



REPUBLIC OF KENYA

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

Civil Case 44 of 2002

RATILAL GOVA SUMARIA1ST
PLAINTIFF

CAMPOS INDUSTRIES LTD2ND
PLAINTIFF

VERSUS

FINA BANK LIMITED1ST
DEFENDANT

CHETAN RATILAL SUMARIA2ND
DEFENDANT

SHUSHRUT RATILAL SUMARIA3RD DEFENDANT

JIGNESH KUMAR NEMCHAND SHAH4TH DEFENDANT

RULING

The Defendant bank has lodged this Notice of Motion under Order 10 Rule 20 of the Civil Procedure Rules, for an order the Plaint be struck out and judgment be entered in its favour against the first and second Plaintiffs on the counterclaim on the grounds that the first and second Plaintiffs have failed to file their list of documents as required by Order 10 rule 11A of the Civil Procedure Rules and by the consent letter dated 12th September 2003 and filed on 17th September, 2003.

The Application is supported by an affidavit sworn by one Francis Robert Kinyanjui the Senior Relationship Officer of the Defendant Bank.

The application is opposed and there are Grounds of Opposition filed on 29th June 2004 by Counsel for the Plaintiffs.

The Application was canvassed before me on 10th March 2005 by Mr. Fraser Learned Counsel for the Defendant bank and Mr. K'Opere Learned Counsel for the Plaintiffs. Counsel for the Defendant bank was brief and to the point. He submitted that after pleadings were closed his firm for the Defendant bank filed its lists of documents and on 30th May 2003 requested from Counsel for the Plaintiffs, the Plaintiffs' list of documents within 15 days of the Letter. The list was not furnished within the period specified in the letter or at all necessitating the application to compel the Plaintiffs to file their list of documents which application was listed for hearing on 19th September, 2003. This application was not heard as the Plaintiffs in a consent letter dated 12th September 2003 and filed on 17th September, 2003 undertook to file their list of documents on or before 30th September 2003. the Deputy Registrar recorded this consent order on 18th September, 2003. The Plaintiff did not file their list even after the consent order. This failure provoked the Advocates for the Defendant bank into giving the Plaintiff's advocates a seven (7) days notice to file the list of documents failing which an application to strike out the plaint would be made. This notice was dated 1st October, 2003. The Plaintiff's still made no move and have to date not filed their list of documents.

In these circumstances, Counsel for the Defendant bank urged me to allow the bank's application with costs. Reliance was placed upon the Court of Appeal decision in Eastern Radio Service -v- Tiny Tots (1967) E.A. 392 for the proposition that failure to give discovery and inspection may result in the striking out of a suit.

Counsel for the Plaintiff on his part argued that the Plaintiffs had not deliberately failed to give discovery as they had been involved in several applications and at the time this application was filed Receivers had been appointed and were in the suit premises. In Counsel's view, the Defendant bank no longer requires the documents.

In the alternative Counsel argued that even if the Plaintiff is struck out, the Defendant would not be entitled to judgment on its counterclaim.

Counsel further argued that he is not satisfied with the state of the pleadings filed by the Plaintiffs in the light of subsequent circumstances and will require leave of the Court to amend the same. In his view the Court has a discretion to give life to the Plaintiff's suit and should not apply the draconian jurisdiction of striking out the plaintiff.

Having considered the arguments advanced before me I take the following view of the matter. The jurisdiction to strike out a plaintiff under Order 10 Rule 20 of the Civil Procedure Rules is a harsh one and as stated in the case of Eastern Radio Service –v- Tiny Tots (supra) should only be applied where a litigant's failure to comply with an order for discovery is due to willful disregard of the order of the Court.

In this case, on 30th May 2003, Counsel for the Defendant bank by their letter of even date requested for the Plaintiffs' list of documents to be furnished within 15 days of the said letter. This letter was addressed to the Plaintiff's former advocates. This letter did not elicit any response. The Defendant bank then filed the Chamber Summons dated 9th July 2003, seeking an order that the Plaintiffs make discovery. That application was scheduled for hearing on 19th September, 2003. Before the hearing date parties entered into consent vide which the Plaintiffs agreed to make discovery on or before 30th September, 2003. The consent was recorded by the Deputy Registrar on 18th September, 2003. The Plaintiffs did not make discovery within the period of the consent order. Notwithstanding the Plaintiff's default, Counsel for the Defendant bank on 1st October 2003 requested Counsel for the Plaintiffs to serve the Plaintiffs list of documents within 7 days of the letter. In effect the Plaintiffs were granted a further 7 days to comply with the consent order failing which the Defendant bank would seek to strike out the Plaintiff. This letter with its threatened consequences again elicited no response from the Plaintiffs. The Defendant bank took another 2 ½ months before filing this application. In the meantime the Plaintiffs could have filed and served their list of documents but they did not. They have not done so to date.

I am fully aware that the order sought by the Defendant bank is a draconian one. But in the circumstances given above, the Defendant bank had no alternative but seek the order sought in its application. The plaintiffs have not reacted to the pleas of the Defendant bank to make discovery. I do not think they intend to make discovery at all. I therefore find and hold that the Plaintiffs have showed willful disregard of the order to make discovery. In the result I have no alternative but order that the plaintiff be and is hereby struck out. The Defendant bank is at liberty to seek judgment against the Plaintiffs on the counterclaim as it deems appropriate.

Costs of this application and the struck out plaintiff are awarded to the Defendant bank.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-