IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G.B.M. KARIUKI & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 272 OF 2011

BETWEEN

UNITED AIRLINES LIMITED ..... APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED ..... RESPONDEN

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J.M. Mutava, J.) dated 24th November, 2011

in

HCCC NO. 4077 OF 1994)

****

JUDGMENT OF THE COURT

1. By a further amended plaint filed at the High Court in Nairobi on 3rd September, 1999 in **High Court Civil Suit No. 4077 of 1994 United Airlines Limited** (the appellant) sued the **Kenya Commercial Bank Limited** (the respondent) seeking several reliefs.

The claim was resisted by the respondent by way of a statement of defence filed on 3rd December, 1994 which was amended later. A reply to defence was also filed and after close of pleadings, the matter was fixed for hearing.

It is also worth noting that the suit was thereafter consolidated with **HCCC No. 388 of 1998** which was said to arise from the same cause of action.

2. According to the appellant, it was the defendant's customer and in that capacity applied for a loan facility for Ksh. twelve million (Ksh. 12,000,000) for the purpose of purchasing an aircraft from Canada. The respondent approved the said loan facility subject to the aircraft being delivered and registered in Kenya and evidence to that effect being availed to the respondent. The respondent was supposed to remit the said money to Canada for the said purchase. According to the appellant, the money was to be released only after the aircraft arrived in Nairobi. This according to the appellant was not done and the money was released before the aircraft was delivered. We do not wish to delve into the details of the said transaction as that is not what is before us, and that suit has yet to be determined by the High Court.

3. The matter was listed for hearing and when the parties appeared before Mbaluto J., three witnesses testified for the appellant before **Elkane Aluwale,** the appellant's managing director was called to the witness stand. In the course of his evidence, the witness sought to produce some documents which were said to be copies of internal correspondence between the respondent's officers and other organizations e.g Bankers Trust of New York and The Royal Bank of Canada.

4. Counsel on record for the respondent objected to the production of the said documents on grounds that they could only be produced by the maker or the persons the documents were addressed to. It was learned counsel's contention that the documents, having not been addressed or copied to the witness, were illegally obtained and the court was called upon to uphold the objection and disallow the production of the said documents. **Section 140(2)** and **Section 139 of the Evidence Act** were relied upon.

5. In response to the objection, learned counsel for the appellant posited that **Section 142(2) of the Evidence Act** was not applicable. He urged that since the said documents related to the witness' bank account, then he could not be stopped from producing them in evidence regardless of the manner in which he had procured them. Counsel for the respondent also urged that since the witness was not the maker of the documents, he could not be cross-examined on them as he had no competence to answer any questions arising from them.

6. The court in its brief Ruling said that the document could only be produced by the person who had made it or who had received the same. The witness was stood down to allow the maker of the document to be recalled to produce it. Next came **Protus Inziani Khasiani** (PW5). The witness had as at the time of his testimony stopped working for the respondent. He informed the court that in 1994 he used to be the relationship manager for the appellant's account, and was therefore, conversant with the transaction in question. In the course of the transaction the witness had written an internal memo to the respondent's senior legal officer. The witness sought to produce the said memo in evidence but an objection was taken by counsel for the respondent on the basis that it was a photocopy, and secondly that the document was an internal inter office communication and was a privileged document which could not be tendered in evidence. Learned counsel for the appellant insisted on the production of the document as the original was in possession of the respondent.

7. In a considered Ruling rendered on 5th September, 2002 the learned Judge overruled the objection and allowed production of the document in question in evidence. Citing **Section 68(1)** of the Evidence Act, the learned Judge found that a Notice to Produce the documents dated 12th May, 1999 and a supplementary Notice to Produce dated 12th April, 2000 were duly served upon the respondent but the respondent had failed to produce the original which was in their possession. Consequently, the rule on production of secondary evidence had been complied with and the document could therefore be produced; irrespective of how it was procured. The learned Judge also ordered that all other documents falling in that category were admissible. The respondent was aggrieved by the said Ruling and with the leave of court filed an appeal to this Court challenging the Ruling.

8. In its Ruling dated 9th November, 2007, this Court (Bosire, Waki and Onyango Otieno, JJ.A), held that it was not satisfied that the document PW5 sought to produce in evidence was included in the Notices to Produce referred to earlier. On that basis, the production was disallowed, with the court advising the appellant to comply with the legal requirements if it still wanted the document produced. The Court also took exception with that part of the impugned Ruling that appeared to allow wholesale production of *"all the documents falling in that category*". The appeal was consequently allowed with costs.

9. The appellant appears to have gone back to the drawing board and prepared a Notice to Produce a total of 68 documents which it wanted the respondent to produce and served it on the respondent. The matter was then placed before Muga Apondi, J. for hearing *de novo* but was later taken up by Mutava, J. The hearing commenced with **Protus Inziani** (formerly PW5) starting off as PW1. When the witness tried to produce the internal memo dated 28th October, 1994, counsel for the respondent once again raised an objection, this time on the ground that the document was confidential and allowing it in evidence amounted to breach of confidence which was not allowed. Counsel called in aid the English decision of

Imerman vs Tchenguiz 2001 All ER 1.

10. Mr. Lubulellah once again insisted that due Notice To Produce had been served on the respondent and so having complied with all legal requirements, production of the document ought to have been allowed. Mutava, J in his Ruling on this issue rendered himself as follows:-

> ***"Employees and ex-employees of banks must therefore be held to the duty to observe confidentiality in respect of any information or communication they obtained in respect of any information or communication they obtained in the course of employment…***
>
> ***I further hold that the privilege attaching to communication between parties and their lawyers must be sanctified by the court, including communication between a department of an institution and it's in house counsel…"***

The objection was therefore upheld and the Court allowed production of the ***"memo in question and its attachments, and any other range of documents or communication made in similar circumstance between departments of the defendant bank and its advocates in connection with the dispute giving rise to this suit"***.

11. Once again, with leave of court, the appellant moved to this Court challenging the said Ruling, based on seventeen grounds contained in the memorandum of appeal dated 19th December, 2011.

For purposes of brevity, we compact the said grounds as follows:- that the learned Judge erred in holding that the disputed document was privileged communication; holding that the witness Protus Inziani having left the respondent's employment was not competent to produce the document in question; the bank had an obligation to protect the privacy of a customer's information even against the customer himself; the right to fair trial cannot supersede the right to privacy, and information under **Articles 31** and **35(1)b of the Constitution of Kenya 2010**; being persuaded by and upholding authorities from other jurisdictions while ignoring the provisions of the Evidence Act; and giving an omnibus order on admission of all "*similar documents*" without them being identified first.

The appellant asks the court to set aside the said order and substitute the same with an order allowing production of the document in question.

12. The appeal proceeded by way written submissions with oral highlighting. In his written and oral submissions, Mr. Lubullelah, learned counsel for the appellant expounded on the grounds of appeal cited above and reiterated that it was wrong for the learned Judge to disallow the production of the document in question under the banner of privilege while the same was relevant and related to the appellant's account. He also urged that the learned Judge failed to abide by this Court's earlier decision which faulted the Judge for allowing production of the exhibits wholesale instead of having each of them subjected to scrutiny and tested against the relevant provisions of the Evidence Act.

13. Opposing the appeal, Mr. Amoko learned counsel for the respondent, urged the Court to dismiss the appeal. He urged that the learned Judge was right in finding that the document in question was privileged and confidential and could not therefore be produced in evidence notwithstanding the fact that the document related to the appellant's account. Learned counsel maintained that the bank had a duty to maintain confidentiality and was duty bound not to disclose information to 3rd parties.

In this respect however, we wish to point out that there were no third parties involved here as the information in question was in respect of the appellant's account. Learned counsel discounted the claim by the appellant's counsel that the Judge was biased and that he had raised and determined a matter that was not before the court. He cited the often cited case of **Odd Jobs vs Mubea (1970) E A 476** , where the court held that a court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties.

14. As submitted by learned counsel for the respondent, illegally obtained evidence was for a long time

admissible in criminal law as long as it was relevant (see **Kuruma Son of Kaniu vs R [1955] 1 All ER 236.** However, the **Constitution of Kenya 2010** has now shifted the paradigm and **Article 50(4) of the Constitution** now disallows such evidence. For purposes of clarity, the said provision provided as hereunder:-

> **50 (4)** ***"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice…"***

The Kuruma case *(supra*) is therefore no longer good law. This article nonetheless applies to criminal law and not civil law, as it succinctly refers to *"trial"* as opposed to *suit*, and also relate to rights of an accused person.

15. Admissibility of documentary evidence is explicitly provided for under the Evidence Act. We shall not delve into all those provisions and will only advert to those that are relevant in this appeal. In this case, we note that the objection was taken not on the basis that the document was illegally obtained, but on the issue of confidentiality. In his objection, Mr. Amoko stated:-

> ***"I wish to object to the production of the document and its annexure. This is because the document relates to internal communication within the Bank as to what transpired in respect to a customer's account… Our objection is based on breach of confidence and not illegally obtained evidence."***

We shall therefore not, for purposes of this judgment delve into the vast arena of illegally obtained evidence in civil cases. We shall do so if and when another opportunity presents itself.

16. What we need to ask ourselves now is whether the document in question was confidential or not. In support of his objection, Mr. Amoko relied on the English cases of **Imerman vs Tchenguiz 2001 All ER 1 and Three Rivers District Council & Others vs Governor & Company of the Bank of England (No. 5) [2004] EWCA Civ 218.**

To start with, we agree with learned counsel for the appellant that these authorities can only be of persuasive value and would not override either the provisions of the Constitution, or any domestic statute. We shall look at the contents of the document in question *vis-à-vis* the meaning of confidentiality and determine whether the same was confidential and whether it could have been produced as evidence without violating the law on confidentiality or any other relevant law.

17. Bryan A. Garner in Black's Law Dictionary defined confidentiality as:-

> *"1. Secrecy; the state of having the dissemination of certain information restricted.*
>
> *2. The relationship between lawyer and client of guardian and ward, or between spouces, with regard to the trust that is placed in the one or the other."*

From the above definition, no doubt communication between lawyer and client is confidential and cannot be disclosed to third parties without the client's authorisation. In this case, however, the challenged document is a memo headed; *"General Letter No. 94/770 from Corporate Moi Avenue Branch''* to *"Legal Department Branch"*, and drawn to the attention of *"Senior Legal Officer"* through *"Chief Manager Moi Avenue Branches"*. It is clear from the face of this document that it is not communication between a lawyer and a client. It is communication within the legal department of the respondent and not to any specifically named individual.

18. In our view, therefore, this was not privileged or confidential information that should be protected under the guise of confidentiality. Moreover, the person who sought to produce the document was its author, and the information was not being disclosed to a stranger third party but to the subject of the memo. This communication is not covered by **Section 134** of the Evidence Act either as it cannot be said

to be client/advocate communication. If anything, under **Article 35(1)(b)** of the Constitution, the appellant had a right to the said information to enable him prosecute his case fairly. We are also inclined to mention that when this Court (differently constituted) pronounced itself on the earlier objection after hearing the appeal from the decision of Mbaluto, J., the issue of confidentiality had not been raised. The appeal was determined on the basis that the document was a photocopy, and there was no evidence the same was included in the "Notice to Produce" that had been served on the respondent. There was therefore nothing wrong in raising another objection and the court pronouncing itself on the same.

19. In conclusion, we would like to state that the bank is an agent of its customers and is obligated to disclose to the customer any information that may have any bearing on the customer's account. It cannot be justified to deliberately withhold from the customer relevant information pertaining to the customer's account. Doing so would amount to dereliction of duty on the part of the bank.

We think we have said enough to show that the document in question ought to have been admitted in evidence. In the circumstances, we allow this appeal with costs to the appellants.

Dated and delivered at Nairobi this 1st day of December, 2017.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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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