



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO 149 OF 2015

BETWEEN

ABN AMRO BANK N.V.....APPELLANT

AND

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

*(An appeal from the ruling of the High Court of Kenya at Nairobi (Gikonyo, J) dated 30th September 2014*

*in*

*H.C.C.C No 3 of 2012)*

**JUDGMENT OF THE COURT**

**Background**

[1] **ABN Amro Bank Limited** (the appellant herein) is the plaintiff in High Court Civil Case No 3 of 2012 (the suit). It has sued the **Kenya Pipeline Company Limited** (the respondent herein). In that suit, the appellant alleges that through Fortis Bank (Nederland) NV (Fortis), a licensed banking institution headquartered in the Netherlands, was involved in various transactions between it and various petroleum companies in Kenya. Pursuant to a merger between Fortis and the appellant on 1st July 2010, all the assets, rights and liabilities of Fortis were acquired by ABN Amro Bank by virtue of universal succession of title in accordance with Dutch law, including all claims that Fortis had with respect to transactions entered into.

[2] Vide its amended plaint filed on 8th May, 2012, the appellant alleged that between 27th October 2007 and 9th March 2008, it entered into an agreement with Triton Petroleum Company Limited (TPC), Triton Energy (K) Ltd [Triton Energy] and Triton DMCC (the Triton Companies). Pursuant to which Fortis Bank was to finance the purchase of various consignments of petroleum products by the Triton Companies, in the following manner: Fortis would pay for the supply to cover the purchase, shipment, storage and other charges such as inspection. The cargo would be discharged at the Kipevu Oil Storage Facility (KOSF), who was to hold this cargo in trust for Fortis, and would only release it to any other parties after receiving a release order from Fortis to do so. Further to these agreements, between 2007 and 2008, the appellant, through Fortis, financed various consignments of petroleum products purchased by the Triton Companies. Fortis financed the purchase of a consignment of 12, 623, 293 metric tonnes (MT) by Triton Energy. Triton Energy had purchased this consignment from Chevron Products Company of Houston, Texas, and it was delivered to the KOSF in July 2008. The consignment of oil ('the Discharged Products') was discharged to KOSF. By a letter to Fortis dated 14th August, 2008, the respondent confirmed receipt of the full consignment.

[3] It was a specific term of the Terms of Supply that none of the Discharged Products would be released by the respondent to Triton Companies without payment and without specific written authorization having been given by Fortis to the respondent to release the product. Fortis obtained from the respondent the written letters of undertaking by which the respondent expressly undertook not to release any of the Discharged Products to Triton without specific written authorization from Fortis. By a letter dated 14th August 2008, the respondent confirmed to Fortis that it had received the consignment of 12,623.293 (MT) of automotive gasoil, and undertook not to release the gasoil until it had received instructions from Fortis. On 12th August, 2008 Fortis Bank received a notification from Triton Energy that it had reached an agreement with Total Kenya Limited (Total) for the sale of a part of cargo amounting to 8,000 MT, and this was confirmed by Total Petroleum Company Limited through a letter dated 17th September 2008, who issued a payment undertaking for payment to Fortis. Based on this, Fortis authorized the respondent to release 8,000 MT of the gasoil Total.

[4] However, on 14th October 2008, Fortis received communication from Total Kenya Limited indicating that the transaction between Total and Triton had been cancelled, and that the payment undertaking had also been revoked.

Fortis notified the respondent of this development and cancelled the authorization that had been previously issued on 17th September 2008. The respondent, by a letter dated 22nd October, 2008 to Fortis confirmed that it still held the full volume of the cargo. On 8th January 2009, the respondent wrote to Fortis indicating that as at 10th December, 2008 the stock in Triton stock under any collateral agreement with the respondent was nil. Due to this, the appellant alleged that the respondent had occasioned it loss through fraud, conversion, breach of trust, breach of fiduciary duty and negligence, for which it sought various reliefs.

[5] In opposition to the suit, the respondent filed an amended statement of defence on 2nd December, 2013 denying the allegations in the amended plaint. The respondent admitted that it received instructions from Fortis to release the cargo to Total and that it acted upon those instructions and as such, the appellant could not have effectively cancelled its instructions to release the cargo. The respondent contended that any loss that was occasioned to the appellant was caused by itself through negligence and fraud; that the appellant held various securities over the suit product, and that in addition, the appellant placed the Triton Companies under receivership and received various sums of money in respect of the cargo, and that these sums ought to be taken into account before any money is paid to the appellant in respect of loss, if any, suffered by it. While maintaining that it was not responsible for any loss occasioned to the appellant, the respondent sought to extinguish its liability, if any, by making a counter claim and set off in which it stated that it had requested that the appellant disclose to it the details of any payments received by the appellant in respect of the product, or any security that it held in relation to the transactions that led to the suit, but the respondent did not accede to the request.

[6] Further to the amended statement of defence, the respondent filed a notice of motion dated 2nd April 2014 in which it sought various documents, referred to by the appellant at paragraphs 42 – 44 of its amended plaint. The application was expressed to be brought under Article 35(1)(b) of the Constitution, Sections 1A, 1B, 22(a) and 63 of the Civil Procedure Act, and Order 11, Rule 3 (2), of the Civil Procedure Rules. For ease of reference, we reproduce these paragraphs of the amended plaint hereinbelow:

#### ***PARTICULARS OF LOSS AND DAMAGE UNDER TORT OF NEGLIGENCE***

***42.1 The Plaintiff repeats the particulars pleaded under paragraph 29 above.***

***42. Following the discovery of the Triton Oil Scandal, Fortis decided to take steps to protect its interests and to this end appointed a receiver over Triton Energy Kenya Limited, and also commenced proceedings to realise its security over an oil storage terminal in Mombasa being constructed by Triton Bulk Storage Limited.***

***43. The Plaintiff further avers that its actions against Triton Energy Kenya Limited and Triton Bulk Storage Limited were on the basis of the specific security documents issued to Fortis by those companies and all actions towards that recovery were undertaken in pursuance of such security.***

***44. The recovery proceedings were interrupted by the filing of High Court Civil Case Number 120 of 2009 (Milimani) by which suit the receivers of Triton Petroleum Company Limited, together with their appointors, Kenya Commercial Bank and PPTA Bank, sought to be involved in the sale process and claimed rights over the bulk storage terminal that was being constructed by Triton Bulk Storages Limited. Pursuant to various proceedings, the parties eventually came to an out of court settlement.***

***45. By virtue of the sale of the terminal, the Plaintiff recovered the net sum of USD3,304,631.00 pursuant to the said out of court settlement in the said suit. No other recoveries have been made by Fortis or the Plaintiff against any Triton company to date.***

***46. the Plaintiff avers that due to the doctrine of mutuality, the Defendant is not entitled to set off its liability herein against the recoveries made from any of the Triton companies because there is no mutuality between the amounts owing by the Defendant to the Plaintiff pursuant to the cause of action pleaded in the Statement of Claim. In addition, the amounts recovered in respect of the sale of the oil terminal were not between the same parties and in the same right or interest as the amounts due from the Defendant to the Plaintiff.? (sic)***

[7] The notice of motion dated 2nd April, 2014 sought the following orders that:

***'(1) The plaintiff do, within 14 days of such order, produce the documents/information listed below:***

***a. Further to paragraph 42 of the Amended Plaint:***

***(i) Copies of all security documentation regarding the security held by the Plaintiff over the oil storage terminal in Mombasa;***

***(ii) All correspondence between the Plaintiff and the Receiver referred to at paragraph 42 of the Amended Plaint;***

***(iii) All reports by the Receiver.***

***b. Further to paragraph 43 of the Amended Plaint:***

***(i) The 'specific' security documents referred to thereat;***

(ii) Demand letters, pleadings and any other documents pertaining to 'all actions towards that recovery' described thereat.

c. Further to paragraph 44 of the Amended Plaintiff:

(i) Copies of all correspondence, consents, pleadings and other documents relating to the out-of-court settlement referred to thereat.

2. The Plaintiff do, within 14 days of such order, disclose the total amount of money recovered by the Plaintiff during the receivership of Triton Petroleum Company Limited (In Receivership) and/or its affiliate companies;

3. The Plaintiff do, within 14 days of such order, produce on oath an account of the total amount of money received or recovered by the Plaintiff from the directors or former directors of Triton Petroleum Company Limited (In Receivership) or its affiliate companies in respect of the monies allegedly secured by the petroleum product the subject-matter of this suit;

4. In the event of non-compliance by the Plaintiff with Orders 1,2 and 3 hereinabove, the Plaintiff's suit be struck out with costs;

5. Such further and other orders as this Court may deem just and fit to grant;

6. Costs of this application be awarded to the Defendant.'

[8] The Notice of motion dated 2nd April, 2014 was based on the grounds that:

a) The Plaintiff's suit against the Defendant relates to petroleum products allegedly held by the Defendant to secure a debt owed to the Plaintiff by Triton Petroleum Company Limited (In Receivership) and/or its affiliates;

b) Inter alia the Defendant has claimed Set-Off against the plaintiff in respect of any payments and/or securities realized in respect of the debt owed to the plaintiff by Triton Petroleum Company Limited (In Receivership) and/or its affiliates;

c) The documentation/information sought relates to payments received and/or securities realized by the Plaintiff in respect of the debt owed to it by Triton Petroleum Company Limited (In receivership) and/or its affiliates;

d) The documentation/information sought is in the custody, control or possession of the Plaintiff who despite request, has failed to provide it to the Defendant;

e) The documentation/information sought is alluded to by the Plaintiff in its Amended Plaintiff and is required in order that this Honourable Court may arrive at a just determination of this dispute.?

[9] The notice of motion was supported by the affidavit of **Ms. Gloria Khafafa, (Ms. Khafafa)** the respondent's Senior Legal Officer who averred, *inter alia*: that the appellant sought the sum of US\$17,105,970.15 as damages from the respondent together with interest and costs; that the respondent filed a defence and set-off in respect of all payments received by the appellant and all securities realized on account of the petroleum products which are the subject of the dispute in the suit; that in its amended plaintiff the appellant alluded to a large number of documents including, realized securities, payments, recoveries and other legal proceedings which are material to the just determination of the dispute the subject matter of the suit; and that the respondent is entitled to disclosure and production of these documents to enable it defend the suit and prosecute its set-off. **Ms. Khafafa** further averred that on or around 5th December, 2013, the respondent sought and was granted leave to file a Supplementary Bundle of Documents within 21 days; that on or around 18th December, 2013 the respondent wrote to the appellant requesting for the documents listed in the application for inclusion in the respondent's Supplementary Bundle; that despite a reminder on or around 30th January, 2014, the respondent did not receive a response to its letters which necessitated the filing of the Notice of Motion; and that it is in the interest of justice that the appellant be ordered to provide the documentation and information sought.

[10] In a replying affidavit dated 28th May, 2014 sworn by **Rui Florencio**, the appellant's Managing Director, Global Head of Energy Commodities, *inter alia* averred that the process of discovery in court proceedings should deal with relevant and necessary material; that the respondent has made the application to delay the hearing of the suit; that some of the information and documents requested for is confidential material to the appellant such as accounts confirming monies realized from other unrelated transactions; and that the information and documents sought are not relevant for the disposal of the dispute between the appellant and the respondent.

[11] By a ruling dated 30th September, 2014 the learned Judge found that the respondent had identified the holder of the information and had also identified the information and documentation sought. The learned judge further found that the information and documents sought had been pleaded by the appellant and the respondent and that the information and documentation constitute part of the matters before the court for determination. On the appellant's claim that the information and documents sought were confidential, the learned judge found that the documentation and transactions stand at the heart of the case and is relevant material and cannot therefore be withheld under the cover of privilege or because they belong to a third party. The learned judge stated as follows:-

*'The Applicant, and I have held so, has laid a basis upon which the Plaintiff should be compelled to release such material, the confidentiality notwithstanding. I do not also think that the Applicant can be said to be seeking information and or documents in order to build a case against the Triton Petroleum companies.*

*I will also state here that the argument on delay in applying is neither here nor there and any such delay has been sufficiently attributed and explained.*

*The upshot is that I allow the Notice of Motion dated 2nd April, 2014. No order as to costs.'*

[12] Aggrieved by these orders, the appellant filed the present appeal raising six main grounds of appeal contending that the learned Judge erred:

- (i) in holding that the documents and information sought by the respondent were relevant and necessary for the fair and just disposal of the suit;
- (ii) in holding that the documents and information sought were in the possession of the appellant and as a corollary erred in ordering discovery in respect of documents in the possession of 3rd parties;
- (iii) in holding that the respondent had satisfied the criteria necessary to warrant an order for discovery in its favour;
- (iv) by ordering the disclosure of privileged documents;/information such as banker-customer information.
- (v) in failing to appreciate and/or misconstruing the law on discovery and failing to appreciate the peculiar circumstances of the case and consequently arrived at wrong conclusions; and
- (vi) in infringing upon the appellant's right to a fair hearing by ordering the striking out of the main suit for alleged non-compliance with the respondent's request for discovery.

[13] The appellant sought orders: allowing the appeal, setting aside the ruling of the High Court dated 30th September, 2014 in HCCC No. 3 of 2012; reinstating HCCC No. 3 of 2012; awarding costs of the appeal and of the proceedings in the High Court to the appellant and such further orders as are fair and just.

#### **The appellant's submissions**

[14] The parties filed written submissions which they orally highlighted. At the hearing of the appeal, learned Counsel, Mrs. Grace Omwenga represented the appellant while learned counsel, Ms. Wanjiru Ngige represented the respondent. The appellant urged that the trial court erred in finding the documents and information requested for by the respondent relevant and necessary for the fair and just disposal of the suit, as well as in holding that the respondent had satisfied the criteria necessary to warrant an order for discovery in its favour. According to the appellant, its cause of action was based on the tortious liability of the respondent for the irregular and unlawful release of the cargo which the respondent had undertaken to hold in trust for the appellant. The appellant based its claim on conversion, breach of trust and fiduciary duty as well as negligence.

[15] It was the appellant's further submission that in its set off, the respondent made allegations of unjust enrichment, non-disclosure and failure to mitigate loss on the part of the appellant, and failed to address the question of whether or not it was responsible for the tortious acts which resulted in a loss to the appellant; that the respondent constituted a new suit which is unrelated to the suit pending in court, and that the documents that were sought in the notice of motion dated 2nd April, 2014 were completely unnecessary in aiding in the determination of the dispute before the court; that the security that had been taken by the appellant over the suit product was in relation to the assets of a company who is a third party and not connected or a party to the appellant's suit. The appellant urged this court not to allow the respondent to use discovery to frame a new case.

[16] It was the appellant's further submission that the respondent failed to establish the nexus between the security taken by the appellant over the assets of the third party company and its liability that resulted in the loss of the suit product; that while this was raised as an issue before the trial court, the trial court did not make a finding on the issue. The appellant urged us to determine this appeal as determined in *Concord Insurance Co Ltd v NIC Bank Ltd (2013) eKLR* where a similar application in the High Court was dismissed for a want of nexus between the claim for breach of a contractual obligations and the statements of accounts demanded.

[17] It was the appellant's further submission that only parties to a proceeding can be ordered to produce documents; that the respondent was not a party to the security taken by the appellant and therefore, it could not have a right of set off against the appellant. Referring to *Bullen & Leaks Precedents of Pleadings 11th Edition at page 944*, the appellant contended that in order to give a right of set off, the debts must be between the same parties and in the same right; that the security that was relevant to the suit before the High Court was the undertaking that had been issued by the respondent to the appellant to hold the cargo in trust for, and to the order of the appellant; that this document had been provided by the appellant in its pleadings, and thus, any other recoveries pursuant to any other securities which did not involve the respondent would not be relevant to this suit and had no bearing on whether or not the respondent was liable for the torts it committed.

[18] Related to this ground, the appellant further argued that the learned trial judge erred in holding that the documents and information requested by the respondent were in its possession, and thus erred in ordering discovery in respect of documents that were in possession of third parties without there being a proper basis laid for this; that where discovery is not confined to the parties in a claim, it has to involve parties between whom there is some right to be adjusted or questions to be decided; that the trial judge failed to appreciate the fact that there was no relationship giving rise to any rights to be adjusted or questions to be determined between the respondent and third party entities involved in the securities issued to the appellant over the cargo; that this led to the court's erroneous conclusion ordering discovery in respect of documents that involve third parties who are unrelated to the suit, and more so in ordering discovery in respect of documents in possession of third parties without a proper basis. Thus, the appellants urged that the trial judge misapprehended the law on discovery and thus arrived at a wrong conclusion.

[19] On the right to fair hearing, the appellant submitted that the trial judge erred by ordering the striking out of the main suit upon the appellant's non-compliance with the respondent's request for discovery; that the position in law with respect to an order for discovery was

set out by the predecessor to this Court in *Eastern Radio Service v Tiny Tots [1967] E.A. 392* which is that a litigant has to comply with an order for discovery but should not be precluded from pursuing his claim unless failure to comply was due to a willful disregard of the court order. Relying on this case, the appellant urged that the court should not impose the penalty of dismissing a suit except in extreme cases and as a last resort, and should only do so where it is satisfied that the party is avoiding a fair discovery or is guilty of willful default.

[20] The appellant further contended that in the circumstances of the appeal before us, the trial court should not have made the order in view of the fact that the discovery sought was not fair, as the respondent had not established a nexus between its case and the documents it sought; that the application for discovery was geared towards enabling the respondent avoid the real issues of liability for determination in the suit and to frame its own unrelated case, and further that compelling the appellant to produce documents in support of its claim amounted to an abuse of the true purpose of discovery which is to enable a party know and meet the case against it; that the appellant was not guilty of willful default and therefore the circumstances did not warrant a dismissal order which is a harsh order which directly bears on a party's right to be heard; that instead, the court should have followed Order 11 Rule 3(2) of the Civil Procedure Rules, 2010 relating to the courts' powers on dismissal and made orders appropriate to the suit, and allow the appellant's suit to proceed to trial when it would have been open to the appellant to make the appropriate inferences on the suit regarding the claims in the suit, and which would ultimately have led to just determination of the suit.

[21] The appellant's final ground was that the trial judge erred in ordering the disclosure of documents that were privileged, and primarily documents that were banker-customer information; that the trial court was informed that the appellant is an international bank with headquarters outside the country and that the disclosure of any bank customers' information without their consent would be unlawful and constitute grounds for sanction. For this proposition, the appellant relied on the case of *Blunt v Park Lane Hotel Ltd [1942] 2KB 253* which held that a party is not bound to answer any question which would expose it to a penalty or forfeiture which the court regards as reasonably likely to be preferred.

[22] For these reasons, the appellant urged us to find that the appeal is merited, allow it, set aside the ruling of the High Court and reinstate the appellant's suit with costs of the appeal as well as the proceedings in the High Court to the appellant.

### **The Respondent's Submissions**

[23] The respondent's written submissions sought to answer each ground raised by the appellant. First, the respondent submitted that the High Court has wide discretionary powers in the determination of whether information is necessary or relevant and that when determining whether the documents sought were relevant and necessary, the trial judge considered the nature of the documents sought *vis a vis* the pleadings filed by the parties and noted that the documents sought by the respondent were referred to by the appellant itself in the amended plaint; and that the appellant, having itself pleaded the documents and information was ordered to disclose those documents.

[24] It was the respondent's further submission that the learned judge correctly found that the information sought was in the possession of the appellant; that the appellant in its reply at the trial only stated that the information sought was irrelevant; and that the learned judge disagreed with this assertion and that the trial court correctly inferred that the documents were in the possession of the appellant since it was the appellant itself who referred to them.

The respondent denied the appellant's contention that the learned judge misconstrued the law of discovery; that the learned judge ordered discovery against the appellant and not against any other parties who were not before him. Relying on *Zuckerman A., Zuckerman on Civil Procedure Principles of Practice, 2<sup>nd</sup> Edition*, the respondent contended that in some circumstances, orders of discovery may be aimed at non-parties to litigation. As such, the respondent submitted that the trial court correctly found that the issues in dispute between the parties could be illuminated by the documents that were sought.

[25] The respondent denied that the appellant's right to a fair trial was infringed when the learned judge ordered that the suit be struck out. In the respondent's view, this order was made as a consequence to the appellant's willful breach of the order for discovery. In this regard, the respondent argued that following the breach of the court order, the trial court was entitled to prescribe sanctions as outlined under Order 11(3) of the Civil Procedure Code which gives the trial court the right to strike out suits in appropriate cases. Moreover, the just, expeditious and efficient resolution of the suit required such an order of dismissal, which have become common place and which save time and money, and ensure compliance with the overriding objective of civil litigation. The respondent urged that even during hearing of the application before the trial court, the appellant did not contest this prayer, and that having had an opportunity to contest this prayer and failed to do so, the appellant cannot now raise it as a ground of appeal.

[26] The respondent denied the assertion that the disclosure would be against public policy for disclosing privileged information, and argued that production of relevant documents cannot be refused on the basis of confidentiality. The respondent referred us to *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No 2) 1973 2All ER 1169* at 1171 where it was held that:

*'...(iii) there was no basis for a claim to privilege in respect of the class (2)(c) documents on the ground that they were documents, or copies of documents, which belonged to third parties and had been entrusted to the commissioners in confidence. Privilege against disclosure could not be claimed on the ground that documents, whether confidential or not, belonged to a third party and the confidential nature of a document was not itself a ground of privilege.'*

[27] It was the respondent's further submission that relevant material, even if it is confidential, must be produced even if it belongs to third parties; that production pursuant to a court order cannot be said to be unlawful, and that any sanctions that would allegedly be faced were not stated; that since there was no claim of privilege made during the hearing of the application, and further as the trial court found that confidentiality alone is not a basis for refusal of disclosure of relevant documents, this ground of appeal fails.

[28] For these reasons, the respondent argued that the overriding objectives require the court to make orders to secure a fair hearing for each party to litigation. The respondent urged us to find that the orders made by the trial court were necessary, and a party who does not comply should not claim respite from this Court. The respondent urged us to dismiss the appeal with costs to the respondent.

## **Determination**

[29] We have considered the appeal and submissions by the respective counsel. The appeal arises from a decision of the High Court made on an interlocutory application in exercise of judicial discretion. The circumstances in which this Court can interfere with the exercise of discretion were succinctly laid down by the predecessor of this Court in *Mbogo and Another v Shah* [1968] EA 93 as follows:

***'I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong conclusion.'***

[30] Therefore, to succeed in this appeal, the appellant must demonstrate that the learned judge took into account matters that he should not have or that he failed to take into account matters that he should have or that his decision is clearly wrong. Based on the grounds of appeal raised in the memorandum of appeal as amplified in the submissions there is essentially one issue for our consideration:

***Whether the High Court correctly allowed the respondent's application for orders of discovery and disclosure. Closely linked with that issue is the question whether the judge erred in holding that the documents and information requested for was relevant and necessary for the just disposal of the main suit.***

[31] In addressing the matter, we are alive to the fact that the main suit in the trial court stands dismissed by virtue of the ruling delivered on 30th September, 2014 and that there are no stay orders in place pending the determination of this appeal. Therefore, we will first address the issue of stay orders. Order 42 rule 6 (1) of the Civil Procedure Rules states as follows:

***'No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.'***

[32] From the foregoing, we find that no application was made for stay of execution of the ruling by the High Court. The appellant by virtue of promptly filing an appeal without complying with the court order, laid itself bare to the sanctions accompanying non-compliance of the order as there were no stay orders in place. Therefore, the timeline for compliance having lapsed the sanctions kicked in and the main suit stands dismissed. This appeal seeks to reverse the entire decision of the Court including the dismissal resulting from non-compliance of the suit with the order for discovery.

[33] The application before the trial court was premised on *inter alia* Article 35(1)(b) of the Constitution of Kenya. This article provides for the right to access information that is held by another person and required for the protection of any right or fundamental freedom as follows:

***"Every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom."***

The application was also premised on Sections 1A, 1B, 22(a) and 63 of the Civil Procedure Act and Rule 3 (2) Order 11 of the Civil Procedure Rules which provide for the just, expeditious and efficient resolution of civil disputes (the overriding objective) and the duty of all parties in the dispute to assist the Court to further the overriding objective and to participate in the processes of the Court.

[34] A court may order the discovery of documents upon an application being made where those documents are related to the suit before it. As stated in *Halsbury's Laws of England (Volume 85 (2012)) (online edition)* at para 655.

***'Any party to a cause or matter may apply to the judge for an order directing any party, other than the proper officer of the Crown, to make discovery on oath of any documents which are or have been in his possession or power relating to any matter in question in the cause or matter. Thereupon the judge may make such order as he thinks fit, but discovery may not be ordered unless he is of opinion that it is necessary either for disposing fairly of the cause or for saving costs.'***

[35] 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. In *Halsbury's Laws of England, 4th Edition Volume 13 at paragraph 1* the function of discovery of documents is set out as follows:

***'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.'***

[36] The manner of discovery, or disclosure, is usually by way of a party providing that information to another, and should a party disclose the existence of such a document to the other party, then the other party, has, as a general rule, the right to inspect it. This proposition is set out in *Halsbury's Laws of England Civil Procedure (Volume 11 (2015), paras 1–503; Volume 12 (2015),)* as follows:

(viii) *Disclosure of Documents 1020. Disclosure; in general,*

*The process formerly known as 'discovery of documents' is now known, for the purposes of proceedings to which the Civil Procedure Rules apply, as 'disclosure'. A party discloses a document by stating that it exists or has existed; and a party to whom a document has been disclosed normally has a right to inspect that document.*

*A party's duty to disclose documents is limited to documents which are or have been in his control and the duty continues until the proceedings are concluded.*

[37] Orders for production of documents fall under the purview of section 22(a) of the Civil Procedure Act which provides that

**22. Power to order discovery and the like 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;**

[38] Having analyzed the submissions made before the trial court during hearing of the application, as well as the extensive submissions of the respondent before us, it is apparent that this appeal revolves around the issue of discovery of documents that the respondent sought from the appellant which were referred to by the appellant itself in the amended plaint.

[39] From ample persuasive authority that we have cited above, it is clear to us that once a party has referred to a document within its own pleadings with a view to strengthening its case, then the opposing party has a right to inspect those documents. That to us, is a tenet of the right to a fair hearing. We were referred to the persuasive authority of the High Court in **Concord Insurance Co Ltd v NIC Bank Ltd (2013) eKLR** for the proposition that discovery ought to be limited to documents that are relevant to the determination of matters in contention. The authorities cited therein are to the effect that:

**'Relevance must be tested by the pleadings and particulars and when particulars have been served which limit a particular issue then discovery on that issue is limited to the matter raised in the particulars.'** See Halsbury's Laws of England Volume 13 at paragraph 1 and **Concord Insurance Co Ltd v NIC Bank Ltd. (supra)**.

[40] On the question whether the documents that the respondent seeks production of are referred to in the amended plaint, the appellant referred to those documents in the amended plaint, stating that it opted to take steps to protect its interests, and appointed a receiver as well as commenced proceedings to realize its security over an oil storage terminal in Mombasa being constructed by Triton Bulk Storage Limited.

[41] The appellant claimed in its amended plaint that it had commenced proceedings to realize its security over an oil storage terminal that was under construction as well as appointing a receiver to take over the operations of Triton Energy Kenya Limited. In addition, the appellant stated that it commenced court proceedings to recover money owed to it and that these proceedings culminated in an out of court settlement and by virtue of the sale of the terminal, the appellant recovered the net sum of USD 3, 304, 631/00 pursuant to the out of court settlement. Juxtaposing these statements to the claim that the appellant had against the respondent, it is clear that these documents would have a direct bearing on the determination of the suit.

[42] The respondent claimed in its set off that the appellant was attempting to unjustly enrich itself. We take the view that the production of these documents as well as an account of the sums of money that were received would enable the trial court reach a just determination of the matter. In the set-off, the respondent claimed that the appellant held several debentures over the assets of the Triton Companies, and further that it placed these companies under receivership in order to realize its security. Further to this, the appellant received various sums of money with respect to the cargo, and therefore the respondent prayed that these sums of money ought to be set-off in order to ensure that the appellant does not unjustly enrich itself at the expense of the respondent. The appellant submitted at length that due to the doctrine of mutuality, the respondent's liability would not be extinguished by any sum of money that had been paid to the appellant.

[43] To determine the issues raised in the plaint, particularly under the head of negligence, the response by the respondent who has sought a set off would be by examining these documents to determine which of the parties' assertions will hold sway. We are therefore satisfied that the respondent demonstrated a nexus between the documents sought and the suit before the court, and agree with the sentiments of the trial court that these documents are necessary for the determination of the suit. The appellant's grounds of appeal under this head therefore must fail.

[44] We turn now to consider whether or not those documents sought were covered by privilege, and if they were in the possession of third parties, and not the appellant. To do this, it is apt to take a closer look at the documents referred to by the appellant, and those sought to be produced by the respondent. We have reproduced the paragraphs of the plaint hereinabove and from the appellant's assertions, it is clear that the security documents sought were issued to Fortis, and on the basis of these documents the appellant took steps, by way of filing proceedings for recovery in the High Court and eventually pursuing an out of court settlement, to realize its security and, ostensibly, mitigate the loss it suffered.

[45] We are not persuaded that confidentiality, by itself is a reason for denial of discovery orders for documents that would aid the court in determining a matter before it. See the English case of **Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (supra)** that confidentiality is not a basis for the refusal for an order of discovery. Neither are we persuaded that the orders granted by the trial court will result in adverse consequences for the appellant. This is borne out of various reasons. First, these documents were referred to by the appellant in its amended plaint where it particularized its loss and damage under the tort of negligence. The appellant described these documents and explained the basis under which it relied on them. Secondly, while the appellant complained that discovery would be

unlawful and constitute grounds for sanction, these sanctions were not elaborated on, save for the statement that the disclosure of customer information would be adverse to the appellant. We note however, that the appellant was a party to the transactions on securing the cargo that was discharged to Triton.

[46] Vide the Notice of motion dated 2nd April, 2014 the respondent sought for an order to strike out the suit in the event that the appellant did not comply with the order for discovery. From the record, counsel for the respondent wrote to the counsel for the appellant on 18th December, 2013 and on 30th January 2014 requesting for the documents which it claimed were material to the just determination of the dispute between the appellant and respondent. The learned judge in the impugned judgment stated as follows:

***'Discovery and other disclosure processes are expected to elicit voluntary response once they are issued by and between the parties. But where a party has failed to make discovery voluntarily, the Court renders its coercive process to compel discovery of information and documents which are relevant and necessary to the resolution of the dispute before the Court.'***

[47] In the circumstances of this case, the final order of dismissal was granted due to non-compliance with orders for production of documents and accounts. As a general rule, the court has power to issue orders for dismissal issued in the event of non-compliance of earlier court orders. We are persuaded that a court has discretion to determine the consequences of its orders. As held in Pereira v Beanlands [1996] 3 All ER 528, a court has discretion to decide the consequence of non-compliance of an 'unless order.' In determining what to take into account when deciding those consequences, we find guidance in the persuasive authority of Re Jokai Tea Holdings Ltd [1993] 1 ALL ER 630 at 637 where it was held that:

***... in cases in which the court has to decide what are the consequences of a failure to comply with an 'unless' order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since disobedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not entitle the litigant to rights which he would otherwise have enjoyed.'***

[48] In Caribbean General Insurance Ltd v Frizel Insurance Brokers Ltd [1994] 2 Lloyd's Reports 32 CA it was held that final orders of dismissal would only be granted where a court is of the opinion that a party has been given sufficient time to comply but has failed to do so. The Court held that:

***'Final, preemptory or 'unless' orders are only made by a court when the party in default has already failed to comply with a requirement of the rules or an order, and the court is satisfied that the time already allowed has been sufficient in the circumstances of the case and the failure of the party to comply with the order is inexcusable.'***

[49] From the foregoing analysis, we are satisfied that the learned trial judge exercised his discretion judicially in ordering discovery. There are no valid grounds for interfering with the exercise of such judicial discretion.

[50] The application dated 2nd April, 2014 sought discovery within 14 days of granting the orders. Prayer 4 of the application sought a consequential order that in the event of non-compliance, the suit be struck out with costs. Those orders were granted. The appellant had the option of complying with the order within 14 days or, if the 14 days stipulated by the order were not reasonable time, to apply for extension of time stipulated by the order of the court pursuant to order 50 rule 6 of the Civil Procedure Rules, 2010 which provides:

***'where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;***

***Provided that the costs of any such application to extend such time and any order made thereon shall be borne by the parties making such application unless the court orders otherwise.'***

[51] As that rule shows, court has discretion to enlarge time even when the application for enlargement is made after the time has expired. It is at the time when the court is exercising its discretion to extend time that court would consider whether a failure to comply is intentional and contumelious. In addition, the appellant had a right to apply for stay of the execution of the order of discovery and the consequential order pending appeal. Since the appellant had all those rights, which were apparently not exercised, the complaint that the appellant was denied fair trial and the penalty for non-compliance should not have been imposed, is not justified.

[52] In the premise, the appeal has no merit and is dismissed with costs to the respondent.

**Dated and Delivered at Nairobi this 19th day of July, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**