



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 71 OF 2018

ELGON KENYA LIMITED.....APPELLANT

VERSUS

BAYER EAST AFRICA LIMITED.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the Ruling and Order of Hon. Nelly W. Kariuki Senior Resident Magistrate in Nyeri **CMCC No.63 of 2017 delivered on 7/12/2018;**

2. A brief summary of the case is as follows; the Plaintiff in **CMCC 63 of 2017** filed suit against the appellant together with two (2) other parties claiming general and special damages for loss incurred as a result of failure to germinate of a variety of onion seeds known as '**Rasta**'; the plaintiff attributed the loss on negligence on the defendants' part;

3. With the leave of the court granted on 4/07/2017 the appellant issued Third Party Notice to the Respondent claiming indemnity and or contribution in respect of sums that may be awarded to the plaintiff together with costs on the grounds that the respondent was the producer of the onion seeds and the appellant was but a mere supplier and that the respondent had guaranteed the appellant of the quality and germination of the seeds;

4. The respondent filed a defence and an application to strike out the Third Party Notice which application was dismissed for being premature; the appellant then applied for directions and urged the trial court to determine the issue of liability between the plaintiff and the appellant concurrently with that of the appellant and the respondent; in its ruling delivered on 7/12/2017 the trial court struck out the Third Party Notice and issued its ruling as set out herein;

'(a) I am ns shall proceed to trial on the question of liability as between the plaintiff and the 1st defendant;'

5. This ruling is the subject matter in this instant appeal; the appellant being dissatisfied with the trial court's decision filed this appeal and listed seven (7) grounds of appeal in its Memorandum of Appeal which are as set out hereunder:

(i) The learned trial magistrate misdirected herself and erred both in Law and in fact by dismissing the appellant's application for Third Party Directions when there was overwhelming reason to allow the same.

(ii) The learned trial magistrate misdirected herself and erred both in Law and in fact by making a ruling that is contrary to the Civil Procedure Rules, Law and practice.

(iii) The learned trial Magistrate Misdirected herself and erred both in law and in fact by considering the merits of the Third Party proceedings at an interlocutory stage when master raised therein could only be determined at a full trial.

(iv) That the Learned trial Magistrate misdirected herself and erred in law and in fact by failing to appreciate that her entire ruling was in fact contradicting a runs in the face her earlier ruling when she rightly refused to strike out the Third Party Notice.

(v) That the Learned trial Magistrate misdirected herself and erred in law and in fact by delivering two contradicting Rulings over the same issue of Third Party Notice.

(vi) That the learned trial magistrate misdirected herself and erred both in law in fact by failing to find that Third Party Directions are only procedural and allow the same to be take.

(vii) The learned trial Magistrate misdirected herself and erred both in law and in fact by making a ruling that leaves the whole case in a limbo since Third Party Directions have not been taken.

6. The parties were directed to dispose of the Appeal by filing and exchanging written submissions. Hereunder is a summary of the parties respective submissions;

APPELLANT'S SUBMISSIONS

7. The appellant submitted that the trial court erred in fact and in law by disallowing the motion dated **31/10/2017** which was contrary to the provisions of **Order 1 Rule 22**; and faulted the trial court for failing to appreciate that having allowed the appellant to enjoin the Third Party, the issuance of a third party notice and taking directions was just a consequence and procedure on how to proceed with the matter;

8. The trial court failed to appreciate that the application for third party directions was not addressing the merits of the 1st defendant and the Third Party's case but rather how the suit as between the plaintiff and the 1st defendant and the suit between the 1st defendant and the Third Party was to proceed;

9. The trial court erred in deciding the issue between the 1st defendant and the Third Party at a preliminary stage without the benefit of evidence from the parties which should have been analyzed after hearing the 1st defendant and Third Party.

10. The appellant submitted that striking out pleadings has been held in many cases as depriving a party the opportunity to be heard hence it ought to be employed only as a last resort and even so in the clearest of cases; case law relied on **Thiomi Ltd vs Kyaka Investments Ltd & Anor (2017) eKLR** where it was held that striking out pleadings should only be exercised after the court has considered all facts.

11. The trial court erred in issuing two contradictory rulings over the same issue relating to Third Party proceedings; the trial court had in an earlier ruling on an application by the Third Party to strike out the Third Party Notice had held that the striking out at that stage would be premature and would amount to injustice to all parties'; yet in its impugned ruling on the appellant's application for third party directions the trial court proceeded to strike out the Third Party Notice;

RESPONDENT'S SUBMISSIONS

12. The respondent urged the appellate court to re-assess and re-evaluate the evidence on record and arrive at an independent conclusion; reference made to Court of Appeal decision **Teachers Service Commission vs Joseph Wambugu Nderitu (2016) eKLR**;

13. The respondent opposed the appeal and submitted that the trial court properly exercised its judicial discretion in striking out the appellants third party notice having duly appreciated and pronounced itself on the tenor and scope of third party proceedings under **Order 1 Rule 22** of the Civil Procedure Rules; case law relied on **Joseph Njuguna Kariuki vs Simon Karichu Irungu (2004) eKLR** and **Premier Savings & Finance Ltd vs Hamendra Mansukhlal Shah Msa HCCC No.2005 of 1995**;

14. The trial court properly exercised its discretionary powers among other directions an order to set aside the Third Party Notice and to strike out the respondent from the suit after satisfying itself that there was no proper question on the liability of the respondent; the third party proceedings are not merely procedural as contended by the appellant and it failed to satisfy the trial court that there was an issue of liability to be tried as between the appellant and the respondent which seized the opportunity and mounted a challenge in having the Third Party Notice set aside;

15. It was clear in the mind of the trial court that the appropriate stage for determination of the issue of liability as between the parties and the striking out of the appellants Third Party Notice was at the third party proceedings; there was no contradiction between the ruling of **10/07/2018** and the subsequent ruling of **7/12/2018**; the former was dismissed for being premature on the face of it and the latter was fully considered and determined after the application;

16. Counsel argued that **Order 1 Rule 22** that Third Party Directions are only taken when and where the trial court finds that there is indeed a question of liability as between the parties; the appellant's argument that the Third Party Directions ought to be taken in any event clearly discloses a clear mis-apprehension of the forgoing provision of the law;

17. The respondent prayed for the dismissal of the appeal with costs as it lacked merit.

ISSUES FOR DETERMINATION

18. Upon reading the parties' rival written submissions this court has framed only two issues for determination which is:-

(i) Whether the trial court had discretionary powers to strike out the Third Party Notice and the Third Party during the hearing of the application for Third Party Directions;

(ii) Whether the trial court was justified in striking out the Third Party Notice.

ANALYSIS

19. In considering the appeal, this court is guided by the Court of Appeal decision in the case of **Selle & Another vs Associated Motor Boat**

Co. Ltd & Another (1968) EA 123. It held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent finding;

20. In addition, the Court of Appeal also held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

Whether the trial court had discretionary powers to strike out the Third Party Notice and the Third Party during the hearing of the application for Third Party Directions;

21. In its application dated the 31/10/2017 the appellant sought the following orders;

(1) *‘That the court do issue third party directions as to the conduct of the suit;*

(2) *‘That the issue of liability and quantum between the plaintiff and the 1st defendant be tried together with the issue of liability between the 1st defendant and the Third Party.’*

22. The appellant in its Third Party Notice outlined the reasons for seeking joinder of the respondent as a Third Party and the court record reads as follows;

‘The 1st defendant now claims full indemnity and/or contribution from yourself in respect of any sums that may be payable to the plaintiff and or any other sum that may be incurred by the 1st defendant as costs of these proceedings on the grounds that ‘RASTA’ onion seed the subject of the cause of action herein was produced and supplied to the 1st defendant by you, Bayer East Africa Limited and that you had guaranteed the 1st defendant of the quality and germination of the seed, full particulars whereof are set out in the 1st defendant’s Statement of Defence served herewith.’

23. The appellant’s Statement of Defence buttressed the contents of the Third Party Notice;

24. The appellant’s contention is that the trial court erred by deciding the issue between the appellant and the respondent at a preliminary stage without the benefit of evidence from the parties which would have been analyzed after hearing both sides; that striking out the pleadings deprives a party the opportunity to be heard hence ought to be employed only as a last resort and even so in the clearest of cases;

25. The applicable law has been well stated by both parties as the provisions of Order 1 Rule 22 of the Civil Procedure Rules which give the trial court various options on how to deal with Third Party Notices;

26. These options are clearly set out in the case of **Joseph Njuguna Kariuki vs Simon Karichu Irungu (2004) eKLR** where it was stated as follows;

‘...the provisions of Order I Rule 18 (now Order I Rule 22) of the Civil Procedure Rules 2010 give the court several options. The court could strike out the third party notice; or it could direct that the issue of liability be tried at the trial. The third option is for the court to direct that the issue of liability be tried after the trial of the suit. In effect, the rule provides a much more conducive opportunity to address the issues pertaining to the manner in which the third party notice can be dealt with.’

27. In the same cited case of **Joseph Njuguna** (supra) the case of **Yafesi Walusumbi vs The Attorney General of Uganda (1959) EA 224** was referred to wherein it was stated as follows;

‘In the Yafesi case when the court was commenting on the scope of the legal provisions governing the grant of directions it had the following to say ‘The powers of the court on the application for directions are now very wide. The master may at any time set aside third party proceedings.’

28. Both the holdings in the **Joseph Njuguna** (supra) and the **Yafesi** (supra) are persuasive and this court is satisfied that the trial magistrate had the powers to deal with the issue of striking out of the Third Party Notice during the hearing of the application for directions;

29. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court was justified in striking out the Third Party Notice and the Third Party.

30. The respondent filed its Replying Affidavit in which it denied liability for indemnity and or contribution with respect to any sums that may be payable to the plaintiff or any costs incurred by the 1st defendant (**the appellant herein**) from the proceedings; the respondent posited that the suit arose from the sale of Rasta onion seeds and due to the principle of privity of contract the respondent could not be held liable for any loss or damage arising there from since there was no contract between the plaintiff and the Third Party;

31. The respondent also relied on the Distribution Agreement between the appellant and the respondent to deny the appellant’s entitlement to

indemnity and contribution; at Clause 7 the Distribution Agreement reads as follows;

‘The distributor will be responsible for and will indemnify and hold BEA harmless from and against all incidents and damages that may arise from the utilization handling or sale of the Products used either alone or in mixtures in field and Territory with the exception of an incident that is acknowledged by BEA in writing to be caused by a defect in the Product.’

32. The question then arises as to whether there is a proper question of liability as between the appellant and the respondent; contrary to the appellant’s claims Clause 7 of the cited Distribution Agreement disentitles it to indemnity from the Respondent.

33. In the case of **Premier Savings & Finance Ltd vs Hamendra Mansukhlal Shah Msa HCCC No.2005/1995** the court enunciated the law in this area as follows;

‘While it is desirable, as the general scope of third party proceedings envisages, that all disputes arising out of a transaction as between the plaintiff and the defendant, and between the defendant and the third party be tried and settled in the same action, in order to save expense and time on multiplicity of actions, it would be undesirable in matters of contract to import indemnity where there is no express provision for it and none can be implied. It is not disputed in this matter that there is no express agreement for indemnity which is the claim laid against the third party. It is said that it can be implied, I suppose that would be by implication of law, such as where there is a fiduciary relationship between the parties. But there is no basis laid for such implication of law as drawn. (emphasis mine)

34. The conclusion in the **Premier** case (supra) was as follows;

‘I perceive the claim made herein against the third party to be an indemnity which has not been shown to exist in fact and in law and general damages for alleged misrepresentation which (sic) does not give rise to third party proceedings.’

35. Again this court is persuaded by the decision in **Premier Savings & Finance Ltd** (supra) and finds that the appellant’s claim against the respondent on indemnity and or contribution has not been shown to exist in fact or in law; the appellant failed to cite the law under which the third party may be found liable to themselves on account of the subject matter before the court;

36. There being no proper issue of liability as between the appellant and the respondent the trial court was justified in striking out the Third Party Notice and the Third Party from the proceedings.

37. This ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS AND DETERMINATION

38. For the forgoing reasons this court makes the following findings and determinations;

- (i) The appeal is found lacking in merit and is hereby dismissed;
- (ii) The Ruling of the trial court delivered on 7/12/2018 is hereby upheld;
- (iii) The order staying the proceedings in the lower court is hereby vacated and the lower court record be transferred back;
- (iv) Each party to bear their own costs of the appeal.

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 20th day of May, 2021.

HON.A.MSHILA

JUDGE