



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**CIVIL CASE 1470 OF 1990**

**TRANS-NATIONAL BANK LTD.....PLAINTIFF**

**VERSUS**

**KASSANGA MULWA .....1<sup>ST</sup> DEFENDANT**

**DAVID MBITI .....2<sup>ND</sup> DEFENDANT**

**RULING-N0 2**

The subject of this ruling is an application dated 23<sup>rd</sup> August 2006 and filed on 25<sup>th</sup> August 2006. It is brought by way of chamber summons under order X rules 11 (2) and 23 of the CPR, section 3A and 22 of the CPR and all other enabling provisions of the law. It seeks three prayers namely:-

- 1. That the plaintiff makes discovery of the documents in its possession.*
- 2. That the plaintiff be ordered to comply with the request for discovery made by the defendant dated 8<sup>th</sup> April 2005 within such time as the court, may order failing which the plaintiffs suit do stand dismissed with costs.*
- 3. That costs of this application be provided for”*

Parties filed written skeleton arguments. In a ruling delivered by this court, on the 25<sup>th</sup> July 2008, the court, deferred ruling on the merits of the application to have the issues of the regularity of the notice of change for the counsel appearing for the defendant clarified first. On 7/05/09 parties appeared in court, and informed the court that the notice of change had been filed on 7<sup>th</sup> day of April 2008. This had in a advertently not been served on to the opposite counsel, nor was a copy traced on the court record. Now that the position has been regularized the court proceeds to pronounce the merits of the ruling.

The background information on the facts of the application are already set out in the above mentioned ruling, but for purposes of competence of this ruling a summary of the same is as follows:-

-That the plaintiff had filed in court, a list of documents dated 11<sup>th</sup> February 2002, which list was presented under order X rule 11A CPR in compliance with the discovery procedures. In the same letter the plaintiff objected to discovery of the notes, memorandum, investigation and reports prepared by and or for and on behalf of the plaintiff and or his/her Advocates and 3<sup>rd</sup> parties for the purpose of preparation of this suit as well as statement for witnesses which are relevant and privileged for the plaintiffs case only.

-The above qualification on discovery led to the defendants issuing notice to produce under order X rule

15 CPR which was not responded to, upon failure to respond to the notice is what led to the filing of the application to enforce discovery. The documents for discovery are set out at page 3 of the deferred ruling. The reasons for seeking the discovery are set out at page 4-6 of the deferred ruling and in a summary from these are that:-

-They have been sued by the plaintiffs as guarantors of a 3<sup>rd</sup> party not party to these proceedings and the documents they are requesting to be supplied with are those relating to the transactions between the plaintiff and the 3<sup>rd</sup> party to which they were not party to.

-It is their stand that the documents they seek are in custody of the plaintiff.

-They seek to establish whether the money was advanced, if advanced how much was advanced, and whether the advancement was within the terms of the guarantee.

What is to be established is whether any payments were made by the borrowers and if so how much. Also to establish if there was any default on the part of the borrower.

The plaintiffs' opposition to that application is set out on page 6 to 10 of the deferred ruling. The sum total of the same in a summary form is that the defendants were Directors who gave personal guarantee to a 3<sup>rd</sup> party Kiatu and Allied products limited allegedly under receivership.

-That the plaintiff has a judgement against the said borrower to the tune of Kshs. 787,647.00 in HCC No. 3409/89 which they would like to enforce against the personal guarantors.

-They stand by their list of documents which they filed in court.

-That the applicants have presented the application under wrong provisions of law.

-Further that the more important reason for refusal to discover what the defendants are asking for, is because the said documents are privileged which can only be overlooked in instances where there is allegation of fraud, illegality, Bankers interest Public and or National Security.

-Further that the applicants were signatories to the guarantee and bank accounts and as such they are supposed to have in their possession the documents they are asking for.

-That the defendants were removed as Directors and as such if their application is to be allowed the court, would be pushing the plaintiff to breach the confidence it has with the receiver.

Due consideration has been made by this court, of the rival arguments herein and the court, finds that resistance to the plaintiffs application is on two fronts namely:-

(a) Technicality based on the assertion that the application has been presented under a wrong rule. The courts, findings on this is that this does not go to oust the application because there is a cure in the provision of order 50 rule 12 CPR which provides:-

(b) *“Every order, rule or statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”*. The application is therefore proper and the same will be ruled upon on its merits.

Turning to the discovery, the reason the respondent gave for refusal to provide those documents is because of privilege. Whether this assertion is to be upheld or not will, depend on whether it is one of the qualifications against the mandatory provisions on discovery.

These provisions are non other than those found in order X rules 11,11A and 13 CPR. The court, has

perused the same and it proceeds to make the following findings:-

“Vide order X rule 11(1) the documents to be discovered are those which have been in the possession of the party sought to make discovery and they must be relating to the matter in question. The matter in question herein is the enforcement of the guarantee against the guarantors on the basis of the sums advanced to the guaranteed allegedly under Receivership. The court, is satisfied that the plaintiff could not have moved to court, to enforce its claim against the guaranteed if it did not have documents to support it. As such the assumption of the court, is that it had those documents when they filed HCCC 3409/89 and must still be having them as at the time they filed the proceedings herein..

(2) The court, can only order discovery if the documents are necessary. Herein what the plaintiff seeks from the defendants are sums owed by the guaranteed. It is on the basis of the said documents and sum owed that the proceedings herein were made. As such the said documents are necessary to establish the borrowers' indebtedness to the plaintiff which indebtedness is being sought to be enforced against the defendants.

(3) The court finds that a reading of order X rule 11,11A and 13 they simply state all documents that relate to the matters in issue. There is no qualification. This being the case, the court, has no alternative but to order their discovery.

(4) It is further claimed by the plaintiff that since the defendants were guarantors and Directors they were signatories to the account and must therefore have had access to the said documents. If indeed the defendants had access to these documents, then there is no justification for withholding the same from them.

For the reasons given in the assessment, the court, is inclined to grant the defendants application dated 23<sup>rd</sup> day of August 2006 and filed on 25<sup>th</sup> day of August 2006 on the following reasons:-

1. The citing of the order X rule 15 CPR is not fatal to the application as the same is curable under order L rule 12 CPR.
2. Since the documents sought to be discovered relate to the indebtedness of the guaranteed to the plaintiff, which indebtedness is sought to be enforced against the personal guarantors, the same are not only relevant and relate to the matters in issue but they are necessary.
3. Since the plaintiff used those documents to get judgement against the guaranteed in HCCC 3409/89 and since they have not denied possession but decline to discover them on account of privilege, the court, is satisfied that the documents sought are in the possession of the plaintiffs.
4. Disqualification on account of privilege is not shielded under order X rule 11,11A and 13 CPR.
5. Since the plaintiff alleges that the defendants had access to the said documents in their capacity as directors. and guarantors, then no confidential rule will be breached if documents are discovered.
6. The defendants/applicants will have costs of the application.
7. Discovery to be complied with within 60 days from the date of the reading of this ruling.
8. In default of number 7 above the plaintiffs' suit herein shall stand struck out without further reference to the court.

**DATED, READ AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2009.**

**R.N. NAMBUYE**

**JUDGE**