



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 47 of 2008

JOHN KUNGU KIARIE.....PLAINTIFF

VERSUS

DYER & BLAIR INVESTMENT BANK LIMITED.....1ST DEFENDANT

STANBIC BANK KENYA LIMITED.....2ND DEFENDANT

R U L I N G

The application under consideration is the one dated 11th May 2008 brought under the provisions of Order VI rule 3(1), 8(2) and 16 of the Civil Procedure Rules. It seeks to have the Plaintiff ordered to furnish the particulars to the request of particulars dated 27th February, 2008.

The grounds for the application are:

1. *THAT the plaintiff has failed to file and/or serve any particulars in answer to the Request for Particulars dated 27th February 2008.*
2. *THAT the 2nd Defendant has specifically denied the allegations in the plaint which led to the filing of the Request for Particulars and the burden of proof is on the Defendant to supply the said particulars.*
3. *THAT it is trite law that special damages must be specifically pleaded and proved. In the absence of the said particulars the defendant will be ambushed at the trial.*
4. *THAT it is in the interest of justice that the particulars be provided to enable the 2nd Defendant adequately prepare for the trial.*

The Request for Particulars is on record. It requests various particulars on various paragraphs of the

plaint. It is also supported by the affidavit of the 2nd Defendant's advocate with the annexures thereto. The Respondent, the Plaintiff in the suit, has opposed the application by filing grounds of opposition dated 25th April 2008. There are six grounds of opposition

1. *The particulars requested in paragraphs 1 are not material to the defendant's case and are irrelevant, spurious, fishy, pre-emptive, pre-mature, scandalous and vexatious.*
2. *The request for particulars is repetitive, verbose, unnecessary and unreasonable.*
3. *The 2nd Defendant is attempting a short cut to the trial fo the case.*
4. *The particulars sought could best be given through oral evidence in court.*
5. *The request for particulars and the application consequent herein are an abuse of the court process and ought to be dismissed with costs to the plaintiff.*
6. *The particulars requested do not flow from the pleadings filed and are unrelated to the facts in the plaint.*

The 2nd Defendant has sought particulars for paragraphs 4, 5, 7, 8 and 10 of the plaint. I will consider the application and the particulars sought seriatim.

Mr. Gichuhi for the Applicant has relied on one authority by Sergon, J. in the case of Mutua vs. Anwarali & Brothers Limited [2003] KLR 415 where the learned Judge held:

"2. The court may order a party to serve on any other party particulars of any claim, defense or other matter stated in his pleading or a statement of the nature of the case on which he relies and the order may be made on such terms as the court thinks just.

3. An order for particulars will not be made where it is shown that it would be unreasonable or oppressive for a party to supply the particulars requested, or where the party so ordered would incur great expenses and face great difficulties or where the applicant seeks for particulars at the last minute when the hearing is approaching."

The application is opposed. Mr. Otieno for the Plaintiff/Respondent relied on filed grounds of opposition which are set out in full at the beginning of this ruling.

The Supreme Court Practice 1991 Vol. I part I, page 299 at paragraph 18/12/2, gives the function of particulars which I summarize as follows:

- (1) *to inform the other side of the nature of the case they have to meet*
- (2) *to prevent the other side from being taken by surprise at the trial*
- (3) *to enable the other side to know what evidence they ought to be prepared with*
- (4) *to limit the generality of the pleadings*
- (5) *to limit and define the issues to be tried, and as to which discovery is required*
- (6) *to tie the hands of the party so that he cannot without leave go into any matters not included*

In every pleading a certain amount of detail is necessary to ensure clearness, and to prevent surprise at the trial. Each party must state his case with precision;

Moreover, it is not the function of particulars to take the place of necessary averments in the pleading, nor “to state the material facts omitted... in order by filling the gaps, to take good an inherently bad pleading.

The main issue is whether the 2nd Defendant in this case is entitled to the particulars sought. Mr. Gichuhi for the Applicant stated that the particulars were requested for before the application was made, but the said request elicited no response from the Plaintiff. The Applicant therefore opted to file the application to compel the Plaintiff to provide the said particulars. Mr. Gichuhi contends that the particulars sought are crucial, as the material provided in the plaint does not show a privity of contract between the Plaintiff and the 2nd Defendant.

Mr. Otieno for the Plaintiff maintains that most of the particulars sought were not material. Mr. Otieno submitted that the source of the funds invested with the Defendants was immaterial. Learned counsel also submitted that most of the particulars sought on most paragraphs of the plaint were repetitive, rotated around the question of the source of funds invested and were fishing for evidence before the trial.

I have perused the plaint and the particulars sought by the 2nd Defendant.

In regard to paragraph 4 and 5 of the plaint, the 2nd Defendant has requested for the following particulars under paragraph 1 and 2 of the Request for Particulars:

1. Paragraph 4:

- a) *Of the written agreement dated 28th April, 2003, identify how the plaintiff was to source for funds.*
- b) *Did these funds belong to the plaintiff?*
- c) *If the answer to 1(a) is in the negative, was the plaintiff a trustee for these funds?*
- d) *Did the written agreement provide for the rate of return if the money was invested in a financial institution? If so what was the rate agreed?*
- e) *Did the term “best return” set a minimum rate of return on the investment?*
- f) *Was the term ‘best return’ a condition set in the agreement?*

2. Paragraph 5

- a) *When was the sum of Kshs.91.5 million deposited with the 1st Defendant?*
- b) *Who drew the cheque for Kshs.91.5 million?*
- c) *Was the cheque issued by the Plaintiff?*
- d) *Was the sum of Kshs.91.5 million raised by the Plaintiff?*
- e) *Where was the sum of Kshs.91.5 million sourced from?*
- f) *Of the advice that the sum of Kshs.91.5 million was invested with the second defendant, was the plaintiff advised by the 1st Defendant of the rate of return?*
- g) *Was this the ‘best return’?*
- h) *Did the Plaintiff query about the rate of return? If so, when was the query made and was it addressed to the 2nd Defendant?*

I am guided by the principles to be applied to an application of this nature as set out in the case of *Mutua vs Anwarali*, supra, and the function of particulars as set out in the Supreme Court Practice. Bearing in mind these general principles I have formed the following view of this application.

The averments in paragraph 4 and 5 of the plaint are clear, precise and sufficient to inform the 2nd Defendant the nature of the case it will meet, and to enable it to know what evidence it ought to be prepared with for the trial. What the 2nd Defendant is seeking in its Request for Particulars is to fish out for evidence, which ought only to be adduced at the trial. Further, the 2nd Defendant is also seeking unnecessary detail which will not help make the pleadings clearer and precise any better than they already are, and such attempt cannot be entertained. The court had a distinct impression that the particulars sought were intended to fill gaps in the plaint and to seek particulars which ordinarily ought to have been part of the pleadings if the Plaintiff intended to rely on them. The function of particulars is not to fill gaps in the pleadings nor are they intended to take the place of averments. The particulars sought in regard to paragraph 4 and 5 of the plaint are therefore declined.

In regard to paragraph 7 of the plaint particulars sought are as follows:

3. Paragraph 7

- a) *Was the plaintiff a customer of the 2nd Defendant?*
- b) *Was the Plaintiff a signatory to the nominee account number 0140021533301 (nomura nominee) opened by the 1st Defendant?*
- c) *Was the 2nd Defendant contractually obligated to oversee the investment of the various funds in the nominee account?*
- d) *Was the 2nd Defendant contractually obligated to identify the funds in the nominee account as those belonging to the Plaintiff?*
- e) *Did the Plaintiff ever identify himself to the 2nd Defendant as one of the undisclosed principals in the nominee account?*

I have considered the averments in the plaint as stated earlier. Looking at the totality of these averments, I am of the view that the particulars sought in paragraph 3 of the Request for Particulars are answered within the plaint. Those particulars that are not answered within the plaint do not flow from the Plaintiff's claim. The particulars requested in regard to paragraph 7 of the plaint as set out in the Request are not in my view intended to prevent the 2nd Defendant from being taken by surprise at the trial, but are an attempt to bring in a claim not at all contemplated by the Plaintiff. The 2nd Defendant is also trying to fish out for evidence and unnecessary detail which does not serve the purpose intended of such an application.

In paragraph 4 of the Request for Particulars the 2nd Defendant seeks the following particulars in regard to paragraph 8 of the plaint:

4. Paragraph 8

- a) *Was the 2nd Defendant under any contractual obligation to invest the funds?*
- b) *If the answer to 4(a) above is in the affirmative, identify the contractual or legal obligation to invest the funds?*
- c) *Did the Plaintiff ever receive any statements of account from the 2nd Defendant in relation to the nominee account?*

d) Was the 2nd Defendant obligated to invest the funds in the nominee account in any manner whatsoever?

e) Was the 2nd Defendant obliged to account to him on how the money was invested?

f) Did the Plaintiff ever request the 2nd Defendant to update him on how his alleged investment was performing?

The particulars sought here are largely a repetition of paragraph 3 of the Request for Particulars. They also seek details of a contract to which the Plaintiff was not a party. Paragraph 8 of the plaint is clear and gives sufficient facts with enough precision to put the 2nd Defendant on guard as to the evidence it is to expect to meet at the trial. The particulars sought are therefore in my view a statement of facts the 2nd Defendant views were necessary but were omitted. That is not the purpose of particulars and the request cannot succeed.

In clause 5 of the Request for Particulars, the 2nd Defendant seeks to know whether a letter of demand was served upon it. Paragraph 10 of the plaint is very clear, precise and no further details can possibly be required of the Plaintiff as far as this paragraph is concerned. The particulars requested cannot also succeed.

Having considered this application and the plaint, I have come to the conclusion that the plaint was clearly and precisely phrased and contains no element of surprise.

In the premises, I find that the 2nd Defendant is not entitled to particulars sought in its Request for Particulars dated 27th February, 2008. In the result the 2nd Defendant's application dated 11th April 2008 is dismissed.

Dated at Nairobi this 13th day of June, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kangethe holding brief for Mr. Gichuhi for the Applicant/2nd Defendant

Mr. Otieno holding brief for Mr. Amuga for the Respondent/Plaintiff

Mr. Kinuthia for 1st Defendant

Ms. Ngetich holding brief for Mr. Njenga for interested party.

LESIIT, J.

JUDGE