



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 483 OF 2003

COOPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

SAMUEL MUSAU NDUNDADEFENDANT

RULING

1. Before me is the defendant's Motion on Notice dated 11/3/2020. It was brought under **Articles 35(1) (b) of the Constitution, Section 1A, 1B 3A and 22(a) of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 11 Rule 3(2) (d) and Order 51 Rule 1 and 4 of the Civil Procedure Rules 2010**.

2. The Motion sought orders for discovery and production of several documents alleged to be in the possession of the plaintiff. For purposes of clarity, I will reproduce the prayers hereunder: -

"a) For discovery and production within 14 days from the date of the order a copy of the Statutory Notice ref. no. A/3/CS/REALIZATION/MKS issued by the Respondent on 1st November 1998 and a copy of the Respondent's letter of instruction dated 15th October 2019 to Cash Crop Auctioneers.

b) Compelling Mr. P. M. Mwangi T/A Cash Crop Auctioneers to produce within 7 days from the date of the order a certified copy of the Respondent's letter dated 15th October 2019 instructing him to sell land parcel no. Machakos/Kiandani/2699.

c) For discovery and production within 14 days from the date of the Order, the Respondent's letter of instruction to the Auctioneer who sold the guarantor's land parcel no. Machakos/Kiandani/ 1757 in May 2005, a copy of the public auction newspaper advertisement and a copy of the Auctioneer's notification of sale in respect of land parcel no. Machakos/Kiandani/1757 and a copy of the financial statement of the said sale.

d) For discovery and production within 14 days from the date of the Order certified copies of bank statements in respect six working capital account nos. [...], [...], [...], [...], [...] and [...] created by the Respondent between January 1998 and July 2003".

3. The application was supported by the affidavit of the applicant sworn on 11/3/2020. He deposed that, he had for long questioned the statutory notice ref. no. A/3/CS/REALIZATION/MKS dated 1/11/1998 as well as the respondent's claim for Kshs. 11,863,164/-. That on 15/10/2019, the respondent instructed Cash Crop Auctioneers to auction the property known as **LR. Machakos/Kiandani/2699**.

4. That he had discovered that the respondent had opened 6 fictitious accounts whose particulars he set out. That the respondent has never accounted for the sale of his guarantor's property **LR. Machakos/Kiandani/1757**. That for the foregoing reasons, the documents sought were necessary for the trial.

5. The applicant opposed the application vide the replying affidavit of **Jackson Kimathi** sworn on 15/6/2020. He deposed that the suit was filed on 7/8/2003 yet the application was being filed 16 years later on 2/3/2020. That during that period, the applicant had never requested for the subject documents. That the suit had severally come up for hearing with no indication from the applicant that he required the said documents.

6. That the applicant was served with the statutory notice ref. A/3/CS/REALIZATION/MKS on 1/11/1998 which is 21 years ago. That the request for a copy thereof was intended to frustrate the bank and the hearing of the suit.

7. That the respondent's letter of 15/10/2019 to **P.M Mwangi t/a Cash Crop Auctioneers** instructing him to sell land **parcel no.**

Machakos/Kiandani/2699 was a communication between the bank and the auctioneer. It was on that basis that the applicant was served with a 45 days Redemption Notice and a Notification of Sale dated 16/10/2019 which is annexed to the supporting affidavit. That the request for the letter was intended to delay the disposal of the suit as the applicant was aware of the import and effect of the letter.

8. It was further averred that the sale of **Machakos/Kiandani/ 1757** in May, 2015 was dealt with in the witness statement of **John Martin Chege** dated 21/11/2012. In that affidavit, he had produced a bank statement showing credit entries for Kshs. 55,000/= and kshs. 150,000/= both amounting to Kshs. 205,000/= at which the property was sold.

9. That the request for discovery and production of the letter of instruction to the auctioneer who sold the **Machakos/ Kiandani/1757** in May 2005, a copy of the public auction newspaper advertisement and a copy of the auctioneer's notification of sale and a copy of the financial statement of the sale was in bad faith and was meant to delay the hearing of this suit. That the request was time barred as the sale was made in May 2005.

10. That the applicant had 5 accounts with the respondent and not six as alleged. That the respondent had supplied the applicant with monthly statements of the five accounts and it was therefore false to claim that they were opened without his consent. That the monthly statements for the five accounts were in the bundle of documents filed on 21/11/2012 and served on the applicant's former advocate. That the applicant has never raised any issue before March, 2020 yet the accounts were opened between January 1998 and July 2003. The applicant is therefore guilty of laches and is not entitled to the orders sought.

11. That some of the documents requested relate to transactions that took place a long time ago. Owing to the change of system employed by the respondent from time to time, it may be difficult for the respondent to locate them and the applicant should not be allowed to take advantage of the lapsed time. That the application had no merit.

12. In answer to the replying affidavit, the applicant filed a lengthy supplementary affidavit sworn on 8/7/2020. He averred that he had requested from the respondent six documents in 2012 through his former advocate F.N. Wamalwa Advocates vide letter ref no. W/C/55/2003 which was served upon the respondent's advocate on 17/12/2012. However, the respondent failed to respond to the same but only filed two documents in court two years later on 16/9/2014. That it left out four crucial documents which have not been produced for the last 8 years.

13. That it is the respondent's failure to provide him with all the documents that had prompted him to bring the current application. This is after advocates for both parties agreed by consent to fix the matter before the deputy registrar for pre-trial conference on 5th and 26th March 2020, respectively.

14. He averred that the November, 1998 statutory notice had alleged that he had secured an advance for a company known as "**Nairobi Petroleum Products Limited**" which he knew nothing about. He had protested vide a letter ref no. KAL/SMN/BANK MATTERS/98/99 on 24/11/1998.

15. He denied that the suit had ever been listed for hearing. He further denied that his request was meant to embarrass the respondent as alleged. He gave reasons why each of the document he had requested was crucial in this suit. That the sale agreement for **parcel no. Machakos/Kiandani/1757** has never been produced despite being requested for.

16. The applicant insisted that the six bank accounts were falsely created by the respondent in 2001 in the name of **Samuel Musau Ndunda** while his genuine accounts were originally in the name of **Sammy Musau Ndunda**. That the respondent had refused to supply him with his bank statements despite writing two demand letters on 28/4/1997 and 7/11/1997, respectively. He denied being guilty of laches as he had filed the application immediately the case came up for pretrial conference.

17. The parties filed their respective submissions which the Court has considered. It was submitted for the applicant that he needed the information sought so as to protect his right to a fair trial as provided under **Article 50** and right to property under **Article 40 of the Constitution**. That the contradictions in the correspondence sought will assist the Court to determine the genuineness of the respondent's claim.

18. That the applicant had not delayed in bringing the application as the suit has never been listed for case management until January, 2020. That in accordance with **Rule 15 (a) of the Commercial and Tax Division** all applications should as far as possible be raised and dealt with at the case management conference.

19. That Section 22 of the Civil Procedure Act donates to courts power to grant orders for discovery of certain information at any stage of the trial process. The cases of **Oracle Productions Ltd vs Decapture Ltd & 3 others HCC No. 567 of 2011** and **ABN Amro Bank N. vs. Kenya Pipeline Company Limited (2014) Eklr**, were cited in support of the submissions.

20. It was submitted for the respondent that, the right to information and property is not an absolute right and there is a guide and limitation to the granting of the same. That an order of production of documents to prove payment of monies or default of payment of monies does not fall within the realm of **Article 35 (1) (b) of the Constitution**. That this was a commercial suit and the applicant was attempting to escape his obligation under the loan agreement.

21. That the application was made in bad faith. The applicant had failed to prove how his fundamental freedoms would be infringed by failure to access the information sought. That the applicant was guilty of laches and should not be allowed to take advantage of the lapse of time by seeking documents which may not be readily available. There was no explanation for the inordinate delay of 17 years.

22. It was further submitted that the letter dated 15/10/2019 from the respondent to Cash Crop Auctioneers was a communication between the bank and the auctioneer and had nothing to do with the applicant. The case of **Gitimu James Gathu & 2 others vs Business Partners International Kenya Limited (2015) Eklr**, was relied in support of that submission. It was urged that the application be dismissed.

23. This is an application for discovery and production of documents. The issue for determination is whether the respondent ought to be compelled to produce the documents sought. It is not for this Court to pronounce itself on the dispute between the parties in relation to the documents sought. That will be determined at the trial of the suit.

24. In **Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd [2016] Eklr**, the court held: -

“There is consequently a general caution on making findings that would embarrass the trial court. The veracity of the plaintiff’s claims and the rebuttals by the defendants will be tested by evidence which in my mind is the true province of the trial court. As a result, the relevance and admissibility of the documents, will depend on the rules of evidence and the pleadings by the parties. The issue for determination in the instant application is whether the Plaintiff’s should be compelled to deliver the impugned materials to the Defendant as prayed”.

25. In **Halsbury’s Laws of England, Volume 13 at para 38**, the authors observe that a court will not make any orders for documents which have no significance or relevance to the matter. They state: -

“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed”.

26. My understanding is that the purpose of discovery is to make level the litigation field. It enables expedited trial as the parties are enabled to gauge the case they will be facing at the trial. It also reduces costs. In general, it is a tool meant to smoothen the litigation path for both the parties and the Court at the trial. Where there is full discovery, there is a likelihood of fair trial. It is for that reason that when a court is called upon to order discovery, it will carefully examine the respective claims of the parties to gauge whether the documents sought are relevant to the dispute.

27. In **Crown Paints (Kenya) Limited v Dry Associates Limited [2015] Eklr**, it was held that: -

“... the Defendant has to show in its application as to the relevance of the particulars it seeks, or the application will stand to be dismissed. Relevance must be tested by the pleadings and particulars. In my opinion, the Defendant has been able to show that the documents it seeks are relevant. Indeed, there is a nexus shown by the Defendant as to the documents it seeks in its application in relation to its pleadings. The pleadings details that the defendant has sought a joint reconciliation of the amounts owed to the investors in vain. That further the Plaintiff has numerous documents that are not in the Defendant’s possession. The same will aid in its case, which is whether it indeed owes the Plaintiff the balance of the investor funds”.

28. In the present case, I have examined the plaint and defence. I have also examined the opposing affidavits and the annexures. It is not in dispute that the parties had a bank-client relationship. It is also not in dispute that the applicant took out a loan facility with the respondent. It is also not in dispute that the facility was secured by the applicant’s property known as **Machakos/Kiandani/2699**. The loan facility was guaranteed by **Joseph Mutiso Kioko**, now deceased.

29. It is the respondent’s case that it filed this suit after severally attempting to sell the charged property, in exercise of its statutory power of sale. It is not in dispute that the respondent sold the guarantor’s property. However, there is dispute as to the amount recovered. While the respondent contends that it realized Kshs. 205,000/=, the applicant disputes that as well as the legitimacy of the sale.

30. The applicant contends that the statutory notice of 1/11/1998 was in respect of another company which is not known to him. The applicant has pointed out the variations in the amounts variously demanded by the respondent in the letters sought to be produced as juxtaposed to the claim in the plaint. It is clear to me that, since the respondent’s claim is on an alleged loan outstanding, the documents sought are relevant to the claim. The claim is vehemently disputed. The documents sought may or may not destroy the applicant’s defence or the claim.

31. As regards the delay in bringing the application, there is evidence that some of the documents were requested for as early as 2012. The respondent decided to supply only two of them two years later. Further, I find that the application has been made at the time the case was listed for case management and in accordance with the rules.

32. The respondent claimed that due to the passage of time, it cannot find some of the documents. That will be regrettable. The dispute before Court is about the lending made to the applicant. My understanding is that the Central Bank Regulations require that banks only destroy documents relating to a particular transaction seven years after the transaction is concluded. The lending to the applicant has never been concluded. That is why the suit is still alive. If for any reason, the respondent destroyed any of the documents relating to the transaction, that would be at its own peril.

33. Having examined the pleadings and the accusations and counter accusations in the affidavits in this case, I am of the view that the applicant requires full discovery of the disputed documents for him to get a fair trial. The applicant has a right to information pertaining to all documents that relate to the loan facility he took out with the respondent. These include details of any sale made in relation to the loan and outstanding balance. The applicant deserves an opportunity to ascertain the extent to which he defaulted, if at all, and the legitimate amount owing. I find that the documents requested for by the applicant have a direct nexus to the applicant’s pleadings and are hence relevant.

34. The upshot is that the applicant’s application is merited. I allow the same as prayed. The applicant will also have the costs of the

application.

It is so ordered.

DATED and **DELIVERED** at Nairobi this **10th** day of **June, 2021**.

A. MABEYA, FCIArb

JUDGE