



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 2784 OF 1995

SWEATA INVESTMENTS LIMITED.....1ST PLAINTIFF

RATI INVESTMENTS LIMITED.....2ND PLAINTIFF

VERSUS

PAN AFRICAN CREDIT.....DEFENDANT

& FINANCE LTD (IN LIQUIDATION)

R U L I N G

1. The Court has before it an application to adduce evidence made halfway through an ongoing trial. The Plaintiffs are two limited companies belonging to the same group of companies. The Defendant is a finance company in liquidation which lent the Plaintiffs monies secured on certain properties owned by the Plaintiffs. The Plaintiff's claim that they were in the process of redeeming their mortgages when the Defendant sold the properties. It is alleged the Defendant sold the properties secretly. It is further alleged that the properties were sold at an undervalue. That appears to have necessitated amendment to the Plaintiff which was dated and filed on 27th November 2012. Prior to that amendment there was an earlier amendment in May/June 2006. The Defendant filed its Re-Amended Defence and Counterclaim on 13th December 2012.

2. The Claim is brought by a two limited companies that were the customers of the Defendant Bank before it went into liquidation. During the trial the Defendant was represented by the Deposit Protection Fund, which is in effect the receiver of the Defendant.

3. The Trial commenced on 27th November 2014. The Plaintiff's first and only witness gave his evidence. The Plaintiffs closed their case and the matter was adjourned to the following week (1st December 2014). On that date the Plaintiff sought to adduce further evidence in the form of the Letter dated 6th October 1987. That was done by way of an oral application. The Application had two limbs, firstly that the Plaintiff would re-open its case and secondly, that it required the leave of the Court to adduce what is new evidence to the trial but is in fact evidence that was available to the Plaintiffs many years previously.

4. The Letter emanates from the Defendant. The Plaintiff's position is that it is the settlement letter and it was not included in the bundle. The Client is then said to have searched and found the original Letter settling the Claim. The Plaintiff would as a consequence like to call further evidence on the basis that the Letter is a very important piece of evidence. The Plaintiff's position is that the Letter will discharge its burden on proof.

5. The Grounds relied upon by the Plaintiffs are that:

- (1) The Document is important to the Plaintiffs' case
- (2) It discharged the Plaintiffs' burden of proof;
- (3) Its omission from the bundle was inadvertent as there have been several cases between the Parties
- (4) It is in the interests of justice for the Plaintiff's to be allowed to adduce the document.

(5) The Court has jurisdiction under Order 11 to grant leave;

(6) Under Article 159 of the Constitution of Kenya the Court is obliged to do substantive justice without undue regard to technicalities.

6. The Application is opposed by the Defendant. Firstly, Counsel for the Defendant argues that there is no basis on which a Plaintiff who has already closed his case can be allowed to open his case and allowed to produce new evidence. Further, it is argued that there is no basis to do so whether under the Civil Procedure Act nor the Civil Procedure Rules 2010. The Defendant's Counsel also argues that Article 159 does not assist the Plaintiff because that Article is not a window for the Plaintiff to abuse the Court process. That abuse would arise if the Court were to "arrest the proceedings". Finally that no good reasons have been adduced in regard to the new document that is now being furnished. The Plaintiff has had that document since 1987 and the Plaintiff instituted the case in 1995. The Plaintiffs knew of the existence of the document and the Plaintiff knew that their witness would be cross-examined by the Defendant. The Defendant argues that the Plaintiff has not given any good reason as to why the document was not produced pursuant to CPR Order 11. Counsel for the Defendant urges the Court to reject any new evidence after the Plaintiffs have closed their case and reject it in accordance to the witness rules.

7. The document in question is in fact a document created by the Defendant, Pan African Credit and Finance Limited. It is dated 6th October 1987. It is addressed to Niche Investments Ltd and Sweata Investments Ltd, namely the First Plaintiff. The Letter was not copied to other nor did it contain any enclosures.

8. Mr Murugaru for the Defendant also argued that the "oxygen rule" embodied in the overriding principle is only applicable where there is no other rule or law to guide the Court in dispensing substantive justice. In this case order 18 is clear as to the order of witnesses, he says.

9. Counsel for the Plaintiff argued that the overriding object under Section 1A and 1B of the Civil Procedure Act (Cap 21) Laws of Kenya provides for justice to both parties. The Rules of procedure and the power to award costs guides the court in the way it should conduct its proceedings. The Civil Procedure Rules provide for the ordering of evidence and witnesses and it provides clearly that the Plaintiff would begin and call its witnesses.

10. It is clear from the above arguments that the Court must exercise its discretion under Section 1A and 1B of the Civil Procedure Act (Cap 21, Laws of Kenya) while at the same time aiming to achieve substantive justice to all the Parties. In order to do so the Court must not allow itself to be hemmed in by technicalities. The issue before the Court is whether the Plaintiffs should be allowed to adduce what it deemed to be "new evidence". In fact the particular document was created by the Defendant in 1987. Neither the Plaintiffs nor the Defendant included the document in the Lists of Bundles. The Plaintiffs say that was due to inadvertence. The Defendant has provided no explanation for the omission. The Defendant further argues that Order 11 of the Civil Procedure Rules has substantive effect that any document not disclosed is automatically excluded thereafter. That cannot be the appropriate way to proceed in the circumstances where both Parties are guilty of the same omission.

11. Further, this suit was eventually being heard in November 2014. In July 2014 the Commercial, Admiralty and Tax Division of the High Court had suspended the application of Order 11 and replaced it with a Case Management Practice Direction which was being piloted at the time. That Practice Direction does not place the same obligation of early disclosure on the parties as was the case under Order 11 and the Civil Procedure Rules prior to that. In fact the Case Management Check List that accompanies the Practice Direction provides expressly for the production of additional documents at point 8. The Court takes judicial notice of the fact that the Case Management Practice Direction and the accompanying Checklist was supported the Law Society and the Advocates practicing in the Commercial Division. That "modern thinking" must also be taken into account. In addition, the Plaintiff's case was amended as recently as 2012, after which there seems to have been no "taking stock" of what further directions were necessary in preparation for trial.

12. This is not a suit that is marked by prompt preparation for trial. As stated, the Suit was filed in 1995. It was amended in 2006. It was re-amended in 2012 with the Re-Amended Defence and Counterclaim being filed on 13th December 2012. Prior to that the Parties had filed their Lists and Bundles of Documents, the Plaintiffs on 9th March 2012 and the Defendant on 27th March 2012, just in time for the Mention two days later. The Case Management Hearing was listed before Hon F. Gikonyo J. He certified the matter ready for hearing after confirming the lists and Bundle of documents and lists of issues had been filed. From the record it appears that the issues of disclosure following amendment of the pleadings was neither raised by the Parties nor decided by the Learned Judge.

13. It is also noteworthy that the Plaintiff's Witness Statement, in particular that of Rajnikant Khetshi Shah (PW1) was filed on 7th February 2012, predating the amendments. One of the main issues for determination in this suit is the relationship between the Plaintiffs' Officers and the Officers of the Defendant in particular a Mr Mohamed Aslam now sadly deceased. PW-1 gave evidence on that issue. The Defendant in its Re-Amended Defence and Counterclaim states at paragraph 6A that:

"The defendant denies paragraph 10A of the re-amended plaint.

(i) The defendant is not aware of the Late Mohamed Aslam's indebtedness to the first plaintiff and was not a party to it.

(ii) Mr Mohamed Aslam acted in his private individual capacity and did not bind the defendant in any agreement as alleged or at all.

(iii) If there was any agreement as alleged, the same was not supported by any consideration."

Therefore, the relationship between the Plaintiffs and the Defendant is central to the case. The correspondence the Plaintiffs seek to now introduce relates to that issue. The admission of the document would allow the Court to resolve the issue with the benefit of all the information relation thereto. .

14. The Defendant also complains of delay. Given the lackadaisical preparation of this case for trial, delay is relative. Pleadings were only finalised 17 years after filing of the suit. Disclosure took place then. However even as late as 27th September 2013 the Defendant was filing a Supplemental List and Bundle of Documents. The List of Issues was not filed until 7th November 2013 and the case management conference held eight months later.

15. Ultimately, the Court must ensure a fair trial where each side is able to put its case fully and each is able to answer fully with the benefit of knowing the case it has to answer (Articles 50 and 159). In the circumstances, what is the relative prejudice to each Party? As far as the Plaintiff's are concerned if they are not granted leave, they will be precluded from presenting a fundamental pillar of their case, namely settlement.

16. The Suit was filed under the old regime when there was a process of discovery under Order X Rule 11 et seq.. Neither party seems to have complied with that. The rules of practice were replaced by the Civil Procedure Rules and discovery was regulated by Order 11, again there was a piecemeal approach. The Defendant is now asking the Court to strictly apply the relevant rules to only the Plaintiffs. The inconsistency is very apparent.

17. Having considered the competing arguments, this Court has come to the conclusion that the justice of the case can only be served by allowing the Plaintiffs to produce the relevant documents into evidence and allow the Defendant to challenge them by way of cross-examination. Neither Party has been afforded the opportunity to do so before.

In the circumstances it is ordered that (1) The Plaintiffs be and are hereby granted leave to re-open their case, (2) The Plaintiffs be and are hereby given on last opportunity to disclose all the documents on which they seek to rely, (3) Costs in the cause.

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered signed and dated at Nairobi this 10th day of September 2018

In the presence of:

Court Assistant: Mohamed

Plaintiffs: Mr. Isindu

Defendant: Ms Watala holding brief for Mrs Karimi