



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 453 of 2011

DIANA INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

ADAM OGDEN.....1ST DEFENDANT

A.F. GROSS T/A A.F. GROSS ADVOCATE.....2ND DEFENDANT

RULING

The Plaintiff/Applicant has brought an application before this court dated 15th December 2011, seeking orders for summons to issue to the 2nd Defendant to attend Court and to produce the originals and certified true copies of a list of documents that is set out in the said application.

The Plaintiff claims that they filed a Notice to Inspect Documents dated 10th November 2011, and served the same on the Defendants' advocates on record. The gist of the Plaintiff's application is that they have sent various letters and made visits to the Defendants' Advocates chambers on 16th November 2011 and 22nd November 2011 requesting to inspect the requested documents. Further that they have not been accorded the opportunity to inspect the documents; neither has the Defendant's Counsel made any arrangements for the said inspection. The Plaintiff states that the said documents are held by the Defendants, and the Defendants' actions are obstructing the cause of justice and frustrating a fair hearing and determination of this matter. The Plaintiff has produced evidence of the said letters dated 18th November 2011 and 22nd November 2011, both addressed to the Defendants' advocate.

The Defendant's Advocate denies that there was any agreement to have a meeting with the Plaintiff's Advocate for inspection of documents. He has also annexed correspondence seeking clarification on the legal basis for the notice to produce, and indicating their opinion that they did not consider the Plaintiff entitled to inspect the documents. The said letters also indicate the Defendants' Advocate's unavailability to attend the meetings proposed by the Plaintiff for inspection of the suggested documents.

The Defendants' Advocate further avers that since the Plaintiff has not filed its list and bundle of documents, and is yet to give discovery of its own documents as required by the Civil Procedure Rules, no order for discovery or inspection of documents can be made. The Defendants' Advocate has annexed a letter dated 15th November 2011 as evidence, and relies on a copy of his letter dated 22nd November 2011 that had been produced as an exhibit to the affidavit of Fredrick Ngatia, the Plaintiff's Advocate, sworn on 15th December 2011.

Both parties have put forward arguments as to the relevance of the documents sought to be produced. The Plaintiff argues that the documents requested to be produced are the completion documents in a sale agreement between the 1st Defendant and one Mr. Nagin Chouhan in which the Plaintiff was a nominee. Further, that the 1st Defendant on 24th August 2011 purportedly rescinded the said sale agreement on the grounds that the completion date had passed, and that the Plaintiff was not known to the Defendants. This purported rescission allegedly occurred one day after the 2nd Defendant had issued a professional undertaking to the Plaintiff's Advocate to hold the balance of the purchase price to their order, pending registration of the suit property in favour of the Plaintiff.

The Defendants on the other hand argue that no rights accrued to the Plaintiff as the alleged nominee once the agreement between Mr. Chouhan and the 1st Defendant was terminated, and Mr. Chouhan refunded his 10% deposit.

The Plaintiff's and Defendants' Advocates made oral submissions during the hearing of the application on 17th January 2012, in which they reiterated their positions with regard to the application filed herein. The Plaintiff's Advocate submitted that section 22 of the Civil Procedure Act (Cap 21) together with Order 16 Rules 6 and 7 of the Civil Procedure Rules give this Court wide discretion to order for production and inspection of documents, and for the issue of summons for production of documents at any time of the proceedings. The Plaintiff's Advocate relied on the authorities of **Wendy v IL Ngwessi Co Ltd & Another (2005) 1 E.A 382** where an order of discovery were made by this Court, and **Menze & Others v Matata (2003) 1 E.A 147** in which non compliance with an order of discovery was held to justify precluding a litigant from setting up their defence.

The Defendants' Advocate submitted that the application herein is immature, since the purpose of section 22 of the Civil Procedure Act is to assist parties prepare for trial, and Order 16 Rules 6 and 7 deal with summoning persons to produce documents at a hearing, or for the purposes of a hearing. He also distinguished the case law relied upon by the Plaintiffs on the ground that they were decided prior to the 2010 Civil Procedure Rules, and that there is now a clear framework in Order 11 of the said Rules for preparing a case for trial.

After consideration of the pleadings filed, the submissions made and authorities cited, I am of the view that the issues before this court is whether the right procedure has been

followed for a summons to be issued against the 2nd Defendant to produce documents, and whether such summons can be issued at this stage of the proceedings. The present application is brought under section 22 of the Civil Procedure Act and Order 16 Rule 6 and 7 of the Civil Procedure Rules. The application is premised on the lack of compliance by the Defendants with the Notice to Inspect documents served by the Plaintiffs.

I have perused the Notice to Inspect Documents dated 10th November 2011, and have observed that the said Notice had also been brought under Section 22 of the Civil Procedure Act. This is indeed the substantive provision that allows for inspection of documents, and the applicable procedure is now provided for under Order 11 Rule 3(1) (d) of the Civil Procedure Rules, wherein such orders are to be given at a case conference. No such case conference has been held in the suit herein. This application is therefore already founded on the wrong procedure.

In addition, even if the provisions of Order 16 Rule 6 and 7 of the Civil Procedure Rules were to apply, they must be read together with Order 16 Rule 1 of the said rules, which rule is the operative rule that allows parties to apply for summons to persons whose attendance is required to produce documents. The said rule states such an application can be made at any time before the trial conference under Order 11. In light of this provision, it is my view that the purpose of the said rules is with reference to the conduct of a trial.

I must now determine if the above provisions apply to the current stage of the proceedings herein. A suit was filed by the Plaintiff by way of a Plaint dated 26th August 2011, which Plaint was amended on 9th September 2011. The Defendants filed their respective Defences on 3rd October 2011. In the meantime the Plaintiffs had also filed an application for an injunctive relief on 26th August 2011, which was also amended on 9th September 2011. The Defendants subsequently filed an application for striking out of the suit dated 12th September 2011. These two applications were pending for hearing at the time the present application was filed on 16th December 2011. No pretrial procedures have so far been undertaken for the suit filed herein, neither has it been set down for hearing.

I therefore find that this application is premature because no such pretrial directions can be given by this Court until disposal of the two pending applications, and the issue of summons to persons to produce documents is predicated upon the pretrial procedures having been commenced. I also find that the authorities cited by the Plaintiff are not applicable as the new procedures as to inspection and discovery are now provided for in Order 11 of the Civil Procedure Rules.

In light of the findings stated in the foregoing, the Plaintiff's application dated 15th December 2011 is hereby stayed until the issuance of pre-trial directions by this Court, and subject to the determination of the applications dated 26th August 2011 as amended on 9th September 2011, and 12th September 2011, that are pending before this Court. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____13th____ day of ____February____, 2012.

P. NYAMWEYA

JUDGE