



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 521 OF 2010

STUART IVAN KEMP ::: PLAINTIFF

VERSUS

ADAM TULLER ::: DEFENDANT

R U L I N G

INTRODUCTION

1. The application before the court is a **Notice of Motion** dated **29th January 2015** filed by the Defendant pursuant to Article 25 (c) of the Constitution and Order 2 Rule 10 (2) of the Civil Procedure Rules. The application seeks to secure the following orders:-
 - a. ***This application be certified urgent and be heard ex parte in the first instance and be heard on or before 17.2.2015 subject to the convenience of the Court and in the event that it cannot be heard on or before 17.2.2015 the main hearing be taken out of the list of that date until this application is heard and determined.***
 - b. ***The Plaintiff be compelled to supply to the Defendant the particulars of the Plaint in the manner specified in the Request for Particulars dated 12.11.2014 and the Court be pleased to limit time for the Plaintiff to do so.***
 - c. ***In the event that the order of the particulars is granted and not complied with within such time as the Court may direct the Plaintiff's suit be dismissed with costs without any further order.***
 - d. ***The costs of this application be paid by the Plaintiff in any event.***
2. The application is premised on the several grounds set out therein and is supported by affidavit of **F. Kinyua Kamundi** dated **30th January 2015** with annexures. The Defendant had vide its advocate's letter dated 12th November 2014 requested the Plaintiff to supply the requested Particulars pursuant to a Request For Particulars under Order 2 Rule 10 of the Civil Procedure Rules, but the Defendant failed to comply hence this application.
3. It is alleged in the Plaint that the Plaintiff advanced various sums to the Defendant on different unspecified dates in the year 2004 in the aggregate of Kshs.7,589,061.00. The Applicant submitted that this suit was filed on 30.7.2010. This means that any sum allegedly loaned to the Plaintiff on or before 29.7.2004 would be time barred and irrecoverable under the provisions of the Limitation of Actions Act because 6 years from 29.7.2004 lapsed on 29.7.2010. The Applicant

states that it is necessary for the Plaintiff to specify the dates so that the Defendant can avail himself of the defence of time bar and amend the Defence appropriately or apply to strike out the Plaintiff's suit. The Defendant's Advocates sent a Request for Particulars to the Plaintiff's Advocates on 12.11.2014 by email but there was no response. On 31.10.2014 the Plaintiff's Advocate alleged that she did not receive the Request for Particulars. On 19.1.2015 the Defendant's Advocates resent the Request for Particulars to the Plaintiff's Advocates by email both to their Mombasa and Nairobi office. On 20.1.2015 the hard copy of the Request for Particulars was served upon the Plaintiff's Advocates at Nairobi. Particulars have not been supplied to date. The Defendant states that if it is indeed true as alleged in the Plaintiff's Affidavits that the sums were allegedly advanced on numerous occasions it will cause no prejudice to the Plaintiff to specify the various dates and the place where those funds were advanced. The Defendant requires the particulars to be prepared fully for the hearing and in order not to be ambushed at the trial. Although the Plaintiff has filed and served Witness Statements, the Applicant states that the Plaintiff avoids specifying when he advanced the various sums claimed and totalling the amount sued for. It is the Defendant's submission that he is entitled to the particulars in order to afford him a constitutional right to a fair trial. A fair trial includes disclosure of the particulars of the suit. The Defendant submitted that it is necessary for the Court to set timelines within which particulars must be delivered. Further the Defendant's counsel Mr. Kinyua submitted that to avoid unnecessary expenditure and a wastage of time for the Court and for the parties it is necessary that any order made for the supply of particulars should contain an unless order to the effect that if the Plaintiff refuses to comply then the suit should be dismissed with costs without any further order.

4. The application is opposed by the Plaintiff who filed Grounds of Opposition on 9th February 2015 stating that Order 2 Rule 10 (2) of the Civil Procedure Rules does not apply and that in any event parties have already complied with Order 11 of the Civil Procedure Rules and the matter is scheduled for hearing on 17th February 2015. The Plaintiff submitted that the application is frivolous, vexatious and is an abuse of the court process and should be dismissed.

ANALYSIS AND DISPOSAL

5. I have carefully considered the application. The only issue I raise for determination is whether the said request is reasonable at this stage, and whether the same will aid in the faster disposal of this suit. Under Order 2 Rule 10 (2) Civil Procedure Rules, any party has the right to seek particulars of pleadings and,

Rule 10 (2) states:-

“The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleadings, or a statement of the nature of the case on which he relies, and the orders may be made on such terms as the court thinks just.”

6. It is therefore within the Defendant's right to seek for the Particulars under reference. The duty of this court is to determine whether the request is genuine. The law does not limit the time within which Requests for Particulars must be made except that it must be made, unless for special reasons, after a defence has been filed. Rule 10 3 (a) and (b) allow the court to order for particulars of facts upon which a person alleges knowledge, and where one alleges notice, particulars of the notice.
7. I have looked at the Defendants request for Particulars dated 12th November 2014. It mainly seeks to know whether the alleged loan stated in paragraph 3 of the Plaintiff's Complaint was advanced, whether as a lumpsum or as a wholesome unit, and whether the loan was directly given to the Defendant or it was disbursed through third parties, and if so in what form? Was it cash, credit, cheque or labour. Requisition for Particulars for paragraph 4 of the Plaintiff's Complaint is equally reasonable as it seeks to establish the intended development of low cost housing project, the nature of the project and the owners thereof. Under paragraph 5 of the Plaintiff's Complaint, the request seeks to know when the demand

- notice was made, in what form and on whom it was served. As I have said, Order 2 Rule 10 (3) (a) and (b) expressly allow the court to order for such particulars to be provided. Perhaps what I need to add is that I have looked at the Plaintiff, and the Plaintiff's Witness Statement. The issues raised in the Request for Particulars have not been addressed, and in my view, the Particulars requested will not only assist the Defendant, but will also help the Plaintiff prosecute its case and help this matter to proceed to hearing on a better platform.
8. Of importance, I have noted that in the Plaintiff's Bundle of documents, there is a lot of reference to third parties such as Green Field, Nema, El-Tigre Techlogorams, Payments to Advocates, and other third parties. I get the impression that the alleged loans, if it was disbursed, may not have been lumpsum, and may not have been given to the Defendants directly. It is therefore important that the Plaintiff makes the necessary clarifications as requested in the said Request for Particulars.
 9. In the upshot, I am satisfied that the Request for Particulars is merited and I allow the application as follows:-
 - i. *The Plaintiff shall supply to the Defendant the Particulars of the Plaintiff in the manner specified in the Request for Particulars dated 12th November 2014 within 14 days from the date hereof.*
 - ii. *If the Plaintiff fails to comply with order (a) above, the Plaintiff shall not participate in any further proceedings in this matter and the Defendant shall be at liberty to apply to have the suit struck out for such disobedience.*
 - iii. *Cost shall be in the cause.*

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 6TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Kanyiri for the Plaintiffs

Mr. Kinyua for the Defendant

Teresia – Court Clerk