



**Advocates v Advocates (Miscellaneous Civil Application E386 of 2020)
[2021] KEHC 359 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E386 OF 2020
A MSHILA, J
DECEMBER 10, 2021**

BETWEEN

WESTLEY M.R.GICHABA T/A GICHABA & CO. ADVOCATES APPLICANT

AND

**CHRISTINE GITHII T/A KIARIE KARIUKI GITHII
ADVOCATES RESPONDENT**

RULING

1. The application is brought under the provisions of Article 35(1) (h) of the [Constitution of Kenya, 2010](#), the [Access to Information Act](#), No. 31 of 2016, Sections 69 and 140 (2) of the [Evidence Act](#), Cap 80 and Section 22 of the [Civil Procedure Act](#) and Order 14 Rules 6 & 7, 20 of the [Civil Procedure Rules, 2010](#) dated 2nd March 2021; the application is premised on the grounds on the face of the application and on the Affidavit of the applicant sworn on an even date; the applicant seeks the following orders;

- a. Spent
- b. That the Court be pleased to order the respondent Christine Githii T/a Kiarie Kariuki & Githii Advocates to produce and file to this Court on oath and serve the Applicant with the statements of account for the months January 2020, February 2020, August 2020, September 2020 and October 2020 relating to and in respect of the following account details:-

Account Name: Kiarie Kariuki & Githii Advocates

Bank And Branch: Absa Bank (formerly Barclays) Market Branch-03

Account Number: 094xxxxxxx

Swift Code: Barckenx



within 7 days of service or issuance of this order.

In the Alternative

- c. That the Honourable Court be pleased to issue an order directing the Manager, Absa Bank, Market Branch-03 to produce and file in Court on oath and serve the applicant with bank statements for the months of January 2020, February 2020, August 2020, September 2020 and October 2020 in respect of the following account details:

Account Name: Kiarie Kariuki & Githii Advocates

Bank And Branch: Absa Bank (formerly Barclays) Market Branch-03

Account Number: 094xxxxxxx

Swift Code: Barckenx

- d. That in default of compliance of the order (b) above, the suit to stand dismissed with costs.
 - e. That the applicant/ respondent to meet costs of this motion.
2. The parties were directed to canvas the application by filing and exchanging written submissions; hereunder are the rival submissions filed by the parties dated 28th September, 2021 and 1st October, 2021 respectively;

Applicant's Submissions

3. The applicant deposed that the respondent was duly served with a Notice to Produce dated 25th November 2020 relating to the above specified account statements. However, the applicant lodged a Notice to Objection to produce dated 10th December 2020. The Applicant claims that the statements sought are crucial and core to the fair and conclusive determination of this suit. The applicant avers that money was paid directly into the respondent's account by him and his client but that the respondent only acknowledged payment of Kshs. 9,300,000/- in her affidavit in support of the suit. It is also deposed that the respondent was fully paid by the applicant and his Client hence there is no account to be settled on the basis of the subject undertaking and that the statements will confirm that fact. The applicant also avers that the specified account statements are for the months payment was made to the respondent's account and that once the statements are produced, there will not be any issue left for determination by the court.
4. The applicant further states that there is no confidentiality or privileges accorded to the statements sought to be utilized in this matter only but to lay open the truth. He also averred that the respondent acknowledges that money was to be paid into the account and that the respondent fully pleaded the account details in the suit and cannot now seek refuge in confidentiality of privilege. Additionally, the applicant contends that the respondent will not suffer any prejudice if the statements are produced for the court to determine this matter in its entirety and to the contrary the applicant will be highly prejudiced if the same is not produced as it is crucial to the matter at hand.
5. The Applicant relied on the case of; *Abdigan Omari Mohamed & 2 Others vs GAM 2020 eKLR*, where the court discussed the importance and functions of discovery. It was the applicant's submission that the court has general power to order discovery, like in the instant action which begun by originating summons. For this proposition, the applicant cited Order 14 of the Civil Procedure Rules and Section



22 of the Civil Procedure Act. The applicant also submitted that Section 69 as read with 140 of the Evidence Act also gives the court wide jurisdiction to give the orders sought.

6. In addition, the applicant cited Article 35 of the Constitution which provides for access to information held by the state or an individual.

Respondents Submissions

7. In opposition, the respondent filed a Replying Affidavit sworn on 16th March 2021 by Christine Gathii. The respondent deposed that the issue in the matter concerns the unfulfilled professional undertaking issued by the applicant for payment of the sum of Kshs. 12,000,000/- of which only Kshs. 9,300,000/- was paid. The respondent further claimed that it was upon the applicant to prove that the funds were transferred into its account and that this application only seeks to divert the attention from the facts of the case and does not speak to the issues of this suit.
8. On its part, the respondent submitted that the burden of proof lies with the person who alleges or who would fail if no evidence at all were given on either side. For this, the respondent cited sections 107 and 108 of the Evidence Act. It was submitted that in this matter the burden of proof lies with the applicant as he alleges that full payment was made by him directly to the respondent's client account. The respondent contended that the applicant ought to have produced either transfer or swift deposit slips together with his bank statements as proof that the sum of Kshs.12,000,000/- was paid to the respondent.
9. Furthermore, the respondent cited the case of; Abraham Kibet Chepkong'a T/A A. K. Chepkong'a & Company Advocates vs Paul Gicheru T/A Gicheru & Company Advocates [2017] eKLR for the proposition that a person who issues a professional undertaking must be the person held accountable for the professional undertaking. The respondent also contended that the instant application has no legal basis in that the respondent cannot prove a negative. The respondent's position is that if the applicant claims that the entire sum was paid then the dispute can easily be resolved through the production of proof of payment.
10. Finally, the respondent urged that the information contained in a client account is confidential and that the courts have always held that an advocate is neither permitted nor obligated to disclose or misuse privileged and/ or confidential information. In this respect, the respondent relied on the case of; Law Society of Kenya vs Martin Day & 3 others [2015] eKLR where it was found that the only exception to the rule is communication made in furtherance of an illegal purpose or any fact observed by an Advocate in the course of his employment showing that a crime or fraud has been committed. For these reasons, the respondent urged the Court to dismiss the instant application and give a hearing date for the main claim.

Issues For Determination

11. Upon reading the respective written submissions this court has framed only one issue for determination;
 - i. Whether the respondent ought to be compelled to produce the specified account statements sought by the applicant.

Analysis



12. The principles for consideration in an application such as this one are clearly depicted in *Halsbury's Laws of England, Volume 13 at para 38* where it was stated that:-

“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”.

13. As can be gleaned from the pleadings, the applicant acted for the purchaser John Riek Yior while the respondent acted for the vendor, Benter Miyomo Okonjo in an agreement for the sale of Plot No. 70 on LR 7969 (Safari Park) dated 20th January 2020. In the matter, instituted by way of an Originating Summons dated 25th September 2020 under Order 52 Rule 7 of the Civil Procedure Rules, the respondent seeks to enforce payment of Kshs. 2,700,000/- by the applicant who issued a professional undertaking to pay the sum Kshs. 12,000,000/-. It is not disputed that on 31st August 2020, the applicant paid the sum of Kshs. 9,300,000/- to the Respondent. However, while the respondent claims that that payment of the Kshs. 2,700,000/- is pending, the applicant claims that the money was fully paid directly into the respondent's account by itself and its client but that the respondent only acknowledged payment of Kshs. 9,300,000/-.

Whether the specified account statements are relevant and admissible

14. In an application such as this, the main principle for consideration is the relevance and admissibility of the documents sought. The East African Court of Appeal in; *Dresdner Bank Ag vs Sango Bay Estates Ltd (No. 4) 1 EA 409 (CAK)* held that an order for discovery ought to be confined to the issue before the court. In *Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd [2016] eKLR*, the Court also found that in determining an application for discovery, the Court has to consider the facts of the case at hand and direct its mind to the relevance and necessity of the documents by looking at the pleadings and the particulars. However, the Court also observed as follows;

“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.”

15. The confidential nature of a document is something that the court will also weigh when considering an application for discovery or inspection. In this instance, the applicant seeks the respondent's Client Account Statements for the months of January 2020, February 2020, August 2020, September 2020 and October 2020. The respondent objected on grounds of confidentiality. Hence, it is up to this Court to decide whether inspection is necessary for the fair disposal of the action.
16. The case of; *Cooperative Bank of Kenya Limited v Samuel Musau Ndunda [2021] eKLR*, cited by the applicant is distinguishable from the instant matter. In the case, the Court applied the above principles and arrived at the conclusion that the documents sought were relevant and of necessity for the fair determination of the matter relating to a loan account as the parties had a bank-client relationship.



17. From the circumstances of the case this court finds that the disclosure of the specified account statement though relevant is not necessary due to the fact that the applicant made the payment and therefore has alternative means of access through other documentation such as the banking slips or banker's cheque or the RTGS slips or bank instructions to prove payment in support of the sum of Kshs. 2,700,000/-.
18. This court is satisfied that there are no compelling reasons advanced by the applicant to warrant the orders directing the Respondent to produce the specified account statements sought by the applicant.

Findings And Determination

19. For the foregoing reasons, the court makes the following finding and determination;
 - i. This court finds no good reasons to compel the respondent to produce the specified account statements sought by the applicant;
 - ii. This court finds that the application lacks merit and it is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF DECEMBER, 2021.

HON.A.MSHILA

JUDGE

In the presence of;

Mbwo Mutuku holding brief for Omanga for the defendant/Applicant

Christine Githi present in person- plaintiff/Respondent

Lucy-----Court Assistant

