



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL &ADMIRALTY DIVISION
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 60 OF 2013

TLM INTERNATIONAL FZE.....PLAINTIFF

VERSUS

DUBAI BANK (K) LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated and filed on 19th December 2013 was brought under the provisions of Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the laws of Kenya and all other enabling provisions of the law. The application sought the review, setting aside and/or vacation of the orders issued *ex parte* on 16th December 2013.

DEFENDANT'S CASE

2. The main grounds on which the Defendant relied upon in support of its application were that the court had no jurisdiction to issue the orders it gave on a mention date, more so in its absence and that the Plaintiff's request for the Letters of Credit was a launching pad for the Plaintiff to fish for information which action would cause the Defendant undue hardship and further result in breach of confidentiality between it and its customers who had nothing to do with this case.
3. The said application was further supported by the affidavit of Peter M Gichuru which was also sworn on 19th December 2013. He reiterated the grounds that had been set out in the face of the present application.
4. The Defendant's written submissions were dated 3rd February 2014 and filed on 4th February 2014. It relied on several cases in which it sought to demonstrate that the court could not issue substantive orders on a mention date and that having done so, it ought to set aside, vary and/or vacate the said orders. **See Cases**

PLAINTIFF'S CASE

5. In response thereto, on 15th January 2014, the Plaintiff swore a Replying Affidavit sworn by James Ochieng Oduol, its counsel. The same was filed on even date. The Plaintiff's case was that the Mention date for Pre-Trial that was scheduled for 16th December 2013 was taken by the

- consent of the parties and that the court, being vested with jurisdiction, issued an order for discovery pursuant to Order 11 Rule 3 (2) of the Civil Procedure Rules, 2010.
6. It contended that the purpose of discovery of Letters of Credit was to demonstrate a sequence and/or pattern of default and/or of dishonouring of the Defendant's obligations under various Letters of Credit it had issued for the years 2010 to 2013 and that the said discovery was therefore of utmost importance/relevance and or admissible herein as it would establish similar fact evidence in relation to the dishonoured Letter of Credit which was the subject matter of the suit herein.
 7. It distinguished the authorities that had been relied upon by the Plaintiff as having been irrelevant in the circumstances of this case.

LEGAL ANALYSIS

8. In its written submissions dated 14th April 2014 and filed on 15th April 2014, the Plaintiff conceded to the Defendant's prayer in which it had sought for the enlargement of time within which the Defendant could file its Statement of Agreed Issues and/or for any Statement of List of Agreed Issues filed by the Defendant be deemed as properly filed.
9. It will therefore not be necessary for the court to delve further into this issue as the same was not in contention. Suffice it to state that the Defendant's Statement of Agreed Issues though filed out of time is hereby deemed to have been properly filed.
10. The court record is clear that the date of 16th December 2013 was taken by the consent of the parties on 22nd November 2013 and the same was to **confirm compliance and/or for further orders and/or directions by the court** (emphasis court). It is therefore misleading for the Defendant to have contended that the said date was only to **confirm compliance of the filing of a Statement of Agreed Issues** (emphasis court). As its counsel had perused the court file, he ought to have set out the complete order as had been issued by the court. Failure to include the complete order was intended to conveniently suit its case and which this court finds to have been misleading.
11. Evidently, provisions of Order 11 Rule 3 (2) of the Civil Procedure Rules, 2010 that the court can make many orders and/or give several directions. The same provides as follows:-

“In addition to any other general power(emphasis court) the court may at the case conference-

- **deal with any interlocutory applications or create a suitable timetable for their expeditious disposal;**
 - **order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case**
 - **make a procedural order**
 - **give any suitable directions to facilitate expeditious disposal of suit or any outstanding issues**
- **deal with as many aspect of the case as it can on the same occasion...**”

12. Indeed, the purport and/or objective of drafting the order in the way the court did, was to give it latitude to issue any other orders and/or directions that would have been necessary to move the matter forward. The court was in the process of conducting the Pre-Trial Conference and until such time that the parties filed the Statement of Agreed Issues and the matter was certified as ready for hearing, it had the discretion of issuing orders with a view to concluding the said conference.
13. If indeed the court was to accept the Defendant's argument that the court was only to confirm compliance, it follows that the court would have had to give another date when it could certify the matter as having been ready for hearing. As was rightly pointed out by the Plaintiff, the court is enjoined by Sections 1A and IB of the Civil Procedure Act Cap 21 (laws of Kenya) to ensure timely and efficient use and/or disposal of judicial time and resources and therefore issues such

- orders and/or directions on any date so long as the order has been couched in such a manner as to contemplate that it can do more than one (1) things on such a date.
14. It is clear that the Plaintiff's request for discovery orders was an interlocutory application which the court could consider during the mention. The court had expressly stated that the mention would also be for issuance of other orders and/or directions.
 15. Each party is entitled to know its opponents case so as to prepare itself. Full disclosure is therefore paramount to avoid ambush at the time of the trial. There is nothing that has been placed before the court to suggest that it could not give an order for discovery as the same was expressly provided for under Order 11 Rule 2 of the Civil Procedure Rules, 2010.
 16. The cases cited by the Defendant were therefore distinguishable from the facts of this case as the court did not determine any substantive issues as had been observed in the cases of **Wanjiku vs Esso Kenya (1995-1998) 1 EA 332**, **Floriculture International vs Central Bank Limited (1995-1998) 1 EA 61** and **Kivuyo vs DHL (2010) 1 EA 210** but rather the court proceeded to make orders that could be given during a pre-trial conference.
 17. Having said so, the question that begs to be answered is whether or not the court acted contrary to its powers by issuing the order for discovery to the Plaintiff in the absence of the Defendant.
 18. As has been pointed hereinabove, the date of 16th December 2013 had been taken by the consent of the parties. Failure by a party to attend court on such a date puts such a party at the risk of having adverse orders issued against it. Once an application is made by a present party in the absence of a party who ought to have been in court but who failed to attend court, the only logical conclusion the court can make is that such an application is unopposed.
 19. At the Pre-trial conference, the court is not fully aware of the parties' cases as it has not had the opportunity of hearing the case on its own merits. The court must therefore be very cautious not to deny a party an opportunity to ventilate its case sought to be achieved through discovery. If the discovery of Letters of Credit issued from 2011- 2013 would have assisted the Plaintiff's case, the court had no mandate and/or right to deny it the opportunity to inspect the same as it is only the Plaintiff which knew how it wanted to present its case for determination by the court.
 20. If the court had denied the Plaintiff its right for discovery, it would have meant that the court was entering into the arena of the dispute to protect the Defendant's interests in its absence when its role was clearly limited to being a neutral arbiter. The court held no brief for the Defendant and ought not to have done so as questions could have arisen as to whether the court had made a determination of how the Plaintiff was to and/or ought to have conducted its case herein.
 21. The Defendant had been accorded an opportunity to attend court on 16th December 2013, a date it was aware of. Failure by its counsel to diarise the date could not and ought not to be visited upon the court when it proceeded to issue adverse orders in its absence. The court was therefore quite in order when it allowed the Plaintiff's application to have an order for discovery issued in the absence of the Defendant and its submissions that the court ought not to have issued the said orders in its absence would therefore find no favour with this court.
 22. The other issue the court identified for determination is whether or not the order would cause hardship to the Defendant. In its order of 16th December 2013, **the order was for discovery of Letters of Credit that had been issued for the period 2010, 2011 and 2013 in favour of the Plaintiff** (emphasis court). Counsel for the Plaintiff informed the court that they wanted the order issued to show the pattern of default by the Defendant in meeting the various letters of credit it had issued which was core to its claim against the Defendant.
 23. In Paragraph 43 of its written submission, the Plaintiff stated that it was not fishing for irrelevant information as had been alleged by the Defendant but rather that it intended to establish similar circumstances where the Defendant had failed to discharge its obligations under Letters of Credit.
 24. This contention was also contained in Paragraph 10 of the Defendant's Replying Affidavit in addition to its averment that the same would not affect third parties and/or pose hardship and/or legal liability to the Defendant, a fact it said the Defendant had failed to prove.
 25. On the other hand, the Defendant contended that the Plaintiff misrepresented to the court the nature and extent of its case. It said that the said orders would cause unnecessary hardship and to legal liability to third parties who were not parties to this suit and that the Defendant would be compelled to breach confidentiality between itself and other customers who had nothing to do with this suit.
 26. It is the Plaintiff's word against that of the Defendant and the court cannot determine what really

the intention of the said Letters of Credit is when it issued an order for discovery. However, what is clear in the mind of this court is that the Defendant cannot be compelled to adduce incriminatory evidence against it and parties cannot go on a fishing mission to boost their cases against their opponents.

27. Section 173 of the Evidence Act Cap 80 (laws of Kenya) stipulates as follows:-

“1. A judge or magistrate may, in order to discover or to obtain proper evidence....order the production of any document or thing...”

2. Subject to sub-section (1) shall not authorise a judge or magistrate-a. to compel a witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under the provisions of Part II, if the question were asked or the document was called for by the adverse party...”

28. Indeed, Section 5 of the Evidence Act provides as follows:-

“Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of a fact in issue or non- existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant.”

29. As seen hereinabove, the court would not have been in a position to have known how the Plaintiff would have wanted to present its case at the time of the Pre-Trial Conference when it sought for the Letters of Credit that had been issued by the Defendant. Upon considering the Defendant's arguments and the Plaintiff's Replying Affidavit and its written submissions, it does appear to this court that the initial request by the Plaintiff was vague. The court cannot from the face of this matter know the specific intentions of the Plaintiff's request for the Letters of Credit it sought to inspect. It was not the understanding of the court that the Plaintiff would drag other parties who were not parties to the suit herein.

30. On considering the pleadings, written and oral submissions and the case law relied upon by the parties, the court finds that what was actually required herein was a clarification of the court orders. Bearing in mind what has been placed before this court, the court sees no need of reviewing, setting aside and/or vacating its orders of 16th December 2013 because it was clear that the Letters of Credit to be furnished to the Defendant were to be those that were issued **in favour of the Plaintiff** (emphasis court).

31. The order was specific to the Plaintiff and to the exclusion of other third parties. There was no error on the face of the court as it was correct in granting the Plaintiff an order to discover Letters of Credit that related to the Plaintiff specifically. If there were no such Letters of Credit relating to it for the period it had sought, then the order that had been sought from the court was in vain. However, any party who felt aggrieved by the order of 16th December 2013 ought to have appealed against the same.

32. The court wishes to point out that parties ought not to be so fast in filing applications where the remedy sought would be one that can be achieved through a clarification on a mention date.

DIPOSITION

33. Accordingly, the upshot of this court's ruling is that save for Prayer (4) herein which was conceded by the Plaintiff, the remaining prayers in the Defendant's Notice of Motion application dated and filed 19th December 2013 were not merited and consequently, the said application is hereby dismissed. For the reason that the present application was not necessary, there will be no order as to costs.

34. Orders accordingly.

DATED and DELIVERED at NAIROBI this 22nd day of September 2014

J. KAMAU

JUDGE