



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 1135 of 2001**

**PETER G. N. NGANGA ..... 1<sup>ST</sup> PLAINTIFF**

**KEZIAH W. NGANGA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA FINANCE BANK LTD  
In liquidation, liquidation agent the**

**DEPOSIT PROTECTION FUND BOARD.....1<sup>ST</sup> DEFENDANT**

**NJORO VEG. LIMITED.....2<sup>ND</sup> DEFENDANT**

**NJORO CANNING FACTORY LTD.....3<sup>RD</sup> DEFENDANT**

**DANIEL KARIUKI GICHANGA.....4<sup>TH</sup> DEFENDANT**

**RULING**

This application is brought by a Chamber Summons dated 20<sup>th</sup> July, 2010 and taken out under **Order X Rules 11 and 11A and 23 of the (old) Civil Procedure Rules**. The Plaintiffs/Applicants thereby seek the following main orders-

- 1. That the Defendants do make discovery on oath documents relating to any matter in question in the suit including and not limited to pleadings, decision, judgment, decrees and orders in some eleven (11) specified matters which are set out on the face of the Application, and any document or matter therein or elsewhere the basis for and or relevant to the Defendant's or any of the Defendant's plea that the Plaintiff's claims are either res judicata or replicate similar issues therein pending undetermined .**
- 2. That the Defendants do within 7 days of this court's order for discovery under paragraph 1 above serve the above documents on the Plaintiffs.**
- 3. That in default of the Defendant's compliance with the order for discovery or service within the time limited by the honourable court, statements of defence by the Defendants in default be deemed struck out effective from due date.**

The application is supported by the annexed affidavit sworn by the 1<sup>st</sup> Applicant, and is based on the grounds that the Respondents plea that the issues herein are res judicata or similar to issues in pending

suits. For that reason, the burden of proving those twin issues lies with the Respondents.

The application is opposed by a replying affidavit sworn by Daniel Leparan Ng'atuny, a Liquidation agent of Kenya Finance Bank Limited, on 6<sup>th</sup> October, 2010.

The process of discovery is very central to the expeditions disposal of civil matters. It enables the litigants to know well in advance the opposite party's case, and sometimes could be a catalyst to settlement. I note from paragraph 6 of Mr. Ngatuny's replying affidavit that on 2<sup>nd</sup> February, 2010 the Respondents wrote to the Applicant's counsel stating that all the documents stated in the notice to produce were not in the possession or power of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and therefore they could not comply with the notice. I further note from paragraph 8 of the same affidavit that the deponent is advised by his counsel, which advice he believes to be true, that this application is not only misconceived but the entire suit is res-judicata and ought to be dismissed with costs.

After considering the application and the contents of the supporting and replying affidavits, I note that this is an old case, having been filed in 2001. It is imperative that it be finalized expeditiously one way or the other. Since the coming into force of the new Civil Procedure Rules in December, 2010, the new rules apply to this matter under **Order 54 Rule 2**. Consequently, pre-trial directions and conferences as set out in **Order 11** apply to this matter. Unfortunately that order is not yet operational and therefore we fall back on **Order X**.

In order to put the preliminaries of this matter to rest, it is necessary that the Respondents should make discovery on oath of the documents which are or have been in their possession or power relating to the matters in question in this suit. Secondly, the issue of res-judicata can only be settled by demonstrating that the matters directly and substantively in issue in this case have been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim. This ought to be done by affidavit evidence and not by letters.

Being of the above persuasions and in order to progress this matter, I accordingly make the following orders-

1. **Prayer 1 of the application by Chamber Summons dated 20<sup>th</sup> July, 2010 is hereby granted as prayed.**
2. **The Defendants do within 21 days of service of this order serve the said documents on the Plaintiffs.**
3. **Parties at liberty to apply.**
4. **Costs in the cause.**

**L. NJAGI**  
**JUDGE**

**DATED and DELIVERED at NAIROBI this 7<sup>th</sup> day of November, 2012.**

**ODUNGA**  
**JUDGE**