



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADMIRALTY CLAIM NO. 1 OF 2009

NATIONAL CEREALS & PRODUCE BOARD.....CLAIMANT

VERSUS

THE OWNERS OF THE MOTOR VESSEL

“FONARUN NAREE”DEFENDANT

R U L I N G

1. What is before Court for determination is the Defendant/Counter Claimant’s application notice dated 12/2/2010 and headed **“APPLICATION NOTICE for specific disclosure”**. At the hearing Mr. Khan for the Defendant/Counterclaimant abandoned prayer (b) with the consequence that only prayer a, c, d e & f are outstanding for determination. The documents sought for specific disclosure have been described by the Defendant/Applicant.

2. In support of the application the applicant filed submissions dated 25/5/2015 and Reply to plaintiffs submissions dated 13/7/2015. The basis and grounds of the application is that the documents now sought to be disclosed are relevant and will be necessary to show the reasons for the rejection of the consignment of maize and how the cargo was subsequently dealt with by the claimant toward its duty to mitigate own losses. The defendant/counter claimant takes the position that the documents sought to be disclosed have been referred to in pleadings in this litigation and other litigation between the parties being Nairobi HCC No. 689 of 2008 and that the ones not so specifically referred in the pleadings are by necessary implication relevant and important and that in past disclosure statement the claimant did not permit inspection of correspondences between it and the Kenya Bureau of Standards regarding the decision to condemn the cargo subject matter of this litigation as well as those between it at Grain Bulk Handlers Limited for reasons that such inspection would be disproportionate to the level of disclosure expected to assist resolution of the dispute between the parties. For those reasons the defendant counterclaimant submit and take the position that it is only by specific disclosure of the documents which have been described so that the issues among then where the cargo was reshipped to may be established.

3. The application was opposed by the claimant who filed a Replying affidavit sworn by **Ann G. Kamau** and a Further Replying Affidavit sworn by **Mr. John Ngetich**. The claimant Equally filed written submission on the 25/6/2015. In both Affidavits and its written submissions, the claimant/Respondent take the position that documents have been filed in this matter including a supplementary list of document dated 7/12/2016 which exhibit the re-export agreement which evidence the disposal of the cargo.

4. On the dispute about the under delivery as disclosed in various reports including the outturn report, the Respondent took the position that the cargo in dispute is only what was in **Hold No. 3** whose report has

been disclosed in the discharge out-turn already filed by the claimant. To the Claimant the short landed quantity is clear from the documents to be 95.470 metric tons.

5. The Claimant then wound up his submissions by asserting that Ojwang J, as he then was, had delivered himself in this matter in similar application by the claimant and held that matters of evidence should be left to the trial.

Analysis and determination

6. In an application of this nature what guides the court's determination is the consideration whether or not the document sought to be disclosed are or have been in possession and power of the Respondent and whether such documents are necessary and relevant to the dispute between the parties so that without them being disclosed the party making the request may be prejudicial or hampered in the proof of his case.

7. I understand both side to agree that the applicable law in this regard is the English Law as coded in the **English Civil Procedure Rules, Part 31 Volume 1**, which Mr. Khana has availed as an annexure to his submissions. This is because we have never, as a county legislated in this area. However, as Prof. Ojwang J, did observe in his ruling in this matter, dated 'the rules regarding disclosure are basic pretrial rules, and they apply no less in maritime cases than they do in day today litigation'. I fully agree and share those views.

8. The Primary and purposive object of an order for discovery or specific disclosure is to avail to all concerned the full facts pertinent to the dispute so that each is prepared to present its case or defence without the feeling that it has been ambushed, taken advantage of or critical facts concealed from it. Equally the court get the chance to access all the facts and material as is practically feasible to enable it render a balanced and informed determination.

9. These must have been the thinking of the rules committee when in 2010, it did amend and revamp the Civil Procedure Rules to introduce those provisions at Order 3 Rule 2, Order 7 Rule 5 and Order 11 Rule 3 of the Rules. That is the same spirit captured in Article 50(i) as read with the principle that justice ought to be dispensed in an expeditious and proportionate fashion.

10. Put in the context of the matter before the court, the documents the defendant/applicant seeks are said to be significant for the determination of the dispute between the parties as far as the question of loss alleged and what steps were taken by the Claimant towards the duty to mitigation own losses.

11. The Claimant resists the application on the basis that it is the duty of the defendant to pursue its defence and counterclaim and that the claimant has no obligation to help in that regard. The claimant additionally contend that some of the documents sought are already in the court file and that Prof. Ojwang J had considered a similar application and found no merit in it.

12. I have had the benefit of reading that decision and I find that the judge did not shut the window to the current application being brought. In the second last paragraph of the ruling dated 1/10/2010 the judge said:-

“On the merit of the submissions by each side, it becomes, apparent that the claimants position is not to be sustained, but a window remains open to the claimant to request with specificity any particular named documents which is known to be in the possession and power of the Defendant”.

13. That decision as can seen was on an application by the Claimant now opposed to the specific disclosure. It was made on the basis that no specifies documents were sought and the judge felt that at that time the request was not deserved. For the application before me there is sufficient material that the specific documents sought to be disclosed have been referred to in the pleadings, are therefore relevant to the proceedings and the defendant does not deny being in possession and control of the same. It has also

not been alleged that the discovery would visit any prejudice upon the Claimant.

14. For all the foregoing reasons I find merit in the application dated 12/2/2010 and allow it with costs to the Defendant/applicant. Let the specific disclosure of the enumerated documents be made within 21 days from today.

Dated and delivered at **Mombasa** this **10th** day of **March 2017**.

HON. P. J. O. OTIENO

JUDGE