



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 10 OF 2009

MARIANO DINACCIPLAINTIFF

VERSUS

ANGELO LATTINELLI.....DEFENDANT

RULING

By a Notice of Motion dated 14-06-10 made under Order VI Rule 8(2), X Rule 11, 13 and 20, and Order L Rule 1 Civil Procedure Rules, applicant seeks that the defendant in compliance with the requirements of Order X Rule 11 Civil Procedure Rules, do file and serve upon the plaintiff, his affidavit of all documents in his possession and/or power, relating to all issues raised in the pleadings in this suit, within such time as this court deems fit and reasonable, and in default the defendant's defence herein be struck out automatically.

Secondly, that the defendant, do in compliance with the requirements of Order X Rule 13 Civil Procedure Rules produce to this court, all documents in his possession and/or power, relating to all issues raised in the pleadings in this suit, within such time as this court deems fit and reasonable.

Finally, that the defendant do in answer to a request for particulars dated 15th December 2009, supply the plaintiff the particulars sought thereon within such time as the court deems fit and reasonable.

The application is based on grounds that the defendant has failed to comply with the plaintiff's requests contained in his advocate's letter to the defendant's advocate, dated 15th September 2009 and 18th March 2010, to make discovery on oath, of all documents in his possession or power, relating to all issues raised on this pleadings. The very nature of the plaintiff's claim requires an order to be made for the plaintiff to comply with requirements of Order X Rule 11 Civil Procedure Rules. The defendant has unreasonably refused, neglected and/or otherwise failed to provide the plaintiff with copies of the documents in his possession related to the matters in dispute. Further that discovery on oath of all the plaintiff's documents in his possession will help shorten the length of the hearing and save on time and money.

The affidavit in support of the application is sworn by Mr. Tukero ole Kina advocate in which he states that the replying affidavit sworn by Angelo Lattienlli is helplessly inadequate as it fails to adequately provide the necessary details of payments made to the plaintiff and the documents filed by the defendant was irregular because the same seemed to be a ploy aimed at concealing material facts necessary for the determination of this suit.

It is further stated that the defendant's defence and set off demonstrate the necessity for discovery

because it is only the defendant's records which can demonstrate the true payments made and the plaintiff would be entitled for the alleged loss incurred due to the alleged breach on the defendant's part.

Several correspondences made to the defendant's advocate seeking to be supplied with copies of documents has not elicited any positive response and all he has received is a document entitled "Notice of Non-production and of document" which indicates that the defendant is not in possession of any of the documents required as the same were earlier on produced to applicant's counsel vide their replying affidavit to an application seeking summary judgment. That notice of non production also pointed out that Mr. ole Kina had not specified which documents he wanted supplied.

Mr. ole Kina now specifies that the documents sought are:-

- (a) Details of payments made to plaintiff and the respective acknowledgments of receipts.
- (b) Details of the payments made, when and how much was paid – if in cash, copies of the receipts given and if in cheque, details of the cheques.
- (c) Details of verbal agreements and when and where made, and if in the presence of a third party, the name of such third party.
- (d) Details of agreement of payment of interest.
- (e) Details of the agreement allowing plaintiff to shop at the Italian Supermarket in settlement of the loan interest.
- (f) Copy of the receipt of Euro 41,314.
- (g) Details of how much of the Euro 41,314 constituted loan and interest respectively.
- (h) Acknowledgement of receipt of US \$50,000.

It is sought that if the defendant does not wish to produce the documents related to the payments, then the defendant be directed to disclose the information to this court.

In opposing the application, the respondent has filed replying affidavit in which he states that all the documents touching on this matter have been supplied to the plaintiff and in any event the nature of the claim brought by the plaintiff did not disclose ever receiving anything from the defendant in terms of the repayment of the loan, save for interest, only, so it follows that plaintiff deliberately failed to disclose particulars of his claim and it is on that basis that defendant/respondent upon producing a receipt, this court dismissed his application for summary judgment – those copies of receipts were annexed to this affidavit and this served the purpose sought in the plaintiff's request for particulars, dated 15th December 2009.

Respondent avers that there are no other agreements or undertakings made that the plaintiff is not aware of as the reply to applicant's prayer for summary judgment dated 13th July 2010 particularly disclosed all that respondent/defendant knew to have transpired between the parties.

Respondent has reservations with this court's jurisdiction over this matter and feels that applicant is bullying him with unnecessary applications instead of fixing the matter for hearing as was ordered when the application or summary judgment was dismissed on 4-11-09.

As regards applicants demand that respondent disclose who witnessed what, the respondent states, that theirs was a private agreement conducted between friends and was never intended to be subject to litigation so there were no witnesses nor documentation property executed and registered.

At the hearing of this application, Mr. Ole Kina submitted on behalf of the applicant, that despite request for particulars, defendant has refused to provide particulars sought so as to enable them make discovery. He refers to paragraph 4 and 5 of the statement of defence and points out that respondent/defendant ought to supply particulars and maintains that what was contained in an affidavit in response to an application, does not wash away the requirement for discovery.

In response, Mrs Ogoti, on behalf of the respondent maintains that the particulars sought are within the replying affidavit and the defendant cannot be made to supply documents which are not within his possession. She explains that most of the agreements and payments were not reduced in writing and it becomes very difficult to supply particulars in verbal transactions which she sees this application as first an attempt by plaintiff to collect evidence for his case.

However, in ole Kina's reply is that there is a standard reply which requires each particular request to be responded to and where there are difficulties, then on each item, there must be a reply to each, in the prescribed form, under the rules, and where they do not disclose any document, they are at liberty to state why, but they have no right to withhold any information they may have because the law requires all the parties to put their cards on the table so as to avoid trial by ambush.

I have perused the statement of defense, in particular paragraph 4 and 5 – paragraph 4 states:

“The defendant denies paragraph 4 and 5 of the plaint and puts the plaintiff to strict proof of the allegations thereof, but avers that if there is any loan agreement, which is denied herein above, the said agreement was entered between the parties out of this court's jurisdiction and its enforcement cannot therefore be executed.”

That paragraph does not admit to there having been a loan, only stating that even if there was (which is denied), this it was executed outside this court's jurisdiction.

However paragraph 5 pleads in the alternative and on a without prejudice basis that defendant has paid the entire loan to the plaintiff who acknowledged long before the institution of this suit and that defendant will produce proof at the hearing of the suit – that is what sets the applicant to request for particulars – and rightly so, my finding is that discovery is necessary here, Order VI rule 8(2) provides that:

“the court may order a party to serve on any other party particulars of any claim, defence or other mater stated in his pleading,....”

It is the defendant who has alluded to paying the entire loan and that he will produce proof at the hearing – he must therefore provide those particulars upon request and not keep it as some sort of secret weapon to unleash only at the hearing.

It is not enough for the respondent to simply state, that applicant is already aware of what documents he has by virtue of the replying affidavit filed in respect of a different application in this matter.

Order X Rule 11A (1) clearly provides the procedure to be used in response to the request – it requires filing and serving on the opposite party a list of documents relating to any matter in question in the suit which are or have been in his power. If the same are not within the defendant's possession then this ought to be clearly stated.

Where for whatever reason, the particulars requested for cannot be supplied then Order X rule 11(3) requires that the part specifies which item she objects to produce, or I think is even unable to produce and

that should be in form no. 5 of Appendix B, with such variations as the case may require. The grounds of objection must be stated in that standard form when replying to the request. I therefore order that defendant/respondent do produce, upon oath as set out under the Civil Procedure Rules, such documents as have been specified in this application, which are in his possession, relating to any matter in question in this suit within 21 (twenty one) days from today. I think for the avoidance of doubt I will direct that the answer to be filed must be on each specific item as provided under the standard form, and a general blanket denial will not help – indeed that response need not necessarily have available all the documents – but reasons for non availability must be stated. In default of failing to comply with this order then the defence shall be struck out and the suit shall be placed in the position as if it was undefended. I allow the application with costs. This application to be borne by respondent.

Dated, read and delivered this **2nd** day of **November, 2010** at Malindi.

H. A. Omondi
JUDGE