



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 175 OF 2006

CONCORD INSURANCE COMPANY LIMITED

(UNDER STATUTORY MANAGEMENT).....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT

RULING

1. The Notice of Motion dated 24th January 2019 invites this Court to discuss the possible consequences of a party failing to respond to a Notice to Produce under Section 69 of the Evidence Act and an order for discovery under Section 22 of the Civil Procedure Act. The Motion proposes that one such consequence is the striking out of the Defence.

2. The Motion seeks the following orders:-

1. That the Honourable Court be pleased to strike out the Defence filed in the instant suit.

2. That consequent to (1) above this Honourable Court be pleased to enter summary judgment against the Defendant for the liquidated amount as prayed in the Plaint.

3. That the costs of this application be borne by the Respondent.

3. Concord Insurance Company Limited (Under Statutory Management) (Concord) sues NIC Bank Limited (NIC Bank) for a sum of Kshs.79,358,624.09 with interest thereon and costs. Emerging from the Plaint dated 22nd March 2011 and filed on 11th May 2011 and as characterized by Concord in its Motion, the underlying dispute is on irregular honouring of cheques not signed in accordance with the signing mandates. These involve various cheques drawn on its current Account No. [...] with the Bank made out in the period between January 2007 and 30th June 2009. That stretch of time, as will be apparent shortly, is critical.

4. The Defence of N.I.C is that the cheques were honoured within the mandate, authority and request issued or made by Concord. In particular, the Bank avers that the Concord advised the Bank that it had appointed 5 persons from its board and management to sign its cheques. That the agreed mandate for the 5 persons was that any two of them were to sign the cheques jointly. It is the defence of N.I.C that this mandate remained until 16th August 2008 when the Bank received a board resolution from Concord dated 2nd March 2005 advising the Bank of new signatory mandates.

5. It is also contended by the Bank that in spite of the new mandates, the Executive Director and Senior Accountant of Concord continued to draw cheques using the old mandates of 2002 which the Bank accepted after consultation with the Concord's management.

6. Against this defence, the lawyers for Concord in that matter served the law firm for the Bank with the following Notice to produce:-

NOTICE TO PRODUCE

(Under Section 69 of the Evidence Act, and Section 22 of the Civil Procedure Act)

To NIC Bank

P.O. Box 44599-00100

NAIROBI

“TAKE NOTICE that the Plaintiff herein requires of you to produce at the hearing hereof the original copies of the following documents which are in your possession:

1. Original bank account opening documents with respect to the Plaintiff’s Bank Account Number [...] maintained with the Defendant.
2. Original account signing mandates with respect to the aforesaid bank account. “

Dated at Nairobi this 16th day of March 2018

RACHIER & AMOLLO LLP

ADVOCATE FOR THE PLAINTIFF

7. On 18th May 2018, the Court ordered the Defendant to answer to the Notice to produce within 14 days of service of the order. By the time the matter came up for case management conference on 22nd June 2018, the Defendant had not complied and was granted extension of time to comply. There were further extensions, the last was made on 23rd October 2018 for a further 14 days. Eventually there was no compliance hence the current application.

8. In the Motion before Court, Concord makes the point that in view of the Defence mounted, the documents are necessary and that the continued failure of the Defendant to make discovery should attract the sanction of this Court to strike out of the Defence. I am told that the Court has jurisdiction to make such order under the provisions of Order 11 rule 3 2(c) of the Civil Procedure Rules.

9. It is also argued, on behalf of Concord, that the intentional refusal, failure and neglect is a breach of the Plaintiff’s right to information as per Article 35 of the Constitution.

10. The Court is asked to make the draconian order of striking out and entering summary judgment for the liquidated sum sought.

11. In responding to the Motion the Bank filed a Replying Affidavit sworn by Stephen Atenya on 29th May 2019. The affidavit, it would seem, is an attempt to comply with the Notice. Annexed to his affidavit is a letter of 2nd March 2005 supposedly from Concord and said to have been received by the Bank on 16th August 2007. A second annexure are copies of account opening forms and mandates for Account Number 53899005. An account opened on 21st June 2002, prior to the current Account [...], by the Concord with the Bank.

12. Explanations are made on the basis of the two documents. First that the change of mandate was received on 10th August 2007 and not 16th August 2008 as stated in the Defence. The date in Defence is said to be erroneous and made in honest and excusable circumstances. The Bank then challenges the authenticity of a similar letter of even date said to have been received by the Bank on 10th March 2005 and found on Page 1 of the Plaintiff’s Bundle of documents. This is said to be a forgery as it does not bear the signature of the Bank official who received it, something that is said to be the norm at the Bank.

13. Second, it is averred as follows:-

[14] It is the standard banking practice of the Defendant Bank that where a customer has an existing account, the Bank will not call for or require additional account opening forms to open any other additional account in the name of the said customer. The Bank only requires instructions to open the additional account. The new account to be opened normally operates under the mandates of the existing accounts unless the contrary have been expressed to the Bank.

[15] In that regard, on 24th June 2002 when the Plaintiff indicated an intention to open its current account Number [...], the Defendant Bank used the account opening forms and signing mandates as provided by the Plaintiff while opening account No. [...]. *True copies of documents evidencing the foregoing are annexed herewith as Exhibits “SA 2”.*

14. As to the delay in compliance, the Defendant denies deliberately refusing to produce the documents and explains that the delay was occasioned by the age of the documents which had been archived and took some time to retrieve.

15. Against this backdrop, counsel for parties filed written submissions which are augmented by oral highlights. This Court has considered these and all material before it.

16. The Notice to produce dated 16th March 2018 and which is the bedrock of the current application was taken out on the premise of Section 69 of the Evidence Act and Section 22 of the Civil Procedure Act.

17. Let me start with Section 69 of the Evidence Act which reads;

[S.69]. Notice to produce a document

Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or

power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- (i) when the document to be proved is itself a notice;
- (ii) when from the nature of the case, the adverse party must know that he will be required to produce it;
- (iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (iv) when the adverse party or his agent has the original in court;
- (v) when the adverse party or his agent has admitted the loss of the document;
- (vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court;
- (vii) in any other case in which the court thinks fit to dispense with the requirement.

18. As would be explicit its intent and purpose is to enable a party in possession of secondary evidence to rely on it as an exception to the general rule of Section 67 of the Evidence Act that documents must be proved by primary evidence. The provision presupposes that the person issuing the notice is in possession of the secondary evidence and the recipient of the Notice is in possession or control of the primary evidence.

19. Failure to comply by the recipient does not attract any censure as suggested by counsel for Concord. It merely gives right to the maker of the Notice to produce the secondary evidence and precludes the recipient from objecting to such production. This Court is unable to accede to the striking out of the Defence for failure of the Defendant to comply with Notice to Produce issued pursuant to Section 69 of the Evidence Act Notice to Produce.

20. Section 22 of the Civil Procedure Act relates to ‘*inter alia*’ deliveries interrogatories, admission of documents and facts, discovering and production of documents and reads:-

[S.22]. Power to order discovery and the like.

Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.

21. One object of this Section is to avoid trial by ambush and to ensure that all material relevant to the just and fair determination of a dispute can be availed to all parties and the Court in good time. As stated by Gikonyo J in ABN Amro Bank N.V v Kenya Pipeline Company Limited [2014] eKLR (a case cited by counsel for Concord), the provisions serve a useful purpose. The Judge held;

“Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the Civil Procedure Act and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that “*the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial.*” It, therefore, serves a higher objective as the enabler of fair hearing.”

22. It is also true that failure to comply with an order for discovery or production under Section 22 can attract censure from the Court. A benign censure is one of payment of costs by a defaulting party (See Order II Rule 7 (3). A harsher and more extreme consequence would be an order for striking out of the pleading of the defaulting party. See for example in Eastern Radio Service – vs – Tiny Tots [1967] E. A. 392 Law.

23. Sir Charles Newhold, then President of the Court of Appeal for East Africa, states at page 395 of that decision as follows:-

“In law an act is done wilfully when it is done deliberately and intentionally, not by an accident or inadvertence, but so that the mind of the person who does the act goes with it. Consequently if the default is due to a reasonable mistake or in certain circumstances to his acting on the bona fide advice of his advocate the default cannot be said to be wilful”.

24. As observed earlier the Bank has through the replying affidavit now responded to the Notice to Produce. In the face of that reply, Concord still maintains that the Defendant has selectively concealed and deliberately failed and refused to produce and disclose documents for account No. [...] which is the subject of the Notice to Produce. A further, and perhaps alternative argument, Concord asserts that the documents produced do not help prop up the Defence filed.

25. Let me first proceed on the assumption that production of the two documents annexed to the replying affidavit of Stephen Atenya are indeed an answer to the Notice to Produce. On 23rd October 2018, the Court made the following order;

“The Defendant to file and serve a witness statement and to comply with orders of Court made on 18th May 2018 within 14 days. Mention on 25th January 2019 for CMC. Last opportunity to Defendant to comply”.

26. The Bank therefore had until on or about 5th November 2018 to comply. The purported compliance therefore came about 7 months later and only then when faced with the current striking out Motion. The Bank explains that the delay in complying was “occasioned by the fact that due to the age of the said documents (all produced in 2002), the same had been archived and it took some time to retrieve the same”. I note, from the Court record, that this was the same reason given by counsel Wafula when he appeared for the Bank on 25th January 2019 and so there is some consistency in the explanation.

27. But is that a good reason? It is submitted for Concord that nothing prevented the Bank from substantiating the difficulties it was facing in retrieving the documents and that Bank was a reputable Bank presumably with impeccable record-keeping. Further that the subject records are subject of active litigation since 2011.

28. It is of course true that this matter has been in Court since 2011 yet it is also true that the Notice to Produce was filed on 11th April 2018, about 7 years after the suit was presented. In a sense therefore the documents sought in 2018 related to documents dating back to 2002 and 2007 over 10 years back. The explanation that the documents could have been archived is therefore believable. In believing the Bank, I note that even before being faced with a striking out order, this was the reason given for the delay in complying and may therefore not have been an excuse made up merely to defeat the striking out Motion.

29. Is the response a sufficient answer to the Notice to Produce? The Bank states that these are the documents it has in its possession in answer to the Notice. Concord on the other hand makes the argument that the documents are for an account other than account No. [...] which is the subject of Notice to Produce.

30. I would think that the letter of 2nd March 2005 which reads to be of the “current account” is in respect to account No. [...]. Concord has produced the same or similar letter but with a different receipt stamp. As to the Account opening forms, this undoubtedly are in respect of a different account being Account No. [...]. However there is an explanation as to why they have been produced. And I reproduce the disposition of Mr. Atenya;-

“14. It is the standard banking practice of the Defendant bank that where a customer has an existing account, the Bank will not call for or require additional account opening forms to open any other additional account in the name of the said customer. The Bank only requires instructions to open the additional account. The new account to be opened normally operates under the mandates of the existing accounts unless the contrary have been expressed to the Bank.

15. In that regard, on 24th June 2002 when the Plaintiff indicated an intention to open its current account number [...], the Defendant Bank used the account opening forms and signing mandates as provided by the Plaintiff while opening account number [...].”

31. What the deponent is saying is that there are no account opening forms and signing mandates specifically for account No. [...] and the Bank adopted those of account Number [...]. This is the position taken by the Defendant in respect to responding to the Notice. Whether it props up its stated Defence is of course another matter. However, for purposes as to whether it is a response to the Notice to Produce, I hold in the affirmative.

32. In respect to the Notice under the provisions of Section 22 of the Civil Procedure Act, this Court accepts the late answer filed in response to the Notice and is reluctant to strike out the Defence on that account.

33. Let me turn to consider whether the Defence raises triable issues? In doing so the Court is alive to the proposition that the draconian order of striking out or entry of summary judgment should not be granted if the Defence raises triable issues, even if it be a single issue. As to what is a Defence which raises triable issues, it is one that shows there are issues which ought to go for trial but does not mean a Defence which must succeed (UAP Provincial Insurance Ltd vs Lenny Kivuti)[1997] eKLR.

34. On this the Court has no difficulty reaching a conclusion that the Defence raises triable issues. Let me point out just two;

i. What were the accounting mandates at the inception of Account No. [...] as neither parties has produced them.

ii. Were the instructions for change of mandate made in the letter of 2nd March 2005 received on 10th March 2005 or on 16th August 2007.

36. In addition, I would add that in the affidavit sworn in support of the application, Concord has not sought to specifically prove that the cheques paid out were done in disregard to the existing lawful mandates, whatever they may have been.

37. In the end, the Court is unable to allow the Notice of Motion dated 24th January 2019 and now dismisses it. However, because the application was partly triggered by the inaction of the Defendant, each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 17th Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Wafula for Defendant

Kabuyu for Ochieng for Plaintiff

Court Assistant: Nixon