



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 69 OF 2016

SANDVIEW PROPERTIES LIMITED.....1ST PLAINTIFF
UPPERVIEW PROPERTIES LIMITED.....2ND PLAINTIFF

VERSUS

IMPERIAL BANK LIMITED (IN RECIEVERSHIP).....DEFENDANT

RULING

1. The plaintiff has asked the court to strike out the following paragraphs in the Replying Affidavit of **MOHAMUD AHMED**, which was sworn on 18th April 2016;

- i) 18 to 24;
- ii) 43;
- iii) 51;
- iv) 52;
- v) 58;
- vi) 59;
- vii) 64;
- viii) 66;
- ix) 67
- x) 68;
- xi) 69;
- xii) 70 and

xiii) 93.

2. It is the plaintiffs contention that paragraphs 18 to 24 make allegations as to the existence of investigations into generalized areas of alleged fraudulent activities. However, those paragraphs do not link the plaintiffs to any of the alleged investigations.

3. As regards paragraph 51, the plaintiffs say that it is meant to vex and embarrass them. Therefore, the plaintiffs contend that that paragraph was scandalous, oppressive and irrelevant.

4. Paragraphs 43, 52 and 93 relate to allegations of purported fraud on the part of the Bank's Directors, Shareholders or Third parties who were associated with them. However, the plaintiffs say that the attempt to link them to the alleged fraud was unsubstantiated.

5. Paragraphs 58, 59, 64, 66, 67, 68, 69 and 70 are described, by the plaintiffs, as being argumentative, and devoid of any substantial factual averments.

6. If the impugned paragraphs were not struck out, the plaintiffs feel that that would cause the court to delve into extraneous, irrelevant and immaterial issues which do not in any way answer the facts pleaded by the plaintiffs.

7. Furthermore, the plaintiffs feel that the paragraphs in issue are offensive, and were made for the mere purpose of abusing, vexing or prejudicing the plaintiffs.

8. Being extraneous to the issues at hand, the paragraphs cited by the plaintiffs were said to be capable of resulting in the court digressing from the real issues.

9. And, as they were said to be irrelevant, the plaintiffs said that the paragraphs sought to be struck out, would not assist the court in arriving at a fair and just determination of the real issues in the application.

10. It is a matter of public notoriety that the Central Bank of Kenya placed the Imperial Bank Limited under receivership in October 2015. The reason proffered by the Central Bank of Kenya for taking that action was that there had been a massive fraud committed against the Imperial Bank Limited.

11. The Kenya Deposit Insurance Corporation (**KDIC**) took over the records, assets, liabilities and businesses of the Imperial Bank Limited.

12. Mohamud Ahmed is a duly appointed Receiver Manager at the Imperial Bank. In his Replying Affidavit, Ahmed deponed that;

"...all matters touching upon IBLIR, including the alleged relationships with the applicants are under forensic investigations, and as soon as the investigations are concluded, if there are no legal reasons for the Receiver to hold on to the Applicants' records, the same shall be released to them".

13. The Applicants do not dispute the existence of the forensic investigations.

14. Their contention is that the investigations are into generalized areas of alleged fraudulent activities, which were not specific to the applicants.

15. In the case of **DANIES JOSEF JULES MAES Vs MATHEW HENRY HANCOX Hccc No. A219/2002** (*At the Cape of Good Hope, Provincial Division, South Africa*) the court addressed the issue regarding new matters being raised in replying affidavits. Bozalek J. expressed himself thus;

"19. What is the situation as regards new matter in Replying Affidavit?

The affidavits in motion proceedings fulfill a dual purpose namely, to place the essential

evidence in support of or in opposition to the granting of the relief claimed before the court and to define the issues between the parties. It is trite that founding affidavits must contain the essential averments on which an applicant's cause of action is based, as in the absence thereof, a respondent would not know what the case is that has to be met.

A respondent's responses to the averments in the founding affidavit delineates the issues between the parties. On the other hand the purpose of a replying affidavit is to deal with the averments made by the respondent in an answering affidavit, Except where the averments in a answering affidavit provide additional grounds for the relief claimed, an applicant is not permitted to make out a new cause of action in a replying affidavit or to supplement averments that should have been included in the founding affidavit. In my view, new matter not covered by the exception alluded to above or not germane to the issues delineated by the founding and answering affidavits, falls squarely within the ambit of Section 2 of the Civil Proceedings Evidence Act and would be inadmissible”.

16. It is the plaintiff's position that the defendant had not only deviated from matters raised in the application, but that it had delved into matters which were scandalous and oppressive to the plaintiffs.

17. The existence of investigations into alleged fraudulent activities were said to be scandalous, vexatious and immaterial because the said investigations were being touted in an attempt to justify the respondents illegal and arbitrary actions.

18. If the respondents could justify their actions by reference to the investigations, it would imply that the said investigations were relevant and germane to the actions which they had taken against the plaintiffs.

19. The defendant's position was that the 2 properties which were the subject matter of the suit were purchased by way of dividends which had been declared by the Imperial Bank.

20. As such dividends were declared at a time when the bank was allegedly making losses, the defendant asserted that money utilized to purchase the properties in issue, had been obtained through fraud.

21. Therefore, the defendant intends to demonstrate that although the properties in issue were registered in the names of the plaintiffs, such ownership was acquired with funds which had been obtained through fraud which the directors and shareholders of Imperial Bank had perpetrated against the bank.

22. But the plaintiffs assert that the defendant had failed to provide any evidence to link them to the alleged fraud.

23. And because evidence was lacking, the plaintiffs submitted that they were unable to respond sufficiently to the impugned paragraphs of the Replying Affidavit.

24. In my understanding, when there is no evidence adduced against any party to a case, the said party has no obligation to respond.

25. In this case the defendant has said that it was investigating accounts, including those of the plaintiffs. However, the defendant says that it cannot reveal the interim results of the forensic investigations because that would jeopardize the investigations.

26. But the plaintiffs reason that the defendant;

“cannot in defence to a claim to specific items/records belonging to the Applicant rely on “ongoing investigations” which may or may not reveal anything that would provide a defence to the claim, and reasonably expect an applicant to speculate and respond to “ongoing investigations”. This is oppressive”.

27. Within that submission is a tacit acknowledgement of the possibility that the investigations may or

may not reveal something which could be a defence to the plaintiffs' claim.

28. If the investigations do not yield a defence to the claim, the defendant would have failed to respond sufficiently to it.

29. Provided that the investigations did not prove the defendant's attempt to show that the plaintiffs were culpable or even when the investigations remained incomplete, the applicants should actually be content, as they would not be prejudiced.

30. I therefore find no reason to warrant the striking out of paragraphs 18 to 24 of the Replying Affidavit.

31. As regards paragraphs 51 of the Replying Affidavit I find that the defendant has not given any reason why the applicants should be expected to disclose the circumstances surrounding the death of Abdulmalek Janmohamed.

32. Therefore, I order that the last sentence in paragraph 51 be struck out.

33. Paragraphs 58 and 59 of the Replying Affidavit have made direct reference to the applicants' alleged involvement in the fraudulent activities of the directors and shareholders of the Imperial Bank. Those depositions are relevant to the matters in issue.

34. The same can be said about paragraphs 64, 66, 67, 68, 69 and 70.

35. Meanwhile, paragraph 93 is an attempt to demonstrate to the court, the nexus between the applicants, and the directors of Imperial Bank.

36. I understand the said deposition as an effort to place in perspective the investigations touching on the Applicants, as interconnected with the overall investigations into Imperial Bank.

37. I am aware that the plaintiffs have commenced an analysis of the various aspects of the Replying Affidavit.

38. On my part, I have consciously refrained from commencing any analysis of the affidavit, at this stage.

39. In my considered opinion, the interrogation of the Replying Affidavit should a part of the exercise of determining the substantive application.

40. If I were to assess the strengths or weaknesses of the Replying Affidavit, I would already be pre-judging the substantive application.

41. By casting aspersions, the defendant would not sway the court.

42. Diversionary tactics would not persuade the court to determine the matters in issue.

43. Extraneous or irrelevant statements have no place when the court is called upon to make a determination.

44. The plaintiffs have demonstrated the ability to make a distinction between what is and what is not ultimately admissible as evidence. That ability can be better utilized in canvassing the substantive application.

45. The expeditious determination of the substantive application would be better achieved if the parties delved into it directly, rather than first asking the court to try and limit the materials which the court should consider when making its determination.

46. Save for the one sentence in paragraph 51 of the Replying Affidavit, all the other paragraphs of the

Replying Affidavit will remain in place.

47. Finally, the costs of the application dated 27th May 2016 shall be in the cause. I so order because I hold the considered view that whichever party succeeds in the substantive application is also deserving of the costs of the application dated 27th May 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of April 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the 1st Plaintiff

No appearance for the 2nd Plaintiff

Ouma for the Defendant

Collins Odhiambo – Court clerk.