companies as guarantors of the debt owed by Triton Petroleum Company (In Receivership).**
 - c. **The Plaintiff shall comply with orders (a) and (b) hereinabove within thirty (30) days**

from the date of this order.

44.As the Defendant did not fully succeed in its application, the court hereby orders that each party shall bear its own costs.

45.It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of May 2014

J. KAMAU

JUDGE