4MB Mining Limited v Freight Forwarders (K) Limited & 3 others; Misnak International (UK) Limited (Third party) (Civil Suit 21 of 2020) [2024] KEHC 13383 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13383 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 21 OF 2020

JK NG'ARNG'AR, J

OCTOBER 29, 2024

BETWEEN

4MB MINING LIMITED ..... PLAINTIFF

AND

FREIGHT FORWARDERS (K) LIMITED ..... 1ST DEFENDANT

SAFMARINE LIMITED ..... 2ND DEFENDANT

UNION LOGISTICS LIMITED ..... 3RD DEFENDANT

KENYA REVENUE AUTHORITY ..... 4TH DEFENDANT

AND

MISNAK INTERNATIONAL (UK) LIMITED ..... THIRD PARTY

RULING

1. The Third Party/Applicant filed a Notice of Motion application dated 27th June 2024 under Certificate of Urgency pursuant to Order 25 Rule 4 of the *Civil Procedure Rules*, Sections 1A, 1B, 3A, 8, and 63 (b) & (e) of the *Civil Procedure Act* and all other enabling provisions of the law.

2. The Third Party/Applicant seeks for orders that the court be pleased to stay the suit herein until the taxed costs of Kshs 13,803,104.15 arising from MSA HCCC No 30 of 2018, 4MB Mining Limited v Misnak International (UK) Limited and Kshs 1,085,433 arising from MSA COCA No 118 of 2018, Misnak International (UK) Limited v 4MB Mining Limited & 3 others are forthwith duly paid by the Plaintiff to the Third Party. That there be liberty to apply and that costs of this application be provided for.

3. The application is premised on grounds on its face and the Supporting Affidavit of Andreas Desmosthenous Yiangou, the Managing Director of the Third Party sworn on 27th June 2024 that the Plaintiff filed MSA HCCC No 30 of 2018, 4MB Mining Limited v Misnak International (UK) Limited. That the said suit was struck out with costs by the Court of Appeal in MSA COCA No 118 of 2018, Misnak International (UK) Limited v 4MB Mining Limited & 3 others pursuant to a judgment delivered on 25th July 2019. That the costs in MSA HCCC No 30 of 2018, 4MB Mining Limited v Misnak International (UK) Limited were taxed at Kshs 13,803,104.15 on 17th August 2022 in favour of the Third Party while the costs in MSA COCA No 118 of 2018, Misnak International (UK) Limited v 4MB Mining Limited & 3 others were taxed at Kshs 1,085,433 on 17th December 2020.

4. The Third Party/Applicant stated that the Plaintiff was sent a Statutory Demand dated 4th March 2024 which was a demand for the settlement of the taxed costs in MSA HCCC No 30 of 2018. That the Plaintiff however instead of first settling the costs due to the Third Party brought the proceedings herein which has a similar cause of action to the previous matter. That the Plaintiff is a limited liability company incorporated in the United States of America with no known source of income in Kenya, that they have no known assets within Kenya to meet the Third Party's taxed costs, and that they do not carry out any business within Kenya and as such there are no attachable assets to recover the taxed costs. That it is only fair and just that there be a stay of proceedings until the taxed costs are duly settled by the Plaintiff.

5. The Plaintiff/Respondent in their Replying Affidavit sworn by Yoram Moussaieff, the Director of the Plaintiff/Respondent on 5th July 2024 admitted that paragraphs 3, 4, 5, 6, 7, and 8 of the facts as stated in the Affidavit are correct. That however, the suit was filed on 20th March 2020 and the bills of costs were taxed on 17th August 2022 and 17th December 2020 long after the institution of this suit. That the alleged circumstances cannot therefore warrant a stay of proceedings in this matter. That the Applicant was enjoined in these proceedings through a Third Party Notice by the 1st, 2nd and 3rd Defendants in a notice dated 6th November 2023 which was served on 27th November 2023. That the Third Party never entered appearance and on 26th February 2024, the court issued directions that the issue of liability between the 1st, 2nd and 3rd Defendants and the Third Party be determined at the hearing. That consequently after pre-trial directions, the court set down the matter for hearing on 24th July 2024 and that the firm of Muregi Okere & Co. Advocates filed a Statutory Demand against the Plaintiff regarding the same bill of costs. That the Plaintiff responded to the Statutory Demand and the same was heard, determined and the court found that it had no jurisdiction.

6. The Plaintiff/Respondent further stated that the firm of Muregi Okere & Co. Advocates being dissatisfied with the ruling filed a Notice of Appeal in the Court of Appeal and that the Plaintiff/Respondent were duly served with the Record of Appeal and that the issue of costs being claimed by the Applicant is ripe for determination by the Court of Appeal. That the costs which now inform the application herein are in respect of a case in which the Applicant was sued as a Defendant. That the case is distinguishable from the instant case as the Applicant was not enjoined but has been brought in by the 1st, 2nd and 3rd Defendants as a Third Party in this suit. That the claim against the Applicant as a Third Party in these proceedings is between it and the 1st, 2nd and 3rd Defendants who intend to claim indemnity from it and not the Plaintiff. That in the event that the suit against the Applicant fails, it is unlikely that the Plaintiff/Respondent will be condemned to pay costs thereof as it will be between the Applicant and the 1st, 2nd and 3rd Defendants.

7. The Plaintiff/Respondent maintained that it is clear the circumstances of this case are not the same as anticipated under Order 25 (4) of the *Civil Procedure Rules* and that the Respondent's claim herein is for USD 8,769,698.02 and special damages of USD 34,698,906. That what the Applicant is claiming as

costs awarded is a fraction of what the Applicant was awarded in costs which can be dealt with as a cross action while determining this suit. That there is no substantive defence in terms of Order 7 of the *Civil Procedure Rules* with reference to the Third Party Notice. That the Applicant whose place of business is in the UK has no known source of income or assets in Kenya but the Plaintiff/Respondent have not asked for any security. That the application should therefore be dismissed with costs to the Plaintiff.

8. The Third Party/Applicant filed a Supplementary Affidavit sworn on 16th July 2024 by Andreas Desmosthenous Yiangou, the Managing Director of the Third Party that as admitted by the Plaintiff, an order for costs was issued on 25th July 2019 by the Court of Appeal for both MSA HCCC No 30 of 2018 and MSA COCA No 118 of 2018. That therefore, the obligation to pay costs arose from that date onwards well before the institution of this suit on 20th March 2020. That the Third Party did not enter appearance albeit under protest on 29th November 2023 and that the Third Party is entitled to pursue all available options to recover the undisputed costs owed by the Plaintiff including insolvency proceedings if necessary. That the matter before the Court of Appeal in respect to the Statutory Demand pertains the question of whether the court has jurisdiction to deal with insolvency proceedings against a foreign incorporated entity. That if the Plaintiff settles the cost due and owing, the matter in the Court of Appeal and the Statutory Demand can then be appropriately deemed to have concluded. That the capacity in which parties appear in the present suit is immaterial and that a comparison of the Plaint herein and in MSA HCCC No 30 of 2018 shows that the cause of action is similar and that many of the reliefs sought are same and/or similar. That the Third Party has been brought into these proceedings and there is no requirement for them therefore to offer security.

9. The application was canvassed by way of written submissions. The Third Party/Applicant in their submissions dated 23rd July 2024 submitted on previous suits discontinued by relying on the holding in *Kimuhu v Wahinya (In her Capacity as Administrator of Richard Moses Ngobi - Deceased) & another* (2023) KEELC 17899 (KLR) that even where a suit is dismissed after hearing rather than withdrawn voluntarily by the Plaintiff and costs are awarded owing to the dismissal, the Plaintiff is bound by Order 25 Rule 4. The Plaintiff cannot rely on technical differences just to avoid payment of costs legitimately due and owing. That the said costs were awarded and certified, and that the same are demanded but not yet paid by the Plaintiff.

10. The Third Party/Applicant argued that Order 25 Rule 4 does not distinguish between whether the party that is owed costs is a defendant, third party or an interested party. That as stated in *Davis Mwatela Dzuya & another v Salim Anjarwalla (the legal representative of the Estate of Hussein Karimbhai Anjarwalla)* (2021) eKLR, a stay can be granted despite a technical difference in capacity. That according to the holding in *Patrick Kigera Mathia & another v Dr. Peter Mungai Ngugi & 2 others* (2021) eKLR where it was held that the court can grant stay suo moto pending settlement of costs and that this effectively renders mute the argument that a stay order can only be granted if the matter of stay is raised by a certain party. That the fact that the present suit filed by the Plaintiff has necessitated appearance and participation by the Third Party without objection by the Plaintiff renders the proceedings amenable to an order of stay until such time as the Plaintiff settles costs owed to the third party.

11. On whether the cause of action is substantially similar, the Third Party/Applicant cited the decision of the Court of Appeal in *Karl Wehnet Claasen v Commissioner of Lands & 4 others* (2019) eKLR and *Alfred Njau & 5 others v City Council of Nairobi* (1983) eKLR and submitted that the cause of action in MSA HCCC No 30 of 2018, 4MB Mining Limited v Misnak International (UK) Limited & 3 others and the present suit are substantially similar. That the facts pleaded in the previous suit all emanate from the same set of facts as the present suit and the cause of action relates to the same 15

containers and/or consignment. That the Plaintiff should settle costs before it is permitted to continue with the present suit.

12. The Plaintiff/Respondent in their submissions dated 23rd July 2024 contended that the court lacks jurisdiction to grant the orders sought by the Applicant pursuant to the holding in The *Owner of the Motor Vessel 'Lilians' v Caltex (K) Ltd* (1989) eKLR. That the application is premised on Order 25 Rule 4 which talks of a discontinued suit and that dismissal of a suit cannot be part of it. That the order does not address a suit that has been struck out and that Mombasa CA No 118 of 2018, Misnak International Limited v 4MB Mining Limited was struck out due to a technicality of improper service out of the jurisdiction. That under Order 25 Rule 4, the intention is to prevent abuse of the court process by a party filing cases and withdrawing just to embarrass the other party. That a person filing an application under Order 25 Rule 4 must have been a Defendant in the first and subsequent case, which is not the case herein.

13. The Plaintiff/Respondent further submitted that in the circumstances, the issues raised by the Plaintiff as against the Defendants are not the same issues raised by the Defendant against the Third Party. That clarification of issues is determined by pleadings but in this case the Third Party has not filed a defence and there is therefore no basis to conclude issues in the context of Order 25 Rule 4. That the operative word under Order 25 Rule 4 is 'may' which means that the court has discretion on the issue of costs in a matter where the Applicant is not a party. That the Applicant is guilty of non-disclosure of material facts as the Statutory Demand was set aside and there is an appeal pending in the Court of Appeal. That once a statutory demand is stayed by virtue of an appeal, one cannot seek payment. That additionally, the advocate for the Applicant was not the advocate in the previous suit and that the advocate does not have locus standi to claim costs.

14. On withdrawal under Order 25, the Plaintiff/Respondent cited the cases of ELC No 125 of 2021, *Charles Kaptarbet Birech v Paul Waweru Mbugua* which cited the case of *Bahati Shee Mwafundi v Elijah Wambua* (2015) eKLR, *Priscilla Nyambura Njue v Geovhem Middle East Ltd & another*, HCCC No 415 of 2016 and the *Matter of the Estate of George M'Mboroki*, Meru HCSC No 357 of 2004. That the discretion is however to be exercised reasonably and judicially by making reference to the circumstances of each case. The Plaintiff/Respondent relied on the decision in *Kenya Wildlife Service v James Mutembei* (2019) eKLR and *Global Tours & Travels Limited*, Nairobi HCCC Winding up Cause No 43 of 2000. That Section 1A and 1B of the *Civil Procedure Act* enjoins the court to expeditiously dispose of matters. The Plaintiff/Respondent submitted that the application herein lacks merit and should be dismissed with costs.

15. I have considered the Third Party/Applicant Notice of Motion application dated 27th June 2024, the Plaintiff/Respondent Replying Affidavit sworn on 5th July 2024, the Third Party/Applicant Supplementary Affidavit sworn on 16th July 2024, and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.

16. The Third Party/Applicant stated that the Plaintiff/Respondent filed MSA HCCC No 30 of 2018, 4MB Mining Limited v Misnak International (UK) Limited which suit was struck out with costs by the Court of Appeal in MSA COCA No 118 of 2018, Misnak International (UK) Limited v 4MB Mining Limited & 3 others pursuant to a judgment delivered on 25th July 2019. The Third Party/Applicant now relies on Order 25 Rule 4 of the Civil Procedure Rules in seeking for orders that there be stay of the suit herein until the taxed costs of Kshs 13,803,104.15 arising from MSA HCCC No 30 of 2018, 4MB Mining Limited v Misnak International (UK) Limited and Kshs 1,085,433 arising from MSA COCA No 118 of 2018, Misnak International (UK) Limited v 4MB Mining Limited & 3 others are forthwith duly paid by the Plaintiff to them.

17. Order 25 Rule 4 of the *Civil Procedure Rules, 2010* provides: -

> If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.

18. The court in Patrick Kigera Mathia & Anr v Dr. Peter Mungai Ngugi & 2 others (2011) eKLR, the court set out the elements of Rule 4 as follows: -

    i. a suit is instituted and later discontinued by the claimant;

    ii. costs are awarded and certified in respect of that discontinued suit to the respondent(s);

    iii. those costs are known/demanded and not paid by the claimant;

    iv. the claimant, nonetheless files another suit upon the same or substantially the same cause of action; and

    v. the court may order a stay of such subsequent suit until such costs have been paid.

19. The Third Party/Applicant is seeking costs in a suit that was struck out. The suit was never discontinued. Order 25 of the Civil Procedure Rules does not provide for suits that have been struck out. The Applicant cannot therefore seek for stay of proceedings herein to recover costs. This court relied on the holding in *Sammy Mwangangi & 10 others v Deposit Protection Fund Board (Liquidator of Thabiti Fiance Company Limited) & another* (2017) eKLR.

20. I find that the Third Party/Applicant Notice of Motion application dated 27th June 2024 lacks merit and is dismissed. Costs to the Plaintiff/Respondent.

DATED AND **DELIVERED VIRTUALLY** AT **MOMBASA** THIS **29TH** DAY OF **OCTOBER, 2024.**

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Okumu Advocate for the Plaintiff

Akware Advocate for the 1st and 3rd Defendants

Mugambi Advocate for the 2nd Defendant

Ngovi Advocate for the 4th Defendant

Shah Advocate for the Third Party

Court Assistant – Mr. Samuel Shitemi