



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Case 1455 of 1997

COASTAL AQUACULTURE LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

KOIT DEVELOPERS LIMITED.....3RD DEFENDANT

KENETE ENTERPRISES LIMITED.....4TH DEFENDANT

SAMAN DEVELOPERS LIMITED.....5TH DEFENDANT

MASOLE ENTERPRISES LIMITED.....6TH DEFENDANT

BALA ENTERPRISES LIMITED.....7TH DEFENDANT

MARIMIO EENTERPRISES LIMITED.....8TH DEFENDANT

LINSALA ENTERPRISES LIMITED.....9TH DEFENDANT

GILERA LIMITED.....10TH DEFENDANT

RULING

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness and hospitalization. The delay is regretted.

In this application (by notice of motion dated 16th May, 2005) the 1st Defendant, **NATIONAL BANK OF KENYA LIMITED**, seeks an order to dismiss the Plaintiff's suit as against itself upon the following grounds;-

- (i) *That the Plaintiff has failed to comply with an order for discovery and inspection of documents made by the court on 1st November, 2004.***
- (ii) *That the Plaintiff has failed to make full discovery of all the documents in its list***

of documents dated 2nd July, 2003.

(iii) That the order of court of 1st November, 2004 was that the Plaintiff do make discovery of all the documents in its list of documents.

The application is made under Order 10, rule 20 of the Civil Procedure Rules which states:

“20. 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.”

There is an affidavit sworn by the 1st Defendant’s advocate giving the factual background to the application. There are no grounds of opposition or replying affidavit filed in response to the application. But at the hearing thereof the court permitted learned counsel for the Plaintiff to address it on any point of law.

I have considered the submissions of the learned counsels appearing. The order of court of 1st November, 2004 was in the following terms:-

“ORDER: By consent the application is allowed in terms of prayers Nos. 1 and 2 of the notice of motion dated 21st September, 2004 save that the Plaintiff shall provide inspection as sought by 8th December, 2004. Costs to the 1st Defendant.”

The said prayers were:-

- (1) that the Plaintiff do provide inspection of all the documents in its list of documents dated 2nd July, 2003 within fourteen (14) days of the order (to be made) herein; and**
- (2) that in default the Plaintiff’s suit as against the 1st Defendant be struck out.**

As already seen the order of 1st November, 2004 was by consent. By consenting to that order the Plaintiff was conceding that it had not made inspection of the documents as requested by the 1st Defendant in its notice dated 16th March, 2004. The Plaintiff cannot now be heard to say, as argued by Mr. Namachaja, learned counsel for the Plaintiff, that it had complied with the said notice. If that were so it would not have conceded the application by notice of motion dated 21st December, 2004 and the consent order of 1st November, 2004 would not have been entered. Again, by arguing as he did, Mr. Namachaja conceded that the Plaintiff did not comply with the consent order of 1st November, 2004. I will proceed upon that basis.

Court orders must be obeyed. Where a party finds himself in a situation where he is unable to comply with a court order, he must move the court appropriately in that regard. In the instant case one would have thought that what the Plaintiff should have done was to apply to court for an extension of the time limited by the consent order of 1st November, 2004. The Plaintiff did nothing of the sort. Instead it has argued at cross-purposes to the said consent order. This is an indication that the Plaintiff does not intend to comply with an order of court it freely consented to. The Plaintiff must therefore suffer the attendant consequences of failing to comply with the order, no matter how dire those consequences. Had the Plaintiff sought extension of time I would have granted it, subject to a penalty of costs, because an order of dismissal of its suit as sought by the 1st Defendant, is indeed a drastic order. But I will not grant it what it has not sought.

In the event, I will allow the 1st Defendant's application by notice of motion dated 16th May, 2005. The Plaintiff's suit is against the 1st Defendant be and is hereby dismissed with costs under Order 10, rule 20 of the Civil Procedure Rules. The 1st Defendant shall also have the costs of this application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 3RD DAY OF FEBRUARY, 2006.