



AIG Kenya Insurance Company Limited v Muga & 17 others (Civil Suit E025 of 2021) [2024] KEHC 9758 (KLR) (Civ) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT E025 OF 2021

CW MEOLI, J

JULY 31, 2024

BETWEEN

AIG KENYA INSURANCE COMPANY LIMITED APPLICANT

AND

- KELLY MUGA 1ST RESPONDENT**
- DISTRIBUTED COLOUR SYSTEMS 2ND RESPONDENT**
- YUNAMI TRAVEL AND TOURS BRAND SOLUTIONS 3RD RESPONDENT**
- BRENDA ACHIENG MUGA 4TH RESPONDENT**
- YUNAMI INTERIORS 5TH RESPONDENT**
- HARRIET MOINDI MAGOMA 6TH RESPONDENT**
- WEBNET SOLUTIONS 7TH RESPONDENT**
- MUSHKIN PRINTING AGENCIES 8TH RESPONDENT**
- SAM MUNDA MUGA 9TH RESPONDENT**
- DANIEL ANGIENDA 10TH RESPONDENT**
- ELIAS OJERA DWALO 11TH RESPONDENT**
- EVANCE ACHIYA ASIYO 12TH RESPONDENT**
- FRANKLINE NYAKUNDI OTOTO 13TH RESPONDENT**
- KENNEDY MWANGI KAGIRI 14TH RESPONDENT**
- PHILIP OUMA OKETCH 15TH RESPONDENT**
- WAMBUGU GACHARA 16TH RESPONDENT**



WILBRODA OTIENO AYUELU 17TH RESPONDENT

YUNAMI HOLDINGS LIMITED 18TH RESPONDENT

RULING

1. This ruling relates to and contemporaneously determines thirteen (13) motions all dated July 23, 2023 and filed by AIG Kenya Insurance Co. Ltd (hereinafter the PlaintiffApplicant) . The motions are brought against Kelly Muga, Distributed Colour Systems, Yunami Travel and Tours Brand Solutions, Brenda Achieng Muga, Yunami Interiors, Harriet Moindi Magoma, Webnet Solutions, Mushkin Printing Agencies, Sam Munda Muga, Elias Ojera Dwalo, Evans Achiya Osoyo, Frankline Nyakundi Ototo, Kennedy Mwangi Kagiri, Phillip Ouma Oketch, Wambugu Gachara and Wilbroda Otieno Ayuelu Yunami Holdings Limited (hereinafter the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, 15th, 16th & 17th Defendants Respondents).
2. The motions are expressed to be brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 11 Rule 2 & Rule 3(5)(b) and Order 51 Rules 1 of the Civil Procedure Rules (CPR). And premised on grounds on the face thereof, as amplified in the affidavits in support of each application as sworn by Esther Kung'u, who describes herself as the Head of Legal at the Plaintiff company, competent and duly authorized to swear the affidavits on its behalf. The common prayers in the motions seek inter alia:-
 - “ 1. That the honorable Court be pleased to grant an order directing the 1st Defendant to produce and deliver or avail certified copies of any and all bank accounts maintained, held, operated or otherwise under the direct or indirect control of the 1st Defendant for the period between January 2015 to December 2018;
 2. That the honorable Court be pleased to grant an order directing the 1st Defendant to produce and deliver certified copies of the following documents for the listed business names registered by the 1st Defendant:- (i) all bank statement for the 2nd Defendant for the period December 2017, April 2018, June 2018 & October 2018 and (ii) all bank statements for the 3rd Defendant for July 2018;
 3. That the honorable Court be pleased to grant an order directing the 4th Defendant to produce and deliver certified copies of the following documents for the following accounts registered under the 4th Defendant:- (i) certified bank statement for the 4th Defendant's account for the period November 2016, January 2017, April 2017, July 2017, March 2018 & May 2018 and (ii) certified bank statements for all bank accounts maintained, operated, held or otherwise directly or indirectly utilized by or for the 5th Defendant's account for June 2016, July 2016, February 2017, August 2017 & January 2018;
 4. That the honorable Court be pleased to grant an order directing the 6th Defendant to produce and deliver or avail certified copies of the following documents: - certified bank statements for the 6th Defendant's account for the period April 2016, September 2016, January 2017, April 2017 & July 2017;



5. That the honorable Court be pleased to grant an order directing the 7th Defendant to produce and deliver or avail certified copies of the following documents: - certified bank statements for the 7th Defendant's account for the period March 2017, April 2017, May 2017, May 2018, March 2018, July 2018, August 2018 & October 2018;
6. That the honorable Court be pleased to grant an order directing the 8th Defendant to produce and deliver or avail certified copies of the following documents: - certified bank statements for the 8th Defendant's account for the period May 2018, June 2018, September 2018 and November 2018;
7. That the honorable Court be pleased to grant an order directing the 9th Defendant to produce and deliver or avail certified copies of the following documents: - bank statements for the 9th Defendant's account for the period February 2017, April 2017, June 2017, October 2017, January 2018, July 2018 & September 2018;
8. That the honorable Court be pleased to grant an order directing the 11th Defendant to produce and deliver or avail certified copies of the following documents: - bank statements for the 11th Defendant's account for the period October 2016, January 2017, April 2017, August 2017, September 2017, December 2017, April 2017, April 2018, June 2018 & September 2018;
9. That the honorable Court be pleased to grant an order directing the 12th Defendant to produce and deliver or avail certified copies of the following documents: - bank statements for the 12th Defendant's account for September 2018;
10. That the honorable Court be pleased to grant an order directing the 13th Defendant to produce and deliver or avail certified copies of the following documents: - certified bank statements for the 13th Defendant's account for the period March 2016, July 2017, December 2017, March 2018, April 2018, August 2018 & October 2018;
11. That the honorable Court be pleased to grant an order directing the 14th Defendant to produce and deliver or avail certified copies of the following documents: - certified bank statements for the 14th Defendant's account for the period April 2016, August 2016, December 2016, March 2017, April 2017, July 2017, September 2017, October 2017, March 2018, July 2018, August 2018 & September 2018;
12. That the honorable Court be pleased to grant an order directing the 15th Defendant to produce and deliver or avail certified copies of the following documents: - bank statements for the 15th Defendant's account for July 2016;
13. That the honorable Court be pleased to grant an order directing the 16th Defendant to produce and deliver or avail certified copies of the following documents: - certified bank statements for the 16th Defendant's account for months of February 2017 & May 2017; and



14. That the honorable Court be pleased to grant an order directing the 17th Defendant to produce and deliver or avail certified copies of the following documents: - bank statements for the 17th Defendant's account for the period December 2016, July 2017, October 2017, December 2017, April 2018, June 2018 & September 2018.”
3. The common thread in Esther Kung'u's various depositions in the respective affidavits in support of the motions is to the following effect. The Plaintiff being an insurance company processes the settlement of claims through its various agents and had developed two (2) systems for the payment of claims, namely the 'PREMIA' claims register that tracks the progress of claims lodged with the company; and the Abridged Receipts & Payment System 'ARPS' system which provides details of the payouts to clients for purposes of reconciliation of records. The deponent further stated that at all material times the 1st Defendant was an employee of the Plaintiff with access to the said systems which enabled him process, review and approve settlement of claims in the ordinary course of business. She further deposes that on or around November 2018 the Plaintiff became aware of irregularities in respect of transactions and claims handled by the 1st Defendant and upon investigations it was discovered that the latter conceived and executed a fraudulent scheme in collusion with the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, 15th, 16th & 17th Defendants by altering/substituting the legitimate insured's beneficiary details within ARPS and PREMIA systems with illegitimate non-insured beneficiaries that he knew or ought to have reasonably known were not the actual persons making the claims or entitled to the payment from the Plaintiff.
4. She goes on to depose that amongst the fraudulent payments made were: funds released to the 2nd & 3rd Defendants, being shell entities which are sole proprietorships fully owned and operated by the 1st Defendant created by the 1st Defendant to hold fraudulently acquired funds; funds released to the 4th & 5th Defendant, the former being the sister to the 1st Defendant and the latter being a shell entity and sole proprietorship created, fully owned and operated by the former to hold the fraudulent funds acquired by the 1st Defendant; funds released to the 6th Defendant being the wife of the 1st Defendant; funds released to the 7th Defendant – a company wholly operated by Kenneth Wanjala Omolo; funds released to the 8th Defendant – a company wholly operated by Daniel Barasa Wanjala Omolo; funds released to the 9th Defendant being the brother of the 1st Defendant; funds released to the 11th Defendant being the 1st Defendant's employee, business partner and agent; funds released to the 12th Defendant; funds released to the 13th Defendant being the 1st Defendant's employee, business partner and agent; funds released to the 14th Defendant being the brother in law of the 1st Defendant; funds released to the 15th Defendant; funds released to the 16th Defendant; and funds released to the 17th Defendant being the 1st Defendant's employee, business partner and agent.
5. That the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, 15th, 16th & 17th Defendants had never transacted with the Plaintiff or been insured or designated as a beneficiaries to any insurance policy issued by the Plaintiff therefore they had reasonable knowledge that they were not entitled to any payment received, transmitted or delivered to them from the Plaintiff. She states that the Plaintiff's records further show the transfer of funds from its accounts to that the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, 15th, 16th & 17th Defendants on various dates ranging between April 2016 and October 2018. She concludes by stating that the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, 15th, 16th & 17th Defendants directly colluded with the 1st Defendant in a fraudulent scheme and the bank statements sought will assist the Plaintiff to prosecute its case as the said documents are relevant to the instant suit. Therefore, the motion ought to be allowed as prayed.



6. The 1st, 2nd, 3rd and 18th Defendants opposed the motion by way of grounds of opposition dated 13.03.2024. They take issues with the motions against them on grounds that the Plaintiff's motion is too broad, vague and by granting it, the Court would be sanctioning a fishing expedition; that a Notice of Production of Documents should have preceded the Plaintiff's motion; that the Plaintiff can sufficiently prove the transactions alluded to in paragraph 4 of its motion through its bank statement from the alleged source bank account; that the Plaintiff has not pointed out the evidence, factual or otherwise sought to be elicited from the alleged documents and the connection, if any, to the Plaintiff's case; and that the Plaintiff's motion is otherwise an abuse of the Court process.
7. The 4th, 5th, 6th, 7th, 8th, 9th, 11th, 13th & 17th Defendants on their part equally opposed the motion against them by way of grounds of opposition dated 06.02.2024. They attack the motion on the following grounds. First, that the court lacks the jurisdiction to grant orders that are antithetical and infringe on the rights of the Defendants, and whose effect is to limit the human rights of the Defendants in view of Article 24, 25 and 50 of *the Constitution*; that the application by the Plaintiff lacks specificity and is too broad to be implemented by the Defendants; that the application requests for information that is privileged and is therefore beyond the scope of Section 22 of the *Civil Procedure Act*; that the granting of the application by the Plaintiff will result in the infringement of non-derogable rights of the Defendants under *the Constitution* including the right to privacy; that the prayers sought would if granted lead to the Defendants breaching confidentiality agreements with third parties exposing the Defendants to further liability; that the Defendants are not the exclusive custodians of the information being sought in the application; that the information sought is irrelevant to the disposition of the instant suit; and that the application by the Plaintiff is brought in bad faith tantamount to a fishing expedition by the Plaintiff.
8. The 14th Defendant also opposed motion against him through a replying affidavit dated 07.11.2023. He views the motion as incompetent and an abuse of the Court process and asserts that it is against public policy and contravenes Article 31 of *the Constitution* as bank statements sought contain private information and other business transactions that if released without the consent of his clients will violate their constitutional rights, provisions of Section 138 of the *Evidence Act* and 32 of the Data Protection Act. He further states that the transactions listed in paragraph 5(1) to (xiv) of the Plaintiff's motion were effected from its system hence it has all the requisite information required; that Article 35 of *the Constitution* is not a panacea for poor or negligent record keeping on the part of the Plaintiff; and that Article 50 of *the Constitution* guarantees his right to a fair hearing, thus he cannot be compelled to produce documents which are self-incriminating. In conclusion he deposes that the motion ought to be dismissed with costs.
9. The 12th, 15th & 16th Defendants failed and or opted not to file a response to the Plaintiff's motion despite service. On 02.05.2024, the Court allowed the respective motions as against the 12th, 15th & 16th Defendants as prayed.
10. The motions were canvassed by way of written submissions. Counsel for the Plaintiff anchored his submissions on the decisions in *Jibril Konse Ali v AIG Insurance Company Limited* [2021] eKLR and *ABN Amro Bank v Kenya Pipeline Company Limited* [2019] eKLR on the importance of discovery and production of documents where negligence and fraud are imputed. Restating the events leading to the instant suit and motion, counsel contended that information sought from the Defendants is necessary and critical as the cause of action is founded on the fraudulent misappropriation of the Plaintiff's funds from its accounts by the 1st Defendant in breach of a fiduciary duty owed by the 1st Defendant to the Plaintiff; that the bank statements will facilitate prima facie identification, tracing and tracking of the monies fraudulently acquired from the Plaintiff; that the participation,



connivance, collusion or state of being accessory after the fact of the Defendants will be ascertained; and that the disclosure is expressly limited to specific months in which the alleged transfer occurred to ascertain dates and identities of the payees. Counsel pointing out that the statements in question are the individual property of the respective Defendants, hence their banks can disclose the statements either directly to the Court or indirectly to the Court by issuing copies to the customers to produce them in Court. The English decision in *Sutherland v Barclays Bank Limited* (1938) 5 LDAB 163 was cited in that regard.

11. On whether the documents requested have been adequately identified and scoped, counsel cited the decision in *Oracle Production Limited v Decapture Limited & 3 Others* [2014] eKLR and *Concord Insurance Co. Ltd v NIC Bank Limited* [2013] eKLR to contend that the Plaintiff through the motions merely seeks to establish a prima facie case on a balance of probabilities that the documents sought exist or could be produced by and for the Defendants by their bankers; are in control or could reasonably be produced by the Defendants in a very short time; are necessary and relevant for a fair trial to be held on contested issues herein. And that regarding the bank statements, the scope in terms of time is the four (4) year period between January 2015 and December 2018, when the 1st Defendant was an employee of the Plaintiff and allegedly engaged in the fraudulent conspiracy jointly with the 2nd to 9th Defendants and 11th to 18th Defendants.
12. Concerning the objection that the prayers sought constitute a violation of the right to privacy as guaranteed in Article 31 of *the Constitution*, counsel placing reliance on the decisions in *Tumaz and Tumaz Enterprises Limited & 2 Others v National Council for Law Reporting (Miscellaneous Civil Case E144 of 2021)* [2022] eKLR and *Intercom Service Limited & 4 Others v Standard Bank* [2022] eKLR argued that the right to privacy is not absolute and while the documents sought may confidential they are not privileged in law and are liable to be produced. That in certain circumstances the disclosure of bank records is not only justified but indispensable for the fair resolution of the matter before the Court. Citing the English decision in *Tournier v National Provincial and Union Bank of England* (1924) IKB 461 applied in the case of *Irene Donna Shamala v NIC Bank Limited* [2021] eKLR, counsel argued that the disclosure of bank statements by the Defendants is allowed under the exceptions to the duty of confidentiality and that there exists a nexus between the documents the Plaintiff is seeking, to establish the fraudulent scheme orchestrated by the 1st Defendant. That the need to uncover the fraudulent activity outweighs any concerns regarding confidentiality or prejudice to third-party interests.
13. On whether the documents requested by the Plaintiff are relevant for the just and efficient disposal of the matter, counsel citing the broad scope of discovery envisaged in Section 22 of the CPA argued that discovery constitutes a formal pre-trial procedure in which a parties may seek to discover evidence and facts that are pivotal to their respective cases. That demonstration of the Plaintiff's case against the Defendants necessitates the production of the bank records to ascertain if the transfers/patments were actually received by the Defendants or whether the Defendants subsequently acted in a manner exhibiting coordination or control by a singular entity and who the final beneficiary of the monies was. The decision in *Concord Insurance Co. Ltd* (supra) was relied on in the latter regard. Counsel relied on the decision in *Kenya Commercial Bank of Kenya v Kenya Pipeline Company Limited* [2014] eKLR to support the submission that the public interest in enhancing the Constitutional right to a fair hearing and the just resolution of the dispute here far outweighs the prejudice likely to be suffered by the Defendants. In conclusion he urged the court to allow the motion against the 1st to 9th Defendants and the 11th to 17th Defendants, to aid the course of justice.
14. On the part of the 4th, 5th, 6th, 7th, 8th, 9th, 11th, 13th & 17th Defendants, counsel at the outset questioned the court's jurisdiction to grant discovery sought herein, which he asserted to be contrary to and



portending infringement upon the Defendants' rights under Article 24, 25 and 50 of *the Constitution*. Citing the decisions in *Lustman & Company (1990) Limited v Corporate Business Centre Limited & 4 others* [2022] KEHC 42 (KLR) and *Bellevue Development Company Ltd v Gikonyo & 3 others* (Petition 42 of 2018) [2020] KESC 43 (KLR) counsel asserted that the granting of discovery orders is a matter of discretion to be exercised in a judicious manner for purposes of fostering justice of the case. However, in his opinion, granting the discovery order sought by the Plaintiff will amount to the limitation of the Defendants' right to fair hearing contrary to Article 24 and 25 of *the Constitution*. The Defendants thereby being compelled to furnish the Court with evidence that may be self-incriminating, contrary to Article 50(2)(1) of *the Constitution*. Further, that the net effect of the discovery order is to have the Defendants discharge the Plaintiff's duty of gathering evidence to sustain the Plaintiff's case, and consequently upsetting the equality of arms.

15. Regarding the question whether the motion meets the requisite threshold under Section 22 of the CPA, counsel called to aid the decisions in *Concord Insurance Co. Ltd* (supra), *Ramji Megji v Kisii University* [2016] eKLR, *Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd* [2016] eKLR and *Selecta Kenya Gmbh & Co Kg & another v Peter Wanderi* [2015] eKLR. In support of the submission that the Plaintiff has failed to establish that the documents sought are relevant; that the information requested is in the sole custody to the Defendants; that no prejudice will be occasioned upon the Defendants; and that it would not be oppressive to them if the orders sought are granted. Counsel adverting to the broad manner in which the application is allegedly drawn pointed out that the motion seeks to have the defendants produce banks statements from all their bank accounts known or unknown to them and those of third parties not before the Court, as demonstration of a fishing expedition by the Plaintiff.
16. Concerning the 1st and 6th Defendants who are spouses, counsel asserting that information sought constituted privileged information, submitted that under Section 130 of the *Evidence Act*, communications during marriage are privileged. Therefore, the prayer for discovery in respect of such privileged information should be declined. The decision in *Lustman & Company (1990) Limited* (supra) was cited here. Finally, concerning the likelihood of Defendants breaching confidentiality agreements thus exposing themselves to liability, it was asserted that the 5th, 7th & 8th Defendants are corporate entities with numerous confidentiality agreements with third parties, and that breach thereof will result in further litigation against them. Defeating the overarching purpose of the Court exercising its discretion to grant discovery orders, namely to meet the ends of justice. In summation the Court was urged to dismiss the motion as against the 4th, 5th, 6th, 7th, 8th, 9th, 11th, 13th & 17th Defendants with costs.
17. On behalf of the 14th Defendant, counsel addressing the singular issue whether the motion against the 14th Defendant ought to be allowed, described it as antithetical to public policy and in contravention of Article 31 of *the Constitution*, bank statements being private data or information involving third parties. That furnishing the information without the consent of the 14th Defendant's clients would amount to infringement upon its Constitutional rights, Section 138 of the *Evidence Act* and Section 32 of the Data Protection Act. Moreover, that the banking information sought being related to transactions effected from the Plaintiff's system was already in the possession of the Plaintiff. Counsel relying on the English decision in *Blunt v Park Lane Hotel Limited* [1942] 2 KB 253 asserted that pursuant to the principles of a fair hearing espoused in Article 50 of *the Constitution*, the 14th Defendant cannot be compelled to produce documents which are self-incriminatory. Similarly, counsel urged the Court to dismiss the motion as against the 14th Defendant, with costs.
18. The Court has considered the material canvassed in respect of the motions. As earlier stated, the Plaintiff's motions are expressed to be brought pursuant to Section 1A, 1B & 3A of the CPA, Order 11 Rule 2 & Rule 3(5)(b) and Order 51 Rules 1 of the CPR. The motions as against the respective



Defendants seek orders directing the said Defendants to produce and deliver or avail certified copies of their bank statement for specific months ranging between January 2015 and December 2018 when the 1st Defendant was an employee of the Plaintiff.

19. The general power of the Court to order production of a document or documents in the custody of a party and or to order discovery is expressly donated by Section 22(a) of the CPA. Section 22 of the CPA in its entirety does provides that; -

Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- (c) order any fact to be proved by affidavit.

20. The Plaintiff's motions did not invoke the above provision, but invoked inter alia Section 3A of the CPA which specifically reserves "the inherent power of the Court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". In relation thereto, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR observed that: -

"Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malcolm Bell* [2013] eKLR, to add the following:-

"Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just."



21. Discussing the purpose and applicable test in regard to discovery under section 22 of the CPA, the Court of Appeal in *Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited* [2019] eKLR observed that:-

“(D)iscovery is a tool requiring an adverse party to disclose information that is essential for the preparation of the requesting party's case and/or to ascertain the existence of information that may be introduced as evidence at trial..... The test for discovery is proof of possession and materiality of the information sought by the parties.”

22. The court proceeded to quote with approval the following from *Halsbury's Laws of England*, 4th Edition :-

“The term "discovery" in this title is used to describe the process by which the parties to a civil cause or matter are enabled to obtain, within certain defined limits, full information of the existence and the content of all relevant documents relating to the matters in question between them.... In determining whether a document should be disclosed by a party two tests should be applied: (1) whether it is relevant: (2) whether it is or was in the possession, custody or power of the party or his agent: and in any case when the order directing disclosure has limited discovery or relates to particular documents only the terms of that order must be applied...The power of the court to make an order for production for inspection is discretionary, and the court will not make an order for the production of any documents for inspection unless it is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. Whilst the court may make an order for production for inspection at any time, it will not normally allow a plaintiff inspection before he has served his statement of claim or a defendant before he has served his defence.”

23. As to the purpose served by discovery the Court of Appeal in *ABN Amro Bank (supra)* said that “The purpose of discovery is mainly to ensure that all documents or information necessary for the just determination of the suit are made available to all the parties as well as to the court.”. *Halsbury's Laws of England* 4th Edition Volume 13 states as follows at paragraph 1 concerning the function of discovery of documents: -

“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.”

24. It is trite therefore that the power of the court to order discovery and or production of documents by an adverse party is discretionary. The Court associates itself with the sentiments of *Havelock, J.* (as he then was) in *Concord Insurance Co. Ltd (supra)* that:-

“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.”



25. The question falling for determination here is whether the Plaintiff's motion meets the key considerations, namely, the relevance of the of the documents sought to the just determination of the dispute; possession of the documents in question by the adverse party; and material scope of the discovery. As to relevance, the Plaintiff emphasized the importance of discovery and production of the documents request in view of the nature of the claim brought against the Defendants, being one founded on negligence and fraud. The Defendants have roundly assailed the motion as an affront to Article 50 of *the Constitution* in seeking to compel the Defendants to furnish the documents in that may be self-incrimination in addition to the burden on the Defendants to gather evidence on behalf of the Plaintiff in prosecution of its case.
26. Here it is undisputed that the Plaintiff's claim is founded on fraud as particularized against each Defendant with specified monies allegedly received by the Defendants in perpetration of the fraud and breach of fiduciary duty by the 1st Defendant (See Para. 25(b) of Plaintiff). Consistent with the decision of the Court of Appeal in *Kinyanjui Kamau vs George Kamau* [2015] eKLR that "any allegations of fraud must be pleaded and strictly proved" and in *Virani ta Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, that "Fraud is a serious quasi-criminal imputation, and it requires more than proof on a balance of probability though not beyond reasonable doubt". Ex facie therefore the bank statements are relevant to enable identification, tracing and tracking of the monies purported to have been fraudulently acquired, when and by whom the monies were received.
27. As to possession of the bank statements requested, the Plaintiff underscored that the statements in question are the individual property of the respective Defendants, and their banks can disclose the statements either directly to the Court or indirectly to the Court. By issuing copies to the customers to produce the same in Court. Further the documents could be produced by and for the Defendants by their bankers and constructively in the Defendants' control and amenable to production in reasonably short time. The Defendants response was that the Plaintiff had not established that the information requested is in the sole custody to the Defendants. The Defendants viewing the request for discovery as a fishing expedition relating inter alia to privileged information between husband and wife (the 6th and 1st Defendants), and confidential agreements with third parties portending breach of such confidentiality. It was equally contended that Defendants cannot be compelled to produce documents which are self-incriminatory in an affront to the right to fair hearing pursuant to Article 50 of *the Constitution*.
28. As correctly argued by the Plaintiff the bank statements though information in possession of third parties, namely, the banks is available to the Defendants as the proprietors of their accounts, upon request. Secondly, concerning claims to privilege, the bank statements do not qualify as communication during marriage between the 6th & 1st Defendant. Moreover, beyond making generalized objections, the Defendants did not tender proof of confidentiality agreements with third parties that would be prejudiced in the event of disclosure. Besides, such considerations cannot in a proper case trump the more pertinent consideration regarding the ultimate purpose her that the ends of justice be met in this case that relates to allegations of fraud involving large sums of money. As to self-incrimination and by extension the application of Section 138 of the *Evidence Act*, a distinction must be made between civil and criminal proceedings. In civil proceedings, the court is called upon to determine all issues in controversy between the parties, whereas the constitutional injunction in Article 50(2)(1) of *the Constitution* against self-incrimination is specific to an accused person facing criminal proceedings. Additionally, Section 138 of the *Evidence Act* cannot be read in isolation from Section 22 of the *Civil Procedure Act* in light of the issues of fraud that are in controversy here.
29. As to the interplay between the Plaintiff's motion and right to privacy, Article 31 of *the Constitution* provides that every person has the right to privacy, which includes the right not to have— (a) their



person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed. The right to privacy has been the subject of numerous decisions by this Court. It is settled that privacy law in relation to information and data (the gist of the Data Protection Act) specifically appertains to the protection of the information and data from unwarranted, unauthorized misuse or abuse. See; - Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others [2015] eKLR and Tumaz and Tumaz Enterprises Limited & 2 Others (supra).

30. Here the information sought is clearly not intended for misuse or other nefarious purpose but assertedly for furthering the ends of justice and the just determination of the issues in controversy. Section 69 of the *Evidence Act* is not applicable to the instant proceedings in light of the preceding provision (Section 68 of the *Evidence Act*) that concerns production of secondary evidence. Notice to produce would be a prerequisite in that case and not in the present circumstances. Further, under Section 22 of the CPA an order of discovery maybe made suo motu by the Court or on application of any party.
31. This said, the motions ultimately succeed or fall on the question of the scope of the Plaintiff's request for discovery. Here the Defendants have argued that the motion is a fishing expedition. That the application seeks to have the Defendants adduce banks statements from all their bank accounts known or unknown to them and those of other parties not before this Court, if these accounts have anything to do with the Defendants. That scope is too wide and non-specific even though the Plaintiff argues that the information sought is specific to certain months as itemized in the respective motions in the four (4) year period between January 2015 and December 2018 when the 1st Defendant was an employee of the Plaintiff.
32. The relevant prayers in the respective motions, generally seek that the respective Defendants furnish bank statements from as early as April 2016 and as late as October 2018 without specifying which bank accounts the statements are in respect of or where the bank accounts are held. As rightly contended by the Defendants, the alleged fraudulent claims were processed by and settlement payments originated from the Plaintiff's accounts, which suggests that it is possible, within reason, for the Plaintiff to be more specific in their request, than evidenced here. Indeed, the contents of the affidavits supporting the motions appear to confirm the foregoing possibility.
33. While the Defendants may each have held or operated one or several bank accounts in the period, without specificity to the accounts in question or banks where the accounts are held, or recipient banks to which alleged fraudulent payments were transferred, the request as presented appears too wide in scope, while bereft of basic details. The request could, if allowed, well result in production of voluminous, unwieldy and possibly unnecessary documentation that is irrelevant to, or even causing obfuscation in the present proceedings. The request consequently appearing after the fact, to be no more than a carte blanche fishing expedition. The court must guard against such a perverse eventuality.
34. This court concurs with Azangalala, J. (as he then was) in National Social Security Fund Board of Trustees v Dr.Sally Kosgei & Another [2005] eKLR where the learned Judge observed that;

“It is clear that the said Notice to produce for inspection did not specify the documents to be produced. The documents may vary from a few documents to numerous documents. I do not think the function of interrogatories, Discovery and Inspection is to give an open chance to a party to seek proof of the case of the other side. The Plaintiff should know essential documents necessary for the creation of a valid title and should have adequately and specifically identified them.



..... I am however of the view that whether what is sought is discovery or inspection, the Applicant must adequately specify the documents he is interested in. In this regard I agree with the observation made by the Court of Appeal in *WHITE –V- SPAFFORD & CO 1*, (1901) 2 K.B. 241 which was cited in the case of the *MOTOR MART AND EXCHANGE LTD –V- THE STANDARD GENERAL INSURANCE CO. LTD (SUPRA)* viz:

“It is not sufficient to make a general affidavit based on a priori reasoning that certain classes of documents must be in his opponent’s possession or power.

“The discovery sought must be of a species not genus.”

35. In the result, the court agrees with the Defendants that the scope of the Plaintiff’s request appears so broad as to give the appearance of a fishing expedition. On that ground alone, the Plaintiff’s motions must fail. Accordingly, the Court is not persuaded to allow the motions against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 13th, 14th & 17th Defendants as prayed. The Plaintiff’s motions are hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Nkarichia

For the 1st -3rd & 18th Respondents: Mr. Orina hb for Mr. Saluni

For the 4th, 6th -9th, 11th 13th, 17th Respondents: Mr. Orina hb for Mr. Nyagah

For the 12th Respondent: Mr. Ngani

For the 14th Respondent: Ms. Musavakwa hb for Mr. Kibathi

CA: Erick

