

UGANDA / JUDGMENT

Angubua v Housing Finance Bank (U) Ltd and Others (Miscellaneous Application No. 434 of 2022) [2023] UGHCCD 74 (31 March 2023)

[2023] UGHCCD 74**COURT**

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

Miscellaneous Application No. 434 of 2022

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(CIVIL DIVISION)****MISCELLANEOUS APPLICATION NO. 434 OF 2022****(ARISING FROM CIVIL SUIT NO.16 OF 2022)****ANGUBUA PETER:.....APPLICANT****VERSUS**

- **1. HOUSING FINANCE BANK (U) LTD**
- **2. THE BOARD OF DIRECTORS HOUSING FINANCE BANK (U) LTD**
- **3. MR. MICHAEL K. MUGABI**
- **4. MS. PEACE LILLIAN P' WANG:..... RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA**RULING**

The applicant sued the respondents jointly and severally seeking, inter alia a declaration that his summary dismissal was unlawful and unfair. He stated that the dismissal violated his right to a fair hearing and that it was marred by irregularities and had no legal effect. The applicant also

sought a declaratory order that he is still the first Respondent's substantive Head of Information Technology and also sought an order for renewal of His contract of employment. The applicant also seeks general, special, exemplary, aggravated and punitive damages. He also seeks the costs of the suit and the interest on it.

The application

This application was made by Chamber Summons under the provisions of Section 33 of Judicature Act Cap 13, Sections 22 (a) and 98 of the Civil Procedure Rules and O. 10 r 12 and 24 of the Civil Procedure Rules SI 71-1. The applicant seeks the following orders;

- 1. A discovery on oath of a Board Resolution and/or minutes authorizing bonus payments for the year 2021 to the Executive Staff, Heads of Departments, Senior Managers and Staff of the Bank to be produced.
- 2. A payment schedule and list of each category to be paid in particular the Heads of Department.
- 3. A board resolution and/or minute showing those who were excluded from receiving the bonus for the year 2021 in respect of the Heads of Department.
- 4. Proof of payment of the authorized bonus to all the staff who were eligible.
- 5. A board resolution and/or minute of the 91st Board meeting held on the 26 th August 2021 which resolved inter alia not to renew the contract of employment of the applicant which was terminating on 31st December 2021.
- 6. Costs of and incidental to the application be provided for.

The grounds in support of this application are set out in the affidavit in support briefly as follows;

- 1. The applicant joined the 1st respondent bank on 4th October 1999 as Systems Administrator, worked through the rank and file until he was promoted to the position of General Manager IT on the 21st January 2008 and performed in that position till the 23rd February 2017.
- 2. That the applicant was the Head of Information Technology of the Housing Finance Bank (U) Limited on a fixed contract of employment for 5 years which commenced on 23rd January 2017.
- 3. That on the 26th August 2021 the Board of Directors at its 91st Board meeting purported to terminate the applicant's contract of employment outside the terms and conditions of employment contract.
- 4. That on the 23rd December 2021 the applicant was unlawfully without affording him a hearing summarily dismissed.
- 5. That all the documents sought are in possession or custody of the respondents.

- 6. That the documents sought by the applicant relate to the matters before court and the respondent shall not suffer any injustice if all the documents sought are produced in court as they will enable court determine all issues of remedies in the event the applicant becomes successful.

The respondent opposed this application and filed an affidavit in reply sworn by Anne Abeja-Company Secretary and Chief Legal Officer on behalf of the respondents;

- 1. The respondents contend that they are not liable to produce the requested documents as the same are not relevant to the resolution of any issue in dispute in the main suit.
- 2. The respondents further contend that the request for an order of production of the said documents is an abuse of court process and a mere fishing expedition base on speculation of rights that the applicant doesn't have.
- 3. The respondents also contend that the requested documents contain confidential and proprietary information and that there is no reasonable justification for their confidentiality and privacy to be violated.
- 4. The respondents in their affidavit in reply also contend that in any event bonus payments by the 1st Respondent are not governed by any documents requested but are governed by the 1st Respondent's human resource policies and procedures manual of which the Applicant has a copy.
- 5. The Respondents therefore state that this Honourable Court has powers to reject an application for production of documents requested merely as part of a fishing expedition and not to assist Court resolve a question before it.

The applicant was represented by *Kituuma Magala* while the respondents were represented by *Zeere James*. The court directed the parties to file their submissions which I have considered.

Whether the court should grant an order for discovery of the said documents?

Counsel for the Applicant submitted that Order 10 rule 12 read together with Section 22 of the Civil Procedure Act empowers this Honourable Court to issue orders of discovery. Relying on the case of **Dresdner Bank Ag vs Sango Bay Estates Ltd (No. 3) [1971] 1 EA 326** and **Dresdner Bank Ag vs Sango Bay Estates Ltd (No. 4) [1971] 1 EA 409**, the respondents state that an order for discovery is discretionary hence Court should use its powers judicially.

In **Olouch vs Charagu [2003] 2 EA at Page 651**, Court held that an order for discovery of documents can only be made where the following prerequisites are made: -

- a) There is sufficient evidence that the documents exist which the other party has not disclosed.
- b) The documents relate to the matter in issue in the action

- c) There is sufficient evidence that the documents are in possession, custody or power of the other party.

Submitting on the first prerequisite of sufficient evidence that the documents exist which the other party hasn't disclosed, Counsel for the Applicant relied on the case of **Dresdner Bank Ag vs Sango Bay Estates Ltd (No. 3)(Supra)** in which Justice Russell Ag said that the object of this rule is clear that it happens where one party to an action makes an allegation of the same fact, such as existence of a partnership or an agency, which is disputed by the other party, if the allegation is true, the right to discovery would follow; if it is not true, there would be no right to discovery. Counsel also stated that the documents sought exist, and in possession or custody of the 1st Respondent according to paragraphs 4,5,7,8,9,10,14 and 18 of the Applicant's Affidavit in Rejoinder. He invited Court to make an order of discovery.

On the second prerequisite that documents must relate to the matter in issue in action, Counsel for the applicant stated that orders (i) to (iv) sought in the Application relate to the payment of bonus. He said that the Applicant had a running employment contract from 23rd February 2017 to 31st Dec 2021 which contract was adduced in evidence as annexure "B" to the affidavit in support. In the case of **Simbamanyo Estates Ltd & Peter Kamya v Equity Bank Ltd & 4 others (Commercial Court) unreported**, Hon Justice Stephen Mubiru held that "to be considered relevant, the document or information must have a tendency to make the existence of any fact of consequence to the suit more or less probable than it would be without evidence. A document is material if it is offered to prove an element of a claim or defence that needs to be established for one side or the other to prevail. The applicant must show a reasonable expectation that the material sought will aid in resolution of the suit."

Counsel for the applicant relying on paragraphs 13, 14, 17 of the affidavit in support of the application stated that the 1st respondent didn't dispute the existence of a running employment contract with the Applicant. He also stated that under paragraph 16 of the Affidavit in support of the application the 1st Respondent Bank made profits which fact wasn't disputed by the 1st Respondent Bank. He invited Court to confirm that the documents sought are not intended for fishing expeditions.

On the issue of confidentiality and proprietary information belonging to the 1st Respondent and 3rd parties who are not party to the suit, Counsel for the Applicant stated that the 1st Respondent Bank ought to have clearly taken advantage of Order 10 rule 19(2) of the Civil Procedure Rules in order to have protection under the law. He relied on the decision of **Justice Stephen Mubiru in Simbamanyo States Ltd (Supra)** at page 12 where he stated that " A party who seeks to exclude documents from discovery on basis of exemption or immunity must specifically plead the particular privilege of immunity claimed and provide evidence supporting such a claim." He said that the 1st Respondent omitted to do so hence Court shouldn't believe the evidence of the Company secretary and Chief Legal Officer of the 1st Respondent Bank.

On the issue of possession, custody or power which is also important in considering applications for discovery of documents, Counsel for the applicant stated that ground 5 of the main application read together with paragraph 17 of the affidavit in support of the application clearly states that the 1st Respondent Bank is in possession, custody and in power of all documents sought. He also

stated that it is the evidence of the applicant under paragraphs 7, 14 and 18 of the Affidavit in rejoinder that the 1st Respondent Bank is in possession, custody and power of all documents sought. He also relied on the decision of **Justice Stephen Mubiru in Simbamanyo Estates Ltd (Supra) at page 13c line 20-25** where Justice Mubiru stated that "Actual possession of the document is unnecessary where if the party has control of it. All that is required is for the Respondent to either have physical possession of the document, or to have a right to possession of the document that is equal or superior to the person who has physical possession of the document"

Respondents' counsel submitted that the discovery of the documents requested should be rejected as they are not relevant to the resolution of the instant case and don't relate to any issue in dispute. For a document to be said to be relevant, the Applicant is required to prove that it contains information that may enable him advance his case or to damage the Respondent's case in the main suit (**Compaigne Financiere du Pacifique vs Peruvian Guano Co. (1882) 11 QBD 55**).

A document will not be considered to be necessary if it is not related to the case pleaded by the Plaintiff or if it is required for purely speculative investigation by the Plaintiff (**O Co. Vs M. Co. (1996) 2 Lloyd's Rep 347**).

The documents requested relate to payment of bonuses by the 1st Respondent to its staff for the year 2021. Apart from stating that the documents are in possession of the 1st Respondent, the Applicant has not in any way demonstrated that how the documents are relevant to the determination of any issue currently before this Honourable Court in the main suit. Counsel for the Respondent stated that in the main suit, the Applicant didn't make any claim for payment of bonuses had accrued at the time he was summarily dismissed.

Counsel for the Respondents submitted that the applicant's statement that the documents are relevant to enable him advance his already pleaded case that he is entitled to a bonus is unfortunately false. The Written Statement of Defence has no paragraph 19 and the Applicant didn't plead any cause of Action in his Complaint relating to payment of a performance bonus and neither did he make any claim for payment of any accrued bonus whatsoever.

Counsel for Respondents further submitted that even in the unlikely scenario that the issue of bonus was in contention in the main case, the relevant

documentation for the resolution of the issue would be the Human Resource Policies and Procedures Manual of the 1st Respondent which the Applicant already has and attached to the Respondent's affidavit in reply as Annexure A hence the Court wouldn't be required to consider the documents requested by the applicant.

Counsel for the respondents also submitted that the Applicant is not in any way entitled to any performance bonus under the 1st Respondent's performance bonus policy because he wasn't a member of staff at the time the performance bonus was paid.

Counsel further submitted that the board resolution and/or minutes of the meeting of 21st August 2021 isn't relevant to the resolution of the main suit because the Applicant's contract of employment was not terminated by virtue of the resolution but terminated following a disciplinary process for verified acts of gross misconduct. The Applicant admitted receiving a summary dismissal letter on 23 December 2021 which is attached to the affidavit in support of the application and marked "I". At page 2 of the letter the applicant was summarily dismissed after breaching the Bank's operating policies, rules, regulations and procedure. Counsel prayed to Court that the discovery of the Board resolution of the meeting of 21st August 2021 is not necessary for resolution of the issues in dispute in the main case.

Counsel for the Respondents also submitted that the documents (i) to (iv) requested by the applicant are not discoverable as they relate to information pertaining to third parties who are staff of the 1st Respondent. Under Section 7(1)(a) of the Data Protection and Privacy Act, the 1st Respondent is prohibited from sharing the personal data of its staff. Counsel prayed to this Honourable Court to prevent violation of the rights of third parties and abuse of court processes.

Counsel for the Respondents also submitted that the request is a fishing expedition through which the applicant seeks to bring a new cause of action for a right he speculatively thinks he is entitled to. In applicant's own admission under paragraph 1.1 of Annexure K to the affidavit in support of the application, he desires to amend his pleadings to include an order directing the Defendants to pay him a bonus for the year 2021. Counsel for the Respondents further

submitted that a Plaintiff is expected to know his case before he files and can't be allowed to seek discovery for purposes of whether he has case or not. (**Gale Vs Denman Picture Houses Ltd** [1930] KB 588, 590 per Lord, Scrutton L. J).

Counsel for the respondent submitted that the application was an abuse of court process as it only seeks discovery to determine whether the Plaintiff is entitled to bonus payments. Counsel prayed to this Honourable Court to dismiss the applicant's application with costs to the Respondents.

Analysis

Under Order 10 rule 12 of the Civil Procedure Rules, any party may, without filing any affidavit, apply to court for an order directing any other party to make discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question in the suit.

The Court may therefore at any time during the pendency of any suit. Order the production by any party to the suit, upon oath of such documents in his or her possession or power, relating to any matter in question in the suit, as court may think right; and the court may deal with the documents, when produced, in such manner as may appear just.

Upon hearing such application, the Court may either refuse or adjourn the hearing, if satisfied that discovery is not necessary, not necessary at that stage of the suit, or make such order, as may, in its discretion, be thought fit; except that discovery will not be ordered when and so far as the court is of the opinion that it is not necessary for disposing the suit fairly or for saving costs (**see Order 10 rules 12 and 14 of the Civil Procedure Rules**). An order for discovery is discretionary (**see Dresdner Bank Ag v Sango Bay Estates Ltd (No. 3) [1971] 1 EA 326**).

Advocates might try to pry in to subjects that have no legitimate significance to the suit or private and confidential, serving to annoy or embarrass the adversaries. The principle is that discovery must not be allowed to be used as a fishing expedition for the applicant to build up an unsure case (**see John Kato v Mahlbauer A. G and another H. C. Misc. Application No. 175 of 2011**). An application for discovery must be specific, establish materiality and must recite precisely what is wanted. It doesn't permit general inspection of the adversary's records.

Where an application is driven by hope that something will emerge which may form the basis of or support the Applicant's claim, then it is a fishing expedition. It's also a fishing expedition when it goes beyond the allegations in the pleadings and attempts to find random additional evidence to support the claim. The information sought must be stated with reasonable particularity and should be consistent with the applicant's case as pleaded in the suit.

The Applicant needs to show that there is a sufficient prima facie basis for believing the evidence exists, it is material and relevant to the issues of trial. The basis can be advanced by argument based on facts contained in the pleadings filed in the suit, or evidence supporting the application. Discovery tends to make a trial less a game of tactics and surprise and more of a fair contest with the basic issues and facts disclosed to the fullest practicable extent.

A distinction has to be made between discovery which is tantamount ^{*}to the aimless trawling of an unlimited sea^{*} as compared to the situation in which a party ^{*}knows a specific and identifiable spot into which he wishes to drop a line (or two)^{*}. Therefore, whether a document is within the scope of a particular discovery is a question of fact. ^{*}Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd [2003] 1 SLR (R) 75^{*}

The main question for determination is whether the requested documents are relevant to resolution of the main suit. I have examined the Applicants' pleadings in the suit and I find that the Applicant's claim is for breach of his contract of employment with the 1st Respondent Bank by a letter dated the 23rd December 2021 authored by the 4th Respondent which summarily dismissed the applicant from his employment without offering him an opportunity to be heard ^{*}(see paragraph 6 of the applicant's plaint in the main suit)^{*}.

Under paragraph 7 of the plaint, the Applicant's main prayer to Court is to declare his summary dismissal unlawful and unfair. The Applicant prayed to Court to declare his dismissal illegal alleging that it violated his right to fair hearing and was marred by irregularities.

It is clear from the Applicant's pleadings in the main suit that he was aggrieved with his dismissal from the 1st Respondent Bank which prompted him to file a suit before this Honourable Court. In such a case all the Applicant had to do was to present evidence to Court to show that his dismissal was unlawful and illegal for failure of the 1st Respondent bank to give him a fair hearing.

Sought in discovery by the applicant in the instant case relate to payment of bonuses by the 1st Respondent Bank to its staff for the year 2021. After examining the Applicant's pleadings in the main suit, I took note of the fact that the applicant didn't make any claim relating to bonus payments but was only aggrieved by the 1st Respondent's decision of his summary dismissal.

It's therefore untenable for the Applicant to file an application for discovery on oath of documents that relate to bonus payments yet in his main suit he didn't make any such claims. For an order of discovery to be made the Applicant must prove to Court that the requested documents are relevant and relate to issues in dispute in the main case.

In the instant case the Applicant is simply seeking Court's powers to determine whether he is entitled to bonus payments. This would amount to a fishing expedition since the Applicant is making an application which goes beyond the allegations in the pleadings and is attempting to randomly find additional evidence to support a claim which is not before the court but rather in anticipation of an amendment of pleadings.

Counsel for applicant in his written submissions states that the documents are relevant because there was a running employment contract between the applicant and the 1st Respondent however this fact isn't contested in the main case. The Applicant's Counsel only alleges that the documents are in possession of the 1st Respondent Bank however he has failed to demonstrate in any manner to this Court how the requested documents are relevant to the determination of any issue currently before this Court in the main suit. The applicant's request to court to order for discovery on oath of documents which are not relevant to main suit is only a fishing expedition in which the applicant seeks to bring a new cause of action for a right he speculatively believes he is entitled to.

In the unlikely event that the issue of bonus was in contention in the main case, the relevant documentation for resolution of the said issue would have been the Human Resource Policies and Procedures Manual of the 1st Respondent Bank. This Honourable Court therefore rejects the applicant's application for an order of discovery of the said documents since it would only lead to the introduction of a new claim which wasn't included in the main suit. The pleadings bind and circumscribe the parties and place fetters on the evidence they would lead. The proper procedure would have been for the applicant to file an application to amend his pleadings to include the bonuses.

This court also agrees with the Respondents' Counsel that document sought in relation to a board resolution not renew his contract of employment is not relevant to the resolution of the main suit because the Applicant's contract of employment wasn't terminated by virtue of the board resolution but was terminated following a disciplinary process for verified acts of gross misconduct. The said board resolution wasn't related in any way to the applicant's summary dismissal which is his ground of contention in the main suit.

Any party who seeks to exclude documents from discovery on the basis of exemption or immunity must specifically plead the particular privilege or immunity claimed and provide evidence supporting such claim (see **Simbamanyo Estates & Anor v Equity Bank & others Misc. App. No. 0583 of 2022**). The Court must then determine whether an in-camera inspection is necessary, and, if so, the party seeking protection must segregate and produce the document in Court.

Under paragraph 9(d) of the Respondents' affidavit in reply, the respondents stated that the documents requested for contain confidential and proprietary information belonging to the 1st Respondent and third parties who are not party to the suit and there is no reasonable justification for their confidentiality and privacy to be violated. Counsel for the Respondents also relied on Section 7(1)(a) of the Data Protection and Privacy Act which prohibits the processing and collecting of personal data without express consent of the data subject. *See *KLW Holdings Ltd v Singapore Press Holdings Ltd* [2002] 2 SLR (R) 477*

It's therefore false for Counsel for the Applicant to state that the Respondents didn't plead immunity or privilege of the documents in their pleadings. It's however important to note that personal data may be processed where the collection or processing is authorized by law or compliance with a legal obligation to which the data controller is subject (see Section 7(2)(a) and (e)). Therefore, Courts can authorize the collection, processing, sharing of personal data where it is deemed to be fair in the interests of justice.

It is however important for the party requesting such information to demonstrate how the said information is important to administer justice. In the instant case, I have noted that the requested documents are not relevant to the resolution of any of the issues in the main suit. The applicant has also failed to give a reasonable justification for disclosure of the requested documents. He claims that the documents are relevant for purposes of bonus payments however he didn't raise any issue relating to bonus payments in the main suit. His claim in the main suit is breach of contract arising from summary dismissal. It's therefore untenable for Court to order discovery of confidential documents containing personal data without any reasonable justification by the applicant.

In conclusion, I find that the Applicant has failed to make out a proper case for grant of an order of discovery against the Respondents. The documents requested by the Applicant are not relevant for resolution of any issue in the main suit hence court can't allow this application to stand. It's for that reason that the application is dismissed. The costs shall be in the cause.

I so Order

Ssekaana Musa Judge 31st March 2023

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