



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**

**Civil Case 30 of 2002**

**NATIONAL BANK OF KENYA LIMITED ..... PLAINTIFF**

**VERSUS**

**SHEM SANYA BALONGO ..... DEFENDANT**

**RULING:**

The applicant's application is for the court to strike out the suit as the plaintiff/respondent has failed to comply with an order of inspection dated 24<sup>th</sup> November 2004. There is an alternative prayer to have the amended plaintiff filed on 10/1/03 struck out and expunged from record as it was filed in contravention of courts order.

Mr. Soire for the applicant submitted that the court made an order on 24<sup>th</sup> November 2004 directing the applicant to serve a Notice to produce documents to the respondent who was to accord him an opportunity to inspect the documents within 10 days of service. He said the notice was served but to date applicant has not been accorded such opportunity.

Secondly it was submitted that the court on 26<sup>th</sup> May 2003 granted plaintiff leave to amend the plaint and ordered the amended plaint annexed to the application to be deemed filed on payment of requisite fees.

However the plaintiff instead filed an amended plaint on 10/1/03 in contravention of the order.

Application was opposed. It was submitted that after the court gave its order 24<sup>th</sup> November 2004 the applicant did not serve any Notice to produce to the Respondent/Plaintiff. He therefore has not contravened any order. The only Notice which was served was the one of 13<sup>th</sup> May 2003 which was before the order of 24<sup>th</sup> November 2004 was made.

Secondly it was pointed out that there was no amended plaint which was filed in court on 10/1/03 as stated in prayer (b) of the application. That prayer therefore cannot stand. Prayer (b) contradicts ground (b) which states the amended plaint was filed on 10/4/05.

I have considered the application. It is true that the court on 24<sup>th</sup> November 2004 made an order that the applicant/defendant do serve the Respondent/plaintiff with a Notice to produce and the Respondent then accord the applicant opportunity to inspect the documents. The order was clear. The applicant was to serve the Notice to the respondent. However it seems that no notice was ever served after the order was made. The notice annexed to the supporting affidavit which the applicant alleges was contravened is the one dated 12<sup>th</sup> May 2003. This was long before the order of 24<sup>th</sup> November 2004 was made.

The applicant was supposed to serve a fresh Notice after that order. This was not done and as such he cannot complain that the respondent failed to comply with the order.

As for the amended plaint it was clear there was no amended plaint filed on 10/1/03 as stated in prayer (b). Mr. Soire said this was an error but never sought to correct the same. That prayer cannot therefore be granted the way it is presented.

In the circumstances I find application has no merit and the same is dismissed with costs.

Dated 4<sup>th</sup> May 2006

**KABURU BAUNI**

**JUDGE**

Cc – Mobisa

Mr. Soire for applicant

N/a for respondent