



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)**

Civil Case 2 of 2004

KIVANGA ESTATES LTD:.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA & ANOTHER :.....DEFENDANT

RULING

By this application, the defendants seek the dismissal of the plaintiff's suit for failure to comply with an order for discovery. They also pray for the costs of the application.

The application is brought by a **Notice of Motion** dated 29th September, 2009, and made under **Order X rule 20** and **Order L, rule 1** of the **Civil Procedure Rules; Sections 3A** and **22** of the **Civil Procedure Act**; and all other enabling provisions of the law. It is supported by the annexed affidavit of Zipporah Kinanga Mogaka, the 1st defendant's General Manager in charge of remedial management, and opposed by the replying affidavit of Kenneth J. M. Githinji, the plaintiff's advocate.

After considering the application and the submission of counsel for the respective parties, I note that on 27th January, 2009, the court made the following orders:-

- (i) **THAT** the plaintiff do produce and furnish the defendants within 21 days from the date of this order with the following documents:-
 - (a) All pleadings, applications for orders of temporary injunction, Ruling/Orders made on such applications and judgment/decree issued in Nairobi **HCCC No.3011 of 1996** – KIVANGA ESTATES LIMITED VERSUS KENYA NATIONAL CAPITAL CORPORATION LIMITED.
 - (b) All pleadings, applications, ruling/orders and judgment/decree in **Meru HCCC No.320 of 1990 (O.S.)** – KIVANGA ESTATE LIMITED VERSUS KENYA NATIONAL CAPITAL CORPORATION LIMITED.
 - (c) All pleadings, applications/orders and judgment/decree in Embu **PMCC No.74 of 1991** - KIVANGA ESTATE LIMITED VERSUS KENYA NATIONAL CAPITAL CORPORATION LIMITED.
- (ii) **THAT** upon the plaintiff's failure to comply with order number 1 above, the suit be dismissed.

The only issue to be determined is whether the plaintiff has complied with order 1 of the court's orders (supra) made on 27th January, 2009. As reproduced above, that order is clear beyond dispute. However, whereas the plaintiff has complied with order 1(a) as to furnishing the defendants with the pleadings, applications, orders and judgment/decree in Embu **PMCC No.74 of 1991**, the same cannot be said of Nairobi **HCCC No.3011 of 1996**, and Meru **HCCC No.320 of 1990 (OS)**. The plaintiff did not furnish the defendants with the required

particulars for Nairobi **HCCC No.3011 of 1996**, and **Meru HCCC No.320 of 1990(O.S.)**, and did not even attempt to do so. During the oral hearing of this application, Mr. Githinji for the respondent was recorded as submitting that the discovery made by the plaintiff was sufficient and sufficient enough to enable the defendants to know the case they had to meet. He also said that the court order was to the effect that the plaintiff supplies the defendants with the documents it had. These statements are not quite correct. The court order was clear and very specific as to what documents the plaintiff should produce and furnish the defendants. The plaintiff duly complied with order 1(c), but did not comply with orders 1(a) and (b). This was a blatant breach of the court order of 27th January, 2009.

For the above reasons, I find that the plaintiff failed to comply with the court order number 1(a) and 1(b). Under the second order made by the court, it was made clear that failure to comply with the first order would attract the dismissal of the suit. This is the fate to which the plaintiff has submitted itself. I accordingly direct that upon the plaintiff's failure to comply with order number 1 of the orders made on 27th January, 2009, the suit herein be and is hereby dismissed with costs. The plaintiff will also bear the costs of this application.

It is so ordered.

Dated and delivered at Nairobi this 25th day of February, +2010.

L. NJAGI

JUDGE