



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC 126 OF 2019

HABIBA ALI MURSAI.....1ST PLAINTIFF

ABDIAZIZ MOHAMMED ADHAWA &

**ASHER MOHAMMED ADHAWA (Suing as the legal administrators of the estate
of Amina Sheikh Ahmed).....2ND PLAINTIFF**

KALY MOHAMMED SHEIKH OMAR.....3RD PLAINTIFF

MUHUBA SHEIKH OMAR.....4TH PLAINTIFF

MALYUN AHMED AMIR.....5TH PLAINTIFF

-VERSUS-

MARIAM NOOR ABDI.....DEFENDANT

RULING

INTRODUCTION

1.Vide Request for Particulars dated the 11th of February 2021, the Defendant herein sought for provision and supply of the following Documents and Particulars;

i.Registration documents for their businesses including registration certificate, iTax pin copies and Nairobi City Council licenses for the years 2016, 2017 and 2018.

ii.Audited accounts for the period 2016, 2017 and 2018.

iii.Income tax returns for 2016, 2017 and 2018.

iv.Certified copies of their bank statements for the period January to October 2018.

v.Stock list for the month of October 2018.

vi.Copies of car sale receipts for purchase and sale of goods.

2.Following the lodgment of the Request for Particulars, it was expected that the Plaintiffs herein, would revert back to the defendant as well as to the Court on whether same were acceding to or objecting the Request for Particulars.

3.Be that as it may, it appears that the Plaintiff herein did not respond or react to the request for particulars and in this regard, the Counsel for the defendant raised the issue concerning non-compliance with the request for particulars on 14th October 2021.

4.Pursuant to and upon the ventilation of the failure by the Plaintiffs to avail the particulars requested for, the Court ordered and/or directed that the defendant do file the requisite application for the provision of particulars within 14 days.

5. Suffice it to say, that the Defendant indeed proceeded to and filed the application dated the 25th of October 2021, wherein the defendant seeks for the following reliefs;

i. The Plaintiffs be compelled to provide the Particulars required by the Defendant under the Request for Particulars dated the 11th of February 2021.

ii. In the event the Plaintiffs default in providing the Particulars, the Plaintiffs suit be deemed to be struck out automatically with costs.

iii. Costs of this Application be provided for.

6. The subject Application is premised on the grounds contained at the foot thereof, and same is further supported by the Affidavit of the Defendant/Applicant's Counsel sworn on 25th October 2021.

7. Upon being served with the subject Application, the Plaintiffs herein responded to same by filing their Grounds of Opposition dated the 4th of November 2021, to which the Plaintiffs have enumerated various, albeit, numerous grounds against the subject Application.

DEPOSITIONS BY THE PARTIES

DEFENDANT/APPLICANT'S DEPOSITION

8. Vide the Supporting Affidavit sworn on 25th of October 2021, the Defendant's Advocate, Mr. Amos O. Wandago averred as hereunder;

9. On the 11th of February 2021, we served to the Plaintiffs Counsel on record a request for particulars dated 11th of February 2021 which has never been responded to, to date.

10. On the other hand, the deponent has further stated that the Plaintiffs seek an aggregate amount of Kshs. 156,112, 530 only, yet each Plaintiff has not particularized the sum claimed and pleaded, as to whether it is a loss of cash or value of the goods and how the amounts claimed were arrived at.

11. It is the deponent's further averment that if the particulars requested for are not supplied, there will be trial by ambush by the Plaintiffs to the detriment of the Defendant.

12. On the other hand, the deponent has further averred that the denial of particulars, as particularized in the request for particulars dated 11th February 2021 will occasion great injustice.

13. Lastly, the deponent has averred that for the Ends of justice to be met, it is only fair and Equitable for the Plaintiffs to supply the Defendant with particulars in the request for particulars dated 11th February 2021.

RESPONSE BY THE PLAINTIFFS'

14. The Plaintiffs herein filed Grounds of opposition dated 4th of November 2021 and same contended as hereunder;

i. An Advocate cannot swear an Affidavit on behalf of his/her client on contested facts that require production of evidence. The Application is thus fatally defective.

ii. An Advocate or any party cannot seek for Evidence in disguise of Request for Particulars.

iii. The Applicant cannot build his defense based on our documents. The 1st to 5th Plaintiffs have since filed the pleadings it wishes to rely on to prove its case.

iv. The Applicant's request to strike out pleadings is a draconian prayer that is only granted in exceptional circumstances.

v. In previous proceedings, we made it clear we have filed all documents we intend to rely on to prosecute our case.

vi. The Application is frivolous, vexatious, abuse of Court process and a total waste of the Court's precious time.

vii. The Application filed on 25th October 2021 is a fishing expedition and same ought to be dismissed with costs.

viii. The Application seeks outlandish prayers that clearly show they have ulterior motives and only want to delay the hearing and determination of the suit.

ix. The Application dated 25th October 2021 ought to be dismissed with costs.

SUBMISSIONS

15. On the 11th of November 2021, the subject Application came up for hearing, whereupon the Court directed that the Application be heard and disposed of by way of written submissions, and thereafter timelines were prescribed.

16. Pursuant to the directions of the Court, the Defendant/Applicant filed her written submissions on 12th November 2021, whereas the Plaintiffs/Respondents filed their submissions on 24th November 2021. For clarity, the two sets of written submissions form part of the court record and same have been duly considered and appreciated.

ISSUES FOR DETERMINATION

17. Having evaluated and duly considered the Notice of Motion application dated the 25th of October 2021, the Supporting Affidavit thereto, the Ground of Opposition filed by the Plaintiffs, as well as the written submissions filed on behalf of the respective parties, the following issues are germane for determination;

i. Whether an Advocate can swear and/or depone to contentious evidential issues and if not, whether the Supporting Affidavit herein is competent.

ii. Whether the Request dated the 11th of February 2021 is for particulars or otherwise.

iii. Whether the Court has Jurisdiction to decree provision of Documents, or whether the Defendant has met the threshold for provision for particulars.

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE

Whether an Advocate can swear and/or depone to contentious Evidential issues and if not, whether the Supporting Affidavit herein is competent.

18. The first attack that has been mounted by and/or on behalf of the Plaintiffs and against the subject application, touches on the validity, legality and thus competence of the Supporting Affidavit attached thereto, which has been sworn by learned counsel for the Defendant/Applicant.

19. It is the Plaintiffs contention that in matters which entail contentious evidential facts or issues of evidence, it is neither wise nor appropriate for an Advocate to swear and/or depone to an Affidavit, in the manner that Counsel has done herein.

20. On the other hand, the Plaintiffs Counsel has further submitted that where an Advocate swears an Affidavit in contentious, nay, controversial Evidential issues, such an Advocate courts invitation to step down from the privileged position as an Advocate and therefore become a witness in the same matter, and thus be exposed to cross-examination.

21. At any rate, the Plaintiffs have further submitted that it is generally unacceptable, for an advocate who enjoys privilege, while conducting matters on behalf of own clients, to supplant and/or appropriate the mandate of the client. In this regard, the Plaintiffs Advocate has invoked and placed due premium on the provisions of Rule 9 of the Advocates (Practice) Rules.

22. In support of the foregoing submissions, the Counsel for the Plaintiffs has also invited the court to take note of the decision in the case of **Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR** where the Honorable Court observed as hereunder;

*“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In **Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 e KLR and Kisya Investments Ltd & Others vs Kenya Finance Corporation Ltd**, it was held that*

“.....it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit”.

In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate’s affidavit creates a legal muddle with untold consequences.”

23. As pertains to this issue of law, I must say that the Defendant/Applicant’s herein did not respond or file any rejoinder submissions thereto. Consequently, I did not have the benefit of the Defendant’s reaction.

24. Be that as it may, I must state that the provisions of **Rule 9 of the Advocates (Practice) Rules** as well as the various decided case law, dating back to the decision in the case of **Simon Isaac Ngui vs Overseas Courier Services [1998] Eklr**, have underscored the fact that it is not acceptable for an Advocate to swear an Affidavit and/or declaration, in respect of contentious evidential facts and/or issues.

25. I must also add my voice to the same trite, if not, hackneyed legal position, which frowns upon advocates abusing their privileged positions, by venturing into and swearing affidavits pertaining to contentious Evidential facts and/or issues, in matters where same have been retained as advocates.

26. Certainly, where an advocate swears an Affidavit relating to contentious evidential facts or issues, such an Advocate runs the risk of being invited into the witness box and thereafter be subjected to cross-examination. For coherence, such an invite, shall, if it does occur, expose the concerned advocate to the vagaries of litigation, including but not limited to cross-examination.

27. In my humble view, this trend ought to be eschewed altogether and if not, Counsel must delineate the true scope and boundaries, for which same are permitted to swear Affidavits, in respect of and/or pertaining to matters where the Counsel is engaged as an advocate for either of the parties.

28. Nevertheless, it must also be known that the law does not prohibit and/or bar advocates completely from swearing affidavits, in the course of the duties and/or discharge of their professional mandate in matters where same are engaged.

29. What I am saying, is that an Advocate can still swear an Affidavit in the matter where same is engaged, provided the Affidavit relates to issues that are born out of the record of the court, issues which have been pronounced upon, issues that the court is to take Judicial notice of, settled issues of law and/or issues that are admitted by the adverse party, either in the subject proceedings or any other proceedings, namely previous proceeding, between same parties.

30. As pertains to the subject matter, I must point out that the impugned Supporting Affidavit has only adverted to Request for Documents, some of which are public documents while others are documents that the Court is obligated to take judicial notice of, to the extent that same are ordinarily kept by business persons and/or required under law to be kept by such persons, in the ordinary course of business.

31. On the other hand, the impugned Supporting Affidavit has also adverted to the nature and extent of the claim mounted by the Plaintiffs, which is in the sum of Kshs. 158, 112, 530 only. For clarity, the said amount, is clearly delineated in the Plaintiffs statement of claim.

32. Besides, the impugned Supporting Affidavit has also adverted to the issue of law concerning Request for particulars and the importance that bely the provisions of particulars, in helping the Court to fully appreciate the issues for determination.

33. Finally, the Supporting Affidavit has thereafter reproduced the usual issue relating to the interest of justice, as well as invoking the Doctrine of Equity, which has since received a Constitutional backing under **Article 10 (2)(b) of the Constitution of Kenya, 2010**.

34. Looking at the impugned Supporting Affidavit, I do not see any contentious evidential issue and/or matter which the learned Counsel for the Defendant/Applicant has adverted to and/or dealt with, to warrant the attack by and/or on behalf of the Plaintiffs/Respondents.

35. Similarly, I do not see how the Supporting Affidavit has delved into any disputed fact, that brings the said Affidavit to the proscribed tenets stipulated vide **Rule 9 of the Advocates (Practice) Rules**.

36. In the premises, it is my finding and holding that the Supporting Affidavit, sworn by learned Counsel for the Defendant/Applicant is legitimate, lawful and legally competent.

37. Consequently, I decline to strike out the said Affidavit.

ISSUE NUMBER TWO

Whether the Request dated the 11th of February 2021 is for Particulars or otherwise.

38. Though the Defendant has titled the document under reference as a request for particulars, beneath same, the defendant has tactically degenerated from request for particulars to request for Documents.

39. At any rate, the gist of the document under reference becomes clear and explicit, as the defendant delves into the body of the Request, wherein the defendant now abandons particulars, but now proceeds on documents that same requires to be produced.

40. In any event, where a party seeks for provisions of particulars of facts, it is trite and established that the request for particulars, must be predicated upon each and every paragraph of the pleading for which particulars are being sought.

41. However, in respect of the subject matter, it is curious that the defendant has abandoned his request for particulars and has also skirted around the established procedure for requesting for Particulars.

42. On the other hand, it is also worthy to note that the Request for particulars is provided for vide the provisions of **Order 2 Rule 10(2) of the Civil Procedure Rules, 2010** which provide as hereunder;

“Particulars of pleading [Order 2, rule 10.]

(2) The court may 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.”

43. Based on the foregoing, I find and hold that the request made by the defendant herein is one for provision of documents, as opposed to provision of particulars.

ISSUE NUMBER THREE

Whether the Court has Jurisdiction to decree provision of Documents or whether the Defendant has met the threshold for provision for particulars.

44. In answer to issue number three herein, I beg to point out that whereas the Court is conferred with jurisdiction to decree and/or compel an adverse party to supply and/or avail requisite particulars, albeit subject to satisfaction of certain statutory prescriptions, the Court however is not seized of jurisdiction to compel provision of documents.

45. Suffice it to observe, that the documents which are being sought for herein are sought for in the course of civil proceedings pitting the Plaintiffs, on one hand and the Defendant on the other hand, as opposed to provision of documents/ Information, under **Article 35 of the Constitution 2010**.

46. It is also imperative to note that under the provisions of Article 35 of the Constitution 2010 as read together with the provisions of the Fair Administrative Actions Act, different considerations do apply.

47. However, in respect of the subject matter, it is trite to observe that each of the disputants understand their respective cases and the burden placed on each, to prove their cases, as prescribed and/or stipulated under the law. **(See Sections 107 and 108 of the Evidence Act Chapter 80 Laws of Kenya)**.

48. In the premises, it is not part of the mandate of the court to help either party, in proving his/her case, to the requisite standard, by compelling the adverse party to supply and/ or avail Documents which the adverse party, does not deem necessary for own case.

49. In respect of the subject matter, the Plaintiffs have tendered and/or availed to the court the various documents, which in their humble opinion, would suffice to prove their claim. For clarity, the said documents have been tendered in compliance with the provisions of **Order 3 Rule 2 of the Civil Procedure Rules, 2010**.

50. To the contrary, the Defendant imagines that the totality of the Documents which have been supplied and/or availed by the Plaintiffs are insufficient, nay, inconclusive.

51. Based on the foregoing, the Defendant has therefore demanded that the Court makes an order to compel the Plaintiffs to produce and avail the numerous documents, which have been enumerated at the foot of (sic) the Request of particulars dated 11th February 2021.

52. I must say, that whether or not the documents that have been supplied and relied upon by the Plaintiffs in support of their claim, are sufficient or otherwise to prove the Plaintiffs case, cannot be the basis of a Request of particulars.

53. On the other hand, whether the Documents that have been availed or supplied shall enable the Plaintiffs to discharge the statutory burden placed on same, can also not be the subject of an Interlocutory Application. To my mind, such an issue must await the plenary hearing and not otherwise.

54. In the premises, I beg to state that subject to the provisions of **Article 35 of the Constitution 2010, Fair Administrative Actions Act and Sections 68 & 69 of the Evidence Act Chapter 80 Laws of Kenya**, it is not the mandate of the court to compel an Adverse party to provide Documents to the opposite party, to enable the opposite party to better own case and/or defence.

55. In view of the foregoing, I must decline the invitation by the Defendant herein, to order that same be supplied with the *plethora* of Documents requested for.

56. On the other hand, even assuming that the Request was for particulars, which I have found to the contrary, I would still have found and held that the Defendant/Applicant has not met the requisite threshold to warrant an order for provision of the particulars.

57. Suffice it to say, that he who requests for particulars, must state and/or stipulate the kind or nature of particulars sought for and in respect of what paragraph of the pleading. However, that is not the case in respect of the instant matter.

58. Secondly, it is also important for the claimant to also delineate how the omitted particulars if any, have incapacitated the claimant from rendering his/her statement of response and/or occasioned a prejudice on him or herself.

59. Thirdly, the Claimant must also ensure that what is being sought for does not fall in the bracket of what amounts to and/or constitutes a Fishing Expedition.

60. Simply put, a Request for particulars is circumscribed to enable a party to be able to sufficiently file his/her statement of response and/or to controvert a particular plea, but same must not extend to adduction of evidence, the latter, which must await its opportune time.

61. In respect of the subject matter, it is sufficient to note that the defendant herein was able to file a Comprehensive written statement of Defence dated the 15th of May 2019, as well as comprehensive witness statements, which indicate that indeed the Defendant fully appreciated and understood the Plaintiffs' claim.

62. For the avoidance of doubt, the Defendant/Applicant herein has not even stated in the Supporting Affidavit that any omitted particular, has prejudiced and/or incapacitated same from answering and/or sufficiently answering the Plaintiffs claim.

63. Consequently, and based on the foregoing, I would still have been obliged to dismiss the Defendant's Application.

64. In support of the foregoing observation, I beg to adopt and restate the position of the law as enunciated in the case of **Elizabeth Ongoro Amollo vs Francis Kajwang Tom Joseph & Others [2017] eKLR** where the Honorable Court observed as hereunder;

“Similarly, the Respondent cannot request for the adduction of evidence under the guise of making a request for particulars. The purpose of requesting for supply of particulars is to prevent surprise and unnecessary expenses and further ensure a fair and effectual trial.

A request for particulars was not meant to be an avenue for a Respondent to challenge the legality of the Petition (read suit) without the Court having the benefit of hearing the complaints raised thereof. ‘Addition supplied.’”

FINAL DISPOSITION

65. In conclusion, I find and hold that the Application by the Defendant/Applicant, is calculated to attract an order which would amount to the Plaintiffs furnishing the Defendant with materials on which the defendant shall build her case against the Plaintiffs. Such an order would amount to helping the Defendant better her case, and thus using the Court as an investigative forum.

66. To my mind, the Honorable Court is an impartial arbiter in the subject matter and hence same must decline and eschew the invite by the Defendant.

67. Consequently, the Notice of Motion Application dated 25th October 2021, is Devoid of Merits.

68. *In a nutshell*, same be and is hereby dismissed with costs to the Plaintiffs.

69. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIRONMENT AND LAND COURT,

MILIMANI.

In the Presence of;

June Nafula Court Assistant

M/s Mirigu h/b for Mr. Amos Wandago for the Defendant/Applicant.

Mr. Ondati h/b for Mr. Cohen Omanyanya for the Plaintiffs/Respondents.