



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 195 of 2008

JOHN KUNGU KIARIE.....PLAINTIFF

V

KENYA COMMERCIAL BANK LTD.....DEFENDANT

R U L I N G

1. In March and April 2010 each party herein filed two applications seeking against the other party orders for discovery and inspection of documents. The four applications were heard together by Mwera, J (as he then was). In a considered ruling delivered on 21st September 2010 the Judge directed the parties

“(i) to file and exchange lists of documents in the next 21 days;

(ii) to file and serve paginated bundles of those documents in 15 days thereafter;

(iii) along with (ii) above, to file and exchange statements of issues for determination; and

(iv) to take a convenient date soon thereafter to have directions as to hearing dates.”

2. The judge also said –

“May it be noted that if there be any interruption in the above schedule, it will be limited to only necessary interlocutory proceedings to amend, if so required and nothing else.”

3. The Plaintiff subsequently applied by **notice of motion dated 11th January 2012** seeking the main orders –

“1. That the bundle of documents dated 24th November 2011 purportedly filed by the Defendant herein on 25th November 2011 be expunged from the court record.

2. That in the alternative to prayer 1 above,

(a) The Defendant be ordered to pay to the Plaintiff the getting-up costs of the hearing of this matter on the 14th and 28th November 2011 within twenty-one days of the ruling in respect to this application.

(b) Leave be granted to the Plaintiff to file a supplementary bundle of documents and to amend his plaint.”

4. The grounds for the application as they appear on the face thereof include –

(i) That the Defendant “brazenly, boldly and completely” disobeyed the orders of Mwera, J of 21st September 2010.

(ii) That the Defendant, “in an attempt to scuttle or delay hearing of the main suit” which had already commenced, belatedly purported to file a bundle of documents without leave of the court.

(iii) That it was too late for the Defendant to file the bundle of documents as the period for discovery and inspection had been exhausted.

(iv) That the Defendants action will cause further delay to hearing of the suit as it will be necessary for the Plaintiff to file additional documents. The Plaintiff will thereby have been prejudiced.

5. The application is supported by the Plaintiff's affidavit in which he set out the history of the issue of discovery and inspection of documents between the parties.

6. The Defendant opposed the application by **replying affidavit filed on 21st February 2012**. It is sworn by one ISAAC KIBERE, the Legal Manager of the Defendant. He depones, *inter alia* –

(i) That the Plaintiff's application is based solely on the technicality of filing documents out of time as the relevance of the documents has not been questioned.

(ii) That though the order of 21st September 2010 required the parties "to file and exchange lists of documents within 21 days", the order "did not injunct, bar or in any way restrict the parties from filing any relevant document after 21 days".

(ii) That the suit ought to be heard on the merits without undue regard to technicalities.

(iii) That excluding the Defendant's bundles of documents will occasion grave injustice to it.

(iv) That the documents in the Defendant's bundle were within the Plaintiff's custody and reach, and he could have included them in his bundle of documents.

(v) That the documents in the Defendant's bundle are vital to its defence.

(vi) That it would be in the interests of justice for the Defendant's bundle of documents to be admitted.

7. I have considered the submissions of the learned counsels appearing, including the cases cited.
8. The order of 21st September 2010 directed the parties, *inter alia*, to file and exchange lists of documents within 21 days of that date and to file and serve paginated bundles of those documents within another 15 days. The Defendant did neither until 25th (according to the Defendant) or 28th (according to the Plaintiff) November 2011, well over one year later.
9. The least one could expect in the replying affidavit is an explanation for this delay which was obviously inordinate. I have closely read the replying affidavit. I cannot find in it any explanation for the delay, not even an attempt at explanation! What the Defendant says at paragraph 5 of the affidavit is that the order of 21st September 2010 directed the filing and exchange of lists of documents within 21 days and did not bar parties from filing any relevant document after 21 days. The Defendant completely ignored direction number (ii) of Mwera, J. That direction was that the parties file and serve paginated bundles of the documents mentioned in their lists of documents within 15 days of filing and exchanging the lists of documents. Clearly the order did not give the parties the freedom to file and serve their bundles of documents within a time frame of their own choice!
10. Lack of explanation for the delay, or even an attempt at explanation, indicates a willful disregard of the order of 21st September 2010. This would have merited imposition of any penalty for default that may have been ordered by the court in the order. But as it happened, there was no such default penalty prescribed in the order. In any case, given the very acrimonious nature of this dispute, it is best that the suit be disposed of upon merit.
11. I will therefore refuse the notice of motion dated 11th January 2011. It is dismissed. But I will award costs thereof to the Plaintiff.
12. The Plaintiff may file and serve a supplementary bundle of documents in response to the Defendant's bundle, if need be, within thirty (30) days of delivery of this ruling. Regarding amendment of the plaint, it has not been indicated what amendments are contemplated. Let the Plaintiff therefore apply for leave to amend if he is so minded.
13. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF MAY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2013