



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 100 OF 1999

BARCLAYS BANK OF KENYA LIMITED PLAINTIFF

VERSUS

ANNE ATIENO ADUL 1ST DEFENDANT

ELIJAH ADUL 2ND DEFENDANT

RULING

By their Notice of Motion of the 7th March, 2005 the Plaintiffs seeks to strike out the Defence of the Plaintiff and Judgment be entered in their favour on the grounds that the Defendants have failed to comply with a Court Order of the 18th February, 2005 requiring them to file a list of documents within 7 days of that order.

The Application is supported by the Affidavit of the 7th March, 2005 sworn by Allen Waiyaki Gichuhi the Advocates for the Plaintiff/applicant and which sets out the relevant facts.

In Reply the 1st Respondent/Defendant swore an affidavit on the 22nd March, 2005 in which she deponed that the Defendants had been unable to file their list of documents because the file pertinent to the Defence was locked up by the Applicant when it repossessed the suit premises on the 8th July, 1998.

In response to that allegation an affidavit was sworn by David Otieno the Property and Administration Manager of the Plaintiff on the 20th April, 2005 in which he deponed that the Defendants were asked to collect their files but did not keep any of the appointments. He further depones pursuant to information given to him by an advocate Mr. Peter Gachuhi of the firm of Kaplan & Stratton that Mr. Gachuhi had informed him that the Defendant collected their files sometimes in 1999. Order 10 Rule 11 A of the Civil Procedure Rules states as follows:-

“Notwithstanding anything contained in rule 11, within one month after the pleadings are closed in a suit in the High Court, every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power”

Pursuant to this order Mr. Justice Kariuki made the following order on the 18th February 2005.

(1) THAT the Defendants herein be and are hereby compelled to file their lists of Documents within 7 days from 18th February 2005.

(2) THAT the Defendants do pay the Plaintiff costs of this application.

Mr. Gachuhi for the Applicant relied on the case of *Bandari versus Bandari & Another HCCC No.485/95 in which Onyancha J* struck out a Defence and counterclaim therein for failure to comply

with an order for discovery. He relied on Order 10 rule 20, which states as follows: -

“Where any party fails to comply with any order to answer interrogatories, 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 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 reply Mr. Masika for the Respondent relied on the case of *Eastern Radios versus Tiny Tots 1967 E.A.L.R. page 392. In that case Newbold P states at page 395:-*

“ It is not, I think, in dispute that a litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim or settling up his defence unless failure to comply was due to a willful disregard of the order of the Court. Nor it is, I think, in dispute that willful means intentional as opposed to accidental”

The facts in that case are somewhat different from the facts in this case as Judgment had already been given in favour of the Plaintiff and it was only in respect of additional proceedings ordered by the Court of Appeal that the Court of Appeal set aside the order of the Judge of the High Court which relates to the whole suit which he had dismissed. The Court of Appeal however, restricted the dismissal of the suit to the further proceedings, which it had ordered to be undertaken.

The Court of Appeal found the refusal to obey the courts order in this case willful.

Whether its is willful or not depends on the facts of each case. In this suit there is no doubt that the Respondent has failed to obey the courts order referred to above.

The Respondent seeks to show its refusal is not willful, as it does not have the documents it relied on and puts the blame on the Applicant. This situation will however never be resolved as the parties take diametrically opposite views as to why the documents are not available. It is not for the court to say which of the two stories is true at this stage.

The onus is however on the Defendants to prove, the Defence and counterclaim and to do so they must produce the documents they rely on.

This suit was filed in January, 1999 and the Defendants have had over five years to either find their documents or seek to put for duplicate documents. In the result I am of the view that the Defendants have acted willfully in not obeying the said court order as their negligence over the years in not obtaining the documents or copies thereof has led to the situation they now find themselves in, that without any documents.

In the result I strike out the Defence and counterclaim. The suit which is set down for hearing will proceed in the absence of these pleadings. Costs to applicant.

Dated and delivered at Nairobi this 13th day of May 2005

P.J. RANSLEY

JUDGE