REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 133 of 2009

OCEANFREIGHT (E.A.) LTD……PLAINTIFF/RESPONDENT

-VERSUS-

TECHNOMATIC LTD……DEFENDANT/RESPONDENT

-AND-

KENYA WINE AGENCIES LTD…….THIRD PARTY/APPLICANT

RULING

The third party came before the Court by Chamber Summons dated ***29th October, 2009*** and brought under Order **VI** Rule 13 (1)(b),(c), (d) of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The applicant came in prayer for orders –

(i) ***that the third-party notice dated 7th July,2009 and filed on 9th July, 2009 be struck out;***

(ii) ***that, in the alternative, the third-party proceedings commenced herein be struck out;***

(iii) ***that the costs of this application and the costs consequent upon the third-party notice, be born by the defendant/respondent.***

The application rests upon the following general grounds:

(a) ***there is no contract, express or implied, that the applicant would indemnify the defendant under the*** *contract* ***between the defendant and the plaintiff;***

(b) ***the defendant having already commenced HCCC No. 398 of 2005,*** *Technomatic Ltd t/a Promopack Company Ltd v. Kenya Wine Agencies Ltd* ***at the Nairobi Milimani Commercial Courts, for the same reliefs and/or remedies as those envisaged by the third-party proceedings herein, the third-party proceedings are plainly an abuse of the process of the Court;***

(c) ***the third-party proceedings are without any legal foundation;***

(d) ***there is no proper question to be tried as to the liability of the third party and the defendant;***

(e) ***the third-party notice filed and/or proceedings commenced herein are scandalous, frivolous and vexatious;***

(f) ***the third-party notice filed and/or proceedings commenced herein may prejudice, embarrass or delay the fair trial of the action;***

(g) ***the third-party notice filed and/or proceedings commenced herein are otherwise an abuse of the process of the Court;***

(h) ***it is untenable and contrary to public policy for the defendant to purport to drag the applicant into this suit through third-party proceedings, thereby re-litigating the same matters already the subject of another suit, and the matter is*** *sub judice.*

(i) ***it is against public policy to litigate the same issues and/or split the same cause of action into different***

limbs, and purport to litigate the same in different forums;

(j) ***the applicant was not privy to the contract and/or transactions between the defendant and the plaintiff.***

Doris M. Thangei, the applicant's Company Secretary, swore a supporting affidavit on 29th October, 2009 deponing, ***inter alia***, that there is a suit pending between the defendant and the plaintiff, and so "it would therefore be improper, irregular, inequitable and unjust if the defendant is allowed to pursue the same remedy in two Courts of concurrent jurisdiction".

Learned counsel ***Mr. Simiyu***, for the applicant, submitted that the defendant had filed a suit at the Milimani Commercial Courts, HCCC No. 398 of 2005, ***Technomatic Limited t/a Promopack Company Limited v. Kenya Wine Agencies Limited***, seeking the same remedy as was being sought in the instant matter against the applicant as third party. Counsel submitted that if both suits were to proceed and succeed, then the defendant would end up with two judgments on one issue – and that "this would be tantamount to unjust enrichment". Therefore, it was submitted, there is no basis for the applicant to have been enjoined in the instant proceedings. To validate this argument, learned counsel invoked judicial authority.

In ***Akasio Mwarano Kibunja v. Standard Chartered Bank (K) Limited***, Nairobi MCCCC No. 3088 of 1995, ***Onyango Otieno, J*** (as he then was) thus stated:

> ***"The law is clear…..and it states that no Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previousy-instituted suit or proceedings between the same parties under which they or any of them claims, litigating under the same title, where such suit or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed."***

Counsel submitted that it was perverse that the two suits should continue in parallel: for "there is the possibility that the two different Courts could come to different conclusions", and "this would definitely expose the judicial system to ridicule". ***Mr. Justice Fred Ochieng, in Achodomoi Itaruk & Two Others v. John Lodinyo***, Kitale HCCC No. 82 of 2007 had to deal with precisely such a state of affairs, and he made the following apposite remarks:

> ***"It would expose the judicial system to possible ridicule if the two suits were allowed to proceed before different courts, at the same time, as there would be a distinct possibility of the two Courts arriving at inconsistent decisions".***

Counsel urged that the third-party proceedings as conceived herein, would offend the doctrine of privity of contract – because the issues in the dispute were limited in scope to the plaintiff and the defendant, and the applicant herein had nothing to do with them. Counsel submitted that there was no contract, express or implied, that conferred upon the defendant a right of indemnity as against the applicant herein: and so, the third-party proceedings are an abuse of the process of the Court.

Counsel started from judicial decisions on privity of contract (***Mwangi v. Braeburn Ltd*** [2004] LLR 4189 (CAK); ***Agricultural Finance Corporation v. Lengetia Limited*** [1985] KLR 765; ***Peras Limited v. Esso Kenya Limited*** [1997]eKLR), and urged that the applicant herein "should thus not be made to shoulder the consequences of breach of an agreement between the plaintiff and the defendant …..as regards demurrage charges as well as the issue of the unreturned containers".

Learned counsel submitted that there was no proper question for trial between the defendant and the applicant; and that it emerged from the pleadings, the applications and the depositions, that the defendant had failed to discharge the burden of establishing that there was any issue for trial between it and the applicant as third party.

Counsel submitted that as the defendant was allowed in ***ex parte*** proceedings to enjoin the applicant herein as third party, the Court was not at the time in a position to know all the relevant facts. The plaintiff's claim against the defendant is for demurrage charges and for the return of containers, the nature of this claim sounding in ***contract***: but counsel urged that the applicant has no place in the said contract. Consequently, counsel submitted, the third-party

proceedings are not sustainable.

On the propriety of third-party proceedings, counsel relied on the Court of Appeal case, ***Sango Bay Estates Ltd & Others v. Dresdner Bank Ag (No.2***) [1971]E.A. 307, in which the following passage (***Brett, M.R.*** at p. 101) in ***Speller v. Bristol Steam Navigation Co.*** (1884), 13 Q.B.D. 96 was quoted with approval [p.313]:

> ***"When by law may a person be entitled to indemnity? It is only when there is a contract express or implied that he shall be indemnified …..and that it can only apply to the case where a third person has contracted to indemnify the defendant".***

The learned Judges in the ***Sango Bay*** case further stated the law as follows (p.315):

> ***"In a third party proceeding, it is for the defendant to satisfy the Court that there is a 'proper question to be tried as to liability of the third party'. In other words, the defendants in the instant case, must satisfy the Court that they have a right of indemnity against GHH, and that that right arises out of the contract between Sango Bay and GHH. In the absence of such a contract they must fail."***

Learned counsel urged that as the defendant was pursuing the same relief in a different Court of competent jurisdiction, there was no privity of contract as between the defendant and the applicant; no issues existed for determination as between the defendant and the applicant; it was an abuse of Court process, for the defendant to enjoin the applicant as third party.

Counsel invited the Court to adopt the position taken on a similar question by the Court of Appeal, in ***Nishith Yogendra Patel v. Pascale Mireille Baksh & Another***, Civ. Appeal No. 264 of 2007:

> ***"….we are of the view that the application before us is an abuse of Court process, as stated earlier, by pursuing the same remedies in parallel Courts which are competent to deal with the application. Such conduct must be deprecated and discouraged. It is for that reason that we order that the Notice of Motion dated 25th October, 2007 be and is hereby struck out."***

For the defendant, learned counsel ***Mr. Kinyua*** submitted that if the third-party proceedings had not been filed within the prescribed period, the defendant would be "greatly prejudiced if judgment was entered against it without the opportunity to claim for indemnity against the third party/applicant".

Counsel submitted that there had been a ***contract*** between the defendant and the applicant, for the supply of three million bottles which the defendant was importing from Greece. After the bottles arrived, the applicant took delivery of some, but the rest remained in containers belonging to the plaintiff. It was the defendant's position that the applicant, by failing to pay up and take delivery of the bottles, as provided in the contract, ***occasioned delay*** in emptying the containers – hence the third-party proceedings. But counsel acknowledged that the said contract between the defendant and the applicant was already the subject-matter of a substantive cause, HCCC No. 398 of 2005 – ***Technomatic Ltd t/a Promopack Company Ltd. v. Kenya Wine Agencies Ltd***.

Counsel urged that the two matters were not ***identical***: the parties in HCCC No. 398 of 2005 are different from the parties in HCCC No. 133 of 2009; and the prayers sought in the two matters are different. So, counsel sought to distinguish the authorities relied on by the applicant: ***Akasio Mwarano Kibunja v. Standard Chartered Bank (K) Limited; Achodomoi Itaruk & Two Others v. John Lodinyo***. It was urged that the third party proceedings in the instant suit involve different parties, and the orders sought are different from those sought in HCCC No. 398 of 2005.

On the argument based on third-party proceedings and privity of contract, counsel submitted that third-party proceedings are not restricted to contract; and that there need not be a contract between a defendant and a third party: the defendant only needs to establish that the acts of the third party have resulted in the defendant being sued by the plaintiff.

Counsel submitted that there was a contractual relationship between the defendant and the third party – and it was the actions of the third party in respect of the said contract, that gave rise to the instant suit. From the position that

there indeed was a contract between the defendant and the third party, and that the third-party proceedings relate to acts of the third party which in all probability gave rise to the suit, counsel urged that the defendant was entitled to file third-party proceedings.

Learned counsel relied on the High Court decision (***Musinga, J***) in ***Mukuna v. National Bank of Kenya Ltd & Four Others***, Nakuru HCCC No. 224 of 1999, in which the following passage appears:

> ***"There is no doubt that the third defendant suffered damage because of the state of affairs created by the fourth defendant knowingly or negligently by opening three different registration cards for the same property.***
>
> ***"The third defendant is therefore entitled to compensation by the 4th defendant in the sum of Kshs. 200,000/= plus interest at Court rates with effect from 17th June, 1996 when he was registered as proprietor of the suit property."***

Mr. Kinyua submitted that "the law has many instances where the Courts have held that a party can be joined in proceedings if its acts affect other parties and a suit arises". In the ***Mukuna*** case the ***plaintiff*** had joined the 4th defendant, and was awarded compensation against 4th defendant, even though the contract of sale of land had only been between 2nd defendant and 3rd defendant.

Learned counsel submitted that several of the authorities relied on by the applicant (***Mwangi v. Braeburn Ltd; Agricultural Finance Corporation v. Lengetia Limited***; ***Peras Limited v. Esso Kenya Limited***) are to be distinguished – because their focus was the question of privity of contract, and the right to sue in contract.

Counsel relied on the Court of Appeal decision in ***Ngugi v. Kenya Ports Authority*** [1991] KLR 605, in which it was thus held (p.605):

> ***"The trial judge accepted in his judgment that it was not the respondent but Bamburi Portland Cement Company, the intended third party, who was responsible for the maintenance of the wharf. A grave prejudice was therefore caused to the appellants when the judge refused joinder.***
>
> ***"Appeal allowed, third party to be enjoined before retrial can take place".***

In the ***Ngugi*** case, as counsel submitted, "there was no contractual relationship between the defendant and the third party"; and counsel urged that "the existence of a contract is not a prerequisite in [the] commencement of third-party proceedings".

From the foregoing point it followed, ***Mr. Kinyua*** submitted, that the contention that there was no issue for trial between the defendant and the applicant, was inapposite: the question is not about a contract between third party and the plaintiff; the contract was between the defendant and the third party, and as a consequence thereof, the plaintiff has sued the defendant.

Learned counsel called in aid the Court of Appeal decision in ***Gachago v. Attorney-General*** [1981] KLR 232, which demonstrates that third-party proceedings are not dependent on there being a ***contrac***t binding the intended third party, nor on there not being a different case pending before the Court or before a Court of equal jurisdiction.

In the ***Gachago*** case, the Attorney-General was sued for damages arising out of alleged ***conversion***, ***negligence*** and ***breach of duty as a bailee***; and the Attorney-General applied for leave to issue third-party notice against three named persons, for purposes of indemnity against the plaintiff's claim. The Court of Appeal allowed the Attorney-General to initiate third-party proceedings against the three persons, but there was ***no contract*** between the Attorney-General and the three. Furthermore, the Court allowed third-party proceedings to proceed notwithstanding the pendency of another suit (HCCC No. 2436 of 1978) – though it ***gave orders as to precedence in the trial of the two matters***. Counsel submitted that the principle emerging from the ***Gachago*** case is that the judicial approach to third-party proceedings is a liberal one, that accords the parties an opportunity to prove their claim, and is less preoccupied with

striking out; and that privity of contract is not the sole consideration in determining whether third-party proceedings may be filed and sustained.

Mr. Kinyua submitted that the Court should decide whether the defendant is entitled to compensation or indemnity, for the actions of the third party which resulted in the suit being filed by the plaintiff.

On the appropriate mode of relating the instant matter to the pending case, Milimani Commercial Court HCCC No. 398 of 2005, ***Technomatic Ltd t/a Promopack Company Ltd. v. Kenya Wine Agencies Ltd***, learned counsel relied on an earlier decision of the High Court (***Ochieng, J***), ***Benja Properties Limited v. Savings and Loan Kenya Limited***, HCCC No. 173 of 2004. In that decision, the following passage occurs:

> ***"….I did come to the conclusion that this suit is not hopeless. But, I do also recognize that there is an overlap between this suit and Milimani HCCC No. 790 of 2003….***
>
> ***"However, as the issues in this suit overlap with those in HCCC No. 790 of 2003, I hold the considered view that the two suits cannot be allowed to proceed concurrently. Therefore I do hereby order that this suit shall be stayed pending the hearing and determination of Milimani HCCC No. 790 of 2003."***

Quite consistent with that position, and specially applicable to third-party proceedings, is the statement of the Court of Appeal in ***Gachago v. Attorney-General*** [1981] KLR 232 (at p. 238):

> ***"The second prayer was that the issue of liability between the other two third parties 'be tried and disposed of'. This has been granted 'as prayed', but that is not good enough. When is that issue to be tried? The Judge does not say. Third party issues are usually tried at or after the trial of the suit between the plaintiff and the defendant."***

Counsel urged that it be left to the Court's discretion, whether the third-party proceedings herein could be stayed pending the hearing and determination of Milimani Commercial Courts HCCC No. 398 of 2005; and that striking out such proceedings at this stage would be premature and would be prejudicial to the defendant, as it would deprive the defendant of the possible remedy of indemnity.

While taking note of the pendency of Milimani Commercial Courts HCCC No. 398 of 2005, between the defendant and the applicant herein, this Court perceives from the evidence, that there exists a contractual arrangement between the defendant and the applicant, and the defendant apprehends failure to perform on that contract, on the part of the applicant herein, as the reason for the suit (***Mombasa HCCC No. 133 of 2009***) which the plaintiff has brought against the defendant. Even as another suit (***Milimani Commercial Courts HCCC No. 398 of 2005***) pends, in which the defendant is the plaintiff, and the applicant herein the defendant, and part of the ground covered by that suit consists in the said contract between the applicant and the defendant in ***Mombasa HCCC No. 133 of 2009***, the plaintiff in this suit is set to proceed with its claim. It is, in my opinion, professionally expedient that the defendant should seek to enjoin the applicant herein, as a third party. This is because of the perceived connection between the applicant's role in the said contract and the cause of action in the plaintiff's suit in ***Mombasa HCCC No. 133 of 2009***.

From the several authorities canvassed by counsel on both sides, it emerges, contrary to the applicant's contentions, that joinder of third parties as may be prayed by defendants, is not conceptually linked to ***contract*** as such; such joinder may be sought in connection with different causes of action, provided only that there exists a basis of liability of the third party to the defendant; and such a basis of liability can arise by operation of the law, in the light of the applicable facts and circumstances.

The balance of probability stands, in my opinion, in favour of the defendant's election to initiate third-party proceedings against the applicant herein, and it follows that the Court's finding is to be in favour of the defendant. The only remaining question is the order of disposal of the third-party matter, especially in the light of the pending case, ***Milimani Commercial Courts HCCC No. 398 of 2005***.

The assessment of law and fact conducted in this ruling, leads me to make orders as follows:

(1) ***The applicant's prayer in the Chamber Summons of 29th October, 2009 is refused, and the third-party notice dated 7th July, 2009 is upheld.***

(2) ***The third-party proceedings shall remain in abeyance, pending the hearing and determination of*** *Milimani Commercial Courts HCCC No. 398 of 2005***.**

(3) ***The third party/applicant shall bear the defendant's costs in this application.***

DATED and **DELIVERED** at **MOMBASA** this 25th day of June, 2010.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Defendant/Respondent: *Mr. Kinyua*

For Third Party/Applicant: *Mr. Simiyu*