



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 449 of 2002

BID INSURANCE BROKERS LIMITED.....PLAINTIFF

VERSUS

THE BRITISH UNITED

PROVIDENT ASSURANCE LIMITED.....DEFENDANT

RULING

By an application dated 8th March 2005 and brought by way of a Notice of Motion pursuant to the provisions of Order X rules 11A, 13 and Order XLIX rule 5 the Plaintiff sought for the following orders:-

- (1) The time for filing and serving a Second Further Supplemental List of Documents which are in the possession of the Plaintiff relating to matters in question in the suit herein be extended,
- (2) That the Plaintiff be permitted to serve on the Defendant the Second Further Supplementary List of Documents within seven days of the Orders herein, (3) That the Defendants be ordered to produce upon Oath and otherwise, the original and/or copies of the documents listed in the said Second Further Supplementary List of Documents,
- (4) Costs of this application be provided for.

The application was supported by the Affidavit of Dilesh Somchand Bid, the nature of the case and the grounds that:-

- (i) It has become necessary to file a Second Further Supplementary List of Documents with a view to enabling the Court to arrive at a just decision,
- (ii) It is entirely due to inadvertence that the Plaintiff did not include the said documents in the Plaintiff's List of Documents, Supplementary List of Documents and Further Supplementary List of Documents already filed.
- (iii) The said documents will not cause any prejudice to the Defendants as the same are and have been in the Defendant's possession.

In amplifying the application Mr. Sehmi, divided his submission into two parts. He urged the first part of the application by reference to Order X rule 11A together with Order XLIX rule 5, and the second part by reference to Order X rule 13.

Learned Counsel for the Plaintiff observed that Order X rule 11A imposes a limit of one month after close of pleadings to make discovery by filing and serving on the opposite party a list of documents

relating to any matter in question in the suit which are or have been in his possession or power. On this point learned Counsel also observed that both parties had been allowed by the Court, and had filed Supplemental List after the lapse of the prescribed one month under the said rule 11A.

Counsel further submitted that Order XLIX rule 5, confers upon the Court wide power to extend time to file documents even after the time prescribed to file such documents. The discretion is wide, and the Plaintiff was willing to bear the costs of this application being the party seeking the extension of time. Counsel also emphasised that the documents sought to be introduced constitute correspondence between the parties and that both parties had equal responsibility to produce these documents. Counsel also emphasized paragraphs 3 – 6 of the Supporting Affidavit of Dilesh Somchand Bid.

These paragraphs in essence amplify the grounds of the application' it has become necessary in the course of proceedings to file a supplementary list (para.3), that the documents are in the possession of the Plaintiff some original or copies of which are in the possession of the Plaintiff or the Defendant (para. 4), it was due to inadvertence that the Plaintiff did not include these documents in the Plaintiff's List of Documents, the Supplementary List of Documents and Further Supplementary List of Documents already filed (para. 5), the said documents will not cause any prejudice to the Defendant as the same are and have been in the Defendant's possession (para. 6).

The Plaintiff's second leg of argument concerned Order X rule 13. This rule enables the Court (of its own motion), at any time during the hearing of any suit to order the production by any party thereto upon oath, of such of the documents in his possession or power relating to any matter in question in such suit, as the Court shall think right, and the Court may deal with such documents when produced in such manner as appears just.

This suit is still pending only one witness has been heard. Citing Mulla on the Indian Code of Civil Procedure, Order 11 rule 14 which is identical to the said rule 13, Counsel submitted that the Court has no discretion under this rule to refuse an order for production unless the document is privileged, and in which event such privilege must be claimed on it.

Again Counsel emphasised that the Court's discretion is quite wide and urged the Court to grant the application as prayed.

The Defendant opposed the application and filed six (6) grounds of opposition dated 11.04.2005, and I will consider these in the course of my consideration of this application later.

Miss Malik Counsel for the Defendant submitted that the Commission Summary referred to in the Schedule Part One Exhibit "DSB1" had already been produced. It is not correspondence, there is no list of documents to be produced in the proposed Second Further Supplementary List of Documents. The Defendant cannot produce on oath what had already been produced in evidence. The power to order production of documents under Rule 13 of Order is invested in the Court itself. It is not subject to invocation by the Plaintiff.

Miss Malik conceded that the Court had a wide discretion to enlarge time under Order XLIX rule 5 but submitted that it would be unjust to allow the Plaintiff to produce documents which are not contained in any list. The Plaintiff will not be able to crossexamine the main witness Dilesh Somchand Bid. The Plaintiff had already produced the Commission Summary. The Plaintiff cannot be allowed to produce documents arising out of cross-examination. Counsel urged in conclusion that the Plaintiff's application be dismissed with costs.

Having set out the rival parties's arguments, I shall now proceed to pronounce my mind on the application. Looking at the application, the Plaintiff states in paragraph 1, that the Plaintiff has in its possession or power the documents relating to the matters in question in this suit in the First Schedule and the Second Part of the Schedule Part One refers to Commission Summary from April 1997 to March 1998. This Summary was submitted in evidence and was a subject of detailed evidence in chief by the Plaintiff's main witness Dilesh Samchand Bid. I can see no legitimate ground for reproduction of this

document.

On the overall merits of the application, the Court has certainly wide discretion both under Order XLIX rule 5, to extend time to enable the Plaintiff to file a Supplementary List of Documents. It has been done when the Plaintiff's principal witness had not given his evidence in Chief, and had not been cross-examined. It is of course easy to say, he can be recalled for further cross-examination for allowing this Further Supplementary List. It seems to me to be highly undesirable to allow a Plaintiff to file documents during the pendency or course of the hearing after the evidence of the Plaintiff's principal witness. It is patently prejudicial to the Defendant's case.

There is another consideration. From the Plaintiff's Counsel opening address at the commencement of the hearing of this suit and the subsequent detailed examination in chief and re-examination of the Plaintiff's principal witness, the Plaintiff was and, has prepared its case extremely well, and on matters of discovery, there has to be some limit as to time and must ordinarily be completed before the commencement of the hearing, and no party may venture to file further and further documents at will, and more particularly in response to questions which the Plaintiff perceives were not well covered or answered during cross-examination of its witness. There has to be an end to discovery.

Mulla, on the Code of Civil Procedure makes a distinction between "discovery" and "production" of documents "the rule as to discovery is the exact contrary of that as to production. You must set out every document in your possession whether you are bound to produce it or not," Order X rule 13 vests in the Court suo moto the power to order the production by any party upon oath of document in his possession or power Before the Court may exercise this power or discretion there must first be established in the proceedings of evidence adduced that which makes it compelling that the document be produced. It must be shown in such evidence that the non-production of such document would be prejudicial to the Plaintiff's case. This rule essentially shifts the burden of producing evidence by one party to another in the interest of justice. I cannot see any such reason in this application. The onus is upon the Plaintiff to prove its case.

It cannot shift that burden or get the Court to aid him to do so. As to the enlargement of time, it is important that the Court's resources should be used as effectively as possible and the proper and regular administration of business in general before the Courts should not be disrupted as a result of breaches of the rules of the Court which occurred without justification even if there was no prejudice to the other party. The overriding principle is that justice must be done, and all litigants, not just these parties are entitled to have their cases resolved with reasonable expedition. Noncompliance with time limits can cause prejudice to other parties to the litigation.

Moreover an acceptable explanation requires more than a mere statement that the reason for not including documents in the Original List or Further Supplementary List was that I forgot about it or was too much weary to get on with it. A more acceptable excuse would perhaps, be illness fire or similar catastrophe as would prompt a more sympathetic response.

This application has no basis in law. It is a pure abuse of the process of the Court. In the result, the same is dismissed with costs.

Dated and Delivered at Nairobi this 30th day of May 2005.

ANYARA EMUKULE

JUDGE