



REPUBLIC OF KENYA

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

**Civil Case 83 of 2007**

**DINESHKUMAR DEVCHAND SHAH.....1<sup>ST</sup> PLAINTIFF**

**SIL INVESTMENTS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**INTERCOUNTRIES IMPORTERS AND EXPORTERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**M. JEEVANJEE ADVOCATE..... 2<sup>ND</sup> DEFENDANT**

**RULING**

This is an application for an order that the 2<sup>nd</sup> Defendant in the suit do within 14 days of the date of the order supply to the Plaintiff’s, particulars of the 2<sup>nd</sup> Defendants defence as per the request for particulars dated 28<sup>th</sup> March, 2007. In default the Plaintiff seeks to have the 2<sup>nd</sup> Defendants defence struck out. The application is brought under Order VI rule 8 and Order X rule 13, 14,17 and 19 of Civil Procedure Rules.

The reasons for the application are that the request for particulars dated 28<sup>th</sup> March, 2007 has solicited no response from the 2<sup>nd</sup> Defendant’s Counsel inspite of the service of the said request and, that the particulars are necessary for proper preparation of the case for hearing to avoid surprise, to save costs and to do justice between the parties.

There is an affidavit sworn by the 1<sup>st</sup> Plaintiff, in support of the application and annexures thereto. The application is opposed. The 2<sup>nd</sup> Defendants Advocates have filed grounds of opposition under Order L rule 16 of Civil Procedure Rules, in which two grounds are cited as follows:

The particulars sought in the application:

- 1(a) are not meant to inform the Plaintiff’s the nature of the case they have to meet in this suit or**
- (b) to prevent the Plaintiffs from being taken by surprise or**
- (c) to enable the Plaintiff’s to know what evidence they ought to be prepared with or**
- (d) to limit and define the issues to be tried or**
- (e) to tie the hands of the Plaintiff’s so that they cannot without leave go into any matters not included.**

2. The application is misconceived and ought to be dismissed with costs.

Mr. Oyatta Advocate, argued the application on behalf of the Plaintiffs, while Mr. Oyatsi Advocate, opposed the application on behalf of the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant is an Advocate of the High Court of Kenya

ing out practice as an Advocate in the firm of M. JEEVANJEE ADVOCATE. The 2<sup>nd</sup> Defendant received as an Advocate for the 1<sup>st</sup> Defendant, a total of Kshs.22.5 million from the 2<sup>nd</sup> Plaintiff, to hold as stakeholder, pending registration of the transfer to the Plaintiff's of suit property they were in the process of purchasing from the 1<sup>st</sup> Defendant. The Plaintiff's aver that upon discovering that there was a suit pending in the High Court in which a third party was challenging the 1<sup>st</sup> Defendant's title to the suit property, the Plaintiff's decided to rescind the sale contract and to call for a refund with interest, of the money paid to the 2<sup>nd</sup> Defendant. This suit inter alia arises out of the failure by the 2<sup>nd</sup> Defendant to refund sums paid to him by the 2<sup>nd</sup> Plaintiff.

In the 2<sup>nd</sup> Defendant's statement of defence, he admits having received a total of Kshs.22,500,000/= as stakeholder until confirmation by the Plaintiff's that the transfer in their favour had been registered. The 2<sup>nd</sup> Defendant avers that it should not release the said sums until the dispute between the parties were determined as to do so would be in breach of his obligation to the parties.

Mr. Oyatta for the Applicant relies on the request for particulars served on the 2<sup>nd</sup> Defendant in which the Plaintiff's sought particulars indicating where the sum deposited with the 2<sup>nd</sup> Defendant, by the 2<sup>nd</sup> Plaintiff, was banked and the interest rate payable on the deposit. Mr. Oyatta relies also on the **SUPREME COURT PRACTICE RULES 1991 AT PAGE 299**, entitled **Function of Particulars** as follows:

*“This function has been stated in various ways as follows:*

- 1) *to inform the other side of the case they have to meet as distinguished from the mode in which that case is to be proved.*
- 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 and to prepare for trial*
- 4) *to limit generality of the pleadings or of the claim or the evidence*
- 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*

Counsel also relies on the ruling of **Azangalala, J** in **ENG. S. R. MANGA VS BOARD OF TRUSTEES OF N.S.S.F MILIMANI HCCC NO. 674 OF 2004**, where the learned Judge observed:

***“As stated above the function of particulars is to ensure clearness and prevent surprise at the trial. Pleadings should therefore state those facts which will put the Defendant on their guard and tell them what they will have to meet when the case comes up for trial. They should sufficiently indicate to the opponent the nature of the evidence required by them.”***

Mr. Oyatsi opposed the application on behalf of his client, **M. JEVANTEE ADVOCATE**. Counsel submitted that the application lacked merit and was mischievous. Counsel submitted that the 2<sup>nd</sup> Defendant, being an Advocate of the High Court of Kenya, carrying out practice and dully licenced to

practice, he was compelled by law under the Advocates (Accounts) Rules, to receive and maintain a separate account for any monies which comes to him. Counsel submitted that under the same rules, an Advocate is required to keep such monies in an interest earning account.

In regard to the supporting affidavit, Mr. Oyatsi submitted that there was no allegation that the 2<sup>nd</sup> Defendant has misappropriated the money or that the money was unsafe or any suggestion that the 2<sup>nd</sup> Plaintiff has reason to suspect that the 2<sup>nd</sup> Defendant is not having the money. Counsel submitted that there was no complaint so far lodged by the Plaintiff's against the 2<sup>nd</sup> Defendant in all the avenues open to them such as the *Law Society of Kenya* and the *Advocates Complaints Commission*.

Mr. Oyatsi submitted that the money was paid to the 2<sup>nd</sup> Defendant by the two parties to the dispute, and that the money can not belong to the Plaintiff but belongs to both parties, until the case was determined either way.

In regard to the authorities cited Mr. Oyatsi submitted that no basis has been laid to justify the order sought being made.

In regard to the overriding principle that litigation between parties should be conducted fairly, openly and without surprises and the six functions of particulars on which Mr. Oyatta relies, Mr. Oyatsi responded to each of them. I will consider his response seriatim.

In regard to the first function, that is, to inform the other party the case they are to meet, Mr. Oyatsi submitted that the instant case was between the Plaintiff and the 1<sup>st</sup> Defendant over a contract, with each party claiming that the other defaulted. Learned counsel submitted that the role of the 2<sup>nd</sup> Defendant, as a stake holder, was neutral and that he does not come in, in the determination of the issues between the parties.

Mr. Oyatta in reply submitted that as a stake holder, the Advocate had duty to provide accounts for money received and held by him. No rule under the Advocate(accounts) Rules was quoted to support that contention. There is a misinterpretation of what giving account is. The 2<sup>nd</sup> Defendant had admitted he received the money in question and that he is holding it as a stakeholder, as agreed between the parties. In my view, that is sufficient accounting for the said money for purposes of the suit. I do not think that request for particulars should be allowed to be used as an excuse to fish out evidence from the opponent. That is what I believe is being done here. Moreover I do not believe that an Advocate can be required to give account at the whim of a client without any reasonable cause. The circumstances of this case would dictate against such a whimsical demand. It is clear that no allegations of unpropriety or reasonable cause of suspicion that the money may have been misappropriated, has been disclosed. The 2<sup>nd</sup> Defendants case is very clear and the Plaintiff's cannot be heard to say that they do not know what case they are to meet in his regard.

In regard to the second function, to prevent a party being taken by surprise at the trial, and the third function, to know what evidence they should prepare, for Mr. Oyatsi submitted that there is no proof the Plaintiff's could suffer any surprise and further that the nature of particulars sought would not enable the Plaintiff's to prepare the case. On the fourth function of reducing generality, Mr. Oyatsi submitted that his client had admitted that he holds the money in question and that no one asked him before to show where the money is, and that it was not shown why it was necessary now. On the fifth and sixth functions to limit and define the issues to be tried and to tie a party to issues pleaded, Mr. Oyatsi submitted that the functions did not apply to his clients. Mr. Oyatsi relied on **Eng. S. R. Manga's case**, supra, also cited by Mr. Oyatta, where the **Supreme Court Practice (White book) 1991 pages 299 and 300 paragraph 18/12/2** dealing with the functions of particulars are cited thus:

***“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 otherwise his opponent will not know for certain what is the real point in dispute therefore will not properly prepare his evidence for the trial. It is absolutely essential that the pleading, not to be embarrassing to the Defendants, should state those***

***facts which will put the Defendant on their guard and tell them what they will have to meet when the case comes up for trial. They should sufficiently indicate to the opponent the nature of the evidence required by him.”***

As I have stated in this ruling the Applicant did not lay a basis for requiring the particulars sought. Infact, the Applicant’s clearly states that they just wanted to know, not for any particular reason. I think that a party seeking particulars must bring itself within the functions of particulars and show that by reason of lack of sufficient detail or precision in the pleadings, the party applying is unable to know for certain what the real point in dispute is and what evidence they are to meet at the trial, and what evidence they may require at the trial. The Party should show that insufficient detail was provided and that therefore the opponents pleading are not clear and may cause them embarrassment or surprise at the trial.

The Applicants have not demonstrated that by reason of insufficient detail in the 2<sup>nd</sup> Defendant’s defence, they are unable to prepare for the trial or that they may be embarrassed at the trial. What the Applicants are seeking do not qualify as particulars. I find that the Applicants are fishing for evidence. I find that the 2<sup>nd</sup> Defendant has given sufficient detail of every material allegation contained in his pleading.

The upshot of this Application is that the same fails and is dismissed with costs to the Respondent.

**Dated at Nairobi this 2<sup>nd</sup> day of November, 2007.**

**LESIT, J.**

JUDGE

Read, signed and delivered in the presence of:

N/A for Applicant

Mr. Wabodo holding brief Mr. Oyatsi

**LESIT, J.**

JUDGE