**National Social Security Fund Board of Trustee v Kerio Farms Limited and**

**others**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of judgment:** 7 November 2005

**Case Number:** 162/05

**Before:** Ochieng J

**Sourced by:** LawAfrica

**Summarised by:** E Ongoya

*[1] Civil practice and procedure – Discovery – Delivery of interrogatories – Applicable principles.*

**RULING**

**Ochieng J:** This is an application pursuant to the provisions of Order X, rules 1, 2, 7 and 20 of the Civil Procedure Rules. Primarily, the applicants are seeking leave to deliver interrogatories to the plaintiff. The applicants are the first and second defendants, and they ask that the plaintiff’s Managing Trustee, Mr Naftali Mogere, be required to answer the interrogatories within 10 days of service, failing which the suit should be struck out. It is contended that the interrogatories were necessary for the fair disposal of the suit, as they will help to determine the real questions in controversy. As far as the applicants were concerned the interrogatories were just and equitable, and would also help to save on both time and costs. The interrogatories raise a total of fourteen questions, all of which are addressed to the plaintiff. They read as follows:

“(1) Who executed the alleged Sale Agreement dated 5 December 1995 on behalf of both the plaintiff and

the first defendant?

(2) Who witnessed the said Sale Agreement on behalf of the parties?

(3) Who attested the said Sale Agreement on behalf of the parties?

(4) What were the salient and/or principal terms and conditions of the said Sale Agreement? *Viz* completion period, consideration, vacant possession etc.

(5) Who were the lawyers of the plaintiff in the said sale transaction?

(6) When was the material consideration paid to the first defendant? How was it paid? When was it paid?

(7) When did the plaintiff receive the Title Deeds of the material properties? *viz* LR numbers 20840 and

20841.

(8) When did the plaintiff know that the second defendant was a Director and/or shareholder of the first defendant? How did it know?

(9) When did the plaintiff know that the second defendant was the alter ego of the first defendant?

(10) How was the second defendant a “Powerful individual(s) in the then country’s (Kenya) corridor of power? Where is the proof of the existence of such power?

(11) How did the plaintiff realise that the second defendant had “. . .unbridled capacity to influence matters in a Government parastatal such as the plaintiff? Where is the basis.

(12) How did the first and second defendants, together with the third and fourth defendants “*connive*” to perpetuate the “grand fraud” against the plaintiff?

(13) How did the first and second defendants unjustly enrich themselves out of the plaintiff?

(14) How did the second defendant influence the plaintiff to enter into the alleged transactions with the first defendant?”

When canvassing the application, Ms Catherine *Mungai* advocate for applicants pointed out that in the first and second defendants’ defence, they specifically denied the existence of any undue influence, which was allegedly being exerted by them on the plaintiff. Indeed the two defendants expressly pleaded that the plaintiff was, at all material times, represented by advocates. In the circumstances, the applicants believe that if the plaintiff was compelled to respond to the interrogatories it would save the court’s time. But the plaintiff contends that the issues raised in the interrogatories numbered 1–5 were well within the knowledge of the applicants, and that therefore, they were unnecessary. Furthermore, the plaintiff feels that once Discovery of documents is carried out and documents exchanged, the said interrogatories will have been answered. So also the interrogatories numbered six and seven. In the circumstances, as Discovery is mandatory, the plaintiff feels that there is no need to answer the interrogatories. By virtue of the provisions of Order X, rule 11A(1), within one month after the pleadings are closed in a suit in the High Court, every party shall make discovery by filing and serving on the opposite party a list of documents relating to any matter in question in the suit which are not or have been in his possession or power. In this case, the fifth and sixth defendants have not yet filed their respective defences. Therefore, the pleadings in the suit have not yet closed, as envisaged by Order VI, rule 11 of the Civil Procedure Rules. That being the case, it would imply that until and unless the plaintiff unilaterally decided to make out its List of Documents, and to serve the same on the defendants, the applicants would be obliged to await the close of pleadings before they could expect to obtain the answers to the interrogatories, by perusing copies of the documents which were produced during the process of discovery. But, I do not think that the applicants should be obliged to await the close of pleadings. They wish to get on with the preparations of their defences. Meanwhile, as regards the interrogatories numbered 8 and 9, the plaintiff avers that the same were a negation of the applicants’ case. The plaintiff points out that in paragraph 4 of the second defendant’s defence, the said defendant denies having been a director or shareholder of the first defendant. In the circumstances, the plaintiff holds the view that it was not proper for the applicants to ask the question as to when the plaintiff knew that he was a director of the first defendant. At a first glance, the questions numbered 8 and 9 would appear to contradict the averments in the second defendant’s defence. However, upon further reflection, it becomes clear that if the answer to the said questions confirmed the averments in the Defence, that line of questioning will have been effectively determined. In other words, the court would have had the opportunity to know, at an early stage, whether or not the second defendant was a Director or shareholder of the first defendant; and also if the said second defendant was the alter ego of the first defendant. In effect, the answers to interrogatories numbered 8 and 9 would assist in saving both time and costs. As regards the interrogatories numbered ten, eleven and twelve, they all ask the questions, How? They are the kind of questions which would be difficult to give a precise answer to. To my mind, the said questions are best left to be tackled by way of cross-examination. However, I believe that the interrogatory numbered thirteen could easily be answered in a specific manner. I do not think that the question raises a pure legal issue. To say that one had unjustly enriched himself implies that he obtained something for himself, without any colour of right to it, and to the detriment of the true owner thereof. I therefore believe that the person who asserts that another person had unjustly enriched himself should be able to pinpoint the exact thing(s) which the person took from the plaintiff without any colour of right. In the case of *Omar v Gordhanbhai and another* [1974] EA 518, Harris J quoted with approval the following passage from *Halisbury’s Laws of England* Volume 12 (3ed) at 64: “The party interrogating may put questions for the purposes of extracting from his opponent information as to the facts material to the questions between them which he has to prove on any issue raised, between them, or for the purposes of securing admissions as to those facts in order that expense and delay may be saved, or to find out whether particular statements of fact contained in the pleadings of the party interrogating as to which onus of proof is upon him are true or untrue, or to ascertain what case he has to meet or what really is in issue, so as to prevent his being taken by surprise at the trial, or to destroy his opponent’s case, or to support his own case.” In this case, I am satisfied that most of the interrogatories are intended to extract from the plaintiff information as to the facts which are material between the applicants and the plaintiff. By asking when the plaintiff became aware that the applicants were directors or shareholders of the first defendant, the applicants are seeking to secure admissions to their averments in their defence, so as to save on expense and delay. In contrast to those interrogatories, I consider those numbered 10, 11 and 12 to be far removed from the real issues between the parties. For instance, whether or not the second defendant was a powerful individual in Kenya; and whether or not he had unbridled capacity to influence parastatals, that could not by itself determine his liability to the plaintiff. The fact that one may have power or authority to cause things to occur would not necessarily imply that they had used such authority or power. Secondly, as I have already said hereinbefore, it would be very difficult to expect the plaintiff to give a precise answer to the question as to how the applicants connived to perpetuate the grand fraud against the plaintiff. For those reasons, I hold that the interrogatories numbered ten, eleven and twelve should not be delivered to the plaintiff. All the other interrogatories will now be delivered to the plaintiff within the next seven days. And the plaintiff is directed to answer the same within fifteen (15) days of delivery. The answers shall be in the form of an affidavit sworn by the plaintiff’s Managing Trustee which should be filed in court, and served on the applicants within fifteen days from the date when the interrogatories are delivered to the plaintiff.

The costs of the application dated 31 May 2005 are awarded to the first and second defendants.

For the appellant:

Ms Catherine *Mungai*

For the respondent:

*Information not available*