



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CASE NO. 82 OF 2004

V.V. KARANIA SHAH.....PLAINTIFF

VERSUS

KAPLAN & STRATTON ADVOCATES.....DEFENDANT

RULING

On 17/2/04, the Applicant, V.V. Karania Shah applied, by way of Notice of Motion, seeking the following orders:-

- 1. That the Respondent be compelled to release all the documents relating and belonging to the applicant with regard to the Sale of International House, then owned by Cannon Insurance Company Limited and the applicant.**
- 2. Costs be in the cause.**

The application is supported by two affidavits, one dated 17/2/04 and a further affidavit, dated 30/3/04, and on the ground that: the applicant was a client of the Respondent for the transaction involving the sale of International House for KShs.40m; that the Respondent divulged the said information to a 3rd party who later purchased the property; that the Respondents acts were a breach of confidentiality between a client and a lawyer. That despite several letters demanding the said documents the Respondent has refused, failed and/or neglected to release the files or details thereof.

In opposition, the Respondents aver that: the application is misconceived as it purported to initiate proceedings by way of Notice of Motion; that the applicant is seeking an order to produce documents that the Respondent does not have in its possession; the application is bad in law and an abuse of the court process. The application is brought under Order 50 rule 1, and Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya.

My perusal of the pleadings and submissions by counsel for both sides – Mr. Okoth for the applicant and Mr. Gachuhi for the Respondent, has led me to the following findings and conclusions. The Respondents wrote to the applicant on 22/8/1980 on the matter of International House and no response was received from the applicant for 24 years even though the applicant says he protested about that letter. But I have found no evidence in support of that protest. The only correspondence from the applicant to the Respondents is dated 24/4/03 when he demanded release of his documents on the International House.

The Respondents state, and rightly in my view, that 23 years is a very long time, and the documents, if any, were destroyed or could not be found in the Respondent's possession as the partner who dealt with the file retired and died in 1994. The available evidence shows that a file was opened in the applicant's name on 22/11/1979 and put away on 2/5/1984 and marked destroyed on 12/6/1987. Effectively therefore, the file is not in the Respondent's possession; the same having been destroyed in accordance with the practice to destroy such files after 7 to 10 years, except for Wills and Title Deeds.

The application is in the nature of an Originating Summons, but it is brought as a Notice of Motion which is not the correct procedure of moving this court. There is nothing in the Civil Procedure Rules like an Originating Motion. What there is, and one of the ways of moving this court, is an Originating Summons, not Motion; and on this point alone, the application is incompetent, and should be, as I hereby do, struck out.

The applicant seems to be under a misconception that Section 3A of Cap. 21, Laws of Kenya, can be invoked towards the ends of justice irrespective of other legal provisions. It is trite learning that Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya, can only be invoked where there are no specific provisions to the contrary. That is not the case here. An Originating Summons is in the same class as a suit, and the Civil Procedure Rules, specifically provide for how such suit and Originating summons shall be instituted. This is as per Section 19 of the Civil Procedure Act; Cap. 21, Laws of Kenya; and Order 4 rule 1 of the Civil Procedure Rules.

Finally, if as averred by the applicant, that Cannon Assurance Company Limited have the documents sought in his prayers, then that company should have been joined as a party to these proceedings. But they were not, and this court cannot issue orders binding to a person who is not a party to the proceedings in issue, as in this case. Further, this court will not issue orders in vain, or which cannot be complied with. If the documents sought to be released by the Respondent were destroyed, an order to produce or release the same to the applicant will be an order in vain. All in all therefore, and for the above reasons this application is dismissed with costs against the applicant, and in favour of the Respondent.

DATED and delivered in Nairobi, this 10th day of June, 2005.

O.K. MUTUNGI

JUDGE