



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT CASE NO. 209 OF 2010

KENYA RAILWAYS CORPORATION.....PLAINTIFF

VERSUS

**DEVELOPMENT BANK OF KENYA
LIMITED.....DEFENDANT**

RULING

On 5th November 2010, the defendant/respondent filed a notice of preliminary objection. In the said notice, the defendant raised the following objections:-

“That the plaintiff/applicant has refused/failed and/or neglected to comply with the defendant/respondent notice for discovery dated 26th April 2010 and filed on 27th April 2010.”

During the hearing of the preliminary objection, the defendant’s counsel, Mr. Ohaga submitted that by a notice dated 27th April and filed on the same date simultaneously with the statement of defence, the defendant required the plaintiff to make discovery on oath of all documents which are in possession of the plaintiff relating to this suit. The notice was filed under the provisions of Order 10 rule 11 of the Civil Procedure Rules. According to the learned counsel, that notice was filed and served 2 months before the present application for summary judgment. The learned counsel contended that the purpose of a party requesting for discovery is to enable him to prepare fully to respond to the matters arising in the suit. He was of the view that this is even more pertinent in a case like this one where the plaintiff’s suit is founded on a guarantee issued by the defendant bank on behalf of a third party with whom the plaintiff intended to enter contractual relations but who has not been made a party to the suit. Further to the above, the learned counsel also submitted that this necessarily means that any document which relate to the contractual arrangement between the plaintiff and the other third party to the suit is crucial. Mr. Ohaga also submitted that the party called Erdmann Property Limited features prominently in this suit. In addition to the above, he also stated that the suit has been brought for the benefit of the Railways Retirement Scheme. He further contended that it was clear to the defendant that it would require the discovery of the document to prepare for the trial. He was of the view that if the plaintiff felt that it was not obliged to respond to the notice of discovery Order 10 rule 11A of the previous Civil Procedure Rules obligated the plaintiff to

make discovery on oath at least a month after the close of proceedings. Apart from the above, the learned counsel also submitted that Section 1A of the Civil Procedure Act has set out the overriding objective and that specifically section 1A (iii) requires parties and advocates to help the court achieve the overriding objective. He contended that the purpose of the same is to achieve the expeditious and proportional disposal of justice. Besides the above, the learned counsel also submitted that the refusal to respond to the notice of discovery may negate the overriding objectives. Thereafter, the counsel also submitted that knowing fully well that the defendant requires discovery, it is not available to the plaintiff to advance the notice of motion before it has responded to their request. Due to the above reasons, he urged this court to find that the notice of motion be deferred or struck out until the plaintiff has complied with the spirit and intent of section 1A of Civil Procedure Act.

On the other hand, the preliminary objection has been opposed by the plaintiff who was represented by Mr. Gachoka. According to the plaintiff's counsel, the said preliminary objection was filed to delay the prosecution of the summary judgment. He further contended that the preliminary objection was filed when their application dated 15th June 2010 was coming up for hearing. It was premised on the basis that on 27th April 2010 the defendant had filed a notice for discovery under Order 10 rule 11. The said notice for discovery requires the plaintiff to produce the documents in their possession under oath. It is the contention of the learned counsel that the plaintiff having examined the defence on record opted to file an application for summary judgment. That is because the defence does not raise any triable issues. He further contended that all the necessary documents for the application for summary judgment were annexed to the application. In addition to the above, they also annexed the affidavits by the Corporation Secretary. Apart from the above, he also submitted that the documents were served on the defendant on 17th June 2010. He was of the view that by the time they were arguing the preliminary objection, there was no element of surprise since the defendant was served with all the necessary documents. It is on the basis of the documents that the plaintiff applied for summary judgment. The learned counsel is of the considered view that the defendant has not suffered any prejudice. He also took issue of the fact that the defendant had not filed any replying affidavit to their application. He described the preliminary objection as a mere technicality to delay the hearing of the application for summary judgment. In conclusion, the learned counsel submitted that according to Order 10 rule 11 (2) of the old Civil Procedure Rules, if a party fails to respond to an application for discovery, then the aggrieved party should make a formal application to the court. However, upto the time that the preliminary objection was being argued, the defendant had not filed any such application. The learned counsel rounded up his submissions by urging this court to dismiss the preliminary objection.

This court has carefully considered the opposing submissions by the learned counsels. According to Order 10 rule 11, it states as follows:-

“11 (1) Any party may request any other party to the suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the suit.

(2) If the party so requested refuses or neglects within fourteen days to make discovery as aforesaid, application may be made to the court for an Order directing such discovery; and at the hearing the court may either refuse or adjourn the application if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such Order, either generally or limited to certain classes of documents, as it thinks fit:

Provided –

(i) That discovery shall not be Ordered when and so far as the court is of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs;

(ii) That on an application by one party the court may make an Order for discovery against that party.

(3) The affidavit to be made by a party either in response to a request under subrule (1), or to an Order under subrule (2), shall specify which of the documents therein mentioned he objects to produce, and shall be in Form No. 5 of Appendix B with such variations as the case may require.”

The above provision of the law is very clear. It states that if a party refuses or neglects within 14 days to make discovery, then an application may be made to the court for an Order directing such discovery. Thereafter, the court may exercise its discretion. It is crystal clear that the law does not refer nor envisage a situation where a preliminary objection will be raised where a plaintiff has refused or neglected to make discovery. It is therefore incumbent of this court to apply the above very clear provisions of the law. Unfortunately, in this case, the defendant has failed to comply with the provisions of the law. Under those circumstances, this court has no option but to dismiss the preliminary objection since the same has no merit at all. The defendant is therefore at liberty to comply with the very clear provisions of the law. The upshot is that the preliminary objection is hereby dismissed and the defendant is hereby directed to bear the costs of the preliminary objection.

Those are the Orders of this court.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open court in the presence of:-

..... Applicant’s counsel
..... Respondent’s counsel

MUGA APONDI

JUDGE

26TH OCTOBER, 2011.