REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 154 OF 2016

LEO INVESTMENT LIMITED.....APPELLANT

VERSUS

MAU WEST LIMITED.....1ST RESPONDENT

MOHAWK COMPANY.....2ND RESPONDENT

(Being an appeal from the judgement of the Senior Principal Magistrate'sCourt

at Milimani (Hon. T. S. Nchoe (Mr.) Ag. SRM) delivered on 25th July, 2014)

JUDGEMENT

1. By plaint dated 8/4/2009 the 1st respondent/plaintiff prayed for reliefs; -

(1) Kshs. 309,430/=

(2) Costs and interest.

2. The claim was in regard of services rendered and goods supplied to the 2nd respondent/defendant in period 2006 upto 2008 by the 1st respondent/plaintiff.

3. The 2nd respondent/defendant filed defence denying claim and in alternative averred that there was contract to procure goods and materials for works from nominated suppliers and Leo Investment – appellant/third party was obliged to make direct payments to such suppliers and deduct the same from any money due or to become due to the 2nd respondent/defendant.

4. Thus the said 3rd party/appellant was enjoined as 3rd party for indemnity and/or contribution of the amount claimed.

5. The 3rd party/appellant filed defence dated 7/4/2011 denying the claim by the 2nd respondent/defendant and specifically denied existence of contract of payment between it and the 2nd respondent/defendant or the appellant and denied breach of contract between it and the 2nd defendant. Thus averred that it was wrongly enjoined.

6. The matter was heard and the court entered judgment against the appellant.

7. Being aggrieved by the said verdict the appellant lodged the appeal and set out the following 7 grounds: -

(1) That the learned trial magistrate erred both in fact and in law in failing to consider the 1st respondent's evidence by PW2, that the appellant was a stranger to them and that they had not entered into any contractual relationship with them rather they were contracted by the 2nd respondent herein.

(2) That the learned trial magistrate erred both in fact and in law in failing to consider the 2nd respondent's evidence that they entered into a contractual relationship with the 1st respondent and that they were indebted to them hence occasioning a miscarriage of justice.

(3) That the learned trial magistrate erred both in fact and in law in failing to find that the appellant was a stranger to the contract between the 1st and 2nd respondent.

(4) That the learned trial magistrate erred in law and fact in ruling that there existed a contractual relationship between the 1st respondent and the appellant, despite lack of any contract in writing and the 1st respondent admitting the non-existence of any contractual relationship with the appellant thus occasioning a miscarriage of justice.

(5) That the learned trial magistrate erred in law and fact in evaluating the evidence on record and arriving at a wrong conclusion that the appellant was liable to mitigate the losses and compensate the 1st respondent for breach of contract despite the fact that the appellant was not a party to the contract.

(6) That the learned trial magistrate erred in law and fact in not considering the defence of the appellant hence occasioning a miscarriage of justice.

(7) That the learned trial magistrate misdirected himself in finding that the appellant herein was liable to indemnify the 2nd respondent yet the 2nd respondent was neither an employee or agent of the appellant nor did the appellant contribute in any way to the breach of contract by the 2nd respondent hence occasioning a miscarriage of justice.

8. The appeal was directed to be canvassed by way of the written submissions. The appellant and respondents filed same.

Appellant's Submissions:

9. The appellant submitted that the learned trial magistrate erred in both law and fact by failing to consider the 1st respondent's evidence by PW1 that the appellant was a stranger to them and that they had entered into a contractual relationship with the 2nd respondent to whom they issued a quotation and invoice.

10. That the quotation dated 26/6/2006 printed on the letter head of the 1st respondent issued to the 2nd defendant for medley of work that includes waterproofing the basement masonry walls and the ground floor concrete slab for Diamond Plaza Extension in Highridge Shopping Centre. The said letter was produced as the plaintiff's first exhibit marked as Pexh 1.

11. PW1 further informed the court that they issued the 2nd respondent with an invoice once work was complete. The said invoice of Kshs.309,430/= was produced by the plaintiff and marked as Pexh 3.

12. It is worth noting that the invoice was issued by the 1st respondent and drawn to the 2nd respondent.

13. That the learned trial magistrate equally failed to consider the evidence of the 2nd respondent that he owned the 1st respondent. The 2nd respondent through the testimony of DW1 admits as follows:

"I did not pay them because I was not paid by Leo Investments..." and further down states that, **"the payment ordinarily would have come from us."**

14. This was an unequivocal admission which the trial court failed to consider in rendering its judgement and therefore occasioning a grave miscarriage of justice against the appellant.

15. PW1 and PW2 while being cross examined by the appellant were asked specifically whether there existed a contract between themselves and the appellant was very clear in stating that the appellant was not involved anywhere and that they only dealt with the 2nd respondent in the cause of their work.

16. The appellant submitted that in deed he was not party to the contract between the 1st respondent and the 2nd respondent and that the same has been demonstrated sufficiently and proved on a balance of probabilities.

17. That in her judgement, the trial magistrate occasions a grave miscarriage of justice against the appellant in relying on a non-existent arbitration award that was neither produced in court as an exhibit nor known to the appellant.

18. That a perusal of the proceedings of the court and particularly the 2nd respondent's DW1 testimony is a non-existed and the clauses relied on by the trial magistrate as Clause 31.5.7 and 32.4.4 are not part of the evidence produced by the 2nd respondent.

19. In ***Kenneth Nyaga Mwige vs Austine Kiguta & 2 Others [2015],*** **Justice Alnashir Vishram** decided that:-

"Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case.....If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

20. The court (supra) further relied on the case of ***Des Raj Sharma vs Reginam [1953] 19 EACA 310*** where the court held that, **"there is a**

distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence."

21. In ***Michael Hausa vs The State [1994] 7-8 SCNJ 144***, it was held that, **"if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence."**

22. The appellant submitted that until a document marked for identification or referred to is formally produced, it is of very little, if any evidential value as it would not have been tested and gone through the rigours of cross examination and re-examination to proof its authenticity.

23. The learned trial magistrate not only referred to a document that was not produced as an exhibit, he refers to non-existent clause therein in reaching her decision thereby causing the appellant a grave injustice.

24. The testimony of the 2nd respondent was rigged with uncertainty from the 2nd respondent's witness who is unable to pinpoint any clauses under the contract signed between the appellant and themselves that stipulates that the appellant was not pay suppliers. The 2nd respondent was not working as an agent nor employee of the appellant.

Respondents' Submissions:

25. The 1st respondent tendered evidence to proof that indeed the 2nd respondent owed it money claimed. The 2nd respondent also tendered evidence to the effect that they were entitled to contribution by the appellant and that indeed the appellant had a duty to pay the 1st respondent under the contract between it and the 2nd respondent. The appellant had a duty to exonerate itself but it did not do so. it did not tender any evidence in rebuttal.

26. As such they submitted that the 2nd respondent owed the 1st respondent the money claimed and further that the 2nd respondent was entitled to indemnity from the appellant. No evidence was tendered by the appellant to rebut this position. As such both the 1st respondent and the 2nd respondent discharged their legal burden of proof as required by law.

27. They submit that the 2nd respondent owed the 1st respondent Kshs.309,430/= indicated in the plaint.

28. The 2nd respondent annexed the agreement between it and the appellant. Clause 32.4.4 provided that, *"all payments by the contractor for materials or goods supplied by a nominated supplier shall be in full and shall be paid within thirty days of the end of the month during which delivery is made. Failure by the contractor to pay the nominated supplier as stipulated shall entitle the employer to pay the relevant sums direct and deduct the same from any money due or to become due to the contractor."*

29. This cause was meant to cover the supplier just in case the contractor was not in a position to pay. This was under presumption that the employer would be in a better position to pay as compared to the contractor. As such, the appellant had a duty to pay the 1st respondent if the 2nd respondent was not in a position to pay. It is pursuant to this clause that the 2nd respondent issued third party notice to the appellant to seek indemnification.

30. In the defence filed by the appellants in the lower court, they did not deny contents of paragraph 4 of the 2nd respondent's defence which stated that, "*under the said contract, the defendant (2nd respondent herein) was to procure goods and materials for the works from nominated suppliers and Leo Investment Limited (appellants) was obliged to make direct payments to such suppliers and deduct the same from any money due or to become due to the defendant (2nd respondent herein)."*

31. They submit that that pursuant to the contract between the appellant and the 2nd respondent, the appellant was under an obligation to pay the 1st respondent (nominated supplier) for the goods supplied if the 2nd respondent (contractor) was not in a position to pay such supplier. Pursuant to the said contract, the 1st respondent was supposed to be paid within thirty days of the end of the month during which delivery was made. The appellant failed to bring any evidence to the rebuttal.

32. The appellant only filed its defence but it did not tender any evidence in support of its assertion in its defence. It did not call any evidence in support of its defence and/or to rebut the evidence by the 2nd respondent.

33. ***Section 107 (1) of the Evidence Act*** provides that, **"whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

34. ***Section 108*** provides that, **"the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were give on either side."**

35. Further, ***section 109*** provides that, **"the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

36. It submitted that the appellant had the burden of proof that indeed they were not liable to indemnify the 2nd respondent. It had a duty to call witnesses and/or tender evidence to this effect.

37. The appellant chose not to call any witness despite it having filed a defence. In ***Shaneebal Limited vs County Government of Machakos [2018] eKLR,*** **Odunga J** while quoting with approval various court decisions held as follows (in relation to failure to tender evidence in support of averments in a defence:

> **".....According to Edward Muriga through Stanley Muriga vs Nathaniel D. Shulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1KLR 835, Madan J (as he then was) expressed himself as hereunder:**
>
> **Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth...."**

38. But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in ***Shaneebal Limited vs County Government of Machakos [2018] eKLR (supra)*** addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.

39. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

40. The learned magistrate was in order by entering judgment in favour of the 1st respondent against the appellant as opposed to the 2nd respondent. By the parties having consented that the issue of liability between the 1st respondent and the 2nd respondent and the appellant be determined simultaneously, the applicant had a duty to call evidence to support its position that they were not liable to contribute/indemnify the 2nd respondent against the liability to pay the 1st respondent.

41. The 1st respondent tendered sufficient evidence to the effect that the 2nd respondent owed it money as indicated in its plaint. The 2nd respondent tendered evidence in form of the contract between it and the appellant and further called a witness to support its position on the indemnity but the appellant did not call any and thus, this evidence was not controverted/rebutted by the applicant by way of evidence.

42. The court before joining the appellant was satisfied as to the conditions for issuing a Third Party Notice. In ***Interactive Advertising Limited & Another vs Equity Bank Limited & 2 Others [2016] eKLR,*** the court while quoting with approval the decision in ***EK Kagwa vs Costa [1963] EA 213 & Sango Bay Ltd vs Dresdner Bank Ltd [1971] EA 307*** held that: ".....From the summary of facts of this dispute, there is a common linkage between the cause of action, issue or question between the plaintiffs and the defendant and the claim between the defendant and the proposed third parties. In ***E.K Kagwa vs Costa [1963] EA & Sango Bay Ltd vs Dresdner Bank Ltd [1971] EA 307*** the court stated as follows:

> ***"Before the court can exercise its discretion to issue third party notice it has to evaluate the allegations of the plaintiff in terms of his legal claim to the relief he is seeking. The court also has to evaluate the defendant's allegations against the third party and has to be satisfied that the substance of each claim is the same and that there is a linkage between all the claims before issuing the notice."***

ISSUES, ANALYSIS AND DETERMINATION:

43. After going through the pleadings, evidence and submissions by the parties, I find the issues are **whether the case was proved on balance of probabilities? What is the order as to costs?**

44. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial. ***(See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123).***

45. In the case of ***Mbogo vs Shah And Another (1968) EA 93*** the Court clearly stated thus**:**

> **"….. It is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."**

46. The 1st respondent tendered evidence to proof that the 2nd respondent owed it money claimed. The 2nd respondent also tendered evidence to the effect that they were entitled to contribution by the appellant and that the appellant had a duty to pay the 1st respondent under the contract between it and the 2nd respondent. The appellant did not tender any evidence in rebuttal.

47. The 2nd respondent owed the 1st respondent the money claimed and further that the 2nd respondent was entitled to indemnity from the appellant. No evidence was tendered by the appellant to rebut this position.

48. The 2nd respondent annexed the agreement between it and the appellant. Clause 32.4.4 provided that, ***"all payments by the contractor for materials or goods supplied by a nominated supplier shall be in full and shall be paid within thirty days of the end of the month during which delivery is made. Failure by the contractor to pay the nominated supplier as stipulated shall entitle the employer to pay the relevant sums direct and deduct the same from any money due or to become due to the contractor."***

49. This cause was meant to cover the supplier just in case the contractor was not in a position to pay. This was under presumption that the employer would be in a better position to pay as compared to the contractor. As such, the appellant had a duty to pay the 1st respondent if the 2nd respondent was not in a position to pay. It is pursuant to this clause that the 2nd respondent issued third party notice to the appellant to seek indemnification.

50. In the defence filed by the appellant in the lower court, it did not deny contents of paragraph 4 of the 2nd respondent's defence which stated that, "***under the said contract, the defendant (2nd respondent herein) was to procure goods and materials for the works from nominated suppliers and Leo Investment Limited (appellants) was obliged to make direct payments to such suppliers and deduct the same from any money due or to become due to the defendant (2nd respondent herein)."***

51. The appellant chose not to call any witness despite it having filed a defence. In ***Shaneebal Limited vs County Government Of Machakos [2018] eKLR,*** **ODUNGA J** while quoting with approval various court decisions held as follows (in relation to failure to tender evidence in support of averments in a defence:

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52. But what is the effect of failure by the appellant to tender evidence in rebuttal? The court in ***Shaneebal Limited vs County Government of*** **Machakos** ***[2018] eKLR (supra)*** addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.

53. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

54. Thus the trial court was in order by entering judgment in favour of the 1st respondent against the appellant as opposed to the 2nd respondent. By the parties having consented that the issue of liability between the 1st respondent and the 2nd respondent and the appellant be determined simultaneously, the applicant had a duty to call evidence to support its position that they were not liable to contribute/indemnify the 2nd respondent against the liability to pay the 1st respondent.

i. In sum the court finds no merit in the appeal and dismisses the same with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE