



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 212 OF 2015**

**STANLEY MWANGI GACHUNGU &**

**BILHA WARUGURU MWANGI T/A**

**VINCO FOOTWEAR.....PLAINTIFFS**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. By a Motion on Notice dated 24/7/2020, brought under *sections 63(e) and 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules*, the defendant sought three orders. These were:-

a) an order to review/set aside and/or vary the judgment and preliminary decree issued on 4/10/2019; b). an order granting the applicant leave to further amend its amended statement of defence in terms of the annexed Further Amended Statement of Defence and;

c) a re-opening of the case to allow the defendant to adduce new evidence, tender documents and call witnesses for purposes of fair trial and just determination of the issues in dispute.

2. The grounds upon which the application was premised were set out in its body and the supporting affidavit of **Michael Masawa**, the Legal Counsel at Absa Bank PLC (formerly Barclays Bank (K) Limited) sworn on 24/7/2020.

3. It was contended that; the plaintiffs were customers of the defendant. That sometimes in 1990 and 1991, the defendant advanced overdraft facilities on the strength of various share certificates and title deeds which the plaintiffs had deposited with the defendant. Thereafter, the plaintiffs filed the present suit against it for alleged fraudulent sale of the said shares which they claimed to have left in its custody.

4. It was further contended that the defendant filed its defence on 23/6/2015 which was amended on 9/2/2017. However, at the trial, it did not call any witness or file any document because the overdraft facilities were granted more than 25 years ago. In compliance with the Central Bank of Kenya Prudential guidelines for the retention and maintenance of documents, the defendant destroys records of business transactions which have been completed after a period of 7 years, thus the defendant did not have any records to support its case.

5. The deponent averred that **Mr. Stanley Mwangi Gachungu**, the 1<sup>st</sup> plaintiff published an autobiography whereby a factual account of his social, business and public service life was stated. That in the autobiography, the 1<sup>st</sup> plaintiff asserted that his investment in shares was wrongfully sold by **Nyaga Stock Brokers (“the said Firm”)** after he had withdrawn them and other securities from the defendant and transferred them to that firm. That the said securities had been released to him by the defendant as he had cleared his loan.

6. It was further averred that the 1<sup>st</sup> plaintiff had indicated in his said autobiography that the said firm collapsed in 2007 causing the plaintiffs’ loss of their life investment. In the said autobiography, letters written by the defendant to the Custody and Registration Services and to the Capital Markets Authority in an effort to recover the said shares and the prosecution of said firm for the fraudulent sale of the subject shares had been reproduced. That in those letters, the innocence of the defendant was stressed.

7. In the premises, it was contended that it was important that the judgment and preliminary decree be reviewed and set aside and the defendant be allowed to further amend its defence to include the foregoing matters.

8. The application was strenuously opposed vide the replying affidavit of **Stanley Mwangi Gachugu** sworn on 9/9/2020. He averred that the defendant had been throughout represented by the firm of **Havelock Nduati & Co Advocates**. The said advocates had fully participated in the suit its conclusion. However, they went silent when the Court called for a valuation report of the subject shares.

9. It was contended that the defendant had failed to adduce any evidence or attend pre-trial conferences. That the Court made judgment and issued an interim decree in favor of the plaintiffs on the basis of the evidence adduced. That the issue of the alleged period of time the defendant is supposed to keep documents before destroying them was an issue in the suit which had been determined. It was therefore *res judicata*. The CBK guidelines relied on were published in 2013, two years before this suit was filed. There was therefore nothing new about them.

10. He denied having published his autobiography and termed the annexure produced as ‘**MM2**’ in the in the supporting affidavit a forgery. That the defendant had not revealed the source of the alleged autobiography and its publishers and had failed to file the valuation report as directed by the Court.

11. It was further averred that the conditions necessary for review had not been met. That the delay in concluding the suit was highly prejudicial to the deponent who was now 90 years while his wife, the co-plaintiff had already passed on without having enjoyed the fruits of their judgment.

12. In addition, the plaintiffs filed a Notice of Objection dated 9/12/2020 objecting to paragraphs 8, 9, 10, 11, 12, 13, 14, 15,16 and 17 of the Supporting Affidavit of **Michael Massawa** sworn on 24/7/2020. It was contended that the deponent thereof had not disclosed the source of the document annexed at paragraph 8 of the Supporting Affidavit as ‘**Exhibit MM- 2**’. That the same was therefore inadmissible as the information set out in the said paragraphs was not within the deponent’s own knowledge. That those paragraphs should be struck out and the exhibit expunged from the record.

13. The parties filed their respective submissions which the Court has considered. The first issue to determine is whether paragraphs 8 to 17 of the supporting affidavit offend the law and should therefore be struck out as contended by the plaintiffs in their preliminary objection.

14. **Order 19, Rule 3 of the Civil Procedure Rules** provides: -

**“(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:**

***Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof”.***

15. It is clear from the foregoing that, the general rule is that a witness can only testify on direct evidence. That hearsay evidence in affidavits is only admissible if the deponent discloses the sources of such information and states the basis of believing the same. Failing that, no such evidence may be permitted to be adduced by way of affidavit.

16. In the case of **Baseline Architects Limited & 2 Others v National Hospital Insurance Fund Board Management [2008] Eklr**, it was held: -

***“It is clear that the law places a duty on the deponent to limit and/or confine facts in an affidavit to issues and/or facts and information within his own knowledge or which he is able to prove. In cases where the facts are within the knowledge of the deponent, it is mandatory for the deponent to disclose the source and grounds of information and facts in the affidavit. Mr. Oraro learned counsel for the applicant submitted that the deponent does not show the source of the documents attached to the affidavits which is privileged and confidential to the applicant. Having gone through the affidavits and the subject paragraphs which the applicant seeks to strike out, it is clear that there is no disclosure as to the source and how the documents annexed to the affidavits were obtained. That is a clear and fundamental departure from the mandatory provisions of Order 18 Rule 3(1)”.***

17. The issue in contention here is the exhibit produced as “**MM-2**”. That is an alleged autobiography of the 1<sup>st</sup> plaintiff. The deponent of the supporting affidavit deposed that the same was gifted by the 1<sup>st</sup> plaintiff to the defendant. On the other hand, the 1<sup>st</sup> plaintiff denies ever having published the same and termed it a forgery.

18. I have looked at the exhibit. It is entitled, “**HONESTY PAYS. An Autobiography**”. It has a photograph and the name of the 1<sup>st</sup> plaintiff thereon. The same neither has the name of the publisher or the date or year of publication.

19. In the supporting affidavit, the deponent has not disclosed when and where the 1<sup>st</sup> plaintiff gifted the defendant with that autobiography. He has not alleged that the 1<sup>st</sup> plaintiff handed the autobiography to him or any named or identifiable officer of the defendant.

20. The 1<sup>st</sup> plaintiff denied ever publishing the said autobiography. He also denied having gifted the same to the defendant. Having denied that fact, the evidentiary burden of proof shifted back to the defendant to prove its allegations that the said document belonged to the 1<sup>st</sup> plaintiff and that he is the one who had gifted it to the defendant as alleged. The defendant should have adduced more evidence than to stop at the mere allegation level. The circumstances in which the document was obtained or made is not clear.

21. The burden of proof lied with the applicant to give sufficient evidence to prove that it indeed received the autobiography from the plaintiff and that it was an authentic copy. This, the defendant failed. This fails the test set out in the **Evidence Act** in **sections 107 and 108** which provides that it is he who alleges that must prove.

22. Accordingly, the Court is satisfied that the authenticity of the alleged autobiography was not proved. The document was wrongly produced and cannot be relied on. It is sheer hearsay. The Court holds that view notwithstanding that the information given in the document is so personal that it can only have emanated from the person whose life is the subject thereof. But to the extent that its sources are unknown, and that the 1<sup>st</sup> plaintiff has disowned it, it cannot be allowed to stand.

23. Accordingly, that document is struck out and expunged from the record. Consequently, paragraphs 8 to 17 of the supporting affidavit are likewise struck out.

24. This is an application for review. **Order 45, Rule (1) of the Civil Procedure Rules** provides the circumstances under which a review may be granted. These are; discovery of new evidence and important evidence which, after the exercise of due diligence, was not within an applicant's knowledge or could not be produced when the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

25. The basis of the defendant's application was that it had discovered new and important piece of evidence by way of the 1<sup>st</sup> plaintiff's autobiography. The Court has already struck out that document and all the averments based on the same.

26. That leaves only one other ground for review. That is, the **Central Bank of Kenya Prudential Guidelines 2013** which requires records of business transactions which have been completed after a period of 7 years to be destroyed.

27. It was the defendant's contention that since the overdraft facilities were granted more than 25 years ago, it had destroyed the records relating to the facilities. That in the premises, it could not produce those records in support of its defence. The plaintiffs retorted that these guidelines were in existence even before the suit was filed but the defendant failed to produce them.

28. It is not in dispute that the subject guidelines were published in 2013. The suit was filed in 2015. The regulations were in existence prior to the trial of the suit. The defendant knew about the alleged destruction of the records but chose not to produce them.

29. In view thereof, the defendant could have raised the matter under **section 7 Explanation no. 4 of the Civil Procedure Act**. In this regard, that matter is *res judicata*. It cannot be a basis for an application for review.

30. In view of the foregoing, the application dated 24/7/2020 is without merit and the same is hereby dismissed with costs.

**DATED and DELIVERED at Nairobi this 6<sup>th</sup> day of May, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**