REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 311 OF 2004

MAE PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH KIBE.....1ST DEFENDANT/RESPONDENT

PLANFARM INVESTMENTS LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 21st July 2015, brought under the provisions of Section 1A, 1B, 3A and 22 of the Civil Procedure Act (Cap 21) of the Laws of Kenya, Order 11 Rule 3(d) & (o), Rule 7 (2) & (3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It is premised on the grounds on the face of it and an affidavit dated 30th July 2015, sworn by Emma Wachira, the Company Secretary and Chief Legal Officer of the Applicant.

2. The Plaintiff (herein " the Applicant") is seeking for orders that the Honourable Court be pleased to strike out the Defence filed in the suit herein and the costs of the application and of the suit be awarded in its favour.

3. The background facts of the matter is that, the Applicant filed the suit herein, seeking for inter alia, an order that the Defendants (herein "the Respondents"), render accounts for the profit made arising out of the sale of certain plots, which belong to the Applicant. It is alleged that, the 1st Defendant who was a director of the Applicant, purchased the plots in his name and/or through the 2nd Respondent at prices below market value, and sold them to third parties. Upon filing of the suit, the Applicant sought from the Respondents the documents relating to the sale of the properties to third parties and solely within the Respondents' possession. The Respondents declined to honour the request, as a result, on 20th May 2014, the court ordered the Respondents, to complete discovery of documents within 21 days pending the hearing of this suit on 15th July 2014.

4. Subsequently, on 23rd May 2014, the Applicant's served the Respondents' Advocate with request pursuant to the order for discovery. There was no compliance still, as a result the Applicant, filed a notice of motion application dated 7th July 2014, seeking that the Respondents' statement of defence be struck out for failure to honour the orders of the Honourable court issued on 20th May 2015.

5. The subject application was heard inter parties and the court rendered its decision thereon on 18th May 2015, ordering the Respondents to provide succinct and specific details of those documents and the oral assignments in favour of the third parties and/or make the disclosure within fourteen (14) days of the orders.

However, the Respondents have allegedly failed and/or neglected to comply with the orders. Instead, they sought stay of execution pending appeal to the Court of Appeal, however, the appeal was eventually struck out on 19th October 2017, due to the Respondents' failure to file it on time.

6. The Applicant argues that the continued failure on the part of the Respondents to comply with the orders of the order of the court, is an abuse of the court process and demonstrates that the Respondents are in contempt and/or disregard of those. Therefore the statement of defence filed herein ought to be struck out with costs to the Applicant.

7. However, the Respondents filed grounds of opposition dated 9th March 2018 in opposition to the Application, and denied that they are abusing the process of the court as alleged. The Respondent stated that they have a constitutional right to have their defence in the matter heard through a full trial and adduce evidence thereof.

8. Further, there is no proof and/or evidence adduced that they have willfully failed to make discovery, neither is the failure to make

discovery intentional or contumacious, in that they have difficulty in obeying the discovery orders, which difficulties has already been relayed to the Honourable court and is part of the court record.

9. As such they have clearly demonstrated that there has never been any willful intention to ignore or flout the order of the court and/or the failure to obey the orders if at all, was due to extraneous circumstances. The failure therefore, ought to be treated not as contumacious and should not disentitle them to rights, they would otherwise have enjoyed, including the right to a fair hearing.

10. The Respondent argued that, final, pre-emptory or "unless" orders are only made by a court when the party in default has already failed to comply with a requirement of the rules or an order and the court is satisfied that, the time already allowed has been sufficient in the circumstances of the case and the failure of the party to comply with the order is inexcusable.

11. Further, it is trite that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence, unless his failure to comply was due to a willful disregard of the order of the court.

12. Finally the Respondents argued that the absence of the subject documents for which discovery has been ordered, will not in any way prejudice or hinder the full hearing of the suit for the reason that, the only claim the Applicant can claim from them, without prejudice is the difference between purchase price and the market value, details of which the Applicant has pleaded in paragraph 13 and 14 of its Plaint, and not the sale price between them and third parties.

13. The parties disposed of the Application by filing submissions. The Applicant relied on the case of; *Eastern Radio Service vs Tiny Tots (1967) E.A. 392*, where the Court of Appeal held that, failure to give discovery and inspection may result in the striking out of a suit.

14. It was submitted that, similarly where a party fails to comply with a court order, an 'unless' order may be issued as a last resort to secure compliance. Reference was made to the case of; *Kahumbu vs National Bank of Kenya (2003) 2 E.A. 475*, where the case of; *Hytec Ltd Coventry City Council (1977) 1 WLR 1666* was quoted and in particular, Ward, LJ who held that;

> *"An "unless" order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed."*

15. The Applicant also referred to, Paul Mathews' text on 'Discovery' (Sweet & Maxwell, 1992) (pages 240-241) where it is stated that:-

> *"Similarly where a defendant has failed to provide discovery, despite adjournments to enable him to do so, the court is justified in striking out the defence on the ground that the default is deliberate and continuing. In modern times, the party ordered to give discovery will be given every opportunity to comply with his discovery obligations, but if he fails to comply with an "unless" order, usually made only after serious failure to comply with earlier orders, striking out a party's case is automatic....."*

16. However, the Respondents' submitted that, "unless" orders are orders of last resort wherein failure to comply will result in automatic enforcement of a sanction stated. It has the implication that, a specific sanction has to be stated which will automatically be enforced, should there be failure to comply with the order issued, unless cogent reasons are given why the sanction ought not to be imposed and/or enforced. Thus an "unless" order has to specify a sanction to be imposed upon failure to comply with the order.

17. The Respondents relied on the case of; *Abalian vs Innousi (1936) 2 All ER 838* where the court stated:

> *".....any order dealing with the dismissal of an action unless something is done should be absolutely and perfectly precise in its terms. The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice."*

18. Further reference was laid on the case of; *Bhandari Construction Company vs Standard Joinery & Building Company (1983) eKLR*, where the Court of Appeal stated, the Learned judge erred, because he did not state in his order that, "unless the plaintiff carried it out, the action will be dismissed."

19. The Respondent therefore submitted that, the order of the Honourable court herein does not amount to an "unless" order as per the authorities cited, because it was not a final order requiring compliance, the failing which would automatically lead to the striking out of the defence.

20. The Respondent reiterated that there would be no miscarriage of justice if this court was to proceed with the hearing of the main suit, because the suit is capable of being determined in the absence of the documents for which discovery has been sought. That, without prejudice to the foregoing, should court finds the order herein to be an "unless" order, the Applicant will not in any way be prejudiced in its claim against the Respondents due the failure to make discovery of the documents.

21. That in determining whether there would a miscarriage of justice, the Honourable court has to determine the discovery sought vis a vis the relevance and according to Black's Law Dictionary, 7th Edition, discovery is defined as:

> *"the disclosure by the defendant of facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a party of a cause or action pending or to be brought in another court, or as evidence of his rights or title in such proceeding."*

22. The Respondents submitted that, the Applicant seeks for nine (9) prayers in the Plaint, among them prayer 4, for accounts of profit for two properties which are listed in paragraph 18(b) of the plaint At paragraph 18(a) of the plaint, the Applicant gives particulars of sale for three properties. It is however not stated as to how the Applicant came about the information. However, the Applicant is seeking to make discovery for all the five properties, despite having pleaded facts with regard to three properties.

23. Further, the Applicant at paragraphs 13 and 14 of the plaint, particularizes and seeks damages for the difference between the sale price to the Respondents and market value of the properties and the loss of use for the difference in the prices., and at paragraph 11 of the defence, the Respondent aver that, they did not have any duty to report to the Applicant further transactions in regard to the properties upon regularly and procedurally purchasing the same from the Applicant.

24. That at the hearing of the main suit, the Applicant will be able to show and prove or should be able to show and prove that the Respondent acted mala-fides in the purchase of the suit properties; that there was a variance between the Respondents' purchase price and the market value of the properties; and lastly that the Respondents breached their duties as directors of the Applicant. All these, issues can be determined by the court without the need for the documents for which discovery is sought.

25. The Respondent similarly argued that, as to the prayer4 and 5 for accounts, they have pleaded at paragraph 11 of the defence that, there was no obligation, factual or legal, that required they to disclose to the Applicant the sale price between them and third parties as the properties were regularly and procedurally purchased from the Applicant. That the resulting contracts between them and third parties were to the exclusion of the Applicant. Therefore, proper administration of justice can be met without the need to strike out the defence.

26. The Respondents submitted that, they acknowledge that, the court orders are to be obeyed without fail. However, the courts have held that where there is a failure to obey the orders, especially if the same is not a willful disobedience, then the court ought not to preclude a litigant from pursuing his claim, as held in the case of; *Eastern Radio Service vs Tiny Tots (1967) EA 392 (CA)*, that:

> *"The authorities show, and there is no dispute about it, that a court should not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the Plaintiff is avoiding a fair discovery or is guilty of willful default."*

27. Similarly in the case of; *Yatin Vinubhai Kotak vsTucha Adventures & Another (2000) eKLR*, it was held that;

> *"the court should not be astute to find excuses for such failure since obedience to peremptory orders of the court is the foundation of its authority, but, if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not to be treated as contumacious and ought not to disentitle him to rights which he would otherwise have enjoyed."*

28. The Respondent submitted that the striking out of their defence is a drastic action not commensurate with the offence, especially as they have explained that the failure to obey is not willful and that justice can still be achieved even in the absence of the documents for which discovery is sought. The case of; *Re Jokal Tea Holdings Ltd CA 1989 (1992) 1 WLR 1196*, where the court stated that:

> *"it appears to me that there must be degrees of appropriate consequences even where the conduct of someone who has failed to comply with a penal order can properly describe as contumacious or contumelious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for a contempt of court by breach of an undertaking or injunction.....In essence, the question in each case must be whether the punishment fits the crime."*

29. That in the instant matter, the Honourable court in its order was willing to issue further orders and did not restrict itself to the striking out of the defence. It is not absolutely necessary and appropriate to strike out the defence. The Respondent pleaded with the court to show leniency and exercise its discretion and refuse to strike out the defence.

30. I have considered the subject application herein and the argument and/or the submissions filed in support and/or opposition thereto I find that it is not in dispute that, the Applicant filed an application dated 7th July 2014, seeking to strike out the Respondents statement of defence due to failure to make discovery of documents requested for.

31. By a ruling delivered on 15th May 2015, the Respondents were ordered to comply accordingly within fourteen (14) days. It is not in dispute that, to date the Respondents have not complied with that order; for reasons advanced being in a nutshell are that, for non-compliance with the subject court order is that they not have in their possession the documents sought and therefore failure to make discovery is beyond their control.

32. Further the absence of the said documents will not prejudice the Applicant's case, and there will be no miscarriage of justice if the main suit proceeds to full hearing. In my considered opinion, the following issues arise for determination;

a) whether the reasons advanced by the Respondents are reasonable and adequate in the given circumstances;

b) whether the said reasons were advanced at the hearing of the application dated 7th July 2014 and whether, the court was dealt with the same;

c) whether, the court in the ruling given on 15th May 2015 gave an "unless orders" in clear and uncertain terms;

d) whether, the failure to produce the subject documents will prejudice the Applicant's case;

e) whether, the court should grant or decline to grant the orders sought; and

f) who should bear the costs of this application.

33. I shall deal with 1st and 2nd issues together and in that regard,, I am guided by the averments in the affidavits sworn in the support and opposition to the application dated 7th July 2014 and the resultant ruling of 15th May 2015. It is clear therefore that, the Applicant was seeking for similar prayers as herein, being basically that, "the court be pleased to strike out the defence filed in this suit and the Applicant be awarded costs for the application and of the main suit.

34. The arguments that were advanced by the Applicant in relation to the said application are well captured under paragraphs 3 to 8 of the ruling whereas; the arguments by the Respondents are captured under paragraphs 10 to 15 thereof. It is therefore evident that, at the hearing of the subject application, the parties advanced quite detailed submissions and relied on substantial and legal principals of law, which mirror the arguments herein.

35. Having considered the submissions by the respective parties, the court rendered its determination as detailed under paragraphs 16 to 18 of the ruling. In a nutshell, the court was of the opinion that the explanation offered by the Respondents that, the documents sought are "non-existent" was not convincing at all, as there was no sworn evidence to support the same and therefore, the Respondents were being "evasive" on the matter.

36. The court then dismissed the Respondents argument that, the burden of proof in civil litigation rests on the Plaintiff and held that:

> *"whereas the burden of proof rests with the person asserting, that does not affect the obligation of a party to make discovery of relevant documents and/or information in his custody, knowledge or possession for the purpose of exercising or asserting a right in a court of law."*

37. However, the court appreciated the fact that, the striking out of a pleading is a draconian measure that should be granted as last resort and in clear cases, and stated as follow:-

> *"I need not remind that, where there is a deliberate disobedience of courts orders, especially on orders for disclosure, striking out a pleading is an option under what is now commonly known as the "unless orders."*

38. The court went on to state further that:-

> *"I do not however, think the extreme measure of striking out the defence is appropriate <u>at the moment.</u> Instead, I shall give the Respondents an opportunity to produce the documents sought as well as provide specific details of those documents and the oral assignments they claimed they made to third parties. <u>This they should do within fourteen (14) days of today".(emphasis mine)</u>*

39. In conclusion the court stated that:-

> *"depending on the response from the Respondents, I <u>shall give further orders on the matter including the possibility of striking out of the defence,</u> if it becomes absolutely necessary and appropriate".*

40. The question that arises therefore is whether, the Respondents have complied with the said court order and more so within, the time frame of the fourteen (14) days given and/or whether, the time has come for the court to make further orders on the matter, including but not limited to the striking out of the defence as prayed for.

41. Before I address these issues, certain salient issues need to be appreciated. First and foremost, it suffices to note that, from the 15th May 2015, when the court rendered its decision on the notice of motion application dated 7th July 2014, the Respondents have not appealed against that decision and/or sought to have it set aside or varied. As such, the decision and the orders arising therefore remain valid. Secondly, it is a fact that, the previous application dealt at length and in depth with the same issues raised herein.

42. In that regard, this court cannot delve into the same issues again. The issue is thus Res judicata. The court will therefore restrict itself to the events after the ruling of 15th May 2015 and in particular whether there has been compliance with the same.

43. As already observed herein, there has been no compliance by the Respondents, with the order given on 15th May 2015 to produce the documents requested for within fourteen (14) days. It is also noteworthy, that prior to this order, the court had on 20th May 2014, ordered that the parties complete discovery of documents within twenty one (21) days ahead of the hearing of the suit on 15th July 2014. Subsequently, the Applicant made a request to the Respondents on 23rd May 2014 to make discovery of the documents listed in the order of discovery but the Respondents did comply. It is therefore clear that even if the Respondents are given more time they will not comply.

44. To revert back to the 2nd issue raised, the question that arises is, should the court strike out the defence at this stage. In answering this question I find that the Respondents are adamant that, they are not in a position and will not be in a position to produce the documents requested for, irrespective of whatever period of time the court will grant them. In a nutshell, the Respondents will not be able to obey the orders of court herein.

45. In my considered opinion, failure to obey a valid court order amounts to contempt of court to allow a litigant to continue flouting court orders and enjoy the audience of the court, amounts to nothing less than impunity and encourages anarchy in the justice system. That cannot be.

46. Having said that though, the question is, can the case be heard in the absence of the documents requested for, will the Applicants be prejudiced? In this regard, I note from the pleadings that, the Plaintiff seeks for prayers inter alia that:-

> *(a) an order that the Defendants do render a true and full account of all such monies received by each of them up to the date of judgment;*
>
> *(b) Kshs. 9,532,909;*
>
> *(c) an account of the profit made by the defendants arising from the sale of each of the following on-sold Runda plots set out in paragraph 18(b) Land Reference Numbers 7785/001 and 7785/1104 showing:*
>
> *(i) all sales by the Defendants to third parties of the Runda properties; and*
>
> *(ii) the proceeds of such sales*
>
> *(d) an order for payment by the defendants to the plaintiff of all sums found to be due from the 1st defendant and the purchase vehicle to the plaintiff upon the taking of the account under paragraph (4) above.*

16. The documents requested for, as per the order for discovery dated 21st May 2014 are:

> (a) *agreement for sale between the defendants and Charles B. Kerongo relating to the property LR 7785/803*
>
> *(b) agreement for sale between the defendants and Sunil Parmar relating to the property LR 7785/958;*
>
> *(c) agreement for sale between the defendants and Samuel Mwangi Wambu relating to the property LR 7785/1001;*
>
> *(d) agreement for sale between the defendants and Mr. and Mrs. Patrick K. Mugambi relating to the property LR 7785/1104*

17. It is therefore clear that, these documents are crucial for the fair hearing and determination of this matter and will enable the court to determine the matter in a fair and just manner, in the interest of justice. It will be a waste of otherwise scarce judicial time to embark on an exercise of hearing of this matter that will not serve any useful purpose. I am of the opinion that, time has come to "further" the orders given on 15th May 2015.

18. However, before I make the final orders, I note that, the Respondents argued that, the orders given on 15th May 2015, do not amount to "unless orders." That "unless orders" has to specify a sanction to be imposed upon failure to comply with the order. I wish to reiterate, at the risk of repeating what has already been stated that that court stated in the order given on 15th May 2015, that;

> *"depending on the response from the Respondents, I will give further orders on the matter <u>including a a possibility of striking out of the defence" (emphasis added)</u>*

47. It is therefore clear that, the striking out of the defence was contemplated by the court and brought to the knowledge of the respondent as an option if they did not comply as ordered. In the given circumstances, I find that, giving the Respondents more time to comply will not yield any different results than what has already "played" herein. It is noteworthy the suit herein was filed in the year 2004, about fourteen (14) years ago and has not proceeded to full hearing.

19. In that case, time is ripe to grant the orders sought for herein. I therefore allow the notice of motion application herein dated 21st July 2015 as prayed.

20. It is so ordered.

Dated, delivered and signed in an open court, this 4th day of April 2019.

G. L. NZIOKA

JUDGE

<u>In the presence of:</u>

Mr. Wakhoya for the Defendants/Applicants

Mr. Oyoo for Mr. Gachuhi for the Plaintiff/Respondent

Dennis……Court Assistant