



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 175 of 2011

CONCORD INSURANCE CO. LTD. PLAINTIFF/RESPONDENT

VERSUS

NIC BANK LTD. DEFENDANT/APPLICANT

RULING

1. The issues for determination emanate from a Notice of Motion application dated 5th October, 2012 by the Defendant. In the Notice, brought under the provisions of **Order 11 Rule 3 (1) (a), (2)(a), (j), (k), (m), (o)** and **Rule 7 (1)(b), (h) & (2), Order 51(1)** of the *Civil Procedure Rules* and **Sections 54 & 55** of the *Insurance Act*, the Applicant seeks for the Plaintiff to be compelled by the Court to produce copies of all books of account i.e. unaudited accounts, revenue accounts, balance sheets, profits and loss accounts and statements of admitted assets and liabilities for the periods between the 1st Quarter of 2007 and 4th Quarter of 2011. The Applicant further seeks to have provided to it audited accounts between 2007 and 2011 together with the auditor's certificate relating to the accounts in respect of each financial year.

2. The application is supported by the Affidavit of **Lilian Sogo** sworn on 5th October, 2012. In reiterating the grounds upon which the application is predicated, the deponent averred that the documents it seeks are pertinent to the Defence. The Plaintiff has been notified of the evidential value of the documents sought and that it would not suffer any prejudice should the documents be produced.

3. In its response to the Application, the Plaintiff by the Affidavit of **John Njihia** sworn on 10th December, 2012, objected by deponing that the documents requested were not relevant to the claim in the suit and that the same could not be determined from examining the documents that the Defendant sought to be provided to it. The Plaintiff also contended that the Defendant is on a fishing expedition and not genuinely concerned with discovery. Further, the Plaintiff reiterated that it was under no obligation to furnish such documents as sought by the Defendant.

4. The issue for determination, from the foregoing is discovery and inspection of documents, and whether the Applicant is warranted under the applicable rules and by the application, to the documents sought. According to Black's Law Dictionary, 7th Edition, discovery is defined as;

“The disclosure by the defendant of facts, titles, documents, or other things which are in his

exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a part of a cause or action pending or to be brought in another court, or as evidence of his rights or title in such proceeding". (Underlining mine).

It follows that in an application for discovery, a party has to ensure that the documents sought are "necessary" to the cause of action before or pending trial before the Court. It has to be a disclosure of relevant facts to the matters in issue. According to **Halsbury's Laws of England, Volume 13 para 1**, the learned authors detail;

"The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation."

5. Discovery is therefore limited solely to the matter in contention. The Court, in exercise of its discretion to issue such orders as to discovery, will be guided by the relevance of the documents that the applicant seeks, in relation to the pleadings. The authors in **Halsbury's** (supra) at para 38 write:

"Relevance must be tested by the pleadings and particulars and when particulars have been served which limit a particular issue then discovery on that issue is limited to the matter raised in the particulars."

In both its oral and written submissions dated 31st January, 2013, the Defendant submitted that the documents it seeks are at the centre of the matter before Court. In its pleadings and especially in the Supporting Affidavit of Lilian Sogo, it was averred *inter alia* that the documents sought were pertinent to the Defence and of high evidential value in determining if any disclosure had ever been made regarding the sum in dispute and if such had been picked up by the auditors.

6. The substantive issue raised for determination in the Plaint is with regard to monies paid out by the Defendant in the subsisting Banker/Customer relationship with Plaintiff. The Plaintiff raised issue with regard to payments made in breach of contractual terms. It filed a Bundle of Documents which it intended to rely upon in its case. The Defendant disputed such allegations, and thereafter, filed the present application seeking audited reports so as to ascertain whether the discrepancy had been captured by the audit reports. It is the Defendant's contention that if the audit reports and statements as well as other documents sought were adduced or produced before trial, they would enable the expeditious, just and proportionate disposition of the matter.

7. However, the more pertinent and significant issue that the Defendant has not addressed clearly to this Court is the relevance of the documents it seeks to have produced. In the case of **Kahumbu v National Bank of Kenya Ltd [2003] 2 E.A 475**, Njagi, J in allowing for the enforcement of the orders of Mbaluto, J held that the conduct by the Defendant in complying with the said orders showed a willful disregard of the Court and merited the imposition of the penalty ordered. The judge, (Mbaluto, J) in making the orders in his ruling therein, had considered the matter and made a determination *inter alia*;

"... As I am satisfied that the documents listed in paragraph 4(ii) – (vii) of the Chamber Summons dated 20 June, 2002 are relevant and necessary for the fair disposal of this suit as well as for the purpose of saving costs, there will be an order directing the Defendant to produce the documents within the next 14 days of the date of this ruling, failing which the Defendant's defence will stand struck out with costs." (Underling mine).

Mbaluto, J in making his determination, was guided by the relevance and necessity of the documents sought, in relation to the pleadings before the Court. It was the Judge's considered determination, in exercise of his discretionary jurisdiction, that the documents which the Plaintiff wanted and for which it

sought the Court's intervention, went to the crux of the matter and were indeed relevant for the just and expeditious determination of the matter.

8. This Court has therefore, to consider the facts of the present case and direct its mind to the relevance and necessity of the documents which the Applicant seeks in this matter. As illustrated by the learned authors in **Halisbury's** (supra) at para 38, the Court will not make any orders for documents which have no significance or relevance to the matter. The learned authors state:

“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”

9. In the New Zealand Case of **Kim Margaret Van Gog v Owen Grauman** [2013] NZHC 406, the learned judge in making a determination on an application for discovery held *inter alia*;

“For the purposes of discovery, the particulars must be in sufficient detail to allow particular documents to be identified. The authorities are quite clear that in the absence of such particulars the defendant has no entitlement to discovery...the defendant is not entitled to discovery for the purpose of finding out whether he has a defence or not. Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something which the other was entitled to know. Here the justification, for want of sufficient particulars is not a well-pleaded defence, and till there is such a defence there can be no right to discovery, in the absence both of the relationship of which I have spoken and of any special circumstances. The pleading by the defendant of his justification, which consists of his general plea and his particulars, is not yet a well-pleaded defence, and until there is such a defence the defendant has no right to discovery.” (Underlining mine).

10. As a consequence of the above authorities, the Defendant has to show in its application as to the relevance of the particulars it seeks, or the application will stand to be dismissed. In my opinion, no relevance or nexus has been shown by the Defendant as to the documents it seeks in its application in relation to its pleadings and as such, the Court is reluctant to exercise its discretion in this application. The pleadings detail a breach of contractual obligations, in which the Plaintiff has adequately set out the particulars in relation thereto. The Applicant has, however, failed to show what statements of account or audited reports have to do with such breach of contract. Adopting the Ruling in **Kim Margaret Van Gog** (supra), the Defendant's application dated 5th October 2012 stands dismissed with costs to the Plaintiff.

DATED and delivered at Nairobi this 9th day of May, 2013.

**J. B. HAVELOCK
JUDGE**