REPUBLIC OF KENYA

High Court at Nyeri

Civil Appeal 1 of 2009

KIRINYAGA DISTRICT CO-OP. UNION.....…APPELLANT

Versus

KENYA POWER & LIGHTING CO. LTD.....1ST RESPONDENT

HEKO HOLDINGS LTD.....….....2ND RESPONDENT

JUDGMENT

1. By a plaint dated 29th October 2002 the 1st Respondent sued the appellant herein in respect of a debt outstanding on account No. 2102874-01 for the sum of Ksh. 315,950/-.

2. The appellant filed a defence in which he denied owing the 1st Respondent the said sum at paragraph 5 and 6 thereof alleged that if such money was owing then it was consumed by Heko holding with collaboration of the 1st Respondent.

3. The appellant thereafter took out third party notice against Heko Holdings Ltd claiming that the power was consumed by Heko Holdings Ltd as such the respondent was entitled to indemnity against the third party.

4. Directions were subsequently given that the issue between the third party and the defendant be determined in the trial of the suit herein.

5. The third party (2nd respondent) filed a defence against the 1st Respondent and the appellant herein on 25th August 2003 in which he denied having applied for electricity from the 1st Respondent and having been supplied with the same under account No. 2102874-01 worth Ksh. 315,000/- and stated that it was not a party to the contract between the appellant and the 1st Respondent.

6. It is upon these pleading that the matter proceeded for hearing before Hon. J.K. Ngeno then SPM who found for the first Respondent on the basis that the contract was between the appellant and the same and that the third party was not privy to the said contract.

7. Being aggrieved by the said judgment the appellant herein filed this appeal and raised the following grounds in the memorandum of appeal.

1. The learned trial magistrate erred in law and in fact in failing to consider fully, adequately or at all the evidence placed before him and the law.

2. The learned trial magistrate misdirected himself in law and fact in failing to frame all issues that

were for determination in the suit and especially the issue whether the appelalnt was entitled to indemnity and/or contribution from the 2nd Respondent.

3. The learned trial magistrate misdirected himself in law and fact in finding that the only issue that was for determination was who ought to pay the debt.

4. The learned trial magistrate misdirected himself in law and misapprehended the import and extent of a claim of indemnity and/or contribution in third party proceedings.

5. The learned trial magistrate erred in law and fact by failing to appreciate the full import of the lease agreement dated 18th October 1999 tendered as evidence in establishing the appellants claim for indemnity and/or contribution from the 2nd respondent.

6. The learned trial magistrate erred in law and in fact in finding that the appellants claim for indemnity and/or contribution from the 2nd Respondent was bad in law and unsustainable within the suit.

7. The learned trial magistrate erred in law and in fact in dismissing the appellants claim for indemnity and/or contribution from the 2nd Respondent with costs.

8. Directions were given that this matter proceed by way of written submission of which only the appellant has filed its submissions.

9. It must be pointed out that the firm of Munene Muriuki upon their application were allowed to withdraw from acting for the 2nd respondent and therefore the same was not represented as at the time of writing this judgment.

10. It was submitted by the appellant that the trial magistrate failed to frame issues well since there were other issues rather than one issue framed by the magistrate as to who ought to pay the debt.

11. It was further submitted that under order xx rule 4 then, the judgment in defendant suits shall contain a concise statement of the case, the points for determination the decision thereof and the reasons for such decision.

12. It was submitted that on the authority of the Court of Appeal case of CHUMO ARAP SONGOK V DAVID KIBIEGO ROTICH NAKURU CIVIL APPEAL NO. 141 of 2004 where the court said

"***the law is now settled that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issue arising from the pleadings unless a matter has been canversed before it by parties to the suit and made an issue through the evidence adduced and submission of parties."***

and that the appellant had raised the issue that the debt it owed to the 1st Respondent arose out of power that had been consumed by the 2nd respondent.

13. It was submitted that the court was wrong in dismissing the appellant claim for indemnity against the 2nd respondent and that the court was supposed to determine who between the appellant and the 2nd respondent was liable to the 1st respondent and to what extent as per EDWARD WAITHAKA & ANOTHER vs PETER MUTAHI GATHU & 4 OTHERS (2005) Eklr.

14. It was submitted that evidence had been tendered to prove that the appellant had contractual relationship with the 2nd respondent of Land Lord and tenant at the time the debt arose as confirmed by the Lease agreement and the evidence of Muriuki Mburu on behalf of the 2nd Respondent.

15. From the pleadings stated herein and the submissions by the appellant there are only two issues for this courts determination.

i. whether the trial court was wrong in framing the issues as framed.

ii. whether the appellant had proved a case for indemnity against the 2nd respondent.

16. From the pleadings herein and the evidence tendered there was no dispute that there was contract between the appellant and the 1st Respondent for the supply of electricity and therefore to that extend the 2nd respondent was not privy to the said contract and therefore one can not fault the trial court for holding that the appellant was liable to pay the said amount to the 1st respondent.

17. However directions having been given that the dispute between the appellant and the 2nd respondent be determined during the main suit the trial court was under a duty to frame the issue in respect thereof and therefore by holding that the said claim was bad in law and unsustainable within the suit and without taking into account the evidence tendered before the court the same fall into error.

18. Having perused the proceedings before the trial court the evidence by Mr. Muriuki Mburu under cross examination by Mr. Munene for the appellant where he stated as follows:

"according to our lease between me and the defendants my hotel was to pay for the electricity. I used the hotel for one year to my memory. All that time I did not pay a cent for electricity consumed by Heko Holdings and left the hotel when the plaintiff came disconnected electricity supply..... my landlord was paying my electricity."

I find as a fact that the appellant had made up a case for indemnity against the 2nd respondent.

19. I therefore allow the appeal herein and substitute the trial courts judgment as follows:

a. The plaintiff has made out a case against the defendant for payment of Ksh. 315950/= and therefore enter judgment for the plaintiff against the defendant from the sum of Ksh. 315,950/- with cost.

b. The defendant is entitled to indemnity from the third party in respect of the amount of the judgment herein together with cost.

20. The 2nd Respondent shall pay the appellant cost of the appeal.

Dated at Nyeri this 21st day of February 2013.

J. WAKIAGA
JUDGE

Miss Birgen for W. Gikonyo

Mr. Kahiga for the appellant

Court: Judgment read in open court in the presence of the above

named.

J. WAKIAGA
JUDGE