

UGANDA / JUDGMENT

Tirupati Development (U) Limited v KCB Bank (U) Limited and Another (Civil Miscellaneous Application 707 of 2022) [2023] UGHCCD 138 (5 May 2023) [2023] UGHCCD 138

COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

Civil Miscellaneous Application 707 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 0707 OF 2022

(Arising from Civil Suit No. 15 of 2022)

TIRUPATI DEVELOPMENT (U) LTD:.....APPLICANT

VERSUS

- **1. KCB BANK (U) LTD**
- **2. KENYA COMMERCIAL BANK LTD:.....RESPONDENTS**

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

The applicant filed Civil Suit No. 15 of 202: Tirupati Development (U) Ltd vs KCB Bank (U) Ltd & 3 others are pending determination before this court. The suit was premised on a loan facility that it obtained from the respondents wherein the plaintiff challenges the breach of fiduciary duty by the respondents.

The applicant brought this application by chamber summons under section 33 of the Judicature Act and Sections 22 and 98 of the Civil Procedure Act & order 10 rules 12, 15, 17 18 and 24 of the Civil Procedure Rules for the orders that;

- *1. An order of discovery and production of all the documents listed herein, in possession of the respondents in support of their defenses:*
- *a) The loan transaction and loan account origination, negotiation, approval, processing, key facts documents, management, and closure in respect of the following accounts:*
- *i. Loan accounts No. 1059906732 with the 2nd respondent and loan account number 215022605732 with the 1st respondent*
- *ii. US dollar current account No. 22900351628 in the applicant's name opened by the 1st respondent.*
- *iii. USD Account Number 2201449317 in the applicant's name with the 1st respondent*
- *iv. Uganda shillings account number 2201449287 in the applicant's name with the 1st respondent.*
- *b) The respondent's policy on fraud detection, reporting, investigation, management, resolution, and closure.*
- *c) Investment origination and management of current and loan accounts.*
- *d) All policies on information and computer technology, system authenticity, cyber security, and digital forensics, in hard copies and soft copies for both KCB Uganda Limited and KCB Kenya Limited.*
- *e) Money laundering policies and suspicious transaction reports on both current and loan accounts since the Anti Money Laundering Act 2013 came into force.*
- *2. Costs of this application.*

The application was supported by the affidavit of Mrs. Kruti Barot the Managing Director of the applicant who contended that;

- 1. The applicant in the main suit alleges several causes of action against the respondents and these include: negligence, conversion, breach of fiduciary duty, breach of statutory duty, money laundering, fraud and so on.
- 2. The applicant's suit is premised on a loan facility that the applicant obtained from the respondents. The manner in which the loan facilities were managed and the policies relating to the said loan facilities are in issue in the main suit.
- 3. That specifically in issue is the respondent's action of creating or opening and operating various accounts in the names of the applicant, without her knowledge or consent and in contravention of the laws in place in Uganda.
- 4. That the respondents allege that they have or had authority to open and operate the said accounts in the names of the applicant, which position is contested since no such authorizations documents or contracts exist with the applicant in respect of the said accounts.
- 5. That the applicant seeks documents related to; The loan transaction and loan account origination, negotiation, approval, processing, key facts documents, management, and closure; The respondent's policy on fraud detection, reporting, investigation, management, resolution, and closure: Investment origination and management of current and loan accounts; All policies on information and computer technology, system authenticity, cyber security, and digital forensics, in hard copies and soft copies for both KCB Uganda Limited and KCB Kenya Limited; Money laundering policies and suspicious transaction reports on both current and loan accounts since the Anti Money Laundering Act 2013 came into force.
- 6. The applicant sought or requested for these documents from the respondents to no avail

The respondent opposed the application in an affidavit sworn by Judy Wambaire, the company secretary of the 1st respondent contending that;

- 1. That at all material times, the relationship ship between the applicants and respondents was governed by the terms of the facility documents copies whereof are in the possession of the applicant including all its loan accounts with the respondents.
- 2. That the application for production is ambiguous and made in broad terms making it impossible to clearly ascertain what documents are in possession of the respondents or are relevant to the matters in question.
- 3. That the respondents are not in possession of any money laundering reports and or suspicious transaction reports and the applicant is not mentioned in any of the reports made or submitted to the Financial Intelligence Authority.

- 4. That the disclosure of the documents related to policies on ICT, Cyber Security, system authenticity, digital forensics, fraud reporting, investigation management resolution form the core of the respondent's banking and disclosure of the said documents to the public will violate the

respondent's rights to intellectual property and privacy and the terms of the confidentiality agreements with the respondent's third party vendors.

- 5. The submission of the said documents will further compromise the respondents' internal processes in relation to their competitors and may expose the respondent and their customers to insurmountable risk thereby causing irreparable harm to the respondents.

The applicants were represented by *Counsel Robert Kirunda* while the respondents were represented by *Counsel Dennis Wamala & Counsel Terrence Kavuma.*

The parties were directed to file submissions that were considered by this court and they filed the same. The applicant's counsel raised a preliminary objection challenging the affidavit of the respondents in reply

Preliminary objection

In their submissions, counsel for the applicant challenged the respondent's affidavit in reply for being filed out of time without leave of court. The applicant contended that the respondent had filed their affidavit more than a month late without seeking the leave of court.

Counsel for the respondents submitted that the contention was misconceived and ought to be rejected by the court. Counsel submitted that the delay in filing the reply had not occasioned the applicant any injustice since they had responded to every averment in their rejoinder. Further without prejudice that the delay was a technicality that could be resolved under Article 126. Counsel for the applicant rejoined that timelines were matters of substantive law and not mere technicalities.

I concur with counsel for the respondent, admitting the respondents' affidavit will not cause an injustice to the applicant. The applicant had ample opportunity to respond to the averments of the respondents which they did in the rejoinder. There is no harm in having this affidavit on record. The objection is baseless and devoid of merit since they responded to the same.

I shall now delve into the merits of the application.

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

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.*

The applicant herein contends that the documents sought are relevant to the head suit pending before this court which is disputed by the respondents.

The applicant contests the respondents' authority to open and operate the accounts in issue. They seek to review; the policies relating to loan transactions and loan origination, negotiation, approval, processing management and closure in order to determine the respondents' authority to create, manage and transact through the accounts without the applicant's consent.

The policies relating to fraud detection, money laundering etc which is relevant to determine the legitimacy of the various transactions on those accounts. The policies relating to investment origination and management by the respondent to understand the respondents' management of the two accounts. Lastly, the applicant seeks to review the respondents' IT policies to understand the legitimacy of the accounts creation, account statements, and transactions.

The documents sought relate to the creation, management, and operation of the loan facilities between the applicant and respondents.

The respondents on the other hand contend that the documents sought are ambiguous and not relevant to the case. Counsel for the respondents submitted that these documents were being sought to determine the issue of the respondents' authority to open and operate accounts in the applicant's name but contrary to the applicant's submissions, the respondent had the authority to open and maintain accounts in the applicant's name under the loan facility agreement.

The respondent's contend that the discovery sought lacks sufficient specificity or that it is vague and ambiguous and coached in broad terms making it impossible to clearly ascertain what documents are in possession of the respondent. In their view this is a classic case of fishing expedition.

The respondents further submitted that the cause of action of the applicant arises out of the facility agreement between the applicant and respondent. It was sufficiently detailed and provided for most of the issues raised in the main suit and therefore they are not relevant to the suit.

The respondents further contended that the some of the documents sought in the discovery are private and confidential. The intended disclosure shall seriously lead to breach of the rights of privacy of several bank staff, managers, referees, account holders or privileged communications between the bank and its lawyers. Such disclosures will be unfair and unjustifiable to compel the respondents since they lack specificities. This will in turn be open to exposing the said documents to the general public which will have the effect of compromising the respondent's systems and internal mechanisms of safe guarding depositors' funds.

Analysis

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. The applicant has set out a lot of documents which he seeks to discover which in his view are relevant. It is also clear that some of the documents sought are too broad and lack specifics which are contrary to the general policy consideration for allowing such a discovery.

The respondents seem not to dispute the relevancy of some of the documents in respect of the loan agreement which is the basis of the suit or out of which the several causes of action of the plaintiff allegedly arose. Such undisputed documents in relation to the bank accounts of the applicants ought to be availed without any contention. The argument of the same being in possession of the applicant is weak, since they have sought the same they should be availed to facilitate the determination of the dispute or to meet the ends of justice.

This court is aware that some 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. Discovery would not be permitted where the information merely reinforces the applicant's position. *Dorsey James Micheal v World Sport Group Pte Ltd* [2014] 2 SLR 208

The respondent has argued against disclosure of some information which may breach confidentiality agreements or privacy of persons who are not party to the dispute or exposure of privileged documents between the bank and the lawyers.

The right to privacy of such persons is protected under the *Constitution of the Republic of Uganda under Article 41.*

*"Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security of the state or interfere with the right to the privacy of any other person"

Article 12 of the Universal Declaration of Human Rights of 1948 provides that no one may be subjected to arbitrary interference with his or her privacy, family life or correspondence.

The protection of the right to privacy is also limited and is not an absolute right. The scope of the right to privacy may vary, depending on whether it is truly a personal space which has been infringed, or whether it involves communal or business relations. " [a] man without privacy is a man without dignity" See Zelman Cowan, "Private Man" (1970) 24 *Inst Pub Affairs Rev* 26

In the context of privacy this would mean that it is only the 'inner *sanctum*' of a person, such as his or her family life, sexual preference and home environment, which is shielded from erosion, by conflicting rights of the community..... Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly. See *Bernstein v Bester* 1996 (4) BCLR 449 (CC)

The disclosure of information of persons whose information the applicant is seeking in respect of money-laundering reports would be prejudicial to third parties whose private life may be exposed and yet they are not party to the suit. This court would also not wish to open up disclosure of the money laundering report of the bank or investigations into the same matter or complaints that they have investigating. It may also involve the disclosure of innocent third parties and may jeopardise investigations or findings or expose the regulator Bank of Uganda.

Indeed, it would be very different or this court would have looked at it with different eye lenses if the right to privacy belonged to a juristic person. The privacy rights of a juristic person would be less intense than those of a human being. Although juristic persons like big companies also enjoy the protection of the privacy rights, this protection would be weaker than for an ordinary human being: See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor

Distributors (Pty) and Others In re:Hyundai Motor Distributors (Pty) and Others v Smit NO and Others (CCTI)/00 [2000] ZACC 12;2000 (10) BCLR 1079; 2001 (1) SA 545(CC)*

The law of privacy overlaps with data protection in so far as it relates to the control (that is, collection, use and disclosure of personal data) over the individual's information as part of his right to autonomy and dignity. The law of privacy may entail the right to control the individual's personal information as an extension of the protection of human anatomy and dignity. If privacy is to be protected, competing rights and interests have to be balanced in particular cases. *See DFCU Bank Ltd v MTN Uganda Ltd & 6 Others HCMA No. 640 of 2019 arising from HCCS No. 501 of 2018*

People must have confidence that their personal data is not inappropriately accessed and if it is to be accessed through an order of court through discovery or-*Norwich Pharmacal* Order the court ought to be quite sure, it is necessary in the interest of justice- that it will not be misused or abused. The court should be mindful of the constitutional right to privacy of such persons against whom the order may be made. The order seeking to disclose or discover information about persons who are customers of the bank will be denied unless it is for disclosure of crime.

This application partially succeeds to the extent that the respondents should avail the applicant the following documents.

- (a) The loan transaction and loan account origination, negotiation, approval, processing, key facts documents, management, and closure in respect of the following accounts:
- *I. Loan accounts No. 1059906732 with the 2nd respondent and loan account number 215022605732 with the 1st respondent*
- *II. US dollar current account No. 22900351628 in the applicant's name opened by the 1st respondent.*
- *III. USD Account Number 2201449317 in the applicant's name with the 1st respondent*
- *IV. Uganda shillings account number 2201449287 in the applicant's name with the 1st respondent.*

The costs shall be in the cause.

I so Order

Ssekaana Musa Judge 5 th May 2023

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