

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3729 of 1991

BENSON B. M. GICHUKIPLAINTIFF

V E R S U S

KENNETH K. MWANGI1ST DEFENDANT

NELLEON DEVELOPMENT CO. LTD.....2ND DEFENDANT

R U L I N G

In this application (by chamber summons dated 28th February, 2007) the Plaintiff seeks an order to strike out the 2nd Defendant's pleadings herein "**as per the order of R. N. Nambuye, J dated 26th February 2007**". The application is expressed to be brought under section 3A of the Civil Procedure Act, Cap. 21, and also under Order 10, rule 20 of the Civil Procedure Rules (the Rules). It is supported by the affidavit of the Plaintiff annexed to the application.

On 12th March, 2007 Nambuye, J granted the 2nd Defendant seven (7) days within which to file its response to the application; it therefore had until 19th March, 2007 to do so. It filed grounds of opposition on 4th of April 2007, way out of time. When the application came up for hearing on 19th April, 2007 I permitted the Plaintiff to prosecute it *ex parte*, subject only to the 2nd Defendant replying on a point of law.

The Plaintiff's case in this application, as set out in his supporting affidavit, is that the 2nd Defendant has failed to make discovery under Order 10, rule 11A of the Rules as ordered by Kariuki, J on 25th July, 2006. The order of Nambuye, J of 26th February 2007 merely directed the Plaintiff to formally apply to strike out the 2nd Defendant's pleadings when he apparently sought to do so informally.

Indeed, on 25th July, 2006 Kariuki, J. ordered as follows, *inter alia* :-

"The suit is stood over to a date to be fixed at the registry on priority basis; and prior to the next hearing date, the parties shall complete discovery or inspection and file their respective bundles of documents together with statements of issues".

On 2nd August 2006, the suit was set down for hearing on 23rd and 24th October, 2006. By those dates the 2nd Defendant had not made discovery nor filed its bundle of documents and statement of issues as ordered on 25th July, 2006. In fact, it did not file its list and bundle of documents together with its statement of issues until 25th March, 2007. The 2nd Defendant was clearly in breach of the order of Kariuki, J, and the Plaintiff was therefore entitled to apply, as he has done, under Order 10, rule 20 of the Rules which provides:-

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly".

The 2nd Defendant did not file any affidavit in reply to the present application. There is therefore no explanation under oath why the order of Kariuki J was not complied with within the time stipulated in the order. Learned counsel for the 2nd Defendant was not entitled to offer any such explanation from the bar in view of the fact that I permitted the Plaintiff to prosecute his application *ex parte*, subject only to leave to the 2nd Defendant to reply on a point of law. But, as already noted the 2nd Defendant did comply with the order of Kariuki, J to make discovery and file a statement of issues, albeit belatedly. He complied on 25th March, 2007, that is some five (5) months out of time.

The question I must now determine is whether I should nevertheless strike out the 2nd Defendant's defence for not complying strictly with the order of Kariuki, J. The wording of rule 20 of Order 10 is significant. The power granted to court under that rule to dismiss the plaintiff's suit or to strike out the defendant's defence is exercisable only where a party fails to comply with any order to answer interrogatories or for discovery or inspection of documents. The 2nd Defendant has finally complied with the order requiring him to make discovery, though it did so very late. But the important thing is that it has made discovery as ordered. I think it would be too heavy a punishment to strike out its defence for having made the discovery outside the time set by the order of 25th July, 2006. There is support for this reasoning to be found in the authority cited by learned counsel for the 2nd Defendant. That authority is the English case of **HUSBAND'S OF MARCHWOOD LTD V DRUMMOND WALKER DEVELOPMENTS LTD [1975] 2 ALL ER, 30**. It was held in that case that an order under a provision similar to our rule 20 of Order 10 should not be made to punish a party for failing to comply with an order for discovery within the time limited by the order if at the hearing of the case it appeared that discovery by the defaulting party was imminent. In the present case discovery by 2nd Defendant has finally been made. I think that the proper punishment that ought to be meted out to the 2nd Defendant for failing to make discovery within the time limited by the order of 25th July, 2006 is an award of costs against it. That will serve the ends of justice in this matter.

I will therefore refuse the Plaintiff's application. It is hereby dismissed. However, I award the Plaintiff costs of the application to be paid by the 2nd Defendant. I hereby assess those costs at KShs. 5,000/00. The same must be paid within 14 days of delivery of this ruling. In default the Plaintiff may execute for the same. Those shall be the orders of the court.

DATED AT NAIROBI THIS 28TH DAY OF JUNE 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 29TH DAY OF JUNE 2007