



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 110 OF 2009

BRIGITTE KORNPLAINTIFF/APPLICANT

VERSUS

KAHINDI MSANZU NDURYA.....DEFENDANT/RESPONDENT

RULING

The plaintiff's Notice of Motion dated and filed on **30th September, 2010** was brought under ss.3A and 63 of the Civil Procedure Act (Cap. 21, Laws of Kenya), and Order L, Rule 1 of the Civil Procedure Rules.

The application carried one main prayer:

“THAT this Court be pleased to issue an order directing and/or compelling the Branch Manager, Barclays Bank of Kenya, Bamburi Branch, to supply the plaintiff/applicant with Bank Statements in respect of the defendant's Bank Account No. 030164282856 for the period commencing from 2004 and running up to 2008, upon payment of any reasonable charges for the same”.

In the grounds for the application, it is stated as follows:

- (i) the plaintiff had filed suit in 2009 with the prayer, inter alia, that she be declared to be the rightful proprietor of a portion of land on plot No. 3847/III/MN;**
- (ii) though the said plot was purchased in the joint names of the defendant and the plaintiff, the plaintiff is the one who paid for it, as well as for the construction of the building thereon; she remitted all the monies for the construction from her Bank in Austria to the defendant's Barclays Bank account at the Bamburi Branch, Mombasa;**
- (iii) all the said remittances were made to the defendant's said account, No. 030164282856;**
- (iv) the plaintiff intends to use the defendant's Bank statements as evidence for the period 2004-2008, which account, which is in the sole name of the defendant, has been confirmed by the Bank Branch Manager to have been closed;**
- (v) on 20th February, 2010 the plaintiff had been advised by the Branch Manager of the said Bank to obtain a Court Order, as under the Banking Act, the Bank cannot on its own, issue statements regarding accounts held, to third parties;**
- (vi) no prejudice will be suffered by the defendant, if the Orders sought herein are granted;**
- (vii) if the Orders sought are not granted, the plaintiff will suffer much prejudice, as she would be unable to prove her case against the defendant.**

The plaintiff swore an affidavit on **30th September, 2010** giving facts in support of her application.

The defendant swore a replying affidavit on **22nd October, 2010** making a limited number of depositions based on his own knowledge; these are:

(i) *“I categorically deny that the plaintiff bought the said Plot No. 3847/III/MN jointly with myself as alleged or at all and I urge this Court to disregard the plaintiff’s contention.....”*

(ii) *“I do state that during the subsistence of our relationship both.....parties offered gifts and favours to [each other]which this Court cannot quantify in monetary terms.”*

For the remainder of the affidavit, the deponent either expresses belief in the truth of his Advocate’s advice, or makes a general statement of disagreement and objection, such as the following:

*“THAT I further aver and maintain that the application herein is frivolous, vexatious, without merit, bad in law **ab initio**, an abuse of court process and the same is but an afterthought and a fishing expedition.....”*

It is a clearly inappropriate statement coming under the head of “evidence”; and besides, no lay deponent can make such a statement as a sincere, sworn statement on **fact**. Considerations of merit, falling in such a category, will be further undertaken in the Court’s assessment of the submissions by counsel.

Learned counsel **Mr. Kenga**, for the applicant, urged that the plaintiff has established a **prima facie** case, and deserves the orders sought.

Counsel submitted that the applicant had sought the relevant bank statements, as they related to funds which she had dispatched to the defendant, for the purchase of the plot which is now in dispute, in the main suit. In the words of counsel: “the plaintiff’s application is meritorious and/or valid in the sense that, without an Order of the Court, the Bank cannot furnish the plaintiff with the.....statements, yet the said statements will form part of the.....evidence”. Counsel urged that the plaintiff had, significantly, annexed to her supporting affidavit *“a bundle of Bank statements belonging to [herself], clearly showing that monies were wired from [her] Bank in Austria to the defendant’s Bank in Kenya for the construction of a house on the suit premises”*.

Counsel submitted that the defendant was raising only one objection: that his Bank cannot release the statement due to **his fiduciary relationship with the Bank**. To this argument, counsel submitted that the relevant Bank at Bamburi, Mombasa, was mindful of the fiduciary relationship, when that Bank advised the plaintiff she must obtain a Court order, as the basis for the release to her of the Bank statement sought – in the absence of the defendant’s own consent.

Counsel submitted that the defendant had not shown how he stood to be prejudiced if the said Bank statements were released to the plaintiff: but the plaintiff absolutely required those statements to prosecute her claim in the main suit.

It was argued for the defendant that “the plaintiff is seeking orders against an entity that is not party to this suit”; and, claiming to speak for Barclays Bank, he submitted: *“tenets of natural justice require that a party shall not be condemned unheard”*. Without citing any statutory provision or case authority, counsel continues to make a case for **the Bank**:

“The plaintiff has not enjoined the Bank nor has she proved that there exist special circumstances that may move the Court to categorize the production of bankers’ books as falling under the exception to the fiduciary and confidentiality rule as between the defendant and his bankers, and thus allow the production of the said documents.”

Counsel submitted that the fiduciary relationship between Barclays Bank and the defendant was the reason the defendant opposed the production of the Bank statement requested by the plaintiff. This

argument is presented in a manner that, in my opinion, fails to take into account the fact that **the Court**, in the exercise of the mandate of doing justice, is being asked to permit the release of the Bank accounts in question; counsel submitted:

“....M/s. Barclays Bank of Kenya are in [a] fiduciary relationship with [the defendant] and are thus duty-bound to safeguard any confidential information regarding the defendant’s said account and unauthorized disclosure will prejudice the defendant”.

The plaintiff’s suit by plaint dated **9th January, 2009** was filed on **17th April, 2009**. The suit relates to property situate in Mombasa, L.R. No. 3847/III/MN which the plaintiff pleads, is held in trust for her by the defendant; she seeks a formal **transfer** of the said property, and its registration in her name as the proprietor; she also asks for orders of **account**, in respect of the rentals which the defendant has been taking on the property.

The evidence at this interlocutory stage suggests that there are records of money transfers which the plaintiff consistently made into the defendant’s Barclays Bank, Bamburi Branch account, for the purpose of purchasing and constructing the suit property. It follows that if the plaintiff is to have a record of those transactions – a record that is essential for **resolving the issues in the suit** – she must get them from the Bank; she needs them for the just resolution of the suit between herself and the defendant. Consequently, the plaintiff has good cause for seeking the statements of account from Barclays Bank.

Is there a **lis** between the plaintiff and Barclays Bank, so she must have the Bank joined as a party? I do not agree with the defendant’s position that there is a **natural justice issue** between the plaintiff and Barclays Bank; for it would prove unnecessarily costly for parties if the Bank had to be joined in the suit, only to be asked for a Bank statement. The Bank has no vested interest in the Statement and, so long as it has lawful authority and has been paid for its service, it is able to provide a statement of account, just as it has already advised.

The **fiduciary relationship**, which is the main consideration in the defendant’s objection to the release of the Bank statements, is an **equitable concept** which, in this case, will only be upheld in a proper case. The relevant considerations are, firstly, that the **just disposal of the suit** herein, requires the release of the Bank statement, through the Court. Secondly, the suit itself points in the direction of possible **unjust enrichment** on the part of the defendant; and that same defendant cannot be allowed to obscure the Court’s view of the **trust relationship** which the plaintiff pleads exists between the defendant and her.

Thirdly, if the said bank statement is released to the applicant, is this to be regarded as **prejudicial to the defendant**, and therefore contrary to even-handed practice in a fair game?

That would not be so – I must emphasize. **Prejudice** would only come to pass if the account statement related to a private question unrelated to the resolution of the **lis** between the parties. This Court **is** a public forum for the resolution of the litigious questions set out in the pleadings. Such questions **must** be addressed by the Court; and there is a duty to admit all such information as leads to a resolution, where the same is requested by a party.

Fourthly, this Court has not attached much merit to the defendant’s replying affidavit, in particular, where he implicitly admits holding assets emanating from the plaintiff, while representing that such assets were mere **generous gifts** and did not fall within the category of **trust obligations**.

Fifthly, it is apparent that the defendant did not appreciate that this Court has authority, in the context of the existing suit and any application thereunder, to make binding orders for the **just disposal** of all questions coming up before it.

On the basis of the foregoing principles, I hereby determine this application in favour of the plaintiff/applicant, and specifically order as follows:

(1) The Branch Manager, Barclays Bank of Kenya, Bamburi Branch, is hereby directed to

supply the plaintiff/applicant with Bank Statements in respect of the defendant's Bank Account No. 030164282856 for the period commencing from 1st January, 2004 and running up to 31st December, 2008, upon payment of any reasonable charges for the same.

(2) The costs of this application shall be in the cause.

DATED and DELIVERED at MOMBASA this 13th day of May, 2011.

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J. B. OJWANG
JUDGE