IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE, & KIAGE, JJ.A)

CIVIL APPEAL NO. 302 OF 2014

BETWEEN

BARCLAYS BANK OF KENYA LIMITED…….....APPELLANT

AND

CHRISTOPHER ORINA KENYARIRI ……..…….....1ST RESPONDENT

CREDIT REFERENCE BUREAU AFRICA LIMITED.....2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi, (Mabeya, J.) dated 11th February, 2014

in

H.C.C.C. NO. 276 OF 2011)

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JUDGMENT OF THE COURT

The appellant Barclays Bank of Kenya (BBK) is before this Court aggrieved by a ruling delivered by the High Court (Mabeya, J) on 27th January 2014 allowing an application by the 1st respondent

Christopher Orina Kenyariri (Orina) dated 11th March 2013. That application sought the production by BBK and the second respondent **Credit Reference Bureau Africa Ltd** (CRB) of a letter from BBK dated 21st February 2011 submitting Orina's information to CRB and to produce on oath another letter dated 18th March 2011 or a screen shot of the encrypted electronic information also within 14 days, in default of which the respective defences filed by BBK and CRB would stand struck out.

That application had been brought by Orina on the grounds appearing on its face as follows;

> ***"1. The defendants have failed to produce documents and/or particulars requested above despite several reminders.***
>
> ***2. The plaintiff is in dire need to further amend his plaint and introduce particulars at paragraphs 10, 11 and 12 of the amended plaint.***

3. The documents are pertinent to the plaint as they will assist the court in determining the issue of defamation as pleaded in the plaint.

4. In spite of several requests the defendants have been evasive and have refused to comply with the request for supply of documents and/or particulars.

5. The document and/or particulars sought are necessary to enable the plaintiff further amend his plaint and for the fair disposal of this suit."

The plaint Orina described as being in dire need to further amend had been filed seeking some Kshs. 20 million as well as general and exemplary damages against BBK and CRB, who were named as defendants. The Kshs. 20 million was the sum of credit financing Orina averred he lost, and the two heads of damages the compensation he sought for loss and injury to his personal and professional reputation and standing in society as an advocate of the High Court of Kenya. This was in consequence of BBK's forwarding to CRB and the latter's publication of Orina's personal details on a list of loan defaulters who are unworthy of credit. He had been brought to ridicule, scandal, odium and contempt by the said publication, which he pleaded was false and impelled by spite and malevolence and calculated to injure him in his profession and business reputation and persona. The plaint stated that he could not give particulars of the words complained of as defamatory until and after discovery.

There is on record a trail of applications and notices chronicling the attempts by Orina to obtain the information and documentation he eventually applied for by way of the application that was before the learned Judge. It was his view, expressed in the grounds we have cited and the supporting affidavit, that BBK and CRB were less than co-operative in the matter of discovery, had been evasive and had refused to honour the request for particulars. He asserted that the documents and/or information subject to his attempts to enforce discovery were essential for his intended amendment of the plaint to enable him to provided vital particulars.

He prayed for the court to compel BBK and CRB to produce documents at pain of their defences being struck out.

In response to the application, BBK filed a replying affidavit that was generally dismissive of the same as being dubious, vexatious, riddled with inconsistencies and little more than a fishing expedition by Orina for information that had been availed to him in any event. CRB took a similar approach in its own replying affidavit in which it declared itself a stranger to the letters the production of which was sought. It also stated that the information sought was in encrypted form and incapable of being read by the naked eye. Moreover, whatever information had previously been retained with regard to Orina was deleted upon receipt of a notice from BBK to amend their list of defaulters and expunge or remove Orina therefrom. This they did and there were no records on Orina capable of being printed and produced.

In its memorandum of appeal BBK complains that the learned Judge erred in law and fact by;

- **Accepting that information on Orina had been forwarded by way of a letter dated 18th March 2011 yet such information is not exchanged through correspondence**

- **Ordering production of encrypted information not in its possession having been already deleted.**

- **Using discretion capriciously and elevating inability to rightly comply with court orders to the level of criminal offences**

- **Failing to appreciate that what was sought had already been availed.**

BBK therefore prayed for the setting aside of the ruling and orders, all consequential proceedings and a dismissal of the application with costs.

The parties herein all filed written submissions. The firm of Mohammed Madhani & Co. Advocates on record for the BBK elected to address its grounds of appeal in the written submissions, relied on by learned counsel Mr. Deya without highlighting, under three general heads as follows;

> ***"(i) Whether the learned judges erred in failing to make a determination whether the documents and information sought could be obtained by way of a request for further and better particulars.***
>
> ***(ii) Whether the learned Judge relied on bad law hence proceeded on wrong principles hence (sic) arrived at an erroneous determination.***
>
> ***(iii) Whether the learned Judge erred in disregarding the provisions of the Banking (Credit Reference Bureau) Regulations 2008 and the uncontested averments by the appellant on the modus operandi of Credit Reference Bureaus."***

Under the first head, counsel's submission was that the information sought by Orina did not constitute particulars as envisaged by ***Order 11 Rule 3(2)(b)*** of the Civil Procedure Rules which are intended to clarify facts contained in pleadings, so as to prevent surprise and not for the purpose of fishing expedition to support a claim, as they accused Orina of doing. In support of that contention counsel quoted from **HALSBURY'S LAWS OF ENGLAND**

3rd Edition Vol. 30;

> ***"But a party is not entitled to an order for particulars for the purpose of ascertaining the evidence upon which his opponent proposes to prove his case; nor is it the function of particulars to fill in gaps in a statement of claim from which a material statement has been omitted."***

The learned Judge was criticized as having erred in failing to find that what Orina sought was not obtainable via a request for further and better particulars.

On the second issue, the learned Judge was lampooned for proceeding on wrong principles and relying on bad law and in particular the Canadian case of ***JAY vs. DHL*** **[2008] PESCTD 13**; 52 C.P.C. (6th) 166 where the judge at first instance had struck out a defence for the defendant?s failure to produce certain information which had in fact been lost when the defendant company experienced computer failure. That decision ought not to have been relied on by the learned Judge, it was contended, as it had already been overturned by the Canadian Court of Appeal in ***JAY vs. DHL*** **[2009] PECA 02** in the course of which it was referred to as representing *„rough justice'*. It was then submitted that on the tests proposed by Chief Justice D.H Jenkins in that appeal decision, namely; whether the failure and/or refusal to produce the documents sought was egregious, contumacious, willfully disobedient, in cavalier disregard to the court, spoliation or a fragrant violation of a previous order; relevance of the information/documents sought to the claim and relative to prejudice to the parties; it was urged for BBK that its defence ought not to have been struck out, which amounted to rough justice.

On the final theme it was urged for BBK that the learned Judge disregarded the provisions of the **Banking** (**Credit Reference Bureau**) **Regulations, 2008** which provide for the permanent deletion of incorrect credit information once an amendment notice containing correct information is received without a requirement to maintain a back up of the deleted information, which would in fact violate the regulations. It was complained that the learned Judge improperly speculated that deleted information could still be retrieved within three years after the deletion.

Mr. Kisinga, CRB'S learned counsel took a similar position.

He relied on written submissions filed on behalf of CRB and emphasized that the learned Judge improperly relied on bad law being the Canadian High Court decision of ***JAY vs. DHL*** (supra) which was later overturned, and on other decisions which were distinguishable from the case before the learned Judge. These cases so wrongly relied on were ***BOARD vs. THOMAS HEDLY & CO. [1951] 2 ALL ER***

431 and ***DAVIES vs. ELI LILLY & CO***. [1987] 1WLR 1136. The learned Judge was criticized for applying the discovery principle on a request for particulars. Counsel reiterated

CRB?s position that the information Orina was seeking was always in his possession and so his application ought to have been dismissed. Counsel urged us to dismiss the appeal.

Rising to oppose the appeal in person, Orina stated that the learned Judge was correct in his ruling and that he merely referred to the dicta of the judge in the Canadian case but did not use it as a basis for his decision. He explained that the Canadian Court of

Appeal overturned that decision due to its having misapprehended the law on contempt of court, and the dicta the learned Judge cited was not impugned. Orina drew our attention to the letter dated 4th May 2011 from BBK to Credit Reference Bureau Limited which; is in reference to Orina stated that: "Our letter dated 2/21/2011 submitting the attached customers information to Credit Reference Bureau Africa for listing refers," to make the point that without a doubt a real letter dated **21st February 2011** did exist, having been exchanged between BBK and CRB, and that they deliberately and with impunity refused to produce it after being given 14 days to do so leading to the striking out of their defences. He concluded by submitting that allowing the appeal would be tantamount to dismissing his suit which is pending formal proof at the High Court – to his great prejudice. BBK and CRB on the other hand, he added, will suffer no prejudice from a dismissal of the appeal as they are at liberty to attend the formal proof and agitate or protect their interests in the suit. He urged us to dismiss the appeal.

We have given due consideration to the record before us, the impugned ruling of the learned Judge, the rival submissions and the authorities cited by the parties. It is common ground that the learned Judge?s order for BBK and CRB to produce under oath the letter dated 21st February 2011; the letter dated 18th March 2011 or the screens-shot of the encrypted electronic information supplied by the former to the latter ***within 14*** days failing which their defences stand struck out, was an exercise of judicial discretion. It is also agreed across the board that what we are being asked to do in this appeal is to interfere with a Judge?s exercise of discretion within his jurisdiction, a matter we must approach with circumspection and hesitation as it is not our place to surplant the learned Judge?s discretion, and substitute it with our own. We must be slow to interfere, doing so only in the circumstances aptly enunciated by the predecessor of this Court in ***MBOGO vs. SHAH*** **1968 EA 93**. There, the Vice-President Sir Clement De Lestang stated, at p94;

> ***"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 has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this Court that the Judge was wrong and this, in my view, it has failed to do."***

Concurring with those sentiments the President, Sir Charles Newbold, rendered himself thus; at p96;

> ***"We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

See also ***UNITED INDIA INSURANCE CO. LTD vs. EAST AFRICAN UNDERWRITERS (KENYA) LTD*** **[1985] EA 989**.

To say that a matter lies in the discretion of a Judge is not the same as saying that the Judge can do anything he pleases as inclination, whim or caprice may suggest to him with a matter that is before him. The discretion is a judicial one, to be judicially and judiciously employed in accordance with settled principles depending on the matter or subject he is dealing with.

In the case at bar, the learned Judge understood, correctly in our view, that the documents and information that Orina sought by way of the application before him, having failed to obtain them through several requests for particulars or for further and better particulars, were critical to enable him to comply with the requirement that a statement of claim in defamation must contain the exact or precise words published and which are alleged to be defamatory of the plaintiff. Indeed the learned Judge had expressly so-stated in a ruling dated 4th July 2012 by which he dismissed Orina?s application to strike out the defences filed by BBK and CRB;

> ***"…….It is crystal clear that in a suit for defamation, what the court has to decide on is the nature and effect of the very words complained of. The defendant also must be able to know the exact claim he has to face. Since, in deciding whether a statement bears a defamatory meaning whether in its plain meaning or innuendo, the Court has to construe the very words used or complained of. This is the basis upon which it is a requirement that the exact words complained of not only be pleaded but be set out verbatim in the statement of claim …….it is clear that the plaintiff has not set out the words complained of in his amended plaint. This may be partly because the letter he complains of ie 18th March, 2011 was never copied to him. But in my view, that does not relieve him of the strict requirement of the law of pleading the words complained of. There is no evidence to show that he has sought a copy of that letter and has been denied. If that was the case there are legal mechanisms available to him for obtaining appropriate relief ….."***

In that same ruling, and after quoting from ***GATLEY ON LIBEL & SLANDER*** at p 972 to the effect that the court has power to grant early disclosure so as enable a claimant to set out the precise words of the libel in his statement of claim, the learned Judge stated as follows;

> ***"It is clear from the pleadings and the affidavits on record that the defendants have not denied the existence of the letter dated 18th March, 2011 or a letter by which, the 1st defendant advised or notified the 2nd defendant to list the plaintiff as a defaulter. In my view therefore, it was open for the plaintiff to have applied for the production of the same by the defendants to be able to plead the same. Of course if they failed to do so there would be sanctions."***

Whether from taking that cue or from independent advice, Orina did in fact move the court through the motion leading to the ruling impugned herein, for precisely that kind of early discovery. We have already set out the basis for that application and the responses put up by BBK and CRB in resisting it. In dealing with the same, the learned Judge reasoned as follows;

> ***"I am of the view that the particulars that are sought by the plaintiff namely the letters dated 21st February, 2011 and 18th March, 2011 and the screen shots of the electronic information of the plaintiff as a defaulter and supplied to the 2nd defendant by the 1st defendant are pertinent to this action. The letters and the electronic information about the plaintiff supplied by the 1st defendant to the 2nd defendant have not been denied by the 1st defendant, though the 2nd defendant denies the receipt of any such communication from the 1st defendant. I shall deal with that aspect of this denial later on in this ruling. However, with regard to the particulars sought, it should be noted that the requirement to give particulars reflects the overriding principle that litigation between the parties and particularly the trial should be conducted freely and openly without surprises."***

In espousing a conduct of litigation that is free from surprise or ambush the learned Judge was pursuing a well-troden path. He quoted and was persuaded by two English cases. The first, ***BOARD vs. THOMAS HEDLEY & CO. LTD*** (supra) a 1957 decision, had Lord Denning say, underscoring the equalizing and

fair role that discovery plays in litigation, as follows;

> ***"The relevant information with regard to the (complaints) is in all the hands of the defendants, and justice requires that the (claimant) should be put in possession of it also so that she can present her case on equal terms."***

The second was ***DAVIES vs. ELI LILLY & CO***. (supra) in which Sir John Donaldson M.R. stated, some thirty years ago;

> ***"In plain language, litigation in this country is conducted, „cards face up the table.? Some people from other lands regard this as incomprehensible. „Why?, they ask „should I be expected to provide my opponent with the means of defeating me?? The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between the opposing parties and, if the Court does not have all the relevant information, it cannot achieve this object."*** (Emphasis added)

The learned Judge in our estimation was entirely correct in adopting that open, honest, accountable and rational approach to litigation that eschews hide-and-seek games and enables parties to lay before each other and before the court all material relevant and needful for the just determination of disputes. It was therefore little surprising that once he found, as was inevitable, that there did in fact exist in the possession or control of BBK and CRB the letter from the former to the latter dated 21st February 2011, whether in original or copy, the next logical step which the learned Judge took was to order that the same be availed for Orina?s inspection and a copy provided for his use as well as the court?s in line with the request for particulars he had issued dated 1st March 2013. The same also applied to the information furnished by BBK to CRB on 18th March 2011 concerning COK's alleged non-performing loan that made him a defaulter deserving of listing as such. Those documents and information were at the heart of Orina's claim in defamation and we hold that the learned Judge was perfectly entitled to order their production within the timelines he set.

On the issue of whether or not the electronic information covered by the learned Judge?s order was available for production or not by reason of having been permanently deleted as contended by CRB, the learned Judge found CRB?s position to be rather incongruous or inconsistent considering the circumstances of this case and the fact that "it is common practice for organizations such as the 2nd defendant (CRB) to back up electronic data." We did not understand him to be saying that he had special knowledge of the operations of credit reference bureaux. Rather, we think that he was expressing a truism that in the Information Age, organizations do, indeed need to back up their data. We think that he did not reason perversely nor in any way poison his discretion when he continued as follows;

> ***"In the foregoing, I see no reason why the 2nd defendant should not endeavor to retrieve the information as required by the plaintiff from its residual data. It is clear that the 2nd defendant did not state that it was not in a position to provide the screen-shot of the encrypted electronic information supplied to the 2nd defendant by the 1st defendant. In fact, counsel to the 2nd defendant confirmed that the said documents formed part of the documents in the 2nd defendant?s bundle of documents. There is therefore no prejudice that will be occasioned to the 2nd defendant, if the same is provided as requested by the plaintiff."***

We also think that his concluding analysis of the matter before him, after considering and avoiding the making an order for *decryption* of the encrypted information or data that Orina sought on the basis that he could not grant an order gratuitously that was not prayed for was sound. His conclusions were, we think, fair and well-founded thus;

> ***"Taking account all the circumstances in this case, I do hold that there is no proper response that has been advanced by the defendants in terms of responding to the request for plaintiff?s particulars and the request for further and better particulars. I am not persuaded by the defendants why the orders sought by the plaintiff should not be granted so that he can implead***

his case with particularity. My thinking is guided by the fact that in light of the overriding objective, the Court has a wide discretion as to when to order disclosure. Such a disclosure may be ordered where it assists a party in properly defining the issues that the court has to determine. I have considered the requests made by the plaintiff and as stated herein before, I am of the view that the defendants in answering the same, will ensure that the trial of this case will be conducted in a way that will achieve justice between the parties since the Court will be able to access the relevant information in order to achieve this objective."

That brings us to a consideration of whether the learned Judge approached the possibility of the defences filed by BBK and CRB being struck out, admittedly a consequential and not a direct result of his order, with the requisite circumspection and an appreciation that striking out is a draconian move that ought to be resorted to sparingly and in the clearest of cases where the justice of the case demands it. We think the learned Judge's approach was correct. He had before him what was essentially a Hobson?s choice: either to look the other way and take no action in the face of a pair of defendants who had no desire to come clean on information and material essential for the fair pleading and trial of the plaintiff's claim – and who had ignored or had been less than forthright on the question of further and better particulars, or aid the course of justice by granting the orders sought giving a time frame for compliance and attaching to them an unless tag which would trigger the sanction of striking out. He chose the latter option and we are on our part fully satisfied that he was perfectly justified in doing so. That he approached the matter with judicious circumspection is clear from the last paragraph of the learned Judge?s ruling;

"I am not persuaded by the defendants submission that the plaintiff should proceed with the trial without the requested information. I am also not persuaded that the information sought is unavailable or that the explanation by the defendants to the plaintiff has fallen on deaf ears. I am alive to the strict requirements on when pleadings are to be struck out as set out in terms of the D.T. DOBIE & COMPANY (K) LTD vs. MUCHINA 1982 KLR 1 case. But in the circumstances of this case and for the reasons advanced, this is a proper case where the provisions or Order II Rule 3 (iii) may be invoked. I hold so because, the communication contained in the letters sought by the plaintiff was disclosed to have existed by the defendants themselves. The conduct of the defendants themselves point towards the existence of that information. Why are the defendants unwilling to disclose the same to Court? Is the Court to allow and encourage litigation by ambush? The days when ambush in litigation was the order of day are long gone and, in the words of Sir John Donaldson Mr. in the case of Daries vs. Ali Elly (supra) this is an era when litigation is to be conducted on a "Cards face up on the table? basis. This is by virtue of Article 159(2) of the Constitution of Kenya, Sections 1A and 1B of the Civil Procedure Act as read together with Order II of the Civil procedure Rules."

It is clear from what we have said that nothing has been placed before us that would entitle us to interfere with what was clearly a very-well-thought-out ruling fairly considering the issues that were before the learned Judge, which is what proper exercise of discretion entails. We accordingly cannot allow this appeal and it is dismissed with costs.

Dated and delivered at Nairobi this 9th day of June, 2017.

P. N. WAKI

……..……..

JUDGE OF APPEAL

R. N. NAMBUYE

……..…….

JUDGE OF APPEAL

P. O. KIAGE

……..…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR