



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 3 OF 2012

ABN AMRO BANK N.VPLAINTIFF

Versus

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT

RULING

Right to information

[1] The application before me is of a unique character as its foundation is Article 35(1) (b) of the Constitution of Kenya, which is on access to information. For its worth, the specific Article 35(1) (b) provides that:-

Every citizen has the right of access to-

(a).....

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

[2] Other than the constitutional provision cited, the Notice of Motion dated 2nd April, 2014 is also expressed to be brought under Sections 1A, 1B, 22(a) and 63 of the Civil procedure Act, and order 11, Rule 3(2) Civil Procedure Rules, and it is seeking orders that:-

1. ***The Plaintiff do, within 14 days of such order, produce the documents/information listed below:***
 - a. ***Further to paragraph 42 of the amended Plaintiff:***
 - i. ***Copies of all security documentation regarding the security held by the Plaintiff over the oil storage terminal in Mombasa.***
 - ii. ***All correspondence between the Plaintiff and the Receiver referred to at paragraph 42 of the amended Plaintiff***
 - iii. ***All reports by the receiver***
 - b. ***Further to paragraph 43 of the Amended Plaintiff:***

- i. *The specific security documents referred to thereat*
 - ii. *Demand letters, pleadings and any other documents pertaining to ‘all actions towards that recovery’ described thereat*
- c. *Further to paragraph 44 of the Amended Plaintiff:*
- i. *Copies of all correspondence, consents, pleadings and other documents relating to the out-of-court settlement referred to thereat.*
 2. *The Plaintiff do, within 14 days of such order, disclose the total amount of money recovered by the Plaintiff during the receivership of Triton Petroleum Company Limited (In Receivership) and/or its affiliate companies;*
 3. *The Plaintiff do, within 14 days of such order, produce on oath an account of the total amount of money received or recovered by the Plaintiff from the directors or former directors of Triton petroleum Company Limited (in receivership) or its affiliate companies in respect of the monies allegedly secured by the petroleum produce the subject-matter of this suit.*
 4. *In the event on non-compliance by the Plaintiff with orders 1, 2 and 3 hereinabove, the Plaintiff’s suit to be struck out with costs.*
 5. *Such further and other orders as this court may deem just and fit to grant.*
 6. *Costs of this application be awarded to the Defendant*

[3] The application was supported by the affidavit of Gloria Khafafa and the following grounds that:

- a. The Plaintiff’s suit against the defendant relates to petroleum produce allegedly held by the Defendant to secure a debt owed to the Plaintiff by Triton Petroleum Company Limited (in Receivership) and/or its affiliates;
- b. Inter alia the Defendant has claimed a Set-Off against the Plaintiff in respect of any payments and/or securities realized on the debt owed to the Plaintiff by Triton Petroleum Company Limited (in receivership) and/or its affiliates;
- c. The documentation/information sought relates to payments received and/or securities realized by the Plaintiff in respect of the debt owed to it by Triton Petroleum Company (in receivership) and/or its affiliates;
- d. The documentation/information sought is alluded to by the Plaintiff in its Amended Plaintiff and is required in order that this Honourable court may arrive at a just determination of this dispute.

The Applicant submitted

[4] The Applicant filed submissions in explication of the grounds listed above. It contended that under Article 35(b) of the Constitution of Kenya and sections 1A, 1B, 229a) and 63 of the Civil Procedure Act and Order 11, Rule 3(2), Civil procedure Rules, access to information is permitted where a person needs the information to exercise or protect a fundamental right or freedom – in this case, it is needed by the Applicant in order to protect its rights to a fair trial (art.50) and to property (art.40). The information is also necessary for the sake of achieving a just, expeditious and efficient resolution of civil disputes – otherwise referred to as the Overriding, objective. It is the duty of all parties to assist the court to further the overriding objective and to participate in the processes of the court.

The overriding objective and this application

[5] The Applicant made specific submissions on the Overriding Objective and emphasized that this Court is under a duty to determine this dispute justly between the parties. That would as of necessity entitle the Court to call for all the relevant and admissible information and documents it requires to make a just determination if the Applicant is to benefit from right to a fair trial under Article 50 of the Constitution. It is wrong, therefore, for the Respondent to argue that it is not under any obligation to the Applicant. See paragraph 9 of the Replying Affidavit. On the contrary,

Section 1A of the Civil Procedure Act places a statutory obligation on parties in a suit to assist the court in furthering the overriding objective. Production of relevant documents is part of that assistance. It is for the court to determine what ‘cogent’ legal and factual grounds are covered under the overriding objective and not the parties. The question before this court now is whether the documents sought are relevant, and we submit that they are.

[6] The Applicant sought to demonstrate the relevance of the documents sought based on the pleadings and the contention between the parties. It is contended that the Plaintiff’s suit inter alia seeks damages for various breaches (including conversion, breach of trust, negligence etc.) concerning approximately 12,623,239MT of automotive gas oil (“the suit product”). The statement of defence avers that the Plaintiff had received undisclosed payments in respect of the suit product, and, pleaded a set-off in respect of any payments received by the Plaintiff. Thereafter, the Plaintiff filed an Amended Plaintiff on 8th May, 2012 and pleaded the recoveries it had made in respect of the Suit product. On this, see paragraphs 42 to 49 of the Amended Plaintiff. The Plaintiff also referred to specific securities held over the suit product as well as other proceedings relating to the suit product which it now claims from the Defendant. See paragraph 42, 44 and 45 of the Amended Plaintiff.

[7] In further elaboration of the relevance of the documents being sought, the Applicant relied on the averments in the Amended Defence filed on 2nd December, 2013. The Applicant pleaded inter alia:

- i. That there was a failure by the Plaintiff to mitigate any loss it suffered on account of the suit product (paragraph 37, Amended Defence);
- ii. There has been material non-disclosure on the part of the Plaintiff (see paragraph 39, Amended Defence)
- iii. The suit is an attempt by the Plaintiff to enrich itself unjustly at the expense of the Defendant (paragraph 40 Amended Defence)
- iv. A set-off of all amounts received by the Plaintiff in respect of the suit property (paragraphs 40, 43-48 Amended Defence)

[8] The Applicant is only seeking for documents pleaded in the Plaintiff’s amended pleadings and the Defence or those which are reasonably inferred from the pleadings. In the absence of a claim of privilege or other grounds on admissibility, the only question the Court should tackle is whether the documents sought by the Defendant are relevant. An affirmative answer portends that those documents must be produced. Relevance is determined by the ordinary process of reasoning. See Halsbury’s Laws of England, 3rd Edition, volume 15, paragraph 478; and the case of **ORACLE PRODUCTIONS LTD v DECAPTURE LTD & 3 OTHERS HCCC NO. 567 OF 2011** that:- “..... Discovery should be limited solely to the matters in contention. Relevance can be gauged or tested by the pleadings or particulars provided. The documents sought have a direct bearing on and are limited to what is in contention in the suit. The above matters are in the pleadings and are issues of relevance and refer expressly to issues arising from transactions leading to the documentation which the Defendant now wishes to be produced. Contrary to the assertion at paragraph 8 of the Replying Affidavit, production of relevant documents may not be refused on the basis of confidentiality. There is no such ground. The case of **ALFRED CROMPTON AMUSEMENT MACHINES LTD v COMMISSIONER OF CUSTOMS & EXCISE (NO. 2) 1973 2 All ER 1169** at 1171 it was held:

“...(iii) there was no basis for a claim to privilege in respect of the class (2) (c) documents on the ground that they were document, or copies of documents which belonged to third parties and had been entrusted to the commissioners in confidence. Privilege against disclosure could not be claimed on the ground that documents whether confidential or not belonged to a third party and the confidential nature of a document was not itself a ground of privilege.”

Relevant material even if confidential should be produced

[9] The Applicant was of the view that, any delay herein is attributable to the Plaintiff. See paragraph 7 of the Replying Affidavit. It failed to respond to two of the Applicant's letters, necessitating this Application which was served on 8th April, 2014. The matter was to come up for hearing on 13th May, 2014, but the Plaintiff sought an adjournment, and served a Response only on 29th May, 2014. In sum, as Costs ordinarily follow the event, the Plaintiff should bear the costs as this Application could have been avoided if the Plaintiff had responded to the letter requesting for the documents herein. This application should be allowed with costs.

The Plaintiff/Respondent also filed submissions

[10] The Plaintiff/Respondent opposes the application by the Defendant/Applicant dated 2nd April, 2014 and relied on the Replying Affidavit sworn on 23rd May, 2014 by one Rui Florencio. The Respondent has also filed a list and bundle of Authorities dated 3rd June, 2014. According to the Respondent, in any application seeking to compel discovery, the principles applicable are that the Applicant has to show:-

- a. That the documents are necessary to the cause of action before the court, and
- b. That the documents are relevant to the matter before the court.

The Respondent referred the Court to the cases of **CONCORD INSURANCE CO. LTD v NIC BANK LTD, MILIMANI HCCC NO.175 OF 2011** and **ORACLE PRODUCTIONS LIMITED v DECAPTURE LIMITED AND 3 OTHERS, NAIROBI HCCC NO. 567 OF 2011** on these principles. The causes of actions pleaded herein are all based on tortious liability of the Defendant to the Plaintiff for irregular and unlawful release of petroleum products which the Defendant had undertaken to hold to the order of the Plaintiff. The specific claims relate to conversion, breach of trust, breach of fiduciary duties and negligence. The Defendant/Applicant alleges that the security documentation regarding property belonging to Triton Bulk Storage Kenya Limited is necessary before they proceed with the suit. But the question the Court should ask is whether this documentation deals with or in any way explains the tortious liability of the Defendant to the Plaintiff? Any security taken by the Plaintiff over the assets of a third party company that is not connected with the suit is, in our humble submission, a red herring. No attempt has been made to show the nexus between this third party company and the default of the Plaintiff. The Defendant/Applicant is not even alleging it was a party to the security documentation it seeks or that it would have had the benefit of any recoveries made thereunder. It is for these reasons that the Plaintiff/Respondent objects to the application for discovery of such documentation given that it bears no relevance to the core dispute at hand and to the parties before the court.

[11] The Defendant should show that there has been unjust enrichment by the Plaintiff as to entitle it to seek to know the total recoveries from receivership of Triton and directors and affiliate companies. This is a fishing expedition by the Defendant applicant, perhaps in furtherance of an action against the Triton Companies itself. For the present case, the security over the petroleum products that are the subject matter of this suit was the undertaking that the defendant itself issued to hold the products to the order of the Plaintiff. It is neither logical nor tenable in law to claim that the Defendant would not be able to mount a defence as to its liability. The position taken by the Defendant in this suit is not an explanation as to why it released the petroleum products unlawfully but rather it is saying that the Respondent should have recovered the money from parties not related to this suit. The Court should only ascertain whether the purpose of discovery is to enable a party create own case, or is it to allow each party to know and meet the case against it. The Defendant/Applicant has made allegations of non-disclosure or unjust enrichment without any basis. Is it then for the Plaintiff to give it a case where none exists?

[12] The Defendant/Respondent has also missed the point on confidentiality as the issue of confidentiality would only arise after they establish that the documents they are seeking are relevant and necessary to the fair and efficient disposal of the suit. The documentation sought is in

relation to recoveries from other entities. The only way to prove such matters would be to open up the books of the Defendant to confirm that the amounts it pleads in its Amended Complaint as recoveries are true. It is an indisputable fact that the Plaintiff is an international bank with headquarters outside the country. The disclosure of any bank customers' information without their consent is not only unlawful but grounds for sanction by the regulatory authorities of the parent country. Given the applicant does not and has not shown the basis upon which the Plaintiff should be compelled to release such confidential material, it is our humble submission that the application should be deemed to fail. In the words of Justice Kimondo in the Oracle productions case "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 trial." The Defendant is able to gauge the Plaintiff's case in its entirety and the documents sought are not relevant. This application is a mere excuse. The Applicant is not suggesting that the Plaintiff has withheld any relevant information in this matter although it has claimed there is non-disclosure or unjust enrichment. And, therefore, the Plaintiff should not be forced to make discovery of documents which are not relevant or necessary to the suit on the basis of speculative statements. This application that has no grounds has been made in an attempt to delay the hearing of the suit. On this basis, and given that the logical and legal basis for making the application has not been made out, the Respondent submitted that the application should be dismissed with costs to the Plaintiff/respondent.

COURT'S RENDITION

[13] The application I am faced with is essentially one of disclosure of information held by another person which the Applicant says is relevant and necessary to these proceedings, for, they are directly connected with the suit and will assist the Court to determine the real issues in controversy completely and effectually. Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the Civil Procedure Act and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. And as Justice Kimondo J stated in the Oracle productions case, I too conclude 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 trial.***" It, therefore, serves a higher objective as the enabler of fair hearing. Needless to state the primary devices of discovery are interrogatories, depositions, request for admissions, inspection of documents and requests for production of documents etc. But such application seeking information and documents is measured on a new yardstick; the Applicant must; a) identify the information and or documents; and the person holding the information; and d) show that the information and or documents are required for the exercise or protection of a right or fundamental freedom. The latter enjoins the Applicant to show the information is relevant and necessary to determination of the suit. This constitutional test must be met before orders of discovery are issued.

[14] I will apply that test on the circumstances of this case. The first prerequisite is fairly straight forward. The Applicant has identified the holder of the information to be the Plaintiff although the Plaintiff claims that the information and or documents are confidential as it belongs to third party customers, Triton Companies. I will deal with the claim of confidentiality later. The Applicant has also identified the information and or documents sought to be: 1) security documentation on the security held by the Plaintiff over the oil storage terminal in Mombasa; 2) correspondence between the Plaintiff and the Receiver and out-of-court settlement, including demand letters, pleadings, consents and any other documents pertaining to 'all actions towards that recovery' alluded to by plaintiff; 3) reports by the receiver; and 4) the total amount of money recovered by the Plaintiff from the directors, receivership of Triton Petroleum Company Limited (In Receivership) and/or its affiliate companies in respect of the monies allegedly secured by the petroleum produce the subject-matter of this suit.

[15] Is this information relevant or necessary to the matters in issue? Relevance entails the nexus between the documents and this case. The documents and or information sought have been pleaded by the Plaintiff and the Defendant. See paragraph 42-49 of the amended Complaint. See also

the set-off and other averments on non-disclosure, unjust enrichment, and failure to mitigate loss in paragraphs 37, 39, 40, 43-48 of the Defence. These averments in the pleadings are relevant and refer expressly to issues arising from transactions leading to the documentation which the Defendant has applied to be produced. I do not, therefore, accede to the argument by the Plaintiff that the documents and or information sought have absolutely no connection with this suit. They constitute part of the matters before the court for determination and cannot be wished away. To understand the foregoing, look at the plaintiff's claim against the Defendant, which relates to petroleum produce allegedly held by the Defendant to secure a debt owed to the Plaintiff by Triton Petroleum Company Limited (in Receivership) and/or its affiliates. And against that claim, the Defendant has put up by way of defence a Set-Off against the Plaintiff based on payments and/or securities realized on the debt owed to the Plaintiff by Triton Petroleum Company Limited (in receivership) and/or its affiliates. The documentation and or information sought to be produced relates to the alleged payments received and/or securities realized by the Plaintiff in respect of the debt owed to it by Triton Petroleum Company (in receivership) and/or its affiliates. If these issues have been pleaded, a just and proportionate determination thereof will support disclosure of full information and documentation which form part of the case before Court. The statutory obligation on parties under the overriding objective would also support an order for discovery in the circumstances of this case. Discovery and other disclosure processes are expected to elicit voluntary response once they are issued by and between the parties. But where a party has failed to make discovery voluntarily, the Court renders its coercive process to compel discovery of information and documents which are relevant and necessary to the resolution of the dispute before the Court.

[16] Even if that is the position I have taken, will confidentiality of information or documentation defeat discovery thereof? The Plaintiff claims in the Replying Affidavit, production of relevant documents may not be refused on the basis of confidentiality. I find the case of **ALFRED CROMPTON AMUSEMENT MACHINES LTD v COMMISSIONER OF CUSTOMS & EXCISE (NO. 2) 1973 2 All ER 1169** at 1171 to be to the point when it held:

“...(iii) there was no basis for a claim to privilege in respect of the class (2) (c) documents on the ground that they were document, or copies of documents which belonged to third parties and had been entrusted to the commissioners in confidence. Privilege against disclosure could not be claimed on the ground that documents whether confidential or not belonged to a third party and the confidential nature of a document was not itself a ground of privilege.”

[17] In any event, the Plaintiff has sought enforcement of an undertaking by the Defendant given on petroleum produce which concerns the third parties herein. The documentation and those transactions stand in the heart of the case and is relevant material. The documents, therefore, cannot be withheld under the cover of privilege or because they belong to third party. In the circumstances of this case and the connexion of the transactions which are subject of the suit are such that the argument that disclosure of any bank customers' information without their consent is unlawful and may attract sanctions from the regulatory authorities of the parent country are not sustainable. The Applicant, and I have held so, has laid a basis upon which the Plaintiff should be compelled to release such material, the confidentiality notwithstanding. I do not also think that the Applicant can be said to be seeking information and or documents in order to build a case against the Triton Petroleum companies.

[18] I will also state here that the argument on delay in applying is neither here nor there and any such delay has been sufficiently attributed and explained.

[19] The upshot is that I allow the Notice of Motion dated 2nd April, 2014. No order as to costs.

Dated, signed and delivered in court at Nairobi this 30th September, 2014

F. GIKONYO

JUDGE