HIN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.233 OF 2016

GOLD COIN FINANCE CO. LTD & ANOTHER .....APPELLANT

VERSUS

LYANDER SAM MACHA ..... RESPONDENT

11/2/2017 & 13/2/2018

JUDGMENT

I.P.KITUSI,J.

This case involves interpretation of the provisions of Order XI of the Civil Procedure Code, relating to discoveries. At the Resident Magistrates' Court of Kivukoni Lyander Sam Macha now respondent, sued Goldcoin Finance CO. Limited and Mandeep Kaur Mann, the first and second appellant respectively, for specific and general damages arising from a contract of loan.

Before commencement of hearing the respondent applied under Rule 10 of Order 11 of CPC for discoveries of four documents from the appellants. Despite on objection by the appellants, the application was granted by the court on 28th June, 2016.

The brief background of the case is that the appellants were engaged in the business of money lending in the course of which they

extended a loan to the respondent. The respondent had alleged at the trial that when he defaulted in the repayment schedule the appellants, without notice, sold an asset that he had placed as security and he maintained that they did not have that right. Unaware that his asset (a motor vehicle) had been sold by the appellants, the respondent sold his house to raise money to discharge the debt. It was after selling his house that he learnt that the appellant had sold his car too.

So the suit preferred by the respondent included and assertion by him that the appellants were unlawfully dealing in money lending and accused them of being fraudulent.

The application, and the resultant order directed the appellants to produce;

I. 1st appellant's business license
II. 2nd defendant's certificate of registration of his business name.
III. Proof of registration of a joint venture issued by an authorized person.

The respondent's ground for these discoveries was that the document were essential in proving the issue of fraud raised in the plaint. For this same reason, the appellants' objection was overruled.

The appellants had also raised another reason for their inability to produce the requested documents were not in their custody. This ground was also rejected on the ground that the objection was unspecific as to which documents they had no possession of.

So the appellants failed that to produce the documents that had may been specified in the order and consequently the respondent invoked the provision of Rule 18 of order x1 of the CPC which reader;

> *"Where any partly fails to comply with an order to answer interrogatories or for discovery or inspection of documents he shall, if a plaintiff, be liable to have suit dismissed for want of prosecution and if a defendant, to have his defence, if any, struck out, and to place in the same position as if he had not defendant and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect and an order may be made accordingly"*

Under the above provision the trial court struck out the appellants written statement of defence and produced ex parte.

This appeal is against the ruling dated 16th November granting the respondent's prayer to have the written statement of defence Stuck out. It raises seven grounds but all of the them revolve around the issue whether the court was correct in striking out the defence. Mr Mutongora learned advocate of who represented the appellant both at the trial that for Rule 18 of Order XI of the Civil Procedure Code to be called into use three conditions must be established.

The learned counsel went on to submit that the first condition is that the court must have issued an order for production of the documents. There is no disparate that such an order had earlier been issued by that (Dr. Yongolo – SRM). The second condition is that the said order must be such as it is capable of being complied with. This means that it must be established that the documents are actually in existence and must be sufficiently described. Mr, Mutongore submitted that the documents apart from being inadequately described, they were not in existence.

The third condition is that there must be proof that the refusal to submit the documents was willful. The learned counsel submitted again mentioning the fact that the document was willful. The learned counsel submitted again mentioning the fact that the documents were not in existence but added the fact that they were not relevant to the issues before court.

Mr. Mtongore cited two decision to support the view that the punishment under Rule 18 of Order X1 of the CPC should only be imposed if the defaulter has acted willfully. The cases are **Kahumbu Vs National Bank of Kenya Limited[2003]** 2EA 475 (CCK) and; **Eastern Radio Service Vs Tiny Tots** [1967] 1 EA 392 (CAN). He also cited the case of **Motor Mart & Exchange Limited V. The standard General Insurance Co**. [1960] 1 EA 616 (HCU) for the submission that an application for discoveries is defective if it does not describe the documents.

Mr. Mwakalasya learned Counsel for the respondent submitted that what has been submitted by counsel for the appellants was supposed to have been submitted before the trial court before the trial court before if exercised its powers under Rule 18 of order XI of the CPC because they had that opportunity under Rule II of Order XI of the CPC.

As regards the contention that the documents were not described Mr. Mwakalasya submitted that they were so described that Mr. Mutongore presented an affidavit in which he stated that some, not all, of the documents were non- existent. So it is the respondent's position that the documents were described and they were in existence.

On the issue whether or not the documents were relevant Mr. Mwakalasya submitted, referring to paragraphs5, 16 17 and 19 of the plaint, that the documents were relevant in determining the issue of fraud. He submitted that the parties were in disagreement as to whether fraud should be included as an issue or not. The learned counsel concluded by submitting that the trial court acted in accordance with the law because the appellants refused to produce the documents.

In a short rejoinder Mr. Mutongore submitted that the affidavit filed during the application did not acknowledge that the appellants were in possession of the documents and that failure to comply with the court orders was caused by the fact that it did not specify the documents to be produced.

I shall now dispose of the appeal by addressing the main issue whether the learned trial magistrate properly exercised his powers under the law. The learned counsel appear to agree with the fact that the underlying principle for ordering discoveries is relevance, and I respectfully agree with them. It seems that relevance is the key word not only for discovery of documents under Rule 10 of Order XI of the CPC but also for interrogatories under Rules 1,2 and 4 of the CPC. This position is clear in the case by my brother Mwambegele, J (now Justice of the Court of Appeal) in **Moto Matiko Mabanga Versus Ophir Energy PLC & 2 others** Misc. Commercial Application No. 24 of 2016, HC (Commercial Division) (unreported).

That relevance is a key factor is also manifest in the following except from **Civil Procedure and Practice in Uganda** by M Ssekaana and S. Ssekaana, 2007 quoted in The **Uganda Civil Justice Bench Book** 1st Edition 2016 at page 96;

> *"Discovery operates as a powerful procedural instrument to produce fairness, openness and equality in the machinery of Civil justice. It enables each party to be informed or to be capable of being informed of all the* ***relevant material evidence****, whether in the possession of the opposite party or not; it ensures that as far possible there should be no surprises before or at the*

trial; it reveals to the parties, the strengths or weaknesses of their respective cases, so produces procedural equality between them; and it encourages fair and favorable settlements, shortens the lengths of trials and saves costs"

The respondent has maintained that the documents sought to be delivered by the appellants were relevant in resolving the issues of fraud. From the plaint there is no dispute that the respondent had alleged that the appellants were engaged in an unauthorized money lending venture. The defendants now appellants had put the plaintiff now respondent to strict proof of that assertion. In view of these facts documents such as Business Licence or Registration Certificate were relevant.

However the appellants took the view that those documents were not relevant because what ought to be resolved was not whether they were operating legally but whether the respondent had borrowed money from them. Mr. Mwakalasya learned counsel for the respondent submitted before me that the question whether fraud should or should not be included as an issue remained unresolved.

I have gone through the record of the lower court and, with respect, it bears out the fact that each party proposed their own set of issues and nowhere did the court make any indication as to which

ones had been adopted. The issue of fraud was included in the list of issues proposed by the respondent but it did not feature in the list proposed by the appellant. So when hearing commenced after the order striking out the written statement of defence, issues would not have been framed because there was no statement of defence.

However the question is whether the court was correct in striking out the written statement of defence when it had not resolved the competing views on the issues. I am afraid I think the learned trial Resident Magistrate though well informed on the applicable law was too hasty and gave it limited application. The provisions of Rule 10 of Order XI of the CPC, under which the application had been made has within it several options available to the court. The said Rule provides;

> " *Any party may without filing any affidavit, apply to the court for an order directing any other party to any suit to make discovery on oath of documents which are or have been in his possession or power relating to any matter in question therein and on the hearing of such application the court may either refuse or adjourn the same if satisfied that such discovery is not necessary, or not necessary at the stage of the suit, or make such order, either generally or*

limited to certain classes of documents
as may in its discretion, be thought fit."

The foregoing Rule empowers the Court to adjourn making of the order for discovery if it considers the documents not necessary at the particular stage of the suit. In view of the fact that there was no middle ground as to what were the issues, I think this was a fit case for the court to adjourn until at a subsequent stage. It fallows therefore that the resultant order striking out the written statement of defence rested on unfirm grounds and must be quashed. If I may once again seek inspiration from the learned Ugandan authors **(The Uganda Civil Justice Bench Book)** fairness is one of the factors that should inform the court in dealing with the issues of discoveries. I do not think in this case, it can confidently be said that the decision was fair.

In fine I allow the appeal, quash the decision of the lower court striking out the written statement of defence and order the same to be restored. Hearing to proceed before any Magistrate competent to hear the case.

Order with costs.

I.P.KITUSI

JUDGE

15/2/2018

16/2/2018

Coram: Hon. Massam DR

Appellant – Mr. Neleus Mtongore Advocate.

Respondent : Mr, Mwakalasya Advocate

Cc: Masasi

Mr. Neleus Mutongore Advocate

The matter is coming for judgment, I am ready for it.

Order – Judgment delivered today in the presence of Mr.Neleus Mutongore Advocate for applicant and Mr. Mwakalasya Advocate for respondent.

B.MASSAM

DR

20.2.2018