



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 730 OF 2008

**UKULIMA CO-OPERATIVE SAVINGS AND
CREDIT SOCIETY LIMITED..... PLAINTIFF**

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

1. This suit was instituted by the Plaintiff against the Defendant by a Plaint dated 4th December, 2008. The Plaintiff and the Defendant had a customer-bank relationship whereby the Plaintiff operated several accounts with the Defendant Bank. A dispute arose between the Parties with regard to Account Number 0112040134100 operated by the Plaintiff in the Defendant's Ukulima Co-operative House Branch. The same was with regard to debits made from the aforesaid account, whereby the Plaintiff alleged that the Defendant paid out cheques bearing the same numbers to different payees on several occasions. According to Paragraph 6 of the Plaint, Cheque Numbers 252670 and 253020 stood out with regard to the Plaintiff's allegations.
2. The Defendant filed a Defence denying the Plaintiff's allegations and requested for particulars from the Plaintiff with regard to Paragraphs 5, 6 and 8 of the Plaint. The Plaintiff responded to this request and filed the particulars so requested on 17th April, 2009. Dissatisfied with the response to its request for particulars, the Defendant requested for further and better particulars on 29th October, 2009. The Plaintiff obliged to this request and filed those further and better particulars on 9th November, 2009.
3. Again the Defendant was dissatisfied with the Plaintiff's response whereby it filed an application dated 18th January, 2010 praying for orders to compel the Plaintiff to supply the further and better particulars. By a ruling dated 29th August, 2011, the Court Ordered the Plaintiff to supply the particulars requested by the Defendant on 29th October, 2009. The Plaintiff thereafter filed its answers to the said request for further and better particulars on 16th May, 2012. The Defendant yet again was dissatisfied with the Plaintiff's response and this time, made an Application dated 13th June, 2012 which sought to strike out Paragraphs 6 and 8 of the Plaint on the grounds that the Plaintiff did not supply better and further particulars in respect to those paragraphs as ordered by the Court.
4. Faced with this application, the Plaintiff filed an Application dated 25th June, 2012 seeking leave to cross examine Regina Anyika on her Affidavit sworn on behalf of the Defendant on 13th June,

2013 specifically on the averments contained in Paragraph 5. The said Paragraph was to the effect that the Plaintiff had failed to provide the Defendant with further and better particulars as required by the Defendant. When the matter was mentioned on 16th April, 2013, the Court ordered that the Application by the Plaintiff dated 25th June, 2012 be heard before the Defendant's Application dated 13th June, 2012. However, on 26th July, 2013, the Court made further orders to the effect that it will render a consolidated ruling for both applications. This then is the Ruling in respect of those applications. I propose to start with the application dated 25th June, 2012.

5. The Plaintiff's application was supported by the Affidavit of Henry E Nakaya sworn on 25th June, 2012. The Plaintiff averred that the said deponent's affidavit was in support of an application that had the factual effect of blocking its suit from being heard and determined on merit. That further, the deponent had refused to disclose how the particulars supplied on the 18th May, 2012 by the Plaintiff were insufficient. As such, the Plaintiff contended that the attempt to strike out the paragraphs of the Plaintiff without full disclosure as to the insufficiency of the particulars provided by the Plaintiff would amount to an abuse of the Court process. Mr. Mbaabu, learned Counsel for the Plaintiff submitted that, Mrs. Anyika had failed to explain the basis of the alleged insufficiency of the Plaintiff's particulars with regard to Paragraphs 6 and 8 of the Plaintiff. He contended that it was only through cross examination that the Plaintiff could be able to discern what is required by the Defendant. He further submitted that the Orders sought are discretionary and as such the Court's discretion should be exercised in favour of his Client. The Plaintiff therefore urged the Court to allow its Application.
6. The Application was opposed by the Defendant. The Defendant relied on the Replying Affidavit of Regina Anyika sworn on 13th June, 2012 and its written submissions. The Defendant contended that the Plaintiff's application for cross examination was misguided and an afterthought. It was contended that the request for further and better particulars by the Defendant dated 29th October, 2009 and ordered by **Apondi J**, on 29th August, 2011 to date have remained unanswered. According to Mr. Liko, Learned Counsel for the Defendant, the Plaintiff was contemptuously seeking to avoid the compliance of the orders made by the Court through the instant application. Further to this, it was contended that the Plaintiff was purposefully distracting the Court from the fact that it has never complied with the Orders of **Apondi. J** made on 29th August, 2012. The Defendant therefore urged the Court that since the Order for cross examination is discretionary, the Court should not entertain the same as the application had been brought by the Plaintiff with unclean hands.
7. Mr. Liko further submitted that the particulars being sought by the Plaintiff were of fraud and negligence are in the possession of the Plaintiff. The Defendant also contended that the Defendant could not comply with Order 11 of the Civil Procedure Rules 2010 without the particulars sought from the Plaintiff. Further to this, it was the Defendant's contention that the Plaintiff had not demonstrated that special circumstances existed to warrant cross examination of Mrs Regina Anyika. As such, the Defendant urged the Court to dismiss the Plaintiff's application with costs.
8. I have considered the affidavits on record and the submissions of learned counsel as well as authorities relied on. My take of the matter is as follows. The law has allowed evidence to be proved by way of Affidavits under Order 19. Under Rule 2 of the said Order, the court may order a deponent of an Affidavit to attend court to be cross examined. Accordingly, an order for cross examination is in the discretion of the Court but as is in all discretions, the same must be exercised judiciously and not capriciously.
9. In the case of **Comet Products UK Limited –vs- Hawkex Plastics Limited and Another (1971) 1 ALL ER 1141**, the Court held that there should be exceptional circumstances in existence to warrant the cross examination of a deponent on his/her affidavit. Such circumstances in my view include, inter alia, allegations of fraud, mala fides, authenticity of the facts deponed and bad motive. This also extends to where there is conflict in Affidavits on record or where the evidence deponed to is conflicting in itself. The question that arises is whether the Plaintiff has satisfactorily demonstrated that any of the aforesaid circumstances exists to warrant the cross examination of Mrs Regina Anyika.
10. The reasons advanced by the Plaintiff is that the Defendant has failed to explain the basis of the alleged insufficiency of the Plaintiff's particulars with regard to Paragraphs 6 and 8 of the Plaintiff and that it was only through cross examination that the Plaintiff can discern what is required by

the Defendant. The Plaintiff further contended that it had supplied all the particulars required by the Defendant in compliance with the Order made of 29th August, 2011 and that the Plaintiff's application to strike out the aforesaid paragraphs in the Plaintiff amounts to the Defendant seeking particulars that are issues of law and evidence that are to be addressed at the main trial. In a rebuttal, the Defendant termed the Plaintiff's application as not only mischievous but an afterthought. That further, if the Plaintiff required clarification as to what was required by the Defendant in terms of the particulars of paragraphs 6 and 8 of the Plaintiff, the Plaintiff should have appealed or sought for a review the Court's Order vide the Ruling of **Apondi J** issued on 29th August, 2011.

11. From the foregoing arguments, it is clear from the outset that the matter in issue is whether there has been compliance with a Request for Further and Better particulars and the Court Order of 29th August, 2011 by **Apondi J**. On the one hand, the Plaintiff pleaded that it has fully complied with both the Defendant's request for further and better particulars dated 29th October, 2009 and in essence the aforementioned Court Order. The Defendant however insists that there has been non-compliance on the Plaintiff's part and hence its application to strike out paragraphs 6 and 8 of the Plaintiff as the particulars sought have not been provided. I am of the opinion therefore that the Plaintiff's application for cross examination of Regina Anyika is sorely hinged on the issue of whether the particulars provided to the Defendant are or are not satisfactory.
12. Having perused the Defendant's application dated 13th June, 2012 and the Plaintiff's response therein, I am of the opinion that in order to determine the issues raised by the Plaintiff in its application, the court must to a large extent determine matters that have been raised in the Defendant's application. It would be imprudent to make pronouncements on the Plaintiff's application for cross examination of Regina Anyika that would only serve to pre-empt the Court's decision on whether the Plaintiff satisfied the Orders made by **Apondi J** for it to determine whether or not to strike out certain paragraphs in the Plaintiff. As such I agree with the Defendant's contention that the Plaintiff's request to cross – examine Mrs Regina Anyika on her averments of her replying affidavit dated 13th June, 2012 is a way of opposing the Defendant's Application to strike out parts of the Plaintiff. I find that the issues raised by the Plaintiff with regard to the sufficiency of its particulars dated 18th May, 2012 can be established by other means other than the cross examination of Regina Anyika.
13. To my mind the Plaintiff has failed to illustrate to this court that special circumstances exist to warrant the cross examination of Regina Anyika at the interlocutory stage. To allow such cross examination would be against the overriding objective of the Civil Procedure Act as enshrined in Section 1A and 1B where the Court is enjoined to facilitate the just and expeditious determination of disputes. With regard to the Plaintiff's assertions that it will be prejudiced if the Defendant is not prompted to disclose the nature of particulars it seeks from the Plaintiff, I find that the Plaintiff still has the opportunity to ventilate this issue while opposing the Defendant's application dated 13th June, 2012. It is my view therefore that the Plaintiff shall not suffer any prejudice as alleged. With the advent of Order 11 of the Civil Procedure Rules, discovery has been made easier and a court must guard against being embroiled in a full blown trial at an interlocutory stage in the name of cross examining a deponent of an Affidavit.
14. To this end I find that the Plaintiff's Application dated 25th June, 2012 is without merit and is hereby dismissed with costs.
15. I now turn to the Defendant's application dated 13th June, 2012. The application was supported by the affidavit of Regina Anyika sworn on 13th June, 2012. It was contended that the Plaintiff had failed to comply with the Order of the Court dated 29th August, 2011 to serve the Defendant with further and better particulars. In view thereof, the Defendant urged the Court to strike out Paragraphs 6 and 8 of the Plaintiff.
16. The Plaintiff opposed the Application through the Replying Affidavit of Henry E. Nakaya sworn on 25th June, 2012. The Plaintiff contended that it had fully addressed the request for particulars. It further averred that it annexed the specific cheques that are in dispute and that such cheques contain the details sought in the request. The Plaintiff was of the opinion that it had disclosed its entire claim and the documents that it has sought to rely on. As such Mr. Mbaabu, Counsel for the Plaintiff, submitted that the instant application was vexatious and was only meant to delay the trial

- by technically blocking his client from recovering the money truly owed to it. He further submitted that courts usually shun applications to strike out pleadings or parts of pleadings unless it is absolutely necessary to do so. He relied on the Case of **Wachira Waruru & Standard Bank Limited –v- Francis Oyatsi Civil Appeal No. 111 of 2000** in support of this argument. The Plaintiff therefore urged the Court to dismiss Defendant’s application.
17. I have considered the affidavits on record and the submissions of counsel as well as the authorities relied on. Order 2 Rule 10 of the Civil Procedure Rules 2010 requires that every pleading must contain the necessary particulars of any claim. The principle behind the provision of further and better particulars is that litigation between parties should be conducted in a fair and open manner. Litigation by ambush is now frowned upon. In the case of **Bruce –vs- Odhams Press Limited 1963 1 KB 697** the Court held that the function of particulars is to fill in the picture of the Plaintiff’s cause of action which information, if sufficiently detailed, will put the Defendant on guard as to the case he/she has to meet to enable him prepare for trial. In essence, the provision of particulars prevents surprise and informs the other party on what is going to be proved to enable him prepare his case.
18. In the present case, I do note that there has been a request for particulars three times, culminating in the Order of the Court made by **Apondi J** on 29th August, 2011. The Plaintiff was ordered to provide the particulars of fraud and negligence as claimed in paragraphs 6 and 8 of the Plaintiff. The Plaintiff was to do so within 7 days. The issue for determination therefore, is whether the said order has been complied with. If there is non-compliance as alleged by the Defendant the Court may consider whether to exercise its discretion and strike out the said paragraphs of the Plaintiff.
19. I have looked at the averments in paragraphs 6 and 8 of the Plaintiff, the request for further and better particulars and the Plaintiff’s response dated 18th May, 2012. The Plaintiff has supplied a schedule of the cheque numbers, payees, date of the cheques as well as the presentation date of the said cheques to the Bank. Copies of the cheques have also been duly attached. As regards the particulars of negligence, the Plaintiff outlined the same in Paragraph C of the answer to particulars dated 18th May, 2012. The same goes into some detail with regard to the Plaintiff’s claim of negligence including the fact that all crossed cheques issued by the Plaintiff ought to have been paid by the Defendant through the payees account. The Defendant however claims that the particulars provided are unsatisfactory and that the particulars of each allegation set out in paragraph 8 have not been made clear as ordered by the Court. Is there merit to this argument?
20. After an analysis of the response to the particulars by the Plaintiff dated 18th May, 2012 and the Court Order by **Apondi J**, I find fault in the Defendant’s position. In my opinion, I find that the Plaintiff as it were, has already put on the table, its entire case by providing copies of the documents that it seeks to rely on during the trial. I further find that it has provided enough material to enable the Defendant discern what fraud or negligence is complained of. With respect, I think that the Defendant is on a fishing expedition and what it purports to require from the Plaintiff is tantamount to evidence which the plaintiff has already provided. I say so because the original cheques that were allegedly paid are supposed to be in the possession of the Defendant. It has been supplied with the particulars of the dates, the amounts together with copies of the same. What else does it require from the Plaintiff?
21. In my view, the Defendant already has the particulars with regard to the Plaintiff’s claim sufficient for it to confront the case at hand. Indeed a defence is on record denying the Plaintiff’s allegations with regard to paragraph 6 and 8. I find that the multiplicity of the request for particulars by the Defendant is tantamount to demanding that the Plaintiff proves its case at this stage - something which should be done at the main trial. Further, the matter at hand is not about the strength or sufficiency of the Plaintiff’s case, it is about whether particulars have been provided to enable the Defendant answer the Plaintiff’s allegations. Such particulars as I have stated earlier, have indeed been provided. I agree with the Plaintiff’s argument that the Defendant has not pointed out what is insufficient with the particulars provided by the Plaintiff to warrant any further request for particulars. To my mind, I find the Defendants conduct to be not only suspect but well calculated to block the Plaintiff’s claim from being prosecuted without any basis at all. In my judgment, there could never be a frivolous and vexatious application than this one.
22. Accordingly, I find the Defendant’s application dated 1st June, 2012 to be without merit and dismiss the same with costs to the Plaintiff. This being a 2008 case, I direct that the parties undertake pre trial directions within 60 days.

DATED and **DELIVERED** at Nairobi this 16th day of August, 2013.

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A. MABEYA

JUDGE