



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 168 OF 2012

CONSOLIDATED BANK OF KENYA LIMITED.....PLAINTIFF

JARED OTIENO OCHUNGO

T/A GIRTH CONSTRUCTION.....1ST DEFENDANT

EVASOUND CONTRACTORS LIMITED.....2ND DEFENDANT

KENYA POWER & LIGHTING COMPANY.....3RD DEFENDANT

RULING

1. The 3rd Defendant, **KENYA POWER & LIGHTING COMPANY LIMITED** has sought the following substantive reliefs;

- a) *The vacation, setting aside or review of the ex parte orders made on 7th October 2013;*
- b) *Leave to the 3rd Defendant to file a Replying Affidavit in answer to the Application dated 13th May 2013;*
- c) *The striking out of the Amended Plaintiff; or alternatively*
- d) *The striking out of the Applicant's name as a Defendant in these proceedings.*

2. Essentially, the advocates for Kenya Power & Lighting Company Limited (who shall hereinafter be cited as ("**KPLC**") have attributed their failure to attend court on the fact that they had been misled that the application dated 13th May 2013 was scheduled for Hearing before the Chief Magistrate's Court.

3. After the advocates for **KPLC** had verified from the Cause List for 7th October 2013 that the case was not listed for hearing at the Chief Magistrate's Court, they did not go to that court.

4. Meanwhile, the case was actually listed for hearing before a Judge of the High Court.

5. Therefore, the advocates for **KPLC** blamed the plaintiff's advocates for causing the

confusion which led to the KPLC not being represented before the correct court.

6. In answer to the application, the plaintiff submitted that although the Hearing Notices had indicated that the application was to be heard at the Chief Magistrate's Court, the advocates for the **KPLC** were not misled.

7. KPLC submitted that pursuant to the provisions of Article 50 of the Constitution of the Republic of Kenya, a Hearing Notice is an essential guarantee to a litigant's right to a fair hearing.

8. In my respectful view, Article 50 addresses the rights of accused persons, mostly. However, it cannot be denied that even in civil cases, every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, before another independent and impartial tribunal or body.

9. The Hearing Notice is an essential component of the right of fair hearing because it informs a party about the date, place and time when his case would be dealt with by the court or such other tribunal or body.

10. In this case, the Hearing Notices in issue informed **KPLC** that the application dated 13th May 2013 would be heard at the Chief Magistrate's Court. Obviously, the information contained on those Hearing Notices was inaccurate.

11. The mistake in the Hearing Notices was made by the plaintiff, and the **KPLC** cannot therefore be blamed for it.

12. KPLC submitted that the failure by their lawyer to attend court on 7th October 2013 was due to an inadvertent mistake, which was attributable to the mistake in the Hearing Notice. Therefore, I was urged to find that there was no deliberate attempt to delay or to obstruct the course of justice.

13. The failure to attend court was thus described as excusable.

14. Mr. Otieno, the learned advocate for **KPLC**, submitted that there was nothing in the conduct of the applicant's advocate which suggested that they deliberately failed to attend court on 7th October 2013.

15. I was therefore invited to give **KPLC** a chance to defend itself, without undue regard to technicalities.

16. The opportunity to defend itself appropriately is believed to be possible if only the court could give to **KPLC** a chance to canvass its opposition to being enjoined to this case, as a defendant.

17. **KPLC** expressed the view that if they were compelled to remain as a defendant in the case, before being permitted to fight-off the attempt to enjoin them into the suit, they would be in a position where they would be forced to expend time and financial resources to defend a suit that raised no cause of action against them.

18. **KPLC** then proceeded to put forward arguments to show why the claim herein did not disclose any cause of action against them. I will not delve into that aspect of the submissions, for now.

19. On its part, the plaintiff, **CONSOLIDATED BANK OF KENYA LIMITED**, faulted **KPLC** for choosing to file a Notice of Appointment of Advocate at the Chief Magistrate's Court, whereas the pleadings served on the Applicant clearly indicated that the case was

before the High Court.

20. Of course, as Consolidated Bank submitted, a Hearing Notice or a Mention Notice was not a pleading.

21. However, although a Hearing Notice was not a pleading, it would be wrong to suggest that it did not have an important role to play. Indeed, it is not right to try and weigh the importance of a pleading against that of a Hearing Notice; to my mind such an attempt was inappropriate.

22. The two instruments play completely different roles. Pleadings contain the particulars of a case, whilst a Hearing Notice informs a party where and when the case was to be heard.

23. If a party was only served with pleadings, but he did not know where and when the case would be heard, he would be highly prejudiced if the case then proceeded in his absence.

24. On the other hand, if a party was served with a Hearing Notice but without pleadings, he would be equally prejudiced because he would be unaware of the case that he was expected to meet.

25. In effect pleadings and Hearing Notices are complimentary.

26. If a party is served with the correct pleadings together with a Hearing Notice which was misleading, he would probably be misled. He could end up going to court on the wrong date or at the wrong time.

27. And in the event that the Hearing Notice specified a Court that was different from that which was shown on the pleadings, the party would be unsure about which court he ought to go to.

28. It is not good enough for the person who served the pleadings together with a Hearing Notice which contained information which were inconsistent, to then argue that the person he served should have chosen to rely on the pleadings.

29. In this case, however, the advocate for **KPLC** does not appear to have been misled. I so find because although the Hearing Notice indicated that the case would be heard before the Chief Magistrate's Court, the learned advocate for **KPLC** did appear before Havelock J on 17th September 2013.

30. The court records show that **KPLC** sought and was granted 14 days within which they were to file and serve their Replying Affidavit.

31. On that same date, the plaintiff was allowed some 7 days, from the date of service, to file and serve a Further Affidavit.

32. Thereafter, the learned Judge set down the application for Hearing on 7th October 2013. Clearly, therefore, the date when the court dealt with the application dated 13th May 2013 was fixed by the court, in the presence of the advocate for **KPLC**. That implies that the Applicant did not need to be served with a Hearing Notice, in order to know the place, time or date when the application was scheduled to be heard.

33. Nonetheless, the court readily acknowledges that to err is human. The plaintiff erred on two occasions, by sending Hearing Notices which indicated that the case was before the Chief Magistrate's Court.

34. On the other hand, the Applicant erred by failing to attend court when it should have

done so.

35. Whilst the Applicant was absent, and because it did not respond to the application dated 13th May 2013, the court ordered that the Applicant be enjoined to this suit, as a Defendant.

36. In my considered opinion, it would not be prejudicial to any of the parties if the orders made on 7th October 2013 were set aside, so that the Applicant can have an opportunity to fight-off the attempt to enjoin it into this case.

37. In the event that the said joinder is warranted, as the plaintiff believes, then the court would be persuaded to enjoin the Applicant to the suit. But if the Applicant persuades the court that there was no cause of action against it, by the plaintiff herein, the court would reject the attempt to have it enjoined.

38. In my considered view, costs are an adequate remedy to the plaintiff for the inconvenience caused to it, by the earlier conduct of the Applicant.

39. It is possible that the court could reject the attempt to enjoin the Applicant to this suit. If that happened, then there would be no need for the Applicant to file any Defence.

40. But if the court still orders that the Applicant be enjoined to this case, then the Applicant would need to file its Defence.

41. It was for those reasons that I had earlier, deliberately, opted not to delve into the questions as to whether or not the Applicant's proposed Defence raised any triable issues.

42. Having reinstated the application dated 13th May 2013 for hearing implies that no decision has been made as to whether or not the Applicant will be enjoined to this suit.

43. Therefore, it is not yet known whether or not there will arise a need to later amend the original Plaintiff.

44. In the circumstances, the arguments concerning the Amended Plaintiff are currently premature.

45. For now, I set aside the orders made on 7th October 2013.

46. Nonetheless, the Applicant will pay the costs of the application dated 6th August 2014, together with all thrown-away costs. For the avoidance of any doubt, the thrown-away costs include the costs for 7th October 2013 and all other consequential costs, including the costs of filing the Amended Plaintiff.

47. The Applicant is granted **TEN (10)** days from today to file and serve its Replying Affidavit in relation to the application dated 13th May 2013.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of December 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff

.....for the 1st Defendant

.....for the 1st Defendant

.....for the 1st Defendant.

Collins Odhiambo – Court clerk.