



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 61 OF 2015

GIBB AFRICA LIMITED.....APPELLANT

VERSUS

DAVID KIPLAGAT ROTICH.....RESPONDENT

(An Appeal arising out of the Ruling and Order of Hon. Mokuia SRM Eldoret delivered on 23rd April, 2015 in Eldoret Chief Magistrate Court Civil Case No. 892 of 2012)

RULING

The Appellant filed **two applications** in **Eldoret Chief Magistrate Court Civil Case No. 892 of 2012**. The first application was brought under certificate of urgency dated 20th April, 2015 seeking extension of time to file and serve their application to institute third party proceedings by a further 30 days from the 2nd of March, 2015. The second was an ex-parte chamber summons application dated 31st March, 2015, seeking leave to issue third party notices to the Attorney General and Sinohydro Corporation Limited.

The trial magistrate, in a ruling delivered on 23rd April, 2015, dismissed both applications. The trial magistrate denied the application for extension of time stating that the Appellant was given ample time to file the third party application but failed to do so. He went ahead and dismissed the Appellant's application for leave to issue the third party notice as prayed, on grounds that the trial court was not persuaded by the contents of the supporting affidavit therein.

The Appellant, being dissatisfied with the said ruling, filed an appeal against the same and raised several grounds of appeal challenging the decision. The Appellant faulted the trial magistrate for dismissing the ex-parte application for leave to issue third party notices, despite the fact that the proposed notices raised triable issues between the Appellant and the proposed 3rd parties. The Appellant took issue with the trial magistrate's decision to record and consider the Respondent's objections to an application that was ex-parte, and which only raised issues between the Appellant and the proposed third parties. The Appellant was aggrieved that the trial magistrate dismissed the ex-parte application despite the absence of grounds of opposition or a replying affidavit filed by the Respondent to warrant the dismissal. The Appellant faulted the trial magistrate for failing to consider the reasons for the delay in filing the said ex-parte application, which were contained in the certificate of urgency dated 20th April, 2015. They complained that no grounds of opposition, or affidavit in reply with regards to the said certificate of urgency were filed by the Respondent. The Appellant asserted that the trial magistrate disintitiled the Appellant to their right to a fair, impartial and independent hearing. The Appellant took issue with the trial magistrate's finding that the said third party proceedings would prejudice the Respondent's case. Finally, the Appellants were aggrieved that the trial magistrate failed to consider the defence and the accompanying documents therein, upon which the ex-parte application was hinged.

By consent of the parties, the appeal was disposed of by way of written submissions. Both parties filed their written submissions. During hearing of the appeal, the Appellant argued that the Works Contract of Sinohydro Corporation Limited in clause 137.1 clearly showed the relationship between Sinohydro Corporation Limited, the Appellant and the Respondent herein. The Appellant submitted that the said clause formed part of the Respondent's contract of employment. Consequently, the court ought to have allowed the said Sinohydro Corporation Limited to be enjoined by the Appellant as a third party. The Appellant asserted that in no way would have caused prejudice to the Respondent's case against the Appellant. The Appellant submitted that they availed a letter delegating the powers of the Ministry of Roads and Public Works in the Works Contract to the Appellant as their representative. Therefore, the court ought to have allowed the Appellant to enjoin the said Ministry of Roads and Public Works (through the Attorney General) to the suit as a third party. This would determine whether the actions undertaken by the Appellant on the contractual site were being done for and on behalf of a disclosed principal. The Appellant maintained that the same would not prejudice the Respondent's case against the Appellant.

The Appellant averred that the trial court failed to consider the merits of the two dismissed applications. The trial magistrate also failed to give substantive reasons why the ex-parte application for leave to issue third party notices was dismissed. The Appellant relied on **Andy Forwarders Services Limited & another v Price - Waterhouse Coopers Limited & Another [2012] eKLR** which addressed the various reasons to be considered when determining an application to co-opt additional defendants in a suit. The High Court in that case held that:

“Sarkar’s Law of Civil Procedure Volume 1 at pages 531 to 532 sets out two tests for determining the question who is a necessary party in civil proceedings. They are:

- a) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and;***
- b) it should not be possible to pass an effective decree in the absence of such party.***

But that is not all. A person may be joined in a suit not because there is a cause of action against him, but because that person’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter (see Amon v Raphael Tuck & Sons Ltd [1956] 1 ALL ER 273.)

It is on the basis of the above principles that this court shall determine these applications. The plaintiffs stated at paragraph 7 of the plaint that CMC Holdings Ltd engaged the services of the 1st defendant to carry out forensic investigations and thereafter prepare an appropriate report.

However, the plaintiffs contended that the engagement of the defendants to carry out the forensic investigations was without approval and sanction of the Board of Directors of CMC Holdings Ltd, the proposed 3rd defendant.

The plaintiff further averred that the report is false in material particulars, reckless, baseless and seek, inter alia, a declaration that it is invalid, null and void and of no effect. If the plaintiffs were to successfully challenge the propriety of the report they would be automatically relieved from the demands being made against them by the proposed defendants.

The names of the proposed 3rd and 4th defendants feature prominently in the plaintiffs’ pleadings. In my view, the court cannot conclusively determine whether the engagement of the defendants to carry out the forensic investigations was without the approval of the proposed 3rd defendant and in violation of the company’s Memorandum and Articles of Association unless it allows the proposed 3rd defendant to be added as a defendant so that it

can give its own side of the story.”

The Appellants further submitted that the trial magistrate dismissed their applications despite the fact that the Respondent did not file any objections, grounds of opposition or replying affidavits with regards to the same. The Appellants asserted that an opposition to facts cannot emanate from the bar. The Appellants argued that the application seeking leave to enjoin the third parties was ex-parte in nature and should in no way have involved the Respondent. The Appellant maintained that the trial court ought to have allowed the said application so as to bring on board all relevant parties to the suit. The Appellant asserted that by dint of **Order 51 Rule 14**, the said certificate of urgency application for extension of time was unopposed. The trial court ought not to have dismissed the same.

The Respondent, while opposing the appeal, stated that the present appeal was an attempt by the Appellant to delay the course of justice. He argued that the Appellant was granted leave to file and serve an amended defence or an application for third party proceedings on 16th February, 2015. The Appellant failed to comply with the said directive. The Respondent asserted that he went ahead and obtained a hearing date for the main suit when the matter came up for mention on 2nd March, 2015. He argued that by the time the Appellant filed the ex-parte application seeking leave to enjoin the third parties; the Respondent had already obtained the hearing date for the main suit.

The Respondent submitted that the said ex-parte application did not raise any triable issues. He maintained that he was an employee of the Appellant as per his contract of employment. The Respondent was of the view that the Appellant's applications were made in bad faith with a view to adjourning the hearing of the main suit. The Respondent averred that his objections to the Appellant's applications were raised in open court. The Respondent maintained that there was no formal complaint or affidavit filed in support of the claims in the Appellant's fifth ground on appeal.

The Respondent averred that the question of extension of time was a matter within the discretion of the court. The Appellant failed to give sufficient reasons for their delay in filing the third party application. The Respondent maintained that the trial court was therefore not misdirected in dismissing the Appellant's application. He submitted that the time within which the Appellant was required to file and serve the third party application lapsed on 2nd March, 2015. There was therefore no time left to extend. He was of the view that the Appellant ought to have made the application for extension of time on 2nd March, 2015, and not one month after the said time had lapsed.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. (See **Selle V Associated Motor Boat Company Ltd [1968] EA 123**). In the present appeal, the issue for determination is whether the trial court was merited in dismissing the Appellant's application for extension of time dated 20th April, 2015 as well as the ex-parte application seeking leave to issue third party notices dated 31st March, 2015.

The issuance of leave to issue a third party notice is discretionary on the part of the court. The rules regarding a third party notice are provided for under **Order 1 Rule 15** of the **Civil Procedure Rules, 2010** which states that:-

“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”.

Therefore, for a Defendant to apply for leave to issue third party notice, it is important to show that any question or issue relating to or connected with the subject matter is substantially the same question or issue arising between the Plaintiff and the Defendant. The same issue ought to therefore be properly determined not only as between the Plaintiff and the Defendant, but as between the Plaintiff, Defendant and the third party or between any or either of them.

From the Respondent's plaint, it is clear that he is seeking damages arising out of a breach of statutory duty by the Appellant to provide him with a safe working environment, pegged on his contract of employment dated 31st October, 2008. The Appellant is seeking leave to enjoin Sinohydro Corporation Limited as well as Ministry of Roads and Publics Works (through the Attorney General) as third parties to the suit. The Appellant claimed that the Respondent is not their employee. The Appellant stated that they were only engaged in the road project (i.e. Construction of Emali-Oloitokitok Road, contract No.RD 0481), as a supervisor. They maintain they were given that mandate by the Ministry of Roads and Public Works. The Appellant availed a letter dated 8th October, 2007 from the said ministry, appointing the Appellant as their representative to perform duties of supervision on the said road project. It's on this basis that they wish to enjoin the Attorney General as a third party.

With regards to Sinohydro Corporation Limited, the Appellants have availed a copy of a contract between the said company and the Ministry of Roads and Public Works. The said contract dated 5th October, 2007, shows that Sinohydro Corporation Limited was employed by the said ministry as a contractor with regards to the same road construction project of Emali-Oloitokitok Road. Looking at the Respondent's employment contract, it is clear that he entered into a contract with Emali-Oloitokitok Road Supervision Project as his employer. Clause 15.1 of the said employment contract provides that the Respondent was to be remunerated by the said Sinohydro Corporation Limited. It is on this basis that the Appellant seeks to enjoin Sinohydro Corporation Limited as a third party in the trial court suit.

This court notes that the question of liability relating to the breach of statutory duty emanating from the Respondent's employment contract, the subject matter herein, between the Respondent and the Appellant, is substantially the same question or issue between the Appellant and the proposed third parties. The Appellant alleges that the Respondent was employed by the said third parties. Therefore, no statutory duty emanated from the Appellant to the Respondent to give rise to any question of liability. The question as to who owed the Respondent the statutory duty of care to provide him with a safe work environment ought to be determined as between the Appellant, Respondent and the proposed third parties. This court is of the view that there is a common link between the cause of action, the dispute between the Appellant and the Respondent, and the claim between the Appellant and the proposed third parties.

The Appellant's claim as against the proposed third parties herein is legitimate. Regardless of the fact that the Appellant delayed in filing the ex-parte application, it nonetheless raises significant and key liability issues which ought to be determined in the same forum. This court consequently deems it necessary for leave to issue. The Respondent stands to suffer no prejudice if either the Appellant or the third parties or all of them are held liable, since his claim will have prevailed in either of those situations. All these factors taken into account, this court is of the opinion that this is a suitable case for exercise of its discretion in favour of the Appellant.

It is therefore for these reasons that this court finds that this appeal is merited. The same is consequently allowed. This court hereby sets aside the ruling of the trial court and substitutes it with the ruling of this court. The Appellant's application for extension of time dated 20th April, 2015 as well as the ex-parte

application seeking leave to issue third party notices dated 31st March, 2015 are hereby allowed as prayed. The Appellant's the ex-parte application seeking leave to issue third party notices dated 31st March, 2015 is hereby deemed to have been filed on time. The third party notices shall be filed and served within thirty (30) days of this court's Ruling. Each party shall bear their own costs of the appeal.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MARCH 2019

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2019

HELLEN OMONDI

JUDGE