



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 17 OF 2018

(CORAM: F. GIKONYO J.)

NICODEMUS OSORO.....1ST APPELLANT

G4S KENYA LIMITED.....2ND APPELLANT

VERSUS

JANE GATWIRI.....RESPONDENT

AND

STANLEY KIOGORA.....1ST INTERESTED PARTY/ APPLICANT

MOSES MUTHURI MARETE.....2ND INTERESTED PARTY/APPLICANT

RULING

1. The Respondent herein was the plaintiff in the trial Court. The 1st and 2nd Appellants were the 3rd and 4th Defendants respectively. The 1st and 2nd interested parties were the 1st and 2nd Defendants.

2. The suit in the trial court related to a road traffic accident that took place on 25/11/2011. The trial court found in favour of the Respondent and apportioned liability at the ratio of 20%:80% against the Defendants. The 1st and 2nd Appellants to bear 80% while the 1st and 2nd interested party to bear 20%. The 1st and 2nd Appellants filed this appeal seeking the trial court's decision on both quantum and liability to be set aside. This court on 13th February 2019 delivered its judgement dismissing the appeal.

3. On 25th May 2019 the interested party filed a notice of motion seeking the following Orders;

a. That pending the hearing and determination of this application inter-parties there be a stay of execution of the judgement/Decree herein delivered on 13th February 2019 and all incidental and consequential orders and proceedings thereto.

b. That the applicants herein Stanley Kiogora and Stanley Muthuri Marete be and are hereby enjoined as interested parties in this appeal.

c. That upon grant of *Prayer 1 and 2* above, this Honourable Court be pleased to set aside the judgement delivered herein on 13th February 2019 and entire proceedings in Meru HCCA 17 of 2018 to accord the applicants a fair hearing in this appeal.

4. The application was supported by the sworn affidavit of **Jemimah Moragwa** the advocate on record for the interested parties. He averred that the interested parties had earlier on filed their Memorandum of Appeal being Meru Hcca No. 49 of 2017 against the said trial court judgement and were shocked to learn that the Appeal proceeded for hearing and determination without their participation.

5. That the interested parties sought a stay of execution of the trial court judgement and parties recorded a consent allowing the application for stay of execution of the judgement in terms of payment of half of the decretal sum Kshs. 219, 946/= to the Respondent and deposit of similar sum in a joint account.

6. That the interested parties were shocked to learn that the instant appeal **Meru Hcca No. 17 of 2018** proceeded without the applicant's participation when they were following up on typed proceedings and judgement of the trial court to enable them file the Record of appeal.

7. The application was opposed by the Respondent through Replying affidavit dated 4th June 2019. She averred that it will be futile to go over the matter again as the same will re-raise issues which have already been determined by a competent court. That the interested parties were well aware of this appeal but never sought to be enjoined in the same.

8. On 31/10/2019 this court directed the parties to canvass the appeal through written submissions. Both parties have filed their respective submissions. The interested parties submitted that it would have been prudent to include the applicants in the instant appeal for consolidation of the appeals and save the courts time in determining two similar appeals arising from the same cause of action.

9. That the right to be heard is a constitutional right and the omission to enjoin the interested parties should be abhorred by this court. That the outcome of the judgement delivered on 13/2/2019 notwithstanding, the applicants have a right to be heard on merit. They cited the case of **JMK V MWM & Another [2015] eKlr.**

10. The Respondent submitted that the interested parties were indolent in prosecuting their appeal and the court cannot assist him as the principles of equity and case law dictates. The interested parties were also well aware of these proceedings since they were informed by the trial court in its correspondence when they sought the trial court proceedings. That the appeal was decided on merit and therefore it goes against the law and nature of practice for this court to sit on appeal of its own judgement.

ANALYSIS AND DETERMINATION

11. The two questions I should determine are: -

- a. **Whether the interested parties should be enjoined as parties in these proceedings; and**
- b. **Whether the judgement herein should be stayed or set aside.**

Joinder of parties

12. Under **Rule 10 (2) of Order 1 of the Civil Procedure Rules (CPR):**

“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 supplied)

13. The power of the court to add a party in Order 1 Rule 10 of the CPR was discussed in **Attorney General v Kenya Bureau of Standards & another [2018] eKLR** by the Court of Appeal thus;

“Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned.

In our view, the circumstances must justify the joinder, in that the claim and defence before the Court must raise a doubt as to which of the parties is liable in the final outcome of the dispute. In this regard, it is clear that KEBS knowingly and intentionally left out the applicant from the arbitral and High Court proceedings. Again, it must be demonstrated that it would be desirable to add the applicant as a new party and that his presence would enable court to resolve all the matters in the dispute.

Another important consideration is whether the joinder is intended to vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings. It cannot therefore fall from the lips of the applicant to say that it would protect and promote public interest in this dispute. The issue of interest or liability between the parties can be sufficiently and conclusively determined without any to the applicant.

14. Further precedent; In **J M K vs M W M & Another** the court of Appeal held:-

"Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of our Civil Procedure Rules, in **Tang Gas Distributors Ltd vs Said & Others [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing**

more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.....”

[Emphasis Added]

15. Applying the above legal test, judgement herein determined issues of quantum and liability. Doubtless, this appeal and appeal number 49 of 2017 arise from the same decision. Ordinarily, when such scenario arises, the two should be handled together.

Concealment

16. Of great concern however, is that, in filing and canvassing this appeal the appellants never sought to cite the interested parties. It has also emerged that the appellants and the Respondent participated in the application for stay in **Meru Hcca No. 49 of 2017**. Yet, none of these parties neither brought the existence of the other appeal to the attention of the court, nor sought for consolidation of the appeals.

17. There is more. There is also indication that the interested parties were well aware of this appeal. In a reply to their letter seeking for proceedings, the trial court wrote as hereunder;

“The above matter was forwarded to the high Court on 27/4/2018 in Hcc Appeal No. 17/18

Kindly liaise with the High Court for the said proceedings.”

18. In light thereof, it is most pretentious for the applicants to seem to express shock that the appeal proceeded without their knowledge. With these set of facts, it is safe to conclude that the interested parties were well aware of this appeal as at 13th December 2018. But, despite their knowledge of the appeal, the applicants seem not to have bothered; they went away and sat pretty only to come after judgment had been rendered in the appeal to ask for joinder and setting aside of the judgment. Almost 6 months thereafter.

19. All the parties herein are guilty of material non-disclosure to the court. Now, they seem to shift blame to each other without acknowledgement of blameworthiness.

20. The arguments by each party is a distortion of the truth; each one of them is taking a position that benefits them. This circus did not leave any vivid impression or picture in the mind of the court on the real purport of this application. It only succeeded in creating a feeling of gauntness and dreariness in the court. I think it is fair to infer from these circumstance, that, there has been abuse of process of court in this case.

21. Recapitulation of these facts impels me to cite **Meena Salon & Barbershop Limited v Soroya Investment Limited** that;

“...Until the court reaches a point where it thinks this is a case of in *pari delicto* whereat the court will not ordinarily involve itself in resolving one side's claim over the other; and will be guided by the practice of law to leave them where it finds them, in accordance with the maxim, in *pari delicto potior est conditio defendentis et possidentis*. Or, simply take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim.

22. In this mix, there are no sufficient grounds of setting aside the judgment. I reject the prayer. Again, the reality is that this appeal has determined. The foreclosure makes joinder of parties to be untenable. Accordingly, I reject the prayer for joinder of parties.

23. I should nonetheless state that, the judgment herein dismissed the appeal, and it seems parties by consent obtained stay of execution of the trial court’s judgment and decree. Accordingly, there is no danger of execution of decree of the trial court. I wonder, however, why these parties did not sort out by consent the mess they have created before entering a consent in the subsequent appeal.

24. In the upshot, I dismiss the application with no orders as to costs.

25. But, out of abundance of caution, I order that a copy of this ruling shall be filed in Meru High Court Civil Appeal No. 49 of 2017.

Dated, signed and delivered at Meru this 28th day of September, 2020.

F. GIKONYO

JUDGE

Representation

Muchiri for respondent

Kairu Mccourt for applicant – absent

Muthoga for appellants - absent