

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 300 Of 2015

VIMALKUMAR BHIMJI

DEPAR SHAH 1ST PLAINTIFF/APPLICANT

BIDCO AFRICA LTD.....2ND PLAINTIFF/APPLICANT

-VERSUS-

STEPHEN JENNINGS T/A RG

AFRICAN LAND LTD..... 1ST

DEFENDANT/RESPONDENT

RENDEAVOUR GROUP 2ND DEFENDANT/RESPONDENT

PRESTON MENDENHALL..... 3RD

DEFENDANT/RESPONDENT

ARTEM GURVEVICH..... 4TH DEFENDANT/RESPONDENT

ALY KHAN SACHU..... 5TH DEFENDANT/RESPONDENT

CYPRIAN NYAKUNDI.....6TH DEFENDANT/RESPONDENT

RULING

1. For determination is **motion dated 01/04/2025** brought pursuant to **Section 1A, 1B & 3A** of the **Civil Procedure Act (CPA)** and filed by **VimalKumar Bhimji Depar Shah** and **Bidco Africa Ltd** as against **Stephen Jennings t/a RG African Land Ltd, Rendevour Group, Peston Mendenhall, Artem Gurvevich, Aly Khan Sachu & Cyprian Nyakundi** (*hereafter the 1st, 2nd, 3rd, 4th, 5th & 6th Defendant/Respondent(s)*) seeking inter alia-;

a. Spent.

- b. That this Honorable Court be pleased to expunge and or strike out the 1st Defendant's bundle of documents dated 16/03/2022, or in the alternative;
- c. That this Honorable Court be pleased to expunge and or strike out the confidential London Court of International Arbitration Final Partial Award dated 15/02/2018 appearing as documents 1 contained at Page 1 to 127 of the 1st Defendant's list and bundle of documents dated 16/03/2022.
- d. That the costs of the application be borne by the 1st Defendant.
2. The motion is premised on grounds amplified in the supporting affidavit sworn by **VimalKumar Bhimji Depar Shah**, (hereafter 1st Plaintiff/Applicant) dated **01/04/2025**, who cites being the director of **Bidco Africa Ltd** (hereafter the 2nd Plaintiff/Applicant) competent and duly authorized to depose on behalf of the latter.
3. **Stephen Armstrong Jennings, Rendeavour Group, Peston Mendenhall, Artem Gurvevich and Aly Khan Sachu** (hereafter the 1st, 2nd, 3rd, 4th & 5th Defendant) oppose the Plaintiffs motion by way of a **replying affidavit** deposed by **Stephen Armstrong Jennings** dated **30/06/2025**.
4. **Cyprian Nyakundi** (hereafter the 6th Defendant) on his part, opposes the Plaintiffs motion by way of **grounds of opposition** dated **17/06/2025**. The Court will address the nucleus of the above affidavits and grounds of opposition later in this ruling.

5. Directions were taken on disposal of the **Plaintiff's motions** by way of written submissions. The parties duly complied. That said, the Court has considered the rival affidavit material, grounds of opposition and submissions, to wit, it postulates that the issues for determination concern: -

a) *Whether the Court ought to expunge and or strike the 1st Defendant's bundle of documents dated 16/03/2022 and or strike out the confidential London Court of International Arbitration Final Partial Award dated 15/12/2018 appearing in the 1st Defendant's bundle of documents dated 16/03/2022?*

b) *Who ought to bear the costs of the motion?*

c) *Whether the Court ought to expunge and or strike out the 1st Defendant's bundle of documents dated 16/03/2022 and or strike out the confidential London Court of International Arbitration Final Partial Award dated 15/12/2018 appearing in the 1st Defendant's bundle of documents dated 16/03/2022?*

6. In presenting the instant motion the Plaintiffs have among other provisions of the CPA cited Section 3A 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"*", to wit, this Court's inherent powers was judiciously addressed by the **Court of Appeal in Rose Njoki King'au & Micugu Wagathara v Shaba Trustees Limited & City Council of Nairobi [2018] KECA 216 (KLR)** and requires no restatement.

7. That said, the power of the Court to strike out pleadings and or in this case expunge documents from the record has since long been settled. It is trite that the power of the Court to strike out pleadings is provided for by **Order 2 Rule 15(1) of the CPR** as read alongside **Section 3A of the CPA**.

8. Concerning striking out of pleadings, the **Court of Appeal in Cooperative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999** as cited with approval in **Jubilee Insurance Co. Ltd v Grace Anyona Mbinda [2016] eKLR**, stated that:

*“The power of the court to strike out pleadings under **Order 6 Rule 13 (1) (b) (c) & (d)** is discretionary Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain in a matter of fact....”*

See also **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR**.

9. That said, it necessitates reminder, that what has been sought is not necessarily the expungement and or striking out of pleadings but of a document appearing in at **Page 1 -127** of the **1st Defendant’s list of documents dated 16/03/2022**. To the foregoing end, the aptly applicable provision would be **Section 3A** of the **CPA**.

10. By their affidavit material, the Plaintiffs depose having filed a defamation suit as against the Defendants meanwhile one of the documents the 1st Defendant intends to rely on in his list of documents dated 16/03/2022 is an arbitral award from the

London Court of International Arbitration dated 15/02/2018. That the said list of documents was served upon the Plaintiffs after pre-trial directions meanwhile the arbitration emanated from proceedings between SCF Holdings II Ltd and Manhattan Coffee Investment Holding.

- 11.** They further contend that the arbitral award is privileged by virtue of a “Confidential” phrase, which appears on the cover page of the award meanwhile neither the 1st nor 2nd Plaintiff were parties to the said arbitral proceedings. They conclude by stating that by virtue of the private and confidential nature of the arbitral proceedings and the Plaintiffs not being parties to the same, the said award is inadmissible as evidence.
- 12.** The 1st Defendant assails the Plaintiffs motion by stating that it is premature and an attempt to take away the former's right to lay basis towards production of the document, to wit, is a key tenet to right to a fair trial. That the matter came up for case management on 17/03/2022, during which the Plaintiffs did not raise any objection that the 1st Defendant's documents had been filed after close of pleadings. He goes on to state that the 1st Plaintiff is a director of Manhattan Coffee Investment Holding and was equally a witness in the arbitral matter thus cannot feign being oblivious to the proceedings leading to the arbitral award or allude to privilege.
- 13.** That the 1st Plaintiff equally discusses in his further witness statement the relationship between the parties in the arbitral award therefore he is precluded from hindering the Defendants from producing the arbitral award. Further, the findings in the arbitral award are materially pertinent to the defamation suit

before this Court whereas the 1st Plaintiff having referred to the award in his statement cannot now plead privilege or inadmissibility of the document. The 1st Defendant concludes by stating that the arbitral award goes to the root of its defence on truth in respect of the alleged defamatory publication, hence he states expunging the same would be highly prejudicial to the Defendants.

- 14.** The 6th Defendant by his grounds of opposition takes issue with the motion on grounds-; *that contrary to the Plaintiffs assertion, the 1st Plaintiff fully participated in the arbitral proceedings and provided two (2) witness statements and was equally orally examined as noted at **paragraph 97(d)** and **paragraph 99** respectively in the award; that **Article 30** of the **London Court International Arbitration Rules, 2020** provides an exemption to confidentiality and provides that disclosure is permissible by a party under a legal duty and to protect or pursue a legal right; and that the final award is admissible in evidence by dint of **Section 44** of the **Evidence Act**; and that the final award contains evidence given by the 1st Plaintiff and is admissible under **Section 34** of the **Evidence Act**.*
- 15.** The Court has taken the liberty of perusing the documents relied on by the respective parties being the pleadings, witness statements and intended documents to be relied on at trial. As earlier noted, the Plaintiffs suit against the Defendants is founded on defamation, in which, the former alleges that the Defendants published defamatory material. In particular, the Plaintiffs allege that the 1st Defendant on 09/06/2015 falsely

and maliciously uttered words that were defamatory of the Plaintiffs.

16. As rightly, argued by the 1st to 5th Defendant, parties attended to the matter for pre-trial directions and or case management on 17/03/2022 wherein no objection was raised to the filing of the 1st Defendant's bundle of documents dated 16/03/2022. Nevertheless, it would appear that the bundle of documents in question was promptly served upon the Plaintiffs prior to setting down the instant suit for hearing. Therefore, applying my mind to the provisions of **1B & 3A** of the **CPA** and **Article 159(2)(d)** of the **Constitution** no prejudice would be occasioned to the Plaintiffs given the aforesaid, to wit, the argument seeking to expunge the said document for having been served upon the Plaintiffs after pre-trial directions, cannot sustain.

17. As to whether the London Court of International Arbitration award dated 15/02/2018 appearing in the 1st Defendant list of documents is confidential and by extension privileged, **Black's Law Dictionary, 9th Ed. Pg. 339** defines "**Confidential**" as-;

"meant to be kept secret" or "characterized by trust and a willingness to confide in the other"

18. Meanwhile at **Pg. 1316**, defines "**Privilege**" as-;

"a special legal right, exemption or immunity granted to a person or class of persons; an exception to a duty"

19. Section 139 of the **Evidence Act**, concerning privileged document in possession of another provides that-;

No one shall be compelled to produce documents in his possession, which any other would be entitled to refuse to

produce if they were in his possession, unless such person consents to their production.

- 20.** It can be garnered from the impugned document in question that the same on its face captures the word “confidential” As concerns the argument the document is admissible by dint of **Section 34** and **44** of the **Evidence Act**. With respect to **Section 34**, it is ostensible that the award in question is an arbitral award and not evidence tendered in the course of previous judicial proceedings.
- 21.** Concerning **Section 44**, reference is drawn to **Section 3** of the **Evidence Act**, which defines Court as “includes all judges and magistrates, and persons, except arbitrators, legally authorized to take evidence.” By reason of the latter definition, an arbitral award is not a judgment of the Court, to wit, an argument can be made that the award can be deemed admissible by dint of **Section 44** of the **Evidence Act**.
- 22.** Further as may concern the concept of privilege and confidentiality, as right argued by the 6th Defendant, a *prima facie* perusal of the award, it is apparent that the 1st Plaintiff participated in the said proceedings, as captured in **paragraph 97(d)** and **paragraph 99** of the said award. It is equally apparent that by dint of **Paragraph 96(b)** and **paragraph 99**, the 1st Defendant participated in the said arbitral proceedings.
- 23.** Meanwhile, by his intended witness statement, the 1st Defendant states therein that he is the founder and CEO of Rendevour Holding Limited an indirect parent company of SCF Holdings II Limited. The Plaintiff has argued that the document ought to be

expunged because it is privileged by dint of the confidential nature of the award whereas the arbitration proceedings were specifically between **SCF Holdings II Ltd and Manhattan Coffee Investment Holding** meanwhile neither the 1st nor 2nd Plaintiff were parties to the said arbitral proceedings.

- 24.** Indubitably, from the face of the said arbitral award, the 1st Plaintiff and Defendant participated in the said proceedings whereas the 2nd Plaintiff and Defendant were respectively captured in the said award. The 1st to 5th Defendants have argued that the arbitral award formulates part of their defence of truth on the premise of the defamatory claim as against them. In light of the above, the Court is not convinced by the Plaintiffs argument that the *ex facie* capture of the word “confidential” in the arbitral award given renders the same confidential.
- 25.** At the risk of repetition, both the 1st Plaintiff and 1st Defendant participated in the proceedings and as such were privy to the evidence adduced therein. In any event, it is not the award that is the subject matter of the dispute before this Court. The court finds that to expunge the same would in all probability hinder the 1st to 5th Defendants from rendering a tenable defence towards deflecting the Plaintiffs claim.
- 26.** In light of above, **the Court is not persuaded to allow the Plaintiffs motion dated 01/04/2025. It is accordingly dismissed with attendant costs to abide by the outcome of the case.**

Orders accordingly.

**Delivered Dated and Signed at Nairobi this 26th day of February,
2026.**

.....

JANET MULWA.

JUDGE

ORIGINAL