



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 134 of 2000

**JOSEPH SURE NYATENG (Suing as the Personal Representative of the Estate of
Wilfrida Achien’g (deceased) PLAINTIFF**

VERSUS

KENINDIA ASSURANCE CO. LTD DEFENDANT

RULING

The applicant/plaintiff filed this Declaratory suit against the Defendant Insurance Company/Respondent seeking them to be declared bound to pay decretal sum passed in KISII HCCC.NO.380 of 1997. The defendant filed a defence denying that they were bound to satisfy decretal sum in that suit. After that both the plaintiff and defendant filed separate applications one of which was to strike out the plaint by the defendant and one to strike out the defence by the plaintiff. Both were rejected separately.

The plaintiff on 24th May 2003 filed his list of documents. The defendant did not. On 9th July 2003 the plaintiff filed an application under Order 10 rule 11A (3) CPR seeking the following orders:-

1. That this Honourable Court do fix a time limit within which the defendant is to comply with provisions of Order 10 Rule 11(1).
2. Costs of this application be borne by the Respondent.

The said application was fixed for hearing on 8th June 2004. On that day Ms. Obaga appeared for the plaintiff/applicant and Mr. Minda held brief for Mr. Okengo for the defendant respondent. They asked court to, and the court did, record the following consent:

“By consent the plaintiff’s application dated 28th May 2004 is hereby allowed. Defendant to make discoveries within

7 days from today’s date.

On 14th August, which was the sixth day after the consent order was entered the defendant filed his list of documents. It seems that counsel for the plaintiff wrote to counsel for the defendant on 11th May giving him a list of specific documents she wanted discovered on oath. However as stated above the defendant filed his own list which were not the same as the notice issued on 11th May 2004. This prompted the present application.

The application is under Order 20 CPR and S.3A CPA. It seeks three reliefs namely:

1. That the defence herein be struck out for failing to comply with the Consent Order of 8th June 2004 for discovery of Specific list of documents.
2. That judgment be entered for the plaintiff as prayed in the amended plaint dated 19th Nov. 2000.
3. Costs be provided for.

Ms. Obaga submitted that the defendant/Respondent failed to comply with the consent order of 8th June 2004. He did not discover specific documents which the plaintiff had specified instead he filed a list of document on 14th June 2004 which was not the documents agreed on 8th June 2004. She pointed out that her application dated 25th May 2004 was under Order 10 Rule 11A (1) which is different from Order 10 Rule 11 CPR.

Mr. Okongo opposed the application and stated that the documents the plaintiff wanted defendant to discover were not in his possession. He said those documents are the same in the list of plaintiff which was filed.

He further submitted that the court ordered that they make discovery. This was complied with and a list file.

I have considered the application and the reply there to. I think, with respect, counsel for the applicant is misinterpreting the order recorded on 8th June 2004. I reproduced the order above and it is very clear. It stated that the applicant's application was allowed and the defendant do make discoveries within 7 days. Ms. Obaga is the one who dictated the Order to court to record. Nowhere did the court order specific documents be discovered, on that day. There was no list presented to court neither was one served on the defendant on that day. Indeed in the first ground supporting the affidavit it is stated that he had served the defendant with a specific list of documents a fact not denied. However in the three prayers of that application no list of documents was mentioned. Prayer one wanted the defendant to discover: documents in his possession and power. The court order stated that the application was allowed. The defendant was therefore to discover the documents in his possession which he says he has done. True he did not file an affidavit to state that he did not have the others but he did file the list.

Lastly a keen reading of Order 11A CPR does not show that a party can force the other to discover specific documents. Sub Rule (1) requires every Party to make discovery by filing and serving the opposite party with a list of document in his possession or power.

Sub rule (2) requires a Party who has been served with a list, may give notice on the party who served him requiring him to verify the list of documents on an affidavit.

Sub rule 3 of rule 11 provides for making of an application if one party fails to comply with sub – rule 2 and ask court to set a time limit to comply with sub rule 1. Sub – rule 1 do not state that one has to discover documents requested to by the opposite party. It only requires one to discover documents in his possession and power. That is what the defendant did. It seems he filed his list of documents on 27th July 2003 after pleadings closed. The plaintiff did not in accordance of provision of rule 11A Sub-rule 2 ask him to verify any list of documents. What he did was to send him the request dated 11th May 2004. That request does not state that it is a request for verification . It is headed:

REQUEST OF DOCUMENTS ORDER X RULE 11 OF CPR

. That was not a request for verification. In any case it is not a request under Order 10 Rule 11A (20 CPR but under Order 10 rule 11 CPR. The two rules are different. Rule 11 does not at all require a Party to make discovery on Oath. The plaintiff cannot therefore be heard to allege that the defendant failed to comply with any Provisions of Order 10 Rule 11A. In fact the Chamber Summons dated 28th May which resulted in the order complained of was made under Order X Rule 11 CPR and not under Order X rule 11A CPR as alleged. The application was therefore superfluous as the defendant had already filed his list of documents.

Last but not least the Order made on 8th June 2004 did not state that in case of defendant defaulting the suit will be dismissed.

The Order said he make his discovery within 7 days. He did so within 6 days so he fully complied. The order did not state that he discover specific documents.

All in all I find the application has no merit. The same is dismissed with costs.

Dated this 15th day of April 2005

KABURU BAUNI

JUDGE

c.c Mobisa

Mr. Ombati H/B Obaga for Respondent