



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL APPEAL NO. 900 OF 2005**

**NATIONAL BANK OF KENYA LTD.....APPELLANT**

**VERSUS**

**JOSEPH MBAI T/A TYRE FACTORY OUTLET.....RESPONDENT**

**JUDGMENT**

The appellant filed a claim in the lower court against the respondent for the sum of Kshs. 172,094.90/= withdrawn by the respondent from a current account in his name. The respondents sought particulars of the claim which the appellant provided. Upon application by the respondent the appellant's suit was struck out for non-compliance of the court order to provide the required particulars. Aggrieved by the said decision, the appellant filed this appeal.

The summary of the grounds of appeal is that the lower court erred in law and in fact in dismissing the appellant's claim yet the particulars required had been duly furnished, and that the court erred in failing to recognize that a copy of the cheque is not a particular but evidence which was to be adduced during the trial. Further, that the court order did not require the production of a non-existent cheque but merely required the plaintiff to furnish particulars, which had been complied with within a set period.

At some point the counsel for the respondent filed an application to cease from acting for the respondent which order was granted on 15<sup>th</sup> April, 2015 by Onyancha J. Thereafter the respondent was served personally by way of registered post. That notwithstanding, he did not reply or participate in the proceedings. Counsel for the appellant filed submissions which I have noted.

The application seeking dismissal of the appellant's claim was made under Order VI Rule 8 (2) of the old Civil Procedure Rules. Clearly this was wrong because that is the rule to be used by a party in requesting particulars. The correct provision is Order VI Rule 13 which provided the following grounds.

- a. Where the cause of action discloses no reasonable cause of action.
- b. Where pleadings are scandalous, frivolous or vexatious.
- c. Where pleadings may prejudice, embarrass or delay fair trial of the action.
- d. In case of an abuse of court process.

It is true therefore that the court erred in striking out the appellant's claim on a totally erroneous provisions of law. In any case, the appellant had complied with the court order to provide particulars and the drastic step chosen by the lower court to strike out a pleading and thereby drive the appellant out of the seat of judgment led to injustice upon the appellant.

Accordingly, this appeal is allowed and the appellant's suit in the lower court reinstated. Consequently, the lower court file shall be returned so that the hearing of the case is conducted before another magistrate of competent jurisdiction. As this is an old case, priority should be given to the hearing and disposal of the case.

*Dated, signed and delivered at Nairobi this 22<sup>nd</sup> Day of February, 2017*

**A. MBOGHOLI MSAGHA**

**JUDGE**