



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 68 OF 2018

NYANZA MANAGEMENT LIMITED1ST PLAINTIFF

ROSE OLUGA.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

JAMES SWAO.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

HARJIT SINGH PANDHAL.....4TH DEFENDANT

R U L I N G

1. The 2nd defendant, JAMES SWAO, has asked the Court to order the plaintiffs to supply the particulars of five specific matters. The said five matters can be summarized as follows:
 - (a) The certificate of incorporation of Nyanza Management Limited;
 - (b) The date when the 2nd plaintiff, Rose Oluga, became a Director of the 1st plaintiff, NYANZA MANAGEMENT LIMITED;
 - (c) The date when the 2nd defendant purportedly signed the Charge instrument;
 - (d) The name and designation of the person who witnessed the 2nd defendant when the latter executed the Charge;
 - (e) The names of all the Directors of the 1st plaintiff at the material time.
2. Prior to making this application, the 2nd defendant had served the plaintiffs with a Request for Particulars.
3. According to the applicant, the pleadings filed by the plaintiffs will remain vague and imprecise until the plaintiffs provide the particulars sought.
4. In the circumstances, the applicant expressed the view that when the particulars were provided, they would enable the applicant to have a sufficiently clear appreciation of the case against him.
5. Furthermore, the applicant believes that the provision of the particulars sought, would serve the wider interests of justice.
6. In the Plaintiff it is averred that the 1st plaintiff is a limited liability company, duly incorporated in Kenya, and that the 2nd plaintiff is a director of that company.
7. The 2nd defendant denied the assertions, and put the plaintiffs to strict proof.
8. In my understanding, if indeed the 1st plaintiff was duly incorporated into a limited liability company, the simplest way of proving that fact was through making available its certificate of incorporation.

9. And if the 2nd plaintiff was a Director of the company, she should be able to provide proof of that fact.
10. I find absolutely nothing objectionable in the provision of materials which would enable the Court verify the plaintiffs' assertions.
11. And once the said materials are made available at this early stage, the trial of the suit would move much faster, as the 2nd defendant could no longer be disputing facts that had already been proved.
12. As regards the Charge instruments which were registered against the suit properties, the plaintiffs accused the 2nd defendant of executing the said charges without the authority of his co-directors in the 1st plaintiff.
13. However, the 2nd defendant has stated that the execution of the Charge instruments was expressly authorized by the 1st plaintiff's Board of Directors.
14. It is noted that the 2nd defendant did not specifically deny the averment that he personally signed the Charge instruments.
15. However, the 2nd defendant made a general statement, denying the contents of paragraph 7 of the plaint.
16. Considering that the 2nd defendant asserts that the Charge instruments were executed and registered in a lawful and proper manner, it would be expected that the said defendant would produce evidence to back up his said assertion.
17. But because the 2nd defendant has categorically denied the plaintiffs' contention, that the 2nd plaintiff was a director of Nyanza Management Limited, the onus will be upon the plaintiffs to prove that contention.
18. Considering that under the current legal dispensation, each party is obliged to put all his cards on the table from the outset, it should actually be the wish and desire of the plaintiffs to provide evidence to show;
- (a) That the 2nd plaintiff was a director of the 1st plaintiff at the material time;
 - (b) That there existed procedures in the company's Memorandum or Articles of Association, which stipulate the manner in which authority was to be given to any person to execute Charge instruments; and
 - (c) That the 2nd defendant was not duly authorized, in the manner provided.
19. In so far as the said proof could be contained in documents, the said documents should have been provided by the plaintiffs at the time when the plaint was being served upon the defendants. That is my understanding of the provisions of Order 3 Rule 2 of the Civil Procedure Rules.
20. The same Rule requires the plaintiff to file and serve Witness Statements, together with the plaint.
21. Therefore, if the proof to be provided by the plaintiff was not in writing, the plaintiff's witnesses would still be required to provide the requisite evidence through their written statements.
22. Pursuant to Order 11 Rule 3 of the Civil Procedure Rules, the court is required, inter alia, to verify whether or not the parties had complied with Order 3 Rule 2 and Order 7 Rule 5. That is a part of the pre-trial Directions, which have the sole purpose of;
- “...furthering expeditious disposal of cases and case management....”***
23. Therefore, whether or not the 2nd defendant had brought the application for provision of particulars, the court would have been obliged to ensure that the parties provide to each other all Witness Statements and all documents that are to be relied upon at the trial.
24. The plaintiffs cannot therefore be permitted to withhold information, under the guise of the contention that such information constituted the evidence which the plaintiffs would be using to prove their case.
25. Whilst it is true that evidence should not be incorporated into the pleadings, it is equally true that each pleading must now be accompanied by;
- (a) An Affidavit verifying the correctness of the averments in the plaint or Defence, respectively;
 - (b) A list of the Witnesses to be called at the trial;
 - (c) Written Witness Statements; and
 - (d) Copies of Documents to be relied upon at the trial, including the Demand Letter before action.

26. Compliance with these requirements cannot await the pre-trial conference, as suggested by the plaintiffs. Order 3 Rule 2 of the Civil Procedure Rules says that all suits, including suits against the Government, (except small claims) SHALL be accompanied by the documents listed above.

27. In my considered view, the conduct of the plaintiffs has compelled the 2nd defendant to seek particulars. I find that the interests of Justice demands that the plaintiffs provide the following particulars;

- (a) The certificate of incorporation of the 1st plaintiff;
- (b) Proof of how and when the 2nd plaintiff became a director of the 1st plaintiff;
- (c) Copies of the Charge instruments in issue.

28. The plaintiffs are ordered to provide the 2nd defendant with those particulars within the next 21 days.

29. The plaintiffs are also ordered to pay to the 2nd defendant the costs of the application dated 10th April 2014.

DATED, SIGNED and DELIVERED at KISUMU this 20th day of September 2018.

FRED A. OCHIENG'

J U D G E