



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. E441 OF 2020

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED.....APPELLANT

AND

SKETCHERS LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon.C. Kithinji, SRM dated 22nd September 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 4858 of 2019)

JUDGMENT

Introduction and Background

1. The Appellant (“the Bank”) appeals against the ruling by the Subordinate Court dated 22nd September 2020 dismissing its application for joinder of two proposed defendants; Swarbry Hassan Mbarak Awaph and Swarbry Ali Said (“the Proposed Defendants”). The Bank prays that the entire ruling be set aside and its application for joinder be allowed as prayed.

2. The parties agreed to canvass the appeal by written submissions with the parties citing several authorities. The facts necessary for resolution of this appeal are not in dispute. The relationship between the Bank and the Respondent is that of a Banker and its customer. The Respondent’s case is that the Bank was negligent and breached its fiduciary duty when it allowed third parties to fraudulently, irregularly and unlawfully open an account in its name causing it to lose funds. While the Bank denies the Respondent’s claim, it attributes the fraud to the Proposed Defendants whom it intends to join as Co-defendants to the suit.

The Bank’s submissions

3. The Bank’s case is that the presence of the Proposed Defendants before the trial court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit as it is not possible to adjudicate the Respondent’s suit effectively without joining the Proposed Defendants. It submits that their enjoiner falls within the ambit of any person(s) whose presence before the court may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit.

4. The Bank’s position is that the Proposed Defendants approached it with account opening documents to open a bank account in the name of the Respondent and that they represented themselves as directors of the Respondent when the account was being opened. The Bank contends that the Proposed Defendants are the perpetrators of the fraud and should the trial court find in favour of the Respondent, then it will be the Proposed Defendants who will be liable to pay the Respondent as they were the ones who operated the account and withdrew the Respondent’s money.

5. The Bank also submits that the inclusion of the Proposed Defendants will prevent a multiplicity of suits. It urges that if the Proposed Defendants are not joined to the suit, the Bank will have to institute other proceedings against them over the same subject matter in this suit, which in turn will lead to protracted proceedings.

6. The Bank submits that it has filed its defence and counterclaim and in case the Plaintiff is successful, and trial court makes a final and binding order against the Proposed Defendants, the said order would be academic, were the trial court in the finality, issue such orders

binding on the Proposed Defendants without their joinder to the suit.

The Respondent's Submissions

7. The Respondent supports the decision of the trial magistrate dismissing the application for joinder. It submits that the Proposed Defendants have no nexus to the suit. The Respondent asks the court to note that the Bank did not make a separate application for joinder but simply enjoined the Proposed Defendants as 2nd and 3rd Defendants respectively. Further, that the Proposed Defendants and a bank employee, one David Ndirangu, are currently facing criminal charges for bank fraud in the same transaction, being **MCCR/242/2021: R v David Ndirangu, Swabry Ali and Swabry Hassan Mbarak** and as demonstrated in the Witness Statements by other bank employees and supervisors, the accused persons acted negligently and were culpable in the fraud leading to the loss of the Respondent's funds.

8. The Respondent submits that in determining whether the Proposed Defendants have a stake and are necessary to the suit, it shall be necessary to establish the chain of causation in the matter and whether demonstrable negligence can be apportioned to the parties. It submits that from the facts and evidence, the Bank was negligent and failed to conduct due diligence when it opened the impugned accounts. It also adds that the Bank failed in its fiduciary duty to the Respondent hence it should be held liable. In the circumstances, it states that it has no link to the Proposed Defendants warranting their involvement in this matter.

9. In the Respondent's view, the Bank has not demonstrated that joinder of the Proposed Defendants will assist the court effectually determine the issues arising in the suit.

Analysis and Determination

10. Joinder of a party to a suit is a matter of discretion for the trial court hence the appellate court will only interfere within the parameters set out in **Mbogo and Another v Shah [1968] EA 15 where it was held that:**

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

11. The main issue for determination is whether the lower court erred in failing to join the Proposed Defendants as parties to the suit before it. The law and principles of joinder of parties are common ground. **Order 1 Rule 3** of the **Rules** provides for who may be joined as defendants as *"All persons..... against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."* [Emphasis mine]

12. The court's discretion to substitute and add parties is provided for under **Order 1 Rule 10(2)** of the **Rules** which provides that *"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."* [Emphasis mine]

13. The Bank cited **Civicon Limited v Kivuwatt Limited & 2 others MSA CA Civil Appeal No. 45 of 2014 [2015] eKLR** where the Court of Appeal expounded on the application of **Order 1** aforesaid and the duty of the court in considering joinder as follows:

Under Order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or;

whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

.....The general rule of practice is that the plaintiff is "dominus litis." This means that he is entitled to choose the defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue. The doctrine of "dominus litis" does not however extend to the joinder (or impleading) of parties. This is because the court has a duty and the power to add a person who is not a party to the action as originally constituted as a defendant even against the will of the plaintiff, whether on the application of the defendant or of the non-party in order for the real matter in dispute to be determined. The non-party (or intervener) must show that he has interest in the matters in dispute to be determined in the suit.

Mulla's Code of Civil Procedure, 16th Edition Vol.2 at page 1496 goes further on this proposition to state that:

“...It cannot be gainsaid that no decree in a suit can bind a person if he is not a party thereto or duly represented therein...

.....

In the case of Gurtner vs Circuit (1968) I All ER 328 it was held that , a party may be enjoined if he can demonstrate that any order in the action would directly affect him either legally or financially.

From the forgoing the power of the court to add a party to a suit is wide and discretionary, the overriding consideration being whether he has interest in the suit. The question is whether the right of a person may be affected if he is not added as a party. Generally in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided.

Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. Mulla's of Civil Procedure 16th Edition Volume 2 goes on to state that,

“...What makes a person a necessary party is that he has relevant evidence to give on some of the questions involved; and this would make him a necessary witness. The only reason which makes it necessary to make a person a party to an action is so that they should be bound by the result of the action and the question to be settled therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has to be drawn on a wider construction of the rule between the direct legal interest and the commercial interest.”

14. From the above decision and authorities cited therein, the onus is on the Bank to demonstrate that the inclusion of the Proposed Defendants as parties to the suit is necessary. It must be recalled when a plaintiff sues a specific defendant it has a specific cause of action and relief against that defendant. What the Bank seeks to do in this case is to join Co-Defendants in effect foisting upon the Plaintiff, Defendants against whom it does not have a cause of action against. As the Court of Appeal stated in **Civicon Limited v Kivuwatt Limited & 2 Others (Supra)**, “[A Plaintiff] is entitled to choose the defendants against whom he wishes to pursue his claim for the relief or remedy he seeks, and that he cannot be compelled to proceed against other persons whom he has no desire to sue.”

15. I am therefore in agreement with the Respondent for several reasons. First, I do not see what relief the Respondent will have against the Proposed Defendants in its claim against the Bank. Second, the relationship between the Respondent and the Bank is contractual and creates an obligation and fiduciary duty of care on the part of the Bank and should the Bank be in breach of this duty, then liability will be against the Bank alone to the exclusion of other parties. Third, the Bank cannot apportion blame and liability to other parties when a customer such as the Respondent alleges breach of this fiduciary duty and negligence. Fourth, it is the Bank who will have to demonstrate that it exercised reasonable care and that it was not negligent in handling of the Respondent's account. Fifth, the Bank's claim or indemnity, if any, can only be against the Proposed Defendants and has nothing to do with the Respondent (see **Avenue Healthcare Limited v Chase Bank Limited ML HCCC No. 594 of 2014 [2019] eKLR**).

Conclusion and Disposition

16. For the reasons I have set out, I find the trial magistrate was right in concluding that, “the application is an afterthought that is engineered to delay justice. Granting the application will only serve to confuse issues and delay the determination and disposal of the suit. The defendant may claim indemnity from the (proposed) defendant(s).” As I do not find any ground to interfere with the trial magistrate's discretion, the appeal is dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021

D. S. MAJANJA

JUDGE

Ms Njoki instructed by Mburu Maina and Company Advocates for the Appellant.

Mr Barongo instructed by Gaka Barongo and Company Advocates for the Respondent.