

REPUBLIC OF KENYA

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

Civil Case 659 of 2003

MALAR LIMITED..... PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED..... DEFENDANT

RULING

The defendant lodged this Chamber Summons under Section 3A and 63 of the Civil Procedure Act Order VI Rules 8, 13 (c) and (d) and 16 of the Civil Procedure Rules and all other enabling provisions of the Law for one primary order that the plaintiff's suit be struck out. The grounds for the application are that on 8.11.2004, an order was made requiring the plaintiff to supply particulars of its claim by 30.11.2004 but the plaintiff has to date failed and or neglected to supply the said particulars and as the plaintiff fails to set out the said particulars the fair trial of the action will be obstructed and the defendant will be prejudiced in the conduct of its defence.

The application is supported by an affidavit sworn by Clifford Okello Rachuonyo counsel for the defendant. The affidavit elaborates the said grounds. The application has not been opposed and neither a replying affidavit nor grounds of opposition were filed. When the application came up before me for hearing on 15.3.2007 it proceeded *ex parte* as neither the plaintiff nor its advocates attended.

Having considered the application, the record and the submissions of counsel for the defendant I take the following view of the matter. The jurisdiction to strike out a plaint is a harsh one and should be exercised sparingly. According to Mulla's Code of Civil Procedure 16th Edition, Volume II at page 1794, the penalty for non compliance with an order for further and better particulars by a defendant is that his defence is liable to be struck out and if the default is by the plaintiff the suit may be dismissed.

In this case, the plaintiff was to serve on the defendant particulars of its plaint dated 4.8.2003 as per the request for particulars dated 31.8.2004 on or before 30.11.2004. The defendant had sought particulars of paragraphs 3, 4, 5, 6, 7, 8, 14, 15 and 16 of the plaint. Since the date of the said order, the plaintiff has not complied with the same nor has it sought a variation of that order. In Eastern Radio Service – vs – Tiny Tots [1967] E. A. 392, the Court of Appeal held that failure to give discovery and inspection may result in the striking out of a suit. Although that case considered failure to make discovery, I am persuaded by the logic therein. In my view, a plaintiff who deliberately and willfully disregards an order of the court to serve particulars should suffer the same penalty. In the premises, I hold that having failed or neglected to serve particulars of its plaint, as ordered by the court or at all, the plaintiff has exposed its plaint to the order sought by the defendant. In the absence of the particulars the plaint may embarrass or delay the fair trial of the action and is also an abuse of the process of the court.

In the result I allow the defendant's application and order that the plaint be and is hereby struck out and the suit is dismissed with costs.

Costs of this application are awarded to the defendant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2007.

F. AZANGALALA

JUDGE

Read in the presence