



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 206 OF 2001

EQUATOR DISTRIBUTORS LTD. PLAINTIFF

- VERSUS -

1. C F C BANK (K) LTD.)

2. ASSOCIATED MOTORS (KE) LTD.) DEFENDANT

RULING

The plaintiff has applied by Chamber Summons dated 8.11.2001 under Order 6 r 8 (2) (3) and Rule 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking three consequential orders:

That is to say:

1. That the 1st and 2nd defendants do supply to the plaintiff within 14 days from the date of the Court order the Particulars requested in the plaintiffs request for particulars dated 17th September, 2001. 2. That in default of either the 1st or the 2nd Defendants to comply with the order sought in prayer 1 above within the time prescribed the defence filed, herein be struck out and judgement be entered for the plaintiff as prayed.
3. In the alternative and without prejudice to prayer 2 herein above, in default of either 1st or the 2nd defendants to comply with the order sought in prayer 1 above within the time prescribed that the allegations of which the particulars were ordered should be struck out from the pleadings.
4. That all further proceedings be stayed until service of the said particulars.

The application is supported by an Affidavit sworn by LIVINGSTONE IKONGE the Managing Director of the plaintiff company and he states that on the Defendant's filing their respective defences, his counsel filed and served a request for particulars. In regard to the 1st defendant, the particulars sought are in respect of paragraphs 6(ii) and (iii) while for the 2nd Defendant the request for particulars was in respect to paragraph 8 of their defences. The said paragraphs were their answers in defence to paragraph 12 of the plaint which states:

“12. On or about the 10th day of April, 1999 while the 1st Defendant

through the 2nd Defendant was in the process of delivering the said

Truck from Nairobi to the plaintiff in Mombasa and before the said delivery

was actually effected, the same got an accident at Maungu enroute to Mombasa and became a write off”

In response the 1st defendant replied as follows:-

6 (ii) by arrangement between the plaintiff and the second defendant unknown to the 1st Defendant the plaintiff took possession of the said vehicle from the second defendant at its place of business in Nairobi and caused the same to be driven by a driver employed by the second defendant for and on behalf of the plaintiff to its place of business at Voi. The first defendant will contend that after removal of the said vehicle from the second Defendant’s place of business in Nairobi. It was on hire to the plaintiff in its exclusive possession and control under the aforesaid Hire-purchase Agreement and at its risk whilst on the road subject to the hire, rental terms conditions and stipulations therein contained:

6 (iii) the first defendant had no control over the said vehicle on the 10th April, 1999 when it was being driven on Mombasa/Nairobi road at the request of the plaintiff by a driver employed by the second defendant when it was involved in an accident causing total right off. The first defendant had never agreed, approved or consented to the vehicle being driven by the employee of the 2nd Defendant which arrangement was arrived at between the plaintiff and second defendant.

On his part the 2nd Defendant’s offence paragraph 8 states:

The 1st Defendant by its Advocates letter dated 11th October, 2001 replied as follows:-

“The plaintiff and the second defendant were parties to the mode of taking delivery of the vehicle purchased with funds provided by the first defendant. It was strictly a matter between the plaintiff and the second defendant how and where to take delivery of the said vehicle known only to them but unknown to the first defendant. Hence, the second defendant is unable to furnish the particulars as requested.”

The second Defendant on its part did file a Reply to request for particulars on 23.10.01 and the response was that the particulars sought are not available to the plaintiff under the provisions of order 6 rule 8 and the same amounted to seeking disclosure of evidence. In paragraph 6 of the Reply, it was further stated that the facts pleaded at paragraph 8 of its Defence were adequate and no further information was needed at this stage.

In his spirited argument in support of the application the plaintiff’s Counsel Mr. Sangoro said the defendants had made positive averments and must therefore provide the particulars sought. He referred 8 authorities all on the same issue and which the counsels for the defence Mr. Pandya & K.Shah concurred had laid the correct position as regards the supply of particulars. However they were emphatic that in this case, the plaintiff would not hide under that shield.

I have considered the various case laws referred to in the light of the particulars sought and the Reply thereto. The general principle has been as set in WEINBERGER vs INGLIS (1916-17) ALL E.R page 844 ASTBURY J. said;

“As a general rule, the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of

establishing which lies upon him”.

From the pleadings, the plaintiff has stated the facts as he sees them in paragraph 12 of the plaint, and the defendants on their part have gone ahead to state what they consider the correct facts. The plaintiff has argued that these are positive averments and particulars must be given. However, to decide whether or not to grant the orders sought, I consider it necessary to look at those averments together with their Reply. In my considered opinion the issue arising in those paragraphs by the plaintiff and the defendants is the place of Delivery and whether the 1st Defendant's obligations regarding place and mode of Delivery as per the purchase agreement terminated on making payments to the 2nd Defendant. These are matters that can only be adequately addressed at the trial. The court has a discretion in granting the order and has to ensure that they are granted where the interrogatories are necessary for disposing fairly with the cause or matter and shall save on costs and time. I consider that the answers sought can best be thrashed out at the hearing and I concur with the Defence Counsels that they are more matters of evidence. The application is consequently dismissed with costs.

Dated and Delivered at Mombasa this 26th day of April, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE