



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

Civil Case 1483 of 2000

VELEO (K) LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

On 8.6.2006, the plaintiff by its Chamber Summons dated 5.6.2006 applied under Order X Rule 20 of the Civil Procedure Rules to strike out the defendant's statement of defence set off and counterclaim and to have liberty to set down its claim for assessment of damages. The application was made upon the principal ground that the defendant had failed, refused and/or neglected to comply with an order for discovery made on 3.3.2004.

When that application came up for hearing before Ochieng J on 21.6.2006 the following order was recorded by consent:

**“That the application dated 5.6.2006 is marked as settled on the understanding that the defendant/respondent shall file and serve its list of documents within the next 7 days.”**

The defendant appears not to have complied with the consent order and on 11.9.2006 the present application was filed seeking the following primary orders:

- 1) ***That the defendant's statement of defence set-off and counterclaim dated 17.10.2000 and filed on 18.10.2000 be struck out.***
- 2) ***That the plaintiff be at liberty to have the costs of the set-off and counterclaim.***
- 3) ***That the plaintiff be at liberty to set down its claim for hearing and assessment of damages.***

The application which is supported by an affidavit of one Krishan Kumar Kapoor the plaintiff's director sworn on 8.9.2006 is based upon the following principal grounds:-

- a) ***That the defendant has failed to comply with the consent order of 21.6.2006 to file and serve its list of documents within the stipulated 7 days of the order.***
- b) ***That the consent order has not been set aside and there are no grounds for doing so.***
- c) ***That the defendant had earlier failed, refused and/or neglected to comply with an order for discovery made on 3.3.2004 in consequence whereof the plaintiff filed the application dated 5.6.2006 to compel the defendant to make discovery.***

***d) That the plaintiff was a customer of the defendant and the defendant has or sometimes had in its possession, custody or power, ledgers, statements, cheques, banking slips, debit/credit notes, banker's books and all other documents relating to its accounts Numbers 5005303 and 5096651 with the defendant which is the subject of the dispute between the plaintiff and the defendant.***

The said supporting affidavit substantiates the above grounds.

The application is not opposed. Neither counsel nor the defendant's representative attended the court when the application came up before for hearing on 9.11.2006. The application therefore proceeded ex-parte. Rule 20 of Order X reads as follows:

**“20 Where any party fails to comply with any order to answer interlocutories, 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.”**

In the matter at hand, the defendant has clearly failed to comply with the consent order to make discovery within 7 days of the order of 21.6.2006. The defendant has in any event neither filed Grounds of Opposition nor a replying affidavit. Its representative or counsel did not attend to contest the application. In the premises, under the above rule, its defence, set-off and counterclaim are liable to be struck out. I see no impediment in making that order. In the premises, the defendant's statement of defence, set-off and counterclaim dated 17.10.2000 and filed on 18.10.2006 are hereby struck out with costs to the plaintiff. The plaintiff will also have the costs of this application in any event.

The plaintiff further has liberty to set down its claim for hearing and assessment of damages.

Orders accordingly.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2006.**

**F. AZANGALALA**

**JUDGE**

**6/12/2006**

**MARY KASANGO**

**JUDGE**

**6/12/2006**