



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCA NO. 33 OF 2017

EASY COACH LIMITED.....APPELLANT

=VERSUS=

PATRICK WATANI MAENDE.....1ST RESPONDENT

ISUSHO CAPITAL KENYA LIMITED.....2ND RESPONDENT

EASY PROPERTIES.....3RD RESPONDENT

[An appeal from the Ruling of the Principal Magistrate’s Court at Eldama Ravine RMCC No.

85 of 2016 delivered on the 24th day of October, 2017 by Hon. J. Nthuku, SRM]

JUDGMENT

1. The standard of review by an appellate Court of an Order made by the trial Court in exercise of its discretion is well settled since **Mbogo v. Shah** (1968) EA 93 that:

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

2. By submission dated 3/12/18 herein, the appellant urged that the trial Magistrate erred in law and fact in failing to grant the application for joinder of proposed third parties against whom the appellant holds that *“alleged accident [subject of the suit herein for personal injury to the Respondent] was caused solely and/or substantially contributed to by the negligence of the authorized driver agent and/or [servant] of the intended interested parties”*, and that the application which was made in good faith and without undue delay should have been allowed *“so as the real issue in controversy may be resolved and also to enable the Court arrive at a just conclusion.”* The appellant faulted the trial Court’s finding of unexplained, inordinate and inexcusable delay in making the application for joinder of the third parties, explaining the delay on the need to trace the owners of the unregistered export vehicle Chasis No. NRR 3263003172 which was involved in the accident subject of the suit with the appellant’s motor vehicle KBY 401V. The appellant also blamed the 1st and 2nd Respondent for not joining *“all parties possible in the dispute at the time of instituting the suit.”*

3. The appellant finally submitted that *“the fact that the Respondent’s case (Plaintiff case) had proceeded to some extent should not have been bar to the application for third party notice being allowed. The prejudice, if any that would have been suffered by the Respondent was well capable of being redressed by way of costs.”*

The decision of the Court in **Interactive Advertising Ltd v. Equity Bank Ltd & 2 Ors** (2016) eKLR (Ogolla, J) and **Iria-Ini Tea Factory Ltd v. Johnstone Muchai Muthanga & 5 Ors** (2017) eKLR (L.N. Waithaka, J.) were cited.

4. The Respondent urged by submissions dated 12/11/2018, that the Court had no jurisdiction to interfere with the exercise of discretionary power by the trial Court *“unless the Court has acted on wrong principles, has misapprehended the law or has acted on evidence or that the Learned Judge was plainly wrong in arriving at the decision”* citing **Mbogo v. Shah** (1968) EA 93.

5. The Respondent pointed out that under provisions of Order 1 Rule 15 (1) (c) of the Civil Procedure Rules provides that an application to enjoin a 3rd party ought to be brought within 14 days after closing *“the appellant regrettably filed its application 1 year after close of pleading a clear demonstration that its application that already been overtaken by events.”*

Relying on the Court of Appeal decision in **Lubna Ali Sheikh Abdalla Bajaber & Anor. v. Chief Magistrate’s Court Mombasa & 2 Ors**

(2018) eKLR, it was submitted “the appellant was heard and was accorded an opportunity to be heard. We submit that dismissal of an application does not amount to denial of the right to be heard.” The 1st Respondent finally submitted that “the upshot of our argument is we urge this Court to find that the trial Court exercised its discretionary powers in dismissing the applicant’s application dated 17th October 2017 for judiciously and properly. In addition, should the appellant wish to lay a claim against the alleged intended third parties following the outcome of the suit before the trial Court, it can seek lawful and or legal redress against them in a different forum and or through a civil suit.”

Determination

6. The object of the provision for joinder of third parties is clearly to afford opportunity for the determination in the same proceeding of same or similar questions between the parties as follows:

Order 1, rule 15. Notice to third and subsequent parties 15.

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them,

He shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

7. An Order which makes it impossible for the determination of the same questions between two different persons in the same suit defeats the object of the rule for joinder of third parties. Such an order is, with respect, also contrary to the express provisions of overriding objective of the civil process which is stipulated in Section 1 A of the Civil Procedure Act as follows:

1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate **the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

8. The Court is under a duty to further the overriding objectives in terms of Section 1B of the Act follows:

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:

(a) The just determination of the proceedings;

(b) The efficient disposal of the business of the Court;

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology.

9. The order of the trial Court herein on the application for joinder of 3rd parties is in the following terms:

“The Defendant filed an *ex parte* Chamber Summons on 17th October, 2017 seeking leave to enjoin a third party in this matter. When I looked at the file I notice that the matter had proceeded substantially with the Plaintiff calling 3 witnesses hence directed same to be done on the Plaintiff. In the Supporting Affidavit sworn by Isiji Jonshson no attempt whatsoever has been made to

explain why the Defendant never sought to serve third party notice earlier. The proceedings show that on 28th February, 2016 parties mentioned this matter to confirm readiness for hearing under Order 11 Civil Procedure Code. Further the police abstract alluded to by Ms. Yebei shows that the motor vehicle which the defence now states belonged to the third party is clearly indicated therein. This list of documents upon being served upon the Defendant, the Defendant never sought to enjoin the third party. They came to Court participating in the trial and only now do they now feel there is need to enjoin a third party. This laxity on the part of the defence can't be explained or excused. The Plaintiff is entitled to justice in equal measure to the Defendant and allowing the Defendants delay this case as they wish will not be in the interests of justice. The application dated 17th October, 2017 has no merit and I dismiss it with costs to the Plaintiff.

Hearing of the main suit to proceed on 28th November, 2017. No adjournment shall be entertained then.

Ruling signed dated delivered in open Court in presence of Yebei for Applicant and Kairu for Plaintiff.

J.N. NTHUKU

SENIOR RESIDENT MAGISTRATE”

10. On scrutiny of the ruling of the trial court, its effect is to increase costs of the defendant in having to seek determination of the liability question between it and the proposed interested party in another forum apart from the pending suit; it does increase the delay in the conclusion of the suit as the defendant/applicant sought, as it was entitled, the intervention of the appellate Court; it has adverse effect on the efficient use of available judicial resources in that 2 or more Courts are employed for the consideration and determination of the issues raised in the suit; and yet no real prejudice or adverse impact to the just determination of the proceedings could be demonstrated as the plaintiff would still obtain his redress for the wrong suffered whether from the appellant or the intended 3rd parties or for both of them in contribution, and any delay may be remedied by an award of costs.

11. With much respect, I consider the trial Court joinder in its duty under Section 1 A and 1B of the Civil Procedure Act and Order 1 Rule 15 (1) of the Civil Procedure Rules to facilitate the fair, expeditious, proportionate and affordable resolution of the civil dispute herein. In terms of Order 1 Rule 15 (1) (c), the question or issue of liability of the appellant for the accident subject of the suit is the same question or issue arising between the defendant and the third parties and “*should properly be determined not only as between the plaintiff and the defendant in this suit but as between the plaintiff and defendant and the third parties*”.

12. As with Ogolla, J in *Interactive Advertising Ltd & Anor v. Equity Bank Ltd & 2 Ors*, supra, I find that despite the delay in presenting the application for joinder of the third parties, there are serious questions to be determined between the parties, in this case the question of the liability of the defendant and the proposed 3rd parties or either of them as to warrant the grant of the application for issuance of the 3rd parties notices.

13. I agree that the appellant cannot complain of not having been heard on the matter, on the authority of the Court of Appeal decision in Lubna Ali Sheikh Abdalla Bajaber, supra, that dismissal of an application upon hearing by the Court does not amount to failure to be heard.

14. However, as the Court has found the trial Court was despite having heard the appellant wrong in its exercise of discretion, the ruling and order of the trial Court made on 24/10/2017 shall be set aside.

15. Having occasioned the delay in presenting the application for joinder of 3rd parties, the appellant shall pay the thrown away costs of the application before the trial Court, and costs incidental thereto as may be occasioned by the recall of the 2 witnesses who have already testified at the time of the applications even though successful in this appeal shall be denied the costs of the appeal.

Orders

16. Accordingly, for the reasons set out above, the Court makes the following orders:

- a. The Order of trial Court made on 24/10/2017 declining the appellant's application to join the proposed third parties is set aside.
- b. The Court substitutes therefor an order granting the appellant/defendant in the suit leave to issue 3rd party notices to the proposed Interested Parties within 14 days of the date of this judgment in accordance with order 1 Rule 15 of the Civil Procedure Rules.
- c. The appellant shall pay to the Respondent the costs of, and incidental to, the application for joinder of the 3rd parties in the trial Court.
- d. For purposes of further hearing of the suit, the trial Court file shall forthwith be returned to the trial Court.
- e. There shall be no order as to costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF MARCH 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Nyairo & Co. Advocates for the Appellant.

M/S Nancy W. Njoroge & Co. Advocates for the Respondents.