LSG Lufthansa Services Europa/Afrika Gmbh & another v Mwangi (Practising in the name and Style of Muturi Mwangi & Associates Advocates) (Civil Appeal 274 of 2016) [2022] KECA 834 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KECA 834 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 274 OF 2016

RN NAMBUYE, W KARANJA & MA WARSAME, JJA

MAY 19, 2022

BETWEEN

LSG LUFTHANSA SERVICES EUROPA/AFRIKA GMBH ..... 1ST APPELLANT

LSG SKY CHEFS KENYA LIMITED ..... 2ND APPELLANT

AND

ELIAB MUTURI MWANGI ..... RESPONDENT

PRACTISING IN THE NAME AND STYLE OF MUTURI MWANGI & ASSOCIATES ADVOCATES

(Being an appeal from the Ruling and Order of the High Court at Nairobi by Kariuki J. delivered on 29th January, 2016) in PETITION No. 154 of 2014)

JUDGMENT

1. This is an appeal against the ruling and order made by the High Court (Kariuki, J.) on 29th January,2016. The respondent, an advocate who practices in the name and style of Muturi Mwangi and Associates Advocates was retained by the appellants herein for certain legal services in respect of a tender by the Kenya Airports Authority (KAA) for setting up and operation of a Kitchen at the Jomo Kenyatta International Airport for in-flight catering.

2. It appears that the Advocate/client relationship turned sour when down the road, the parties disagreed on the amount of legal fees payable to the respondent for work done and consequently, the respondent's services were terminated.

3. This was the casus belli for the respondent's claim in the High Court where he sought inter alia, an interim injunction restraining the appellants from further developing, putting into operation or managing an inflight kitchen pursuant to the tender; a declaration that the appellants had breached

the terms of the advocate - client relationship and agreement for legal services and an enquiry into the quantum of damages payable by the appellants resulting from their use of his work product.

4. In the course of taking pretrial directions on 27th February, 2015, Counsel for the respondent sought leave to serve interrogatories regarding the travel entries of officials of the appellants; Mr. Paul M. F.Lyimo, Dr. Stephane Zilles and Mr. Tobias Diebold during the month of May, 2014 when the signing of the primary documents took place. The Court acquiesced and directed Counsel to serve the interrogatories and notice to inspect within 14 days. A mention to confirm compliance was scheduled for 24th March, 2015.

4. The appellants were duly served with the interrogatories dated 13th March, 2015 and when the matter came up on 24th March, 2015, they sought more time to file their response. The Court agreed and granted the appellants a further 14 days to "file their interrogatories and notice to produce, and file witness statement by expert."

6. The appellants filed answers to interrogatories sworn by one Ndung'u Githinji on 10th April, 2015 and objections to the interrogatories filed on 10th April, 2015 and 20th April, 2015 by Mr. Lyimo and Mr. Diebold respectively.

7. Dissatisfied with the course of events, the respondent filed an application dated 12th May, 2015, premised on Rule 3 (2) and 7 (2) of the *Civil Procedure Rules* where it sought that:

> Mr. Tobias Diebold and Mr. Paul M.F Lyimo be jointly and severally, compelled within 14 days (or such other period as the Court may deem fit) to respond fully to all the questions put to each of them by way of interrogatories filed in the Honourable Court on 13th March, 2015 and served on the appellants' advocates on the same date; and that the appellants be deemed to have violated the overriding objective in Section JA and JB of the Act as well as costs be awarded to the Respondent.

8. The main grievance as stated on the face of the application reiterated in the supporting affidavit of Ngunjiri Nderitu, dated 12th May, 2015 is that the appellants had indicated to the respondent and the Honourable Court that they needed more time to complete the answers to the interrogatories and that the act of filing an objection to the interrogatories was a clear indication that the appellants were intent on misleading the Court and stealing a match on the respondent. It was the respondent's contention that the appellants had willfully failed and omitted to comply with the direct orders of the Court that Mr. Diebold and Mr. Lyimo answer the interrogatories served upon them.

9. The application was opposed by the appellants who filed grounds of opposition dated 26th May, 2015 and a replying affidavit similarly dated and executed by Ndung'u Githinji, the chairman of the 2nd appellant.

10. The gist of the applicant's argument was that the application was an abuse of the court process given that appellants had responded to the interrogatories by way of the answers of Ndung'u Githinji and by filing objections to the same; that interrogatories can only be directed to parties to a suit, a status which Mr. Diebold and Mr. Lyimo did not hold; that interrogatories were a mere fishing expedition and did not arise from issues raised in the pleadings; that there was no court order requiring Mr. Diebold and Mr. Lyimo to answer to the respondent's interrogatories; that there was no basis in law to compel the appellants to answer to the interrogatories through specific persons given that they were corporate entities with the liberty to elect which of their officers/agents should respond on their behalf.

11. In a Ruling delivered on 29th January, 2016, the trial Judge (Kariuki, J.) allowed the application and found that it was imperative for the court in exercise of its inherent jurisdiction to issue the orders

of 27th February, 2015 pursuant to the oxygen principles and as an exception to the general rule that interrogatories may not be issued to non-parties, in order to enable the respondent to obtain documents that would ordinarily be in the keep of the named persons and unobtainable from any other person.

12. In addition, the learned Judge pointed out that the named persons, including Mr. Ndung'u Githinji were named as the appellants' representatives in their statement of defence filed on 17th July, 2014 and that the said Mr. Githinji had reiterated that he had answered the interrogatories on his behalf and not on behalf of the other named persons. The court therefore held that it was the duty of the named persons to respond to the interrogatories as per the orders of the court, failure to which they would be deemed to have willfully disobeyed a Court order especially where no appeal or application to vary or set aside the order had been filed.

13. In conclusion, the learned Judge, echoing with approval, the decision of Mabeya, J. in *Africa Management Communication International Limited -V- Joseph Mathenge Mugo & Another* (2013) eKLR on the impressive duty of obeying Court Orders stated that:

> " The orders issued by the Court have to be complied with, and the defendants never raised a question or query about that order. It was therefore onerous (sic)for them, and the named persons, to comply with the orders of the Court, whether they believe it to be regular or not".

14. Aggrieved by this decision, the appellants appealed to this Court, citing 10 grounds of appeal which t h e y summarized as follows: whether interrogatories can be administered to persons not parties to a suit; whether the interrogatories were necessary for the disposal of the suit and whether the High Court correctly interpreted the Court orders of 27th February, 2015.

15. The appeal proceeded by way of written submissions. In their written submissions dated 24th October, 2019, the appellants reiterated their arguments before the trial Court. Relying on the case of this Court in Agga rwal vs Officia Receiver (1976) EA 585, it was argued that the court erred in fact and in law in directing persons who were not parties to the suit to answer to interrogatories. In their view, the interrogatories ought to have been directed to the appellants rather than Mr. Diebold and Mr. Lyimo.

16. On whether interrogatories were necessary for the disposal of the suit, the appellants submitted that the threshold for the admission of interrogatories included those questions that are relevant to the questions in issue; questions that are necessary for fairly disposing of the suit to save costs; if the Judge is satisfied that the answers would bring the suit to an earlier close and result in saving costs; where they were necessary for disposing fairly of the cause of matter or matters which are in issue or sufficiently material at the particular stage of the action at which they are sought to be delivered or to the relief claimed.

17. Several cases were cited in support of this submissions including *Aggarwal -vs-official Receiver* (1976) EA 585 and High Court decisions in *Tulip Properties Limited v Mohammed Koriow Nur & 4 Others (2007)* eKLR and *Arthur Papa Odera Vs The British Council* (2007) eKLR.

18. In view of the threshold for admission of interrogatories stated above, it was the appellants' firm belief that the learned Judge had exercised his discretion incorrectly since none of the questions raised had any relation to the questions in issue and the respondent was simply trying to get the appellants to expose the kind of evidence they would rely on in trial. Furthermore, the interrogatories were oppressive, and the appellants could not have known the answers to them.

19. Lastly, the appellants submitted that the Ruling of the Court was based on an erroneous interpretation of its own directions and the same should be set aside. According to the appellants, the Court's

directions of 27th February,2015 did not state that Mr. Paul MF Lyimo and or Mr. Tobias Diebold or either of them were to specifically answer the interrogatories. The Court merely directed the appellants who were party to the suit, to file answers to the interrogatories.

20. The respondent did not file any submissions in the matter.

21. Having carefully analyzed and considered the submissions, the record of appeal and the law, we perceive that the issue that falls for determination is whether the High Court correctly exercised discretion by granting the orders compelling the appellants to respond to the interrogatories filed by the respondent.

22. From the onset, it is imperative to distinguish that what is before us is not an appeal against the decision of the court granting leave to serve interrogatories. This Court has been called to advert into the relevancy or the merits of the interrogatories served by the respondent. The question is simple, did the court direct Mr. Lyimo and Mr. Diebold to respond to the interrogatories served? If so, did the responses/objections to the interrogatories filed by the appellants amount to answers to the interrogatories therefore amounting to compliance with court orders? These are the questions that will inform this Court as to whether the learned Judge exercised his discretion correctly.

23. It is trite that interrogatories must be answered either by the party to whom they are directed or where a party is a corporation or a body of persons, by an officer or agent, who must furnish the information available to the party . Further still, the individual responding to the interrogatories must provide on oath true, explicit, accurate, complete and candid answers to the interrogatories where it is within their knowledge.

24. The appellants contend that the court merely asked the interrogatories with respect to the travel itineraries of the named persons be answered but did not imply that the interrogatories be ·answered specifically by the named persons. Conversely, the respondent's perception of the orders from their submissions before the High Court and the interrogatories served is that the orders of the court were directed to the appellants t o b e transmitted t o s p e c i f i c o f f i c e r s /agents. Clearly, there a r e t w o different interpretations of the same order resulting in divergent execution and compliance.

25. In the South African case of *Plaslike Oorgansraad Van Bronkerspruit v Senekal,* (2001) 22 ILJ 602 (SCA) the Supreme Court of Appeal in dealing with the issue of interpreting Judgment quoted with approval the decision in Administrator, *Cape and Another -V- Mtshwagela and Others* ,1990 (1) SA 705 (A) at 715 F-l where it was said that :

> " The Court's intention is to be ascertained primarily from the language of the Judgment or order as construed according to the usual well-known rules. As in the case of any document, the Judgment or order and the reasoning for giving it must be read as a whole order to ascertain its intention. If on such reading, the meaning of the Judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case even the Court that gave the Judgment or order can be asked to state what its subjective intention was giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading to the Court's granting the Judgment or order may be investigated and regarded in order to clarify it."
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> See also the similar decision of the Constitutional Court of South Africa in Firestone South Africa (Pty) Ltd V Genticuro AG 1977(4) SA 298 (A)

26. We have perused the record and the sequence of events leading to the instant application. On 27th February,2015 during the pre-trial conference the proceedings of the Court were as follows:

Coram: Gikonyo J.

Court Clerk: Alex

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Nderitu for the Plaintiff

Kuyo for the Defendant

Nderitu:

We have been served with the bundle of documents and witness statements. We would seek leave to serve interrogatories and compel production of certain documents. We need legible copies of the passports of Mr. Paul MF Lyimo in addition to those of Dr. Stephane Zailles and Tobias Diebold for the month of May, 2015.

We have filed a copy of the letter. They said the req uest is not based on pleadings and documents sought are not necessary.

Kuyo:

We have filed documents. We can in due quickly(sic)

Court:

Mr. Nderitu to serve interrogatories, notice to produce and inspect documents in respect of the travel entries of Mr. Paul MF Lyimo, Dr. Stephane Zilles and Tobias Diebold in the month of May, 2014 within 14 days.

27. On the 24th March, 2015, during subsequent mention, the appellants sought more time to answer to the interrogatories served upon it. The court issued the following order:

> I allow parties 14 days to comply. The defendant to file answers to the interrogatories and notice to produce and file witness statement by expert. And the plaintiff to file additional witness statement by expert and documents. Mention on 28/4/2015.

28. On 28th April, 2015, when the matter came up for mention, Counsel for the respondent complained that the appellants had not fully responded to the interrogatories. Consequently, the court issued the following orders.

> "Nderitu (Counsel for the Respondent) to file and serve application identifying the interrogatories that were not answered and also indicating whether it is necessary for this Court to compel the party to answer the interrogatories so identified. He should do so in 14 days of today. Mention on 20/5/2015".

29. As has been stated time and again, context is everything. From our perusal of the record and the interrogatories served on the appellants, it appears that the need for interrogatories arose upon the · alleged execution of certain primary documents between KAA and the appellants, which were subject of injunction orders sought by the respondent. The interrogatories served by the respondent were therefore targeted at interrogating the circumstances surrounding the alleged signing of the primary documents, information which was seemingly known by the officials of the appellants, being Mr. Diebold and Mr. Lyimo. This informed the nature of the interrogatories in the form of questions such as:

> "Please identify all persons known to you to have personal k n o w l e d g e of the facts pertaining to the signing of the primary documents, and indicate those who were

eyewitnesses and state the substance of their knowledge ..." and "Give the following details regarding your travel to Nairobi, Kenya for the signing of the primary documents ...".

30. Regardless of whether or not the interrogatories are permissible, what is clear is that the main purpose of the interrogatories was to extract from the appellants information pertaining the signing of the primary document and that travel entries of Mr. Paul MF Lyimo, Dr. Stephane Zilles and Tobias Diebold who were officials of the appellants were crucial in ascertaining the purported signing of the primary documents.

31. Looking at the orders of the Court as framed in their ordinary sense, we are inclined to agree with the appellants that the orders of the Court did not specifically name the person required to answer the interrogatories. It would have been prudent for the respondent to have specifically sought orders allowing him to deliver interrogatories to specific officers of the appellants. The orders of 27th February, 2015 were that

> " Mr. Nderitu to serve interrogatories, notice to produce and inspect documents". The order was however specific that the interrogatories must speak to the travel entries of Mr. Paul MF Lyimu, Dr. Stephane Zilles and Tobias Diebold in the month of May 2014".

32. We take note that even in the former *Civil Procedure Rules* under Order X which extensively provided for the procedure for interrogatories (and which has since been done away with in the current rules), a party who wished to serve interrogatories on a corporation had to apply for orders allowing him to deliver interrogatories to any member or officer of the corporation and the order was drawn accordingly. In essence, the decision of who to direct to respond to interrogatories in the corporation rested with the party delivering the interrogatories upon specifically seeking orders to serve to any person.

The provision read:

> Where any party to a suit is a corporation or a body of persons, empowered by law to sue or be sued whether in its own name or in the name of any officer or other persons, any opposite party ma y appl y for an order allowing him to deliver interrogatories to any member or of ficer of such corporation or bod y, and an order ma y be made accordingl y. (emphasis ours)

33. An order under Order X of the Civil Procedure Rules is not the same as an order for contempt, t h e n a t u r e , effect and consequences of disobedience of such orders are different. An order for contempt has severe consequences which can even lead to incarceration of the contemnor while an order under Order X cannot lead to incarceration. The only effect of disobedience of an order under Order X is the adverse inference against the person who willfully refuses to partially or fully comply with such an order.

34. ln our view, any information acquired by an agent or officer concerning the business of the organization while acting in their capacity as an officer or agent of the said organization, is information deemed to be in possession and control of the organization. Where the court fails to direct that a specific person responds to the interrogatories, it is incumbent upon the organization to select a suitable agent/official who can furnish such information as is available to the organization with regard to interrogatories and respond accordingly. Where the information being interrogated pertains to certain acts or information within the special knowledge of other parties within the organization, the chosen officer can consult with the other members/agents of the organization who are in possession of the said information sought to be discovered and then respond to the interrogatories.

35. Again, it was not for the court to enquire from the parties whether the orders as framed captured their intentions, perceptions, and expectations. Furthermore, it is not the duty of the Court to advise counsel on how to prosecute its case. Had the court orders been wanting in this regard, one would have expected either of the parties to approach court to seek clarity, or to file a review or an appeal against the orders as framed. This was not the case.

36. Moreover, the fact that the appellants took certain steps in compliance with the court order points to the fact that it understood the terms of the order in its ordinary sense that: It was required to respond to the interrogatories with respect to the travel entries of Mr. Lyimo and Mr. Diebold and the appellants cannot be faulted for this or be held to have failed to comply with court orders.

37. In addition, the respondent's inclusion of a concluding paragraph in the interrogatories, attempting to name Mr. Lyimo, Mr. Diebold and Mr. Githinji as the specific officials to respond to the interrogatories is indicative of the fact that they realized that there was need for specificity when seeking court orders, but the train had left the station.

38. In view of the foregoing, and in answer to the first question, we find that the orders of the court did not specifically direct Mr. Lyimo and Mr. Diebold to answer the interrogatories.

39. On the second question of whether the responses or objections to the interrogatories filed by the appellants amounted to answers to the interrogatories, our answer is in the affirmative.

40. It is common ground that when a party is directed to respond to interrogatories, that party can choose to answer directly to each interrogatory to the best of their knowledge or in the alternative raise an objection to answering any interrogatory and indicate the reason.

41. A cursory look of the affidavit response of Mr. Githinji dated 10th April, 2015 shows that he has declined to answer to certain interrogatories and appended reasons for his objection. The sufficiency or otherwise of this response is also not for this Court to determine. However, with respect to the learned Judge, it cannot be said that the appellants refused/neglected to comply with court orders of 27th February, 2015.

42. ln the premises and in the circumstances of the case before us, we find the appeal meritorious and come to the conclusion that the learned Judge did not exercise his discretion correctly. We consequently allow the appeal with costs to the appellants.

Dated and delivered at Nairobi this 19th day of May, 2022

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR