

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 280 OF 2007

KENYA ANTI-CORRUPTION COMMISSIONPLAINTIFF

V E R S U S

W. MUSALIA MUDAVADIDEFENDANT

R U L I N G

The Plaintiff has sought by chamber summons dated 20th March, 2008 leave for it to deliver interrogatories to the Defendant. The application is stated to be brought under Order X, rules 1, 2 and 23 of the Civil Procedure Rules (the Rules).

What the court has to decide at this stage is whether the leave sought should be granted *ex parte*. The Plaintiff's learned counsel has urged so. I have considered his submissions, including the cases cited.

Rule 1 of Order X makes provision for discovery by interrogatories. It provides that in any suit the plaintiff or defendant, by leave of the court, may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties. Application for such leave is made under rule 2 of Order X. Rule 23 of the same Order says that such application shall be by summons in chambers. It does not say that the application shall be *ex parte*. Where it is intended that an application shall be *ex parte* the relevant rule will usually say so. See for instance Order I, rule 14(1) of the Rules. But there are instances where the relevant rule may not state that the application shall be *ex parte* but nevertheless the application will be *ex parte* by necessity. These types of applications include, for instance, applications to extend the validity of summons under Order V, rule 1, and applications for substituted service under rule 17 or for service of process outside jurisdiction under rules 21 and 21A of the same order.

In the present case, I see no compelling necessity for the present application to be heard *ex parte*. Indeed, the wording of rule 2 itself of Order X seems to preclude an *ex parte* hearing. It says, *inter alia*, that in deciding upon such application for leave to deliver interrogatories,

“the court shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the court shall consider necessary either for disposing fairly of the suit or for saving costs”.

In the instant case, how can the Defendant make any such offers unless he is served with the application and granted an opportunity to be heard upon it?

Learned counsel for the Plaintiff sought to rely on an old, year 1880, Indian case where a similar application appears to have been heard *ex parte*. This is the case of **SHAM KISHORE MUNDLE – vs- SHOSHIBHOOSUN BISCUITS** reported at page 707 of the **Indian Law Reports, Vol. V, Calcutta Series**. The particular rules of the **Indian Code of Civil Procedure** under consideration in that case were not laid before this court so that we may know whether there is a rule equivalent to our rule 2 of Order X.

I hold that an application under the said rule 2 of Order X of the Rules is not *ex parte* either by law or

by necessity. The chamber summons dated 20th March, 2008 must therefore be heard *inter partes*. It is so ordered. There will be no order as to costs of these preliminary proceedings.

DATED AT NAIROBI THIS 24TH DAY OF APRIL, 2008

H. P. G. WAWERU

J U D G E

DELIVERED AT NAIROBI THIS 25th DAY OF APRIL, 2008