IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 163 OF 2018

BETWEEN

MERRY BEACH LIMITED.....APPELLANT

AND

BARCLAYS BANK OF

KENYA LIMITED.....RESPONDENT

(Appeal from the ruling and order of the of the High Court of Kenya at

Malindi (Korir, J.) delivered on 18th October 2018

in

Malindi H.C.C.C. No. 5 of 2014)

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JUDGEMENT OF THE COURT

The ***appellant, Merry Beach Limited,*** is dissatisfied with the decision of the High Court which concluded that ***the respondent, Barclays Bank of Kenya Limited*** had complied with this Court's orders in *Merry Beach Limited vs Barclays Bank of Kenya Limited & Gianluigi Cernuschi, Civil Appeal No. 5 of 2014*, wherein this Court ordered the respondent to deliver the original cheques and other documents to the appellant within 30 days, and in default its defence would be struck out.

The appellant's case is that it had on two occasions applied to the High Court to have the respondent's defence struck out for failing to make available documents and cheques relating to the dispute, but on both occasions the High Court had dismissed its applications; that it had appealed the dismissal in the first application to this Court which then ordered the respondent to provide the documents, failing which its defence would be struck out.

Following the orders of this Court the respondent had provided some documents and cheques, but had failed to supply all the cheques but in what it called an '*Application of Compliance'* it sought to explain the reasons for not providing them. The appellant was incensed by the respondent's action and filed a second application in the High Court where it sought to have the defence struck out. Once again, the High Court declined to grant that order, thus provoking this appeal.

As a brief background, the appellant opened two bank accounts with the respondent at its Malindi Branch, a Kenya shillings account number 1027690 and a Euro account number 7244054. The bank accounts were opened to enable the appellant undertake the development of a property at Chembe Kibambamshe. The bank account mandate on the accounts required that they be operated jointly by two signatories namely Gianluigi Cernschi *(Gianluigi)* and Massoud Mowlazadeh *(Massoud)*, the appellant's directors.

Massoud who was resident in Italy left cheques in the custody of Gianluigi, and had also signed some blank cheques to ensure that payments were effected as and when they fell due. But it later came to his attention that large amounts of money, that is Kshs. 20,263,646 and Euros 60,000 were paid through cheques drawn on the appellant's accounts without the authorization of either the appellant or Massoud. On enquiry, the appellant sought for copies of the cheques, that were presented for payment, but the respondent failed and or neglected to make them available.

On 28th February 2014, the appellant instituted proceedings against the respondent and Gianluigi in the High Court claiming that the respondent had colluded with Gianluigi to defraud it of the missing sums by paying out cheques and electronic transfers outside the specified account mandate; that the respondent was negligent in allowing Gianluigi to operate the bank accounts in a manner that was contrary to the specified mandate**.** When the respondent failed to file its list of documents and witness statement as required by ***order 7 rule 5*** of the ***Civil Procedure Rules***, on 11th August, 2014, the appellant filed an application seeking an order to strike out the respondent's defence, which application was opposed by the respondent who argued that the appellant did not set down the suit for the pre-trial conference. It nonetheless sought a period of 30 days to assemble the requested documents. By a ruling dated 11th December, 2014, the High Court disallowed the application to strike out the defence, and instead directed the respondent to file the list of documents within 30 days from the date of the ruling.

The respondent did not comply with the court's order thus compelling the appellant to file a second application on 18th November 2017, again seeking to strike out the respondent's statement of defence and for the suit to proceed undefended. A further order was sought to compel the respondent to release the original cheques referred at paragraph 14 of the plaint so that they could be subjected to examination by a document examiner. It also sought for judgment to be entered in its favour.

This application was opposed with the respondent arguing once again that the appellant had not set the matter down for the pre-trial conference; that the appellant was on a fishing expedition to gather evidence in support of its claim; that its defence raised triable issues.

In a ruling dated 16th March, 2016 the learned judge (Chitembwe, J.) allowed the prayer for amendment of the plaint to further articulate the relationship between the parties and their contractual duties vis a vis the breach by the appellant and Gianluigi Cernuschi, and to specify that the respondent has established severe breach of contract on the part of the appellant and the Gianluigi Cernuschi and granted the respondent leave to amend its defence. The court dismissed the application to strike out the defence. Of importance, the learned Judge concluded, that it would not enter judgment in favour of the appellant merely because the respondent has failed to provide the original cheques; that since the respondent had filed a list of documents which included some photocopies of cheques, the suit should proceed to trial during which time the documents could be produced.

The appellant was once again aggrieved by the decision and appealed to this Court for the second time. In a judgment delivered on 14th December 2017, this Court concluded that the respondent had filed the list of documents on 15th December 2015 which was one year after the expiry of the time frame ordered by the court, and that in the circumstances the respondent ought to have sought leave of the court to do so.

On the release of the cheques, this Court found that it was not unreasonable for the appellant to demand the production of the requested cheques; that though it did not agree that the cheques ought to have been produced during the pre-trial conference or at the hearing, the Court found that the learned judge was wrong in declining to grant the order of production of the cheques for examination as this would have enabled the parties to present all the materials necessary before each other and the trial court for the just determination of the dispute. The Court concluded that it was inappropriate for judgment to be entered at this stage of the proceedings.

In the final orders, the respondent was directed to;

> (a) file and serve its list and bundle of documents it intended to rely on within 30 days of the judgment;
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> (b) to produce the cheques whose details are listed at paragraph 14 of the plaint to the appellant's advocate or examination by a handwriting expert within 30 days of the judgment and
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> (c) in default of the orders, the respondent's statement of defence stood struck out with costs.

Following delivery of the judgment, the respondent filed what it referred to as an '*Affidavit of Compliance'* to which it attached copies of specified cheques. It also provided an explanation for its inability to make available other requested cheques. Thereafter, on 15th March 2018, it filed an application in the High Court seeking to amend its Statement of Defence, and attached a draft which it sought to file within 15 days from the date of the order granting leave to amend the defence and counterclaim. Subsequent to this, the appellant also filed another application dated 23rd April 2018, wherein it request for summary judgment to be entered against the respondent in the sum of Kshs. 27,331,646 and Euros 60,000 together with interest. It further sought to have the respondent's application struck out with costs.

After hearing both parties, the learned judge determined that though the respondent had provided some and not of all of the cheques, and had instead filed an affidavit specifying reasons for noncompliance, it had as good as complied with this Court's orders. Accordingly, the court dismissed the application for summary judgment.

Regarding the application for leave to file an amended Defence and Counterclaim, the learned judge found that it was merited, reasoning that it did not seek to introduce new issues, but merely sought to place all dispute issues before the court for determination.

The appellant was aggrieved by the determination of the trial court and has brought this appeal premised on 18 grounds which in summary were that; the learned judge was wrong that the respondent had complied with orders made by this Court on 14th December 2017 in *Civil Appeal No. 2 of 2017 (Merry Beach Limited vs. Barclays Bank of Kenya Ltd & Gianluigi Cernuschi)* and which directed the respondent to deliver original cheques and other documents to the Appellant within 30 days and in default its defence be struck out; whether the learned Judge purported to vary, set aside or review the orders made by this Court *in Civil Appeal No. 2 of 2017*; whether the learned was wrong in allowing the respondent's application to amend the defence and by dismissing the appellant's motion to strike out the application; that learned judge violated the appellant's fundamental right to be heard and to a fair hearing under ***Articles 25 (c)*** and ***50 (i)*** of ***the Constitution*** by failing to appreciate that the appellant cannot enjoy its right to a fair hearing in the absence of the said original cheques and other documents ordered by this Court; that the learned Judge was biased against the appellant and favoured the respondent.

In its written submissions filed on 26th March 2019, the appellant submitted that following the orders of this Court, the respondent, through its advocate Milka Maina filed a document entitled, "*Affidavit of Compliance*" which in a nutshell sought to explain why the respondent was unable to fully comply with the orders of this Court. It was argued that filing the affidavit in this Court was an abuse of the court process, and a ploy to later utilize it in the High Court; that the affidavit was in fact, presented before the High Court and was relied upon by the learned judge to usurp this Court's jurisdiction.

It was further asserted that the replying affidavit sworn by Paul Kinyanjui Ndungi on 25th May 2018, was incompetent, and did not demonstrate that the respondent had complied with the orders of this Court; that furthermore, the learned judge had treated this Court's orders with contempt by substituting them with his view on how this Court should have determined the suit.

On the issue of bias, it was submitted that this was the second time the appellant was seeking justice from this Court on account of the High Court's inexplicably protective stance of the respondent, in that the court had continued to condone the respondent's incalcitranse in supplying the documents required; that the first application was filed because the respondent had refused to produce copies of the specified cheques, and that though its advocate stated that she was unable to retrieve the documents, she nevertheless sought for and was accorded 30 days to file a list and bundle of documents, of which had yet to be produced 2 years later.

Regarding compliance with this Court's judgment delivered 14th December in *Civil Appeal No. 2 of 2017 (Merry Beach Limited vs Barclays Bank of Kenya Limited)* and which ordered the respondent to release the original cheques and other documents to the appellant within 30 days from the date of the judgment, and in default, the respondent's Statement of Defence to stand struck out with costs, it was submitted that the "*Affidavit of Compliance*" filed in this Court after delivery of the judgment was an abuse of process given that the judgment had already been delivered, which had denied the appellant the opportunity to challenge it. Further, that, this Court's orders were self-enforcing and did not require intervention from the High Court, yet the learned judge accepted the respondent's explanation for non-compliance which was tantamount to the lower court reviewing or setting aside this Court's orders.

The appellant added that the respondent's explanation that it had destroyed 2 specific cheques in 2015 in adherence to the bank's policy on destruction of documents was untenable as the respondent had initially indicated that a list and bundle of documents, which included the missing cheques were ready for filing in December, 2015 yet the same cheques were destroyed 4 months earlier in August, 2015.

The appellant concluded by stating that the learned judge's observation that a party cannot be compelled to provide documents which it says it no longer has, and that the failure to provide the documents can be revisited during the trial, was unacceptable and had assisted the respondent in perverting the course of justice by disobeying this Court's orders. The appellant urged us to allow the appeal as pleaded, to hold that the respondent's Defence was deemed to be struck out with costs, to strike out the amended Defence and Counterclaim with costs and to enter judgment against the respondent for the sums demanded.

In responding to the appellant's submissions, the respondent compressed the 18 grounds into five issues which were whether the learned judge erred in holding that the respondent had complied with the orders made by this Court delivered on 14th December 2017 in *Civil Appeal No. 2 of 2017 – Merry Beach Limited vs Barclays Bank of Kenya Limited*; whether the learned judge purported to vary, set aside or review the orders made by this Court; whether the learned Judge was biased; whether the learned trial Judge was wrong in allowing the respondent's chamber summons application dated 14th March 2018 and dismissing the appellant's notice of motion application dated 23rd April 2018 and who should bear the costs of this appeal.

Beginning with whether the learned judge wrongly held that the respondent had complied with the orders of this Court, it was submitted that in seeking to have summary judgment against it, what the appellant was demanding was for this Court to deny the respondent a right to a fair hearing and access to justice; that this was despite the learned judge having rightly observed that by supplying the available documents, the respondent had fulfilled its obligations in compliance with this Court's orders and that allegations of intentional destruction of documents, was a matter that could be substantiated at the hearing of the suit.

On the issue of the learned judge's attempt to vary, set aside or review this Court's decision, it was submitted that the learned judge was right in concluding that the threshold requirement of ***order 36*** of the ***Civil Procedure rules*** had been met, as the respondent had complied with this Court's order in the stipulated time frame. As concerns whether failure to fully comply with this Court's orders was sufficient grounds for entering summary judgment, the learned judge came to the conclusion that it was not, and in so finding the learned judge could not be faulted for arriving at this conclusion.

As to whether the appellant had demonstrated that the learned judge was biased, citing the case of ***Lubna Ali Sheik Abdulla Bajabar & another vs Chief Magistrate's Court, Mombasa & 2 others [2018] eKLR*** which considered the term bias as defined in the Court of Appeal case of ***Medicament and related Classes of Goods (2001) 1 WLR 700***, the respondent contended that the learned judge's ruling was not demonstrative of biased, in that nothing disclosed that the learned judge had set his mind on an identified outcome in favour of the respondent. Furthermore, it was submitted that in allowing the respondent's application, and declining the appellant's application, the learned judge was exercising his judicial discretion which he was mandated to do; that the learned judge's decision took into account that the amended pleadings did not introduce new issues but sought to place the entire dispute before the court for determination.

In considering the pleadings, the grounds of appeal, the parties' submissions and the law, we find that there are two issues for determination.

These are;

> *i) whether the learned judge was biased in the exercise of his discretion in declining to grant the respondent's application of 14th March 2018 and allowing the appellant's application dated*
>
> *23rd April 2018; and*

ii) whether the learned judge varied, set aside or reviewed the orders in Civil Appeal No. 2 of 2017 delivered on 14th December 2017, or whether the learned judge rightly concluded that the respondent had complied with the orders of this Court.

Beginning with the question of bias, this Court in the case of ***Attorney- General vs Anyang' Nyong'o & Others*** [***2007] 1E.A. 12;***

> ***"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially [?]….. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."***

Hence, the test for bias therefore, is whether a reasonable and right thinking person applying their mind to the situation would conclude that the judge was biased. In this case, there is nothing to show that during the hearing of the two applications that the trial judge showed a leaning in the case one way or the other. The appellant did not attest to any incidents of bias, or identify any action or utterance on the part of the trial judge that would have pointed to bias or impartiality. Our view is that the allegations being raised after the decision was rendered must be regarded with circumspect, and in our view are an after thought.

Having found that bias was not established, did the learned judge properly exercise his discretion in granting leave to the respondent to file an amended defence and counterclaim, and in declining to strike out the respondent's defence and counterclaim and to enter judgment in favour of the appellant?

It is an accepted principle that a Court of Appeal will not interfere with the judge's exercise of discretion unless it is satisfied that the trial judge misdirected himself in some matter and as a result arrived at a wrong conclusion or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion which has resulted in a misjustice. ***See Mbogo vs Shah (1968) EA 93.***

In the case of ***Osodo versus Barclays Bank International Limited (1981) KLR 30*** it was held inter alia that;

> ***"Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionality"***.

And in the case of ***Magunga General Stores versus Pepco Distributors Limited (1987) 2KAR 89***, the Court of Appeal held inter alia that;

> ***"An appellate court will not interfere with a trial Judges' exercise of his/her discretion on an application for summary Judgment unless the exercise was wrong in principle or that the Judge acted wrongly on the facts."***

Though the appellant has impugned the trial judge's exercise of discretion, it has not provided any reason for doing so. It is not enough for the appellant to allege that the trial judge improperly exercised his discretion, and then fail to specify in what way such exercise was flawed. From the ruling it is clear that the learned judge interrogated the draft amended defence and counterclaim, and concluded that it did not introduce new issues. On analyzing the draft amended defence and counterclaim, the judge did not take into account extraneous matters or neglect to consider matters that were relevant, and we can find nothing that controverts the learned judge's conclusion. Accordingly, we are satisfied that there was nothing that demonstrated that the learned judge was biased or that he injudiciously or capriciously exercised his discretion.

On the question of whether the learned judge rightly concluded that the respondent had complied with this Court's orders, the learned judge stated thus;

> ***"The orders of the Court of Appeal were succinct. Barclays Bank was directed to take certain steps within 30 days from 14th December 2017 when the judgment was delivered failing which its statement of defence stood struck out with costs to the Merry Beach."***

It was further stated that;

> ***"A look at the pleadings and submissions will instantly disclose that there is no dispute that Barclays Bank complied with Order (a) of the Court of Appeal's orders. There is also no dispute that the Bank did not provide all the cheques to Merry Beach's advocates as directed by the Court of Appeal. Additionally, it is agreed that Barclays Bank filed an affidavit of compliance in the Court of Appeal explaining why it could not supply all the cheques to Merry Beach's counsel."***

It is clear from the above that the learned judge was satisfied that the respondent had complied with this Court's orders within the time frame set out. What was in contention was that not all cheques that were requisitioned were made available. To address this shortcoming, the respondent filed an '*Affidavit of Compliance'*, wherein it provided the reasons as to why not all cheques were provided. The question that then lends itself is whether in so doing, the respondent had complied with this Court's orders?

Essentially, this Court ordered the respondent to file and serve its list and bundle of documents within 30 days of the judgment; the respondent was also ordered to produce the original cheques whose details were listed at Paragraph 14 of the Plaint to the appellant's advocate for examination by a hand writing expert within 30 days from the judgment, and in default of the orders issued, the respondent's statement of defence be struck out with costs to the appellant.

In response to the orders, the respondent sought to comply by providing some of the documents stipulated in paragraph 14 of the plaint within the stipulated time frame, and where it fell short, it provided an explanation. In this regard the learned judge stated thus;

> ***"25. Should Barclays Bank be deemed to have defied the orders of the Court of Appeal? I do not think so. The Bank has stated why it could not avail some cheques to Merry Beach's counsel. Whether the reasons given for non-compliance are plausible is another issue altogether. A party cannot be compelled to supply documents which it says it no longer has. Failure to avail documents is not a ground for denying a party an opportunity to be heard. There are consequences attendant to a party's failure to provide documentary evidence as directed by the court. However, those consequences can only be visited upon the party after the hearing. That is the time it will become clear whether a party destroyed or hid documents or whether the documents were genuinely damaged or lost. By supplying the documents, it claims to have, the Bank has fulfilled its obligation in compliance with the Court of Appeal order."***

We would agree with the learned judge that having provided some of the cheques in the list, and then setting out the reasons for its inability to provide the remaining cheques, amounted to sufficient compliance in the circumstance. At least some of the cheques were supplied, and for those that were alleged to be destroyed, the matter did not end there, the appellant would still have an opportunity during the trial to interrogate the circumstances of their destruction; whether the destruction took place after suit was filed or whether the respondent destroyed original cheques and other documents relating to the subject matter prematurely are matters that are more appropriately raised during the trial. For now, interrogating these issues in the manner undertaken herein is premature and inappropriate, and with the respondent having made available some cheques and an explanation for the omission of others, we find that it cannot be said to have defaulted in complying with this Court's order.

In the case of ***Yatin Vinubhai Kotak vs Tucha Adventures & Another (2000) eKLR,*** it was held that;

> ***"the court should not be astute to find excuses for such failure since obedience to peremptory orders of the court is the foundation of its authority, but, if the non-complying 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, the failure ought not to be treated as contumacious and ought not to disentitle him to rights which he would otherwise have enjoyed."***

And in the case of ***Eastern Radio Service vs Tiny Tots [1967] EA 392,*** it was explained that;

> ***"A litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim and setting up his defence unless his failure to comply was due to a wilful disregard of the order of the court."***

We agree. We also do not consider that, by acknowledging the available documents and the Affidavit of Compliance that the learned judge varied or set aside or reviewed this Court's orders. As observed by the learned judge, the inability to obtain some cheques was not reason enough for the court to strike out the respondent's defence. At this stage, striking out the respondent's defence was not an end in itself, and particularly where the trial court had already admitted the amended pleadings. In effect, the decision to admit the pleadings superseded any striking out, as to do so would in the face of the amended defence and counterclaim would give rise to an absurdity.

In summary, we find that the appeal is unmerited, and is accordingly dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR