



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 714 of 2003

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....PLAINTIFF

VERSUS

DR. SALLY KOSGEI 1ST DEFENDANT

GUARDIAN INTERNATIONAL LTD.....2ND DEFENDANT

RULING

This is an Application for an Order that the Plaintiff do furnish particulars of the plaint to the Defendant. The particulars sought are of paragraphs 5,6,7,8,9 and 14 of the Plaint. In default the Defendants pray that the Plaint be struck out. The application is brought under Order VI rule 8(1) and (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Mr. Okwach for the Defendants argued that before filing the present application, he requested for the said particulars from the Plaintiffs Advocates, but despite several reminders the request was neither acknowledged nor were the particulars furnished. Counsel submitted that the cause of action pleaded is based on fraud and undue influence to procure an agreement of sale or contract of sale. Under Order VI rule 8 1 (a) particulars of misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies "must" be given. Counsel further submitted that the requirement for particulars is to prevent surprise at the trial and avoid embarrassment. He relied on the Supreme Court Practice (White Book) 1991 pages 299 and 300 paragraph 18/12/2 dealing with function of Particulars. The book says inter alia that:

"In every pleading a certain amount of detail is necessary to ensure clearness and to prevent surprise at the trial. Each party must state his case with precision otherwise his opponent will not know for certain what is the real point in dispute and therefore will not properly prepare his evidence for the trial."

An further states at page 300: that:-

"it is absolutely essential that the pleading, not to be embarrassing to the Defendants, should state those facts which will put the Defendants on their guard and tell them what they will have to meet when the case comes up for trial..... They should sufficiently indicate to the opponent the nature of the evidence required by him." Counsel further relied upon the case of KENYENGA -v- OMBWOR1 (2001)2 E.A. 416. In this case the Plaintiff's claim based on trust was not allowed as the same had not been pleaded. At page 420 of the judgment the Court of Appeal said:

"The Learned Judge cannot be faulted for not having found that indeed the Respondent held the suit land in trust for the Appellant.

"This becomes even more necessary when the statute provides categorically as is the case with Order VI, rule 8 that the particulars of trust must be pleaded."

Mr. Oyatsi for the Plaintiff opposed the Application. He argued that the request was made before the defence was delivered. In his view the purpose of the request was to enable the Defendants prepare their defence and since the Defendants have now filed their defences particulars are no longer necessary.

Counsel further argued that the Defendants require particulars which have already been given at paragraphs 12 and 13 of the Plaintiff and if the Defendants are not satisfied with the particulars given, they should have applied for further and better particulars.

Counsel for the Plaintiff relies on the following authorities:

1. Bullen & Leake 12th Edition page 885. At this page it is stated:-

"The jurisdiction in relation to the exercise of undue influence is founded on the principle of correcting abuses of confidence and ought to be applied whatever may be the nature of the confidence reposed or the relation of the parties between whom it has subsisted..... relationship between bank and old customer"

2. Earl of Aylesford -v- Morris (1873) Volume VIII 484. At pages 490 and 491, their Lordships said:

"Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence proving it to have been in point of fact fair, just and reasonable."

3. Inche Noriah -v- Shaik Allie Bin Omor (1928) AC 127.

In this it was held that:

"Where the relations between a donor and a donee raise a presumption that the donee had influence over the donor the Court will set aside the gift."

4. Taherali Rasudbhai & Another -v- Chaudhrey (1963) E.A. 157.

"This was an action in negligence arising from a motor-car accident - where it was held that further and better particulars would not be ordered over the defence which denied negligence was sufficient even where an additional plea of inevitable accident was made."

On the above authorities Counsel for the Plaintiff submitted that the Defendants are not entitled to the orders sought in their Chamber Summons dated 15th January, 2004. He added that the Defendants know the case they are going to meet and the Defendants application is fishing out evidence.

In a brief reply Mr. Okwach submitted that the filing of defence does not stop the request for particulars indeed Order 6 Rule 8(4) of the Civil Procedure rules says so. Counsel further submitted that the Defendants have not requested for particulars of paragraphs 12 and 13 and the particulars given in the said paragraphs are not the particulars sought in respect of the paragraphs in question.

Counsel further submitted that all the authorities relied upon by the Plaintiff are not relevant and should be disregarded altogether.

Having heard the rival submissions made on behalf of the Defendants and the Plaintiff I have found as follows:

Paragraph 5 of the Complaint is as follows:

"The Plaintiff further states that at all material times the 1st Defendant was a Permanent Secretary in the Government of Kenya exercising power and influence at he said Fund and the Plaintiff. Further, and at all material times the 1st Defendant represented to the Plaintiff that she was a Director or shareholder or officer of the 2nd Defendant Company."

The particulars given at paragraphs 12, 13 and 14 of the Complaint do not cover paragraph 5 of the Complaint.

Paragraph 6 of the Complaint is worded as follows:-

"On diverse dates between August 1995 and January, 1996, the 1st Defendant on behalf of the Second Defendant wrongfully procured and induced the Plaintiff to approve and enter into a contract with them or the 2nd Defendant for the purchase of a property known as L.R.209/6439 Parklands, Ojjo Road Nairobi at the price of Kshs 174,500,000/=."

The particulars pointed at paragraphs 12, 13 and 14 are not particulars sought of paragraph 6 of the Complaint.

Paragraph 7 of the complaint is as follows:-

"At all material time the said property was in fact owned by Kenya Railways Corporation which is also a state corporation And over which the 1st Defendant also exercised power and influence by reason of her position in the Government as a Permanent Secretary."

Again the particulars given at paragraphs 12, 13 and 14 of the Complaint are not an answer to the request made of the said paragraph 7.

Paragraph 8 of the complaint is as follows:

"The Plaintiff states that after procuring and influencing the Plaintiff to approve the purchase of the said property and/or having secured the said approval the Defendants then procured or caused the said Kenya Railways Corporation to purportedly sell or transfer the said property to the Defendants on 31st January 1996 at the price of Kshs 77,130,000/=."

Here again the particulars sought of this paragraph are not the particulars furnished at paragraphs 12, 13 and 14 of the Complaint.

Paragraph 9 of the Complaint is as follows:-

"On 6th February, 1996, six days after acquiring the property, the Defendants, again using their power and influence caused the Change of User of the said property to be effected from residential to commercial and on 8th February 1996, eight days after acquisition of the property from Kenya Railways Corporation the Defendants procured and induced or caused the Plaintiff to execute an Agreement for sale and Transfer whereby the Plaintiff purportedly agreed to purchase the said property from the Defendants at the said purchase price'of Kshs 174,500,000/=."

Once more the particulars sought of this paragraph are not the particulars given at paragraphs 12, 13 and 14 of the complaint.

Paragraph 14 of the Complaint is as follows:-"By reason of the matters aforesaid the Plaintiff has lost the said sum of Kshs 174,500,000/= and all the expenses, incurred by the Plaintiff.

(a) Principal sum Kshs 174,500,000.00

(b) Stamp Duty Kshs 6.960.020.00

Total 181.460.020.00"

The particulars given in this paragraph are sufficient for what is pleaded at paragraph 14. The request made by the 2nd Defendant in respect of the said paragraph is a request for evidence which is outside the arm bit of the functions of particulars.

The Plaintiffs claim is founded on undue influence fraud and or misrepresentation. Under the provisions of Order 8(1)(a) of the Civil Procedure Rules, particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which a party relies must be given. Under sub rule (2) of the said rule the Court has power to order a party to serve on any other party particulars of any claim defence or other matter stated in his pleading or a statement of the nature of the case on which he relies and the order may be made on such terms as the Court thinks just.

Having found that the particulars given at paragraphs 12, 13 and 14 of the plaint are not an answer to the request for particulars made by the Defendants, I make the following orders:-

(1) The Plaintiff shall within fourteen (14) days from the date hereof serve on the Defendants the following particulars of the Plaint.

(A) OF PARAGRAPH 5

(I) Specify the 1st Defendant's alleged powers

(ii) Specify the nature and basis of the alleged influence allegedly exercised over the Plaintiff,

(iii) Were the alleged representations to the Plaintiff oral or in writing and(iv) If oral specify the alleged representation and(v) If in writing identify the document(s) in which the representations are allegedly contained.

(B) OF PARAGRAPH 6

Specify the specific acts of the 1st Defendant alleged to amount to wrongful procurement and inducement.

(C) OF PARAGRAPH 7

(i) Specify the alleged powers the 1st Defendant had and exercised over Kenya Railways Corporation.

(ii) Specify the nature and basis of the alleged influence the 1st Defendant had and exercised over Kenya Railways Corporation.

(D) OF PARAGRAPH 8

(i) Specify the specific acts of the 1st Defendant which allegedly procured and induced the Plaintiff to approve the alleged purchase,(ii) Specify the specific acts of the 1st Defendant that allegedly procured or caused the Kenya Railways Corporation to sell and transfer the suit property.

(E) OF PARAGRAPH 9

(i) Specify the specific powers of the 1st Plaintiff and

(ii) Over whom the 1st Defendant exercised the alleged powers and the influence exercised.

From the above it is clear that I have not allowed the request for particulars made by the defendant in their requests dated 25th November 2003 in their entirety. I have excluded from the said requests particulars that call for evidence or legislation which may be availed at the trial of the action.

(2) In default of furnishing particulars as ordered within the period provided, the following paragraphs of the plaintiff shall stand dismissed: paragraphs 5,6,7,8 and 9.

With respect to Counsel the authorities cited in opposition to this application may be used in support of the action but are not relevant at this stage.

In view of the foregoing I am satisfied that the Defendants application for particulars is not altogether without merit and is allowed in part as above with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10th DAY OF MAY 2004

F. AZANGALALA AG. JUDGE