REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & SICHALE, JJ.A)

CIVIL APPEAL NO. 11 OF 2017

BETWEEN

CHASE BANK (KENYA) LIMITED.....APPELLANT

VERSUS

CANNON ASSURANCE (K) LIMITED.....RESPONDENTS

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Sergon, J.) dated 16th *August, 2016* ***in*** **HCCC No. 534 of 2012)**

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JUDGMENT OF THE COURT

This is an appeal against a ruling dated 16th August, 2016 wherein the learned Judge (**Sergon, J.**) allowed an application for discovery in the exercise of the court's power under **Section 22** of the **Civil Procedure Act.** The central issue for determination in the present appeal is whether there is basis for this Court to interfere with the Learned Judge's exercise of those powers.

It is trite law that the appellate court will only interfere with the exercise of discretion where the Judge misdirected himself in some matter and as a result arrived at a wrong decision or where he misapprehended the law or failed to take into account a relevant matter. (See this Court's decision in ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125***).

A synopsis of the pertinent facts which gave rise to the issue at hand is essential. Vide a letter dated 13th March, 2009, **Cannon Assurance (K) Limited** (the respondent), requested financial advice from **Chase Bank (Kenya) Limited** (the appellant), on an intended guarantee in favour of Standard Chartered Bank, Tanzania. The request was accompanied by various documents (hereinafter 'the documents') which included:

a. The original loan agreement between Arusha Skyline Hotel Ltd and Union Project Capital AG dated 11th December 2006.

b. The original Memorandum of Understanding & Agreement between Arusha Skyline Hotels Ltd and Unionmatex Insustrienlagen GMBH dated 20th December 2006.

c. The original Deed of Agreement between Arusha Skyline Hotels Limited and the plaintiff dated 9th November 2009;

d. The 1st Deed of Variation of the Agreement dated 9th November 2006, dated 16th May 2007;

e. The 3rd Deed of Variation of the Agreement dated 9th November 2009, dated 31st May 2007.

f. The original charge dated 9th November 2006.

The Respondent averred that, although no facility agreement was entered into, the appellant retained the documents and illegally debited the respondent's fixed deposit account by €448,000. As a result, the respondent lodged a claim vide a plaint dated 17th October, 2012 against the

appellant seeking, *inter alia*, the recovery of the aforementioned sum.

The respondent then filed an application dated 8th October,2013 seeking to compel the appellant to *"produce and return the documents which are or have been in its possession or power and which relate to the suit"*. The respondent stated that it had on several occasions requested the appellant to return the documents but it had refused, failed or neglected to do so.

In response, the appellant alleged that despite its best and diligent efforts, it had been unable to trace the documents and was consequently unable to produce them. Moreover, the appellant contends that the documents must have been returned to the respondent and that they are immaterial to the matters in the suit.

Faced with the submissions and evidence put forth by the parties, the learned Judge in a ruling dated 16th August, 2017, allowed the application and rendered himself as follows:

> **" I am not convinced that the Respondent Returned (sic) the documents enlisted in this application. In fact even the Respondents head of corporate in cross-examination intimated that there is a possibility that the documents could still be in the archive. The Applicant claimed it will be prejudiced in its suit moving forward if these documents are not availed. At this preliminary stage, I cannot overrule the importance of the documents which on the face of the plaint, it is evident that they are crucial documents. The Respondent should endeavour therefore to return the six documents which are clearly in its possession"**

It is that decision that gave rise to the appeal before us which is anchored on the grounds that the learned Judge erred by-

> **i. Failing to appreciate that after diligent search the appellant was unable to trace the documents requested**
>
> **ii. Failing to appreciate that some of the requested documents were not listed in the respondent's list of documents**
>
> **iii. Failing to grant a definitive order on production**
>
> **iv. Failing to apply the law**

At the hearing, learned counsel, **Mr. Chacha Odera** appeared for the appellant while learned counsel, **Mr. Onyango** appeared for the respondent. Both counsel proceeded by way of written submissions as well as oral highlights.

Mr. Chacha submitted that some of the documents requested by the respondent and ordered for production by the superior court, did not form part of the respondent's list of documents. Consequently, the respondent had failed to comply with the provisions of **Order 3 Rule 2 (d)** of the **Civil Procedure Rules** which mandates copies of documents to be relied on at the trial to accompany the plaint. In counsel's opinion, the respondent was on a fishing expedition to obtain new documents to support its case and introduce a new cause of action.

In addition, he faulted the Judge for placing the burden of proof on the appellant and placed reliance on **Section 107 and Section 109** of the **Evidence Act**. According to him, the burden of proving that the material standby letter of credit, as well as other supporting documents did not create a guarantee in favour of Exim Bank (Tanzania) Ltd, lay with the respondent and not the appellant. Also, the burden of producing any documents should lie with the respondent.

Lastly, the appellant emphasized that courts should not issue orders in vain and that the order of the learned judge directing it to "*endeavor therefore to return the six documents, which are clearly in its possession*" was unrealistic given that it would be near impossible if not totally impossible to comply with the order. It was submitted that in the absence of primary evidence sought, the next best alternative was secondary evidence, namely counter-part copies of the documents, which the respondent was in a position to produce.

On his part, **Mr. Onyango**, submitted that the learned Judge's decision was well founded in law and incapable of reproach. He reiterated that it was immaterial whether the documents were in the respondent's list of documents given that the purpose of the application was to retrieve documents it considered crucial to its case and there was nothing to stop it from filing a supplementary list of documents once the documents were returned. Counsel contended that the documents were crucial as they would enable it to demonstrate that the appellant acted without authority by debiting € 448,000.00 from its account.

Counsel further submitted that the argument that the production of documents should not have been ordered because the documents were not part of the respondent's list of documents was never made before the superior court and was clearly an afterthought that should not be entertained.

On the issue of using secondary evidence, the respondent maintained that where primary evidence was still traceable, it should be produced and used in trial. Moreover, the appellant had not demonstrated that it had used its best efforts to trace the documents despite its elaborate document tracking and storage facilities nor had it bothered to respond to the respondent's letters seeking return of the documents. Furthermore, the respondent argued that the cross-examination of one Mr.Mwaura, before the trial court revealed that the documents were in the appellant's possession.

In a brief rebuttal, Mr. Odera emphasized that the trial court had committed a manifest error in the exercise of its discretionary jurisdiction given that if a party does not indicate a document in its list of documents, the document cannot then be the basis of discovery.

We have given due consideration to the record before us, the impugned ruling of the learned Judge, parties' submissions and the authorities

cited by the parties. The appellant's appeal is hinged on the ground that the learned Judge committed a manifest error by issuing orders for discovery where the documents sought had not been listed in the list of documents. Consequently, it was alleged that he exercised his discretion erroneously. Simply put, the issue is whether in discovery, a party can only ask for documents stated in their list of documents.

The nature and extent of discovery has been discussed in **Halsbury's Laws of England, 4th Edition** as follows :

> **"The term "discovery" in this title is used to describe the process by which the parties to civil cause or matter are enabled to obtain, within certain defined limits, full information of the existence and the content of all relevant documents relating to the matters in question between them…. In determining whether a document should be disclosed by a party two tests should be applied: (1) whether it is relevant: (2) whether it is or was in the possession, custody or power of the party or his agent: and in any case when the order directing disclosure has limited discovery or relates to particular documents only the terms of that order must be applied…The power of the court to make an order for production for inspection is discretionary, and the court will not make an order for the production of any documents for inspection unless it is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. Whilst the court may make an order for production for inspection at any time, it will not normally allow a plaintiff inspection before he has served his statement of claim or a defendant before he has served his defence."**

The application before the trial court called upon the appellant to produce and return six documents, four of which were original documents. Despite various requests to return the documents, the appellant did not produce any of the sought documents, nor did it bother to respond to the respondent's requests.

Generally, it is the duty of a party to argue his case with the best evidence available which can throw light on the controversy at hand. Furthermore, the onus is upon the party in whose custody the best evidence is to produce the document notwithstanding the question of burden. The provisions under **Section 112** of the **Evidence Act**, clearly state that:

> **"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

The contents of the appellant's replying affidavit dated 15th May 2014, plainly state that the documents in question were left in their custody by the respondent. In fact, during cross-examination on the said affidavit, the deponent- Mr. Mwaura, admitted custody of the documents in order to give the advice sought. Despite his allegations that the documents were reviewed by the bank and immediately handed back to the respondent by a legal officer, he admitted that there was no forwarding letter, no documentation showing the movement of the documents, that he did not see anyone handing over the documents, and that the legal officers who received the documents had since left the appellant's employ. He also stated that if the documents were not returned to the respondent, they were in the bank's archive.

From the evidence on record, it is obvious that the specific knowledge of the movement and whereabouts of the documents after being received by the appellant bank, can only be adduced, proved or disproved by the said appellant. The appellant is the only one who can attest to the details of which employee received the documents, whether or not the receipt was documented, where the documents were stored, who reviewed the documents, when the documents were reviewed, where the documents were stored after being reviewed, who returned the documents to the respondent as alleged, when they were returned, the means used to return the documents, and who received the documents on behalf of the respondent. It is beyond impossible for the respondent to have such intricate knowledge.

Having found that the burden of proof as to the location of the documents lay with the appellant, we now turn to the question of whether the documents sought must be reflected in the list of documents.

As correctly stated by counsel for the appellant, **Order 3, rule 2** of the **Civil Procedure Rules**, requires all suits filed to be accompanied by an affidavit, a list of witnesses to be called at the trial, witness statements and copies of documents to be relied on at the trial including a demand letter before action. However, if documents are not available as at the time of filing pleadings or a party wishes to introduce new or additional evidence, as often happens, the law provides a leeway in such circumstances and allows any party to seek leave of the court at any stage of the proceedings to amend its pleadings and file any relevant supplementary documents even after the close of pleadings. Such direction may be given by a court under the provisions of **Order 11** of the **Civil Procedure Rules**.

All evidence produced or intended to be produced in court must always be in line with the pleadings. Where the evidence is not aligned to the pleadings, the said evidence cannot be looked into or relied upon by the court. In the Indian case of **Union of India vs Ibrahim Uddin & Another**, **Civil Appeal No. 1374 of 2008**, the Supreme Court stated:

> **"No evidence is permissible to be taken on record in absence of the pleadings in that respect. No party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon."**

Looking at the respondent's pleadings, the six documents requested to be produced and returned are well aligned with its pleadings and are alluded to not only in the plaint but in the witness statements on record. The pleadings contain the necessary averments to make out the need for all the sought documents regardless of whether or not they are contained in the list of documents. Whether or not the respondent will follow the necessary procedure to include them in their pleadings does not deter the court from ordering their production once it is satisfied that that the documents are relevant and are within the custody of the appellant.

In short, we do not agree with the appellant's position that only documents contained in the list of documents can be requested in discovery. In our view, such a straight-jacket approach would result in injustice, would waste the court's time due to numerous discovery applications ensuing after each application for leave to allow amendment of pleadings and is also contrary to the spirit of section 1A and 1B of the Civil

Procedure Act.

We also do not agree with counsel's contention that the orders issued by the trial court will be in vain. If the appellant fails to comply with the Court's order for production, the respondent is entitled to follow the procedure laid out in the Evidence Act enabling it to produce secondary evidence in proving the contents and existence of the documents.

Under **Section 68** of the **Evidence Act**, secondary evidence may be given of the existence, condition or contents of a document in the following cases:

> **a. when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;**
>
> **b. when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;**
>
> **c. when the original has been destroyed or lost…**
>
> **d. when the original is of such a nature as not to be easily movable;**

Again, the court is at liberty to conclude from such omission, an adverse inference by weighing the evidence before it. Where the court has ordered for production of certain documents, and the party so ordered fails to produce the documents, the court can permit the leading of secondary evidence. It is further open to the court to draw adverse inference as provided under **Section 119** of the **Evidence Act** which states:

> **"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."**

This provision in our Evidence Act embodies the doctrine of spoliation or suppression of evidence. Under this doctrine, it is generally the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy. Where such material is withheld, the court may draw adverse inference. **(See Woodroffe's Law of Evidence, 9th Edition at Page 811-816).**

In the case of **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 *Others* *[2012] eKLR*,** the learned Judge rightly stated that:-

> **"Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party."**

In the present case, it has been established that the appellant bank had custody of the respondent's documents for over five (5) years as at the time of filing the application in the trial court. However, it has failed to produce or explain the whereabouts of the said documents. The fact that there is no proof of return of the documents as alleged, leads us to conclude that the documents are still in the appellant's possession. Moreover, the admission by the appellant's employee, Mr. James Mwaura, that if the documents were not returned to the respondent, they could be in the bank's archive, shows that due diligence in locating the requested documents was not exercised.

As stated earlier, discovery is a tool requiring an adverse party to disclose information that is essential for the preparation of the requesting party's case and/or to ascertain the existence of information that may be introduced as evidence at trial. The respondent was well within its rights to request the return of documents given to the appellant, presumably with the intent to introduce the documents as evidence at the trial which was yet to begin.

The test for discovery is proof of possession and materiality of the information sought by the parties. This being the settled legal requirement and having been proved by the respondent in the present case, we find no inclination to interfere with the trial court's decision.

Under the circumstances, we dismiss the appeal and direct the appellant to bear the costs of the appeal.

Dated and **delivered** at **Nairobi this 11th day of October, 2019.**

P.N WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

…….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR