

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 455 of 2002

PANSIBA LIMITED PLAINTIFF

VERSUS

INVESTMENT & MORTGAGES

BANK LIMITED.....DEFENDANT

RULING

The defendant has applied to produce four (4) documents as documentary evidence at this stage of the proceedings. The defendant filed a further supplementary list of documents on 14th May 2009. This was after two of the three (3) witnesses of the plaintiff testified. The third witness has offered his testimony-in-chief. It was during cross-examination that the defendant applied to have the said documents produced. This court recalls that before commencement of this trial, the parties to this suit were directed by the court to compile their documents, bind them, serve the opposing party and produce them in court to enable them be admitted before the formal commencement of the hearing of the case. The parties did comply with the direction of the court. Under Order X rule 11A of the Civil Procedure Rules, parties are required to conclude discovery a month after the close of the pleadings.

In the interest of justice, the period of discovery may be extended by the court. In this case however, it was apparent that the defendant is using the discovery process to ambush the plaintiff and further to delay the smooth trial of this case. The defendant had all the opportunity to produce its documents. The defendant could even have produced the documents in question before the plaintiff's witnesses testified. I think it would occasion considerable injustice to the plaintiff if the court were to allow the defendant to produce the documents at this later stage of the proceedings. Justice is both procedural and substantive. It is procedural when it requires all the parties to avail documents to the opposing party before commencement of trial. This requirement is meant to safeguard the level playing field so that none of the party is not taken by surprise during the hearing of the case.

If the present application were to be allowed, it would mean that this court is condoning the defendant's conduct of formulating its defence on the hop i.e. producing document depending on the nature of the evidence adduced by the plaintiff's witness – that cannot be. It is not the form of trial envisaged under our civil procedure. If parties were allowed to produce documents in the manner requested by the defendant, then it would rubbish the entire discovery process. I concede that the defendant has a valid argument when it states that the courts should lean towards assisting parties to produce evidence in the best possible manner so that the court may be put in picture of the true nature of each party's case.

However, I do not think that the court would be advancing the interest of justice if it allows a party to conceal evidence and then produce it at the point of such a party's choosing under the excuse that it has just made discovery of the documents or that the evidence adduced by the plaintiff had necessitated the production of further evidence in form of documents and reports. If that were the case, then there would be no need for the elaborate rules of procedure that are meant to guard against ambush or surprise. I find no merit with the defendant's application in relation to the production of the documents listed in the defendant's further supplementary list of documents. The said documents, having not been discovered at the appropriate time, cannot be produced at this stage. The documents are there expunged from the record of this court.

I agree with the plaintiff that the production of the said documents has come too late in the day to aid this court in the proper adjudication of the matters in dispute between the parties in this case. It is so ordered.

DATED at NAIROBI this 9TH day of JUNE 2009.

L. KIMARU

JUDGE