



**TALOCK SINGH NADHRA**

**MAHENDRA PATEL**

**DINESH SHAH**

**TAJDIN JIWA (suing on their own behalf and on**

**behalf of the Depositors of TRUST BANK LTD.....**  
**.....PLAINTIFFS**

**VERSUS**

**ROBIN CAHILL**

**ANDREW GREGORY**

**WILFRED MURIITHI**

**ANIS PRINCLE**

**CHARLIE APPELTON DAVID POWEL**

**BRIAN D'SOUZA**

**RICHARD NDUNGU**

**ZAHIR SHEIKH**

**JOSPHAT MWAURA (trading as KPMG PEAT**  
**MARWICK.....DEFENDANTS**

**RULING**

On 9<sup>th</sup> November 2005 this case was set down for hearing on 22<sup>nd</sup> to 25<sup>th</sup> May 2006. The said hearing date was fixed by consent of the advocates representing the two sides to this case.

A few weeks before the date for the trial, the advocates for the Defendants served the advocates for the plaintiffs with a “**Request for Particulars of the Amended Plaint and of the Reply to the Amended Defence.**”

In response to the said request, Messers Shapley Berret & Co. Advocates, who are acting for the plaintiffs herein wrote back on the very next day. By their said letter, the advocates indicated that:

**“a substantial portion of the matters raised therein will be answered in our client’s bundle of documents which we are in the process of assembling or preparing. We expect to serve you with**

**this bundle within a fortnight.”**

Notwithstanding that assurance, the defendants’ advocates were still keen to obtain the particulars. They therefore wrote to the plaintiffs’ advocates on 20<sup>th</sup> April 2006, indicating that if the particulars were not supplied by 26<sup>th</sup> April 2006, the defendants would make a formal application to court.

The response from the plaintiff’s advocates was by way of a letter dated 24<sup>th</sup> April 2006, through which they delivered a list and bundle of documents. However, they also indicated that there were a few other documents which were in the hands of the Liquidator of Trust Bank, which the plaintiffs were yet to lay their hands on. Amongst the documents said to be in the hands of the Liquidator were the list of depositors represented by the plaintiffs.

Upon receipt of the plaintiff’s list and bundle of documents, the defendants’ advocates wrote back to the plaintiffs’ advocates, and reiterated the need for the plaintiffs to provide particulars. That letter was written on 25<sup>th</sup> April 2006.

Apparently, the plaintiffs did not provide the particulars, whereupon the defendants filed an application on 4<sup>th</sup> May 2006, seeking orders, inter alia, to compel the plaintiffs to provide particulars. That application was filed under a Certificate of Urgency, and the Hon. Waweru J. directed that it be heard on 18<sup>th</sup> May 2006.

It is in those circumstances that the case was listed before me on 18<sup>th</sup> May 2006. However, before the court could delve into the substance of the defendant’s application, the plaintiffs put forward a preliminary objection. Essentially, the preliminary objection was to the effect that the defendants had brought their application too late in the proceedings. This ruling is in relation to the said preliminary objection.

But even before analysing the said preliminary objection, I wish to make it clear that immediately after hearing the objection, I did, effectively, overrule it. It is for that reason that I then reserved my formal ruling, to today. Had I been minded to uphold the preliminary objection, I would have done so promptly, so as to enable the trial proceed, as had been scheduled.

In effect, this ruling is primarily designed to provide my reasons for the decision which I had made, and communicated orally, in court, on 18<sup>th</sup> May 2006.

When canvassing the preliminary objection, Mr. Wananda Advocate pointed out that the defendants’ were belatedly seeking particulars of the Amended Plaint dated 22<sup>nd</sup> January 2001. He pointed out that it had taken more than four years for the defendants to seek particulars.

There can be no doubt whatsoever that a period of four years is a long period of time for a party to wait, before seeking particulars of a pleading which he had been served with. Therefore, if the party did not have a satisfactory explanation for the delay in seeking particulars, I would most probably decline his application for particulars.

In this case, the plaintiffs opposed the hearing of the defendants’ application on merit, as the said hearing would, invariably result in the delay of the trial. It was also submitted that if the court were to order the plaintiffs to provide the particulars sought by the defendants, it would be very difficult for the plaintiffs to comply within the three days which remained between 18<sup>th</sup> May, (when this application was to be heard) and 22<sup>nd</sup> May 2006 (when the trial was scheduled to commence). For that reason, the plaintiffs read mischief in the defendants decision to file the application so late.

Meanwhile, the plaintiffs drew the court’s attention to the fact that the suit herein was for the benefit of thousands of depositors of Trust Bank, who lost their savings when the bank collapsed in 1998.

Already, the trial of the case had been considerably delayed, by the appeal which the defendants had filed, challenging a ruling by the Hon. Ringera J. (as he then was). The learned judge had ruled that the plaintiffs herein were entitled to sustain this suit as a representative action. Being dissatisfied with that decision, the defendants filed and prosecuted **Civil Appeal No. 52 of 2002**.

Whilst the appeal was still outstanding, the trial of the suit before the superior court was in limbo. Therefore, there can be no doubt that there has been some delay attributable to the steps which the defendants took when they did appeal to the Court of Appeal. However, when it is borne in mind that any party who has a right of appeal has a right to pursue his said right, it would be wrong to fault the defendants for a delay that was occasioned solely by virtue of the appeal which they filed and prosecuted.

The plaintiffs did rely on the decision of the Court of Appeal, in **ASTROVLANIS COMPANIA NAVIERA SA V LINARD [1972] 2 All E.R. 647**, as authority to back their proposition that if a party was guilty of inexcusable delay in filing his application for particulars; and if he were to bring the application shortly before the trial date, his application would be dismissed.

In my considered opinion, the principle applied in the above-cited decision is equally applicable to the matter now before me. And, I have already found that a delay of four years is considerable. Therefore, in my understanding unless the defendants were able to justify the delay, the application for particulars ought to be dismissed.

So, what explanation did the defendants offer for the delay herein?

Basically, the defendants brought it to the attention of the court that the decision in **Civil Appeal No. 52 of 2003**, was only handed down on 5<sup>th</sup> April 2006. Therefore, when the defendants served the plaintiffs with a request for particulars on 10<sup>th</sup> April 2006, I have not the slightest doubt that the defendants acted promptly.

I am also satisfied that the defendants could not have sought particulars before the Court of Appeal delivered its verdict, because as at that time, there was no way that the defendants could have known whether to seek particulars for the four named plaintiffs, or for all the depositors of Trust Bank Limited. Therefore, I am satisfied that the defendants have tendered sufficient explanation for the delay in filing the application for particulars.

The other issue which has weighed heavily on my mind is the fact that by the application dated 4<sup>th</sup> May 2006, the defendants did not just seek for particulars. By that application, the defendants also seek Directions on discovery of the documents.

Without deciding the issue, as the same is yet to be canvassed fully, I nonetheless note that pursuant to Section 31 of the Banking Act, no information obtained under that statute can be published, if it would disclose the affairs of any person, unless that person gives his consent in writing. The unauthorised publication of information in contravention of Section 31 constitutes a criminal offence.

In the circumstances, both parties are obliged to give serious consideration to the nature of evidence which they will adduce at the trial, lest they face the penalties stipulated in Section 49 of the Banking Act.

Although the plaintiffs contend that the directions could be easily given by the trial judge, to my mind, the issue requires serious consideration by the parties. It is only then that the parties will be in a position to make appropriate submissions, for due consideration by the court.

Meanwhile, it is also noteworthy that on 18<sup>th</sup> October 2001, the Hon. Ringera J. ordered that hearing dates be fixed only after discovery and framing of issues. Therefore, inasmuch as the plaintiffs only filed their list of issues on 17<sup>th</sup> May 2006, whereas the trial dates had been fixed on 3<sup>rd</sup> December 2004, the said step of fixing the trial date was premature. It violated the express orders made on 18<sup>th</sup> October 2001.

The violation was not only because the issues had not yet been agreed upon (by the time the hearing dates were being fixed), but also because the process of discovery was incomplete. Indeed, on 24<sup>th</sup> April 2006 the plaintiffs' advocates did write to the advocates for the defendants, pointing out, inter alia, that there were some documents which the plaintiffs had not yet obtained from the Liquidator of Trust Bank Limited.

For all those reasons, I find no merit in the Preliminary Objection dated 16<sup>th</sup> May 2006. It is therefore overruled, with costs to the defendants.

Dated and Delivered at Nairobi this 22<sup>nd</sup> day of June 2006.

**FRED A. OCHIENG**

**JUDGE**