



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO.77 OF 2016

JAMES TITUS KISIA.....PLAINTIFF

-VERSUS-

QUARANTY TRUST BANK (BANK) LIMITED....DEFENDANT

RULING

INTRODUCTION

1. This is an application by way of Notice of Motion dated 26th November, 2019 under certificate of urgency seeking Orders from this court to:-

(a) Spent

(b) That the Honourable Court be and is hereby pleased to review, uplift and/or set aside the order of this Court made on 29/10/2019 expunging the Defendant's Notice of Motion Application dated 28/10/2019 from the Court record.

(c) That upon the grant of prayer (2) above, the Honourable Court be and is hereby pleased to make an order reinstating the Defendant's Notice of Motion Application dated 28/10/2019 for purpose of having it heard and determined on merit.

(d) That in the alternative to prayer (1) and (2) above, the Honourable Court be and is hereby pleased to grant an enlargement of time and extend the leave granted by the Honourable Court on 16/7/2019 to the Defendant file an application seeking to file and rely during trial of this suit a further supplementary list of documents incorporating the complete statement of account on the Plaintiff's current account and past due statement of account and other related correspondence.

(e) That upon grant of prayer (4) above, the Honourable court be and is hereby pleased to deem the application dated 28/10/2019 as having been filed and served on time.

(f) That the cost of this application be provided for

2. The application is premised on the grounds on its face and the supporting affidavit sworn on 26/11/2019 by Joseph Machuhi; the Defendant's Risk Management Manager. It is deponed therein that the Plaintiff maintained with the Defendant, a current account through which term loan facility, to finance for the construction of a building was disbursed. Repayments for the loan ought to have been debited from the said account when they fell due so far as the account was funded. The Defendant bank changed its core banking system migrating from EQUINOX hitherto in use to BASIS core banking system during the period between April, 2014 and July, 2014. It is averred that during the migration period the Plaintiff's current account was on account of a system error credit from inception to reflect an opening balance of Kshs.43,678,792.28 when the opening deposit made was Kshs.10,000,000/= only.

3. It is deponed that the said system error on the Plaintiff's current account and its origin was only discovered during a recent internal audit of the Plaintiff's loan account. That the Defendant bank is now in possession of the complete statement of account in respect of the Plaintiff's current account which goes back to the inception of the account. It is on this account that the Defendant Bank seeks to file the supplementary list of documents since this evidence will aid in explaining the said system's error.

4. The deponent further states the defendant had filed an application dated 28/10/2019 which sought to introduce the new evidence but the same was dismissed on 29/10/2019 on account that the application had been filed without the leave of the court. However according to the Defendant leave had been sought way back on 16/7/2019 wherein Defendant had been directed to file the application within 7days but was unable to do so. The Defendant avers that no prejudice will be occasioned to the Plaintiff and it is only just and fair that the application be allowed for the Defendant to defend its case.

5. The Plaintiff/Respondent is opposed to the Application. On that basis, filed a replying affidavit sworn by himself on 11/12/2019 and a further replying affidavit sworn by Silvanus Musyoki Muli on 11/12/2018 and filed in court on the even date. The Plaintiff/Respondent also filed grounds of opposition dated 11/12/2019 in further opposition of the Application. The Plaintiff/Respondent's case is that the Application is defective for failure to annex the decree or order which the court is being requested to review. It is averred that the application does not meet the threshold prescribed in Order 45 of the Civil Procedure Rules, which compels review only grounds of discovery of new and important matter or evidence which was not within the Applicant's knowledge or could not be produced by the Applicant at the time when the order was made or for any other sufficient reasons.

6. It is the Plaintiff's case that the document which the Applicant seeks to introduce has been within the Applicant's knowledge since 2014 when the alleged system error occurred between April 2014 and July 2014. According to the Plaintiff, the system error was therefore not discovered recently during an internal audit of the Plaintiff's account as alleged by the Defendant/Applicant. The Plaintiff further states that this court has the duty to uphold the overriding objective principle enshrined in Section 1A of the Civil Procedure Act which is to achieve fair, just, expeditious, time and cost saving disposal of cases. It is the Plaintiff's assertions that; the Defendant/Applicant in seeking to introduce supplementary documents long after the Plaintiff has closed his case would not be doing justice to the Plaintiff.

7. The Plaintiff further asserts that the application offends the mandatory provisions of Order 7 rule 5(d) of the Civil Procedure Rules which requires that of the Civil Procedure Rules the documents to be relied on in a trial accompany the defence; Order 11 of the Civil Procedure Rules on pretrial directions, Order 15 on framing of issues and Order 16 on hearing and examination of witnesses. If the application is allowed, then the Plaintiff fears that the court might determine the case on unchallenged evidence given that he has closed his case.

8. The foregoing notwithstanding, the Plaintiff avers that the Defendant on 16/7/2019 had been granted leave to file the Application seeking to introduce the said documents within 7 days. The application was not filed until 28/10/2019. According to the Plaintiff, the delay has not been explained. He therefore considers the present application as an afterthought and seeks the court to dismiss the same.

9. On 4/12/2019 the court directed the application to be disposed of by way of written submissions and both parties have complied. The Defendant/Applicant filed its submissions on 13/12/2019, whilst the Plaintiff/Respondent filed his on 11/12/2019.

10. It is the Defendant/Applicant's submission that this court has jurisdiction to enlarge time for filing the application by virtue of Order 50 Rule 6 of the Civil Procedure Rules. It is submitted that the discretion must be exercised judiciously and reliance is placed on the case of **Anthony Konde Fondo & Another –vs- Roselyne Mwanatumu Chimega [2019] eKLR**, wherein the court cited with approval the case of Nicholas **Kiptoo Arap Korir Salat-vs- IEBC & 7 Others [2014] eKLR**, in which case the Supreme Court delineated the underlying principles that a Court should consider in exercise of its discretion in extension of time.

11. The Defendant/Applicant submits that the reason for delay in filing the Application as directed by the orders delivered on 16/7/2019 was because there was active engagement between the parties aimed at an attempt to have the matters in dispute resolved amicably and out of court. Now that those efforts have not yielded any fruits, the Defendant/Applicant seeks the court consider the Constitutional imperative under Article 159 of the Kenyan Constitution, 2010, which encourages alternative dispute resolution and allow the application. To buttress this line of argument the Applicant relies on precepts in the case of **Kenya Commercial Bank Limited-vs-Ann Kajuju Charles [2012] eKLR**.

12. It is the Applicant's case that the Plaintiff will not suffer any prejudice which cannot be compensated by an order for costs. If the application is not allowed the Defendant/Applicant submits that it will suffer the consequences of placing faith in alternative dispute Resolution Avenue recognized by the Constitution. It is further submitted that the court should grant the Applicant an opportunity to be heard and determine the dispute herein on its merits without undue regard to technicalities as was held in the case of **Anthony Konde Fondo & Another –vs- Roselyne Mwanatumu Chimega [2019]eKLR**.

13. The Plaintiff/Respondent in his submission reiterates the grounds in his replying affidavits and the grounds of opposition. However, the Applicant points out two pertinent issues for determination. That is,

a) *Whether the Defendant's application meets the legal threshold for review of the Court Orders made on 29th October 2019.*

b) *Whether the Defendant is entitled to enlargement of time from the initial seven (7) days granted on 16th July, 2019.*

14. On the first issue, it is submitted that the defendant did not tender documentary evidence to authenticate the change in its banking system hence the same remain mere allegations before this court. According to the Plaintiff the system shifting was between April, 2014 and July, 2014. It was then when the alleged error on Plaintiff's accounts occurred. The Plaintiff therefore submits that the information is not recent as alleged. The Plaintiff further submits that if the orders sought are granted then the effect will be that the case will be re-heard. According to the Plaintiff he will be prejudiced because he has already closed his case and two witnesses testified. To buttress his argument he relies on the case of **Evan Bwire –vs-Andrew Aginda Civil Appeal No. 147 of 2006** and in **Suleiman Murunga –vs- Nilestar Holdings Ltd & Another [2016]eKLR**.

15. On whether the Defendant is entitled to enlargement of time; the Plaintiff submits that there were no ongoing negotiations as alleged Defendant/Applicant and therefore the reason advanced for the delay is untrue. It is further submitted that the Defendant/Applicant's claim is that there was a system error which occurred during the transition to the new banking system in 2014. It is therefore submitted that the evidence sought to be introduced is not new hence the application is incompetent.

Analysis and Determination

16. I have considered the application dated 26th November, 2019 with regard to the prayers sought, the replying affidavit by the Respondent/Plaintiff, arguments' in submissions by either party cited law and authorities. I find the issues for consideration being whether

the defendant should at this stage of the trial be allowed to file a supplementary list of documents and whether the Court should review its orders issued on 29/10/2019 in favour of the Defendant.

17. It will be noted that prior to the filing of the application seeking to introduce supplementary list documents, the plaintiff had already presented his witnesses and closed his case. Under Order 3 Rule 2 of the Civil Procedure Rules, when filing suit, one needs to also file a Verifying Affidavit, list of witnesses, statements of witnesses (excluding expert witnesses), and copies of documents to be relied upon at the trial. There is a proviso that the written statements may with the leave of the court be availed at least 15 days prior to the Trial Conference envisaged under Order 11 of the Civil Procedure Rules.

18. The same applies to a defendant when filing its defence and counterclaim (if any). The relevant provision is Order 7 Rule 5 of the Civil Procedure Rules. I think that it is best that I set this provision out in full, for it is the provision that ought to apply to the application herein. The same is drawn as follows:- under Order 7 Rule 5 of the Civil Procedure Rules Documents to accompany defence or counterclaim: The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

19. It will be seen from the above provision that both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7 of the Civil Procedure Rules. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.

20. There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided for under Order 3 Rule 7 and Order 7 Rule 5 of the Civil Procedure Rules. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the Constitution under Article 50 (1) provides that every party deserves fair trial, but it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.

21. The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of **Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR**, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

22. This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided for under the rules. The court as a shrine of justice has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full.

23. However the court may consider various factors including, but not restricted to; the earlier availability of the witnesses, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided for by the rules.

24. It is on this basis that this court had earlier granted 7 days leave for the Defendant to file an application seeking to introduce a supplementary list of document. The Defendant failed to oblige with the timelines and the consequence was that the application was expunged from the court record. The reason for the delay as advanced by the Defendant is that there were ongoing negotiations which later yielded no results. However, the allegation is in toto denied by the Plaintiff and the defendant has not offered evidence to confirm the same.

25. The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the application by the defendant to adduce the additional documents to reinstate the application dated 28/10/2019.

26. When the Plaintiff and his witnesses testified and tendered their respective evidence, they had in mind that all that the defendant would be relying on was the documents already on record. The documents sought to be introduced was not in their contemplation. They were never cross-examined on it.

27. I have to concur with the submissions of Mr. Matemu, the Plaintiff's counsel, that the plaintiff will be greatly prejudiced if this court is to allow this application by the Defendant. The Plaintiff has already closed his case

and will not have an opportunity to rebut the new evidence. It will be unfair to the Plaintiff, if this court allows the Defendant Bank, at this late stage of the proceedings, to fundamentally alter the character of its case, to one that the Plaintiff never contemplated when tabling his evidence. In essence, the trial will end up being unfair to the Plaintiff and will violate the provisions of Article 50(1) of the Constitution.

28. For the above reasons, I am inclined to disallow the application by the defendant to seeking review to reinstate the application dated 28/10/2019 which sought to introduce the supplementary list document. The defendant Bank will proceed on the basis of the evidence it had proposed to tender when it filed its defence. Leave to appeal is granted.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA this 21st day of January, 2020.

D. O. CHEPKWONY

JUDGE