



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 203 OF 2005

THETA TEA COMPANY LIMITED.....1ST APPELLANT

JENNIFER JEMUTAI KOSITANY.....2ND
APPELLANT

VERSUS

JACOB JUMA T/A MUNGORE FARM.....1ST RESPONDENT

EASTERN PRODUCE KENYA LIMITED.....2ND RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed at the Chief Magistrate's Court at Nairobi by Jacob Juma t/a Mungore Farm, (hereinafter referred to as the 1st respondent). He had sued Eastern Produce Kenya Limited (hereinafter referred to as the 2nd respondent), seeking judgment as follows:

- (i) An order compelling the 2nd respondent to render accounts to the 1st respondent for all monies due and owing to the 1st respondent.
- (ii) An order compelling the 2nd respondent to open his books of accounts for inspection by the 1st respondent.
- (iii) An order to the 2nd respondent to pay to the 1st respondent all monies due and owing on account of supply of green tea leaf supplied to the 2nd respondent by the 1st respondent.
- (iv) General damages for breach of contract
- (v) Costs of the suit
- (vi) Interest at court rates.

2. The 1st respondent's claim was anchored on his alleged proprietary interest over Land Parcel known as LR.No.12357 (original number 6074/2/1 and 6072) (hereinafter referred to as the suit land), and an

agreement entered into between the 1st and 2nd respondent pursuant to which the 1st respondent delivered certain quantities of green tea leaves from the suit land to the 2nd respondent's factory for processing and for which the 2nd respondent was to account for.

3. Pursuant to a chamber summons brought on 18th March, 2005 under Order XXXIX Rule 2(1), 2A(1) and 9 of the Civil Procedure Rules, the 1st respondent obtained an *ex-parte* order of temporary injunction restraining the 2nd respondent or its agent from committing acts of breach of contract for supply of green tea leaves by withholding such payments of advances, delivered produce and bonuses to the applicant pending the *inter-parte* hearing of the application.

4. On 29th March, 2005, Theita Tea Company Ltd and Jennifer Jemutai Kositany, (hereinafter referred to as the 1st and 2nd appellants), filed a chamber summons under Order 1 Rule 10(2) and 22 of the Civil Procedure Rules. The appellants sought orders as follows:

(i) That the application be certified as urgent and the same be heard *ex-parte* in the first instance.

(ii) That the Honourable court be pleased to join the 1st and 2nd applicants as the 2nd and 3rd defendants in this suit, that the pleadings be amended in such manner as may be necessary and that the amended pleadings and summons be served on the applicants.

(iii) That the court do vacate and/or stay the orders issued on 18th March, 2005 and the plaintiff/respondent be ordered to deposit in court the sum of money received from the defendant/respondent, if any, pursuant to the court order aforesaid, pending the hearing and the determination of this application or until further orders of the court.

(iv) That the defendant/respondent be ordered to forthwith withhold all proceeds from the farm, namely LR.No.123577 (original No.6074/2/1 & 6072) until further orders from the court.

(v) That the costs of this application be provided for.

5. The application which was supported by an affidavit sworn by David K. Bor and another affidavit sworn by Jennifer Jemutai Kositany was based on the following grounds:

(i) That the plaintiff/respondent duped the 2nd applicant into signing an agreement dated 21st February 2003. The said agreement has since been rescinded and the applicants have taken over the farm.

(ii) That on 7th March, 2005, the applicants appointed new managers who took over from the plaintiff from 12th of March, 2005 to date.

(iii) That on 11th of March, 2005, the plaintiff filed HCCC (Milimani) No.136 of 2005 on a certificate of urgency but failed to obtain restraining orders against the applicants to date.

(iv) That on 18th March, 2005 the plaintiff filed this suit and without joining the applicants misled the court into granting interim orders prejudicial to the rights and interest of the applicants.

(v) That from the date the plaintiff/respondent illegally occupied and managed the farm the applicants shall counter-claim for a declaration, accounts and refund of sale proceeds received and an injunction.

6. The appellants' application dated 29th March, 2005 was certified urgent and *ex-parte* orders issued staying the previous *ex-parte* orders made on 18th March, 2005. The 2nd respondent was further ordered to forthwith withhold all proceeds from the suit land until further orders from the court.

7. In response to the chamber summons dated 29th March, 2005, the 1st respondent filed a notice of

preliminary objection on the following grounds:

- (i) That orders of stay and withholding of all proceeds from the farm known as LR.No.123577 (original No.6074/2/1 & 6072) are a nullity *ab initio* and should be set aside *ex debito justitiae* as no order in favour of the applicants could be granted unless and until an order joining them as defendants to the suit had been made. The formal order has no such order.
- (ii) Prayers 3 and 4 in the application cannot be granted and should be struck out as no law has been cited granting the court jurisdiction to issue or grant them.
- (iii) The applicants cannot be joined as defendants to the suit as the plaintiff has no claim against them as the suit arises from a Green Leaf Agreement between the plaintiff and the defendant signed on 1st March, 2003 to which the applicants are not parties to.
- (iv) The supporting affidavit of David K. Bor sworn on 29th march, 2005 is totally defective and should be struck out as he has not deposed that he was authorized by the 1st applicant to swear the affidavit on its behalf.

8. The application was also supported by an affidavit sworn by Jacob Juma on 1st April, 2005. Juma maintained that no green leaf tea was delivered to the 1st appellant nor did the 1st respondent have any claim against them for any delivery of green tea leaf to warrant them being joined to the suit. The 1st respondent maintained that the suit did not concern ownership of the suit land but concerned the enforcement of the terms of the green leaf agreement made between him and the 2nd respondent on the 12th march, 2003. He maintained that the two appellants were strangers to that agreement and should not therefore be allowed to interfere with the enforcement of any rights against the 2nd respondent. The 1st respondent further maintained that the 2nd applicant was not a director of the 1st applicant and did not have any legal capacity to cancel the said agreement between the 1st applicant and the 1st respondent.

9. On the 1st April, 2005, the application dated 29th March, 2005 was heard *inter-partes*. Mr. Kiplenge who appeared for the appellants urged the court to allow the appellants to be enjoined in the suit as the 1st appellant is the registered proprietor of the suit land whilst the 2nd appellant has an interest in the suit property. Counsel contended that it was necessary for the court to enjoin the two appellants to the suit in order to enable it effectively determine all matters in controversy.

10. Counsel for the 2nd respondent did not object to the application but Mr. Kibunja who appeared for the 1st respondent strenuously opposed the application. He reiterated that the 1st respondent's suit was for enforcement of a Green Leaf Tea Agreement between the 1st and 2nd respondent and that the appellants were not privy to that agreement. Mr. Kibunja submitted that the dispute regarding the delivery of produce was different from the dispute over ownership of the suit land which was being contested in HCCC No.136 of 2005. It was further maintained that David K. Bor was a stranger and his affidavit should be struck out as he had not shown his authority to swear the affidavit. It was maintained that the 1st respondent was entitled to an injunction as the appellants had no locus nor did they dispute the Green Tea Leaf Agreement.

11. In her ruling, the trial magistrate ruled that under Order 1 Rule 3 of the Civil Procedure Rules, any person or persons may be joined as a defendant, against whom any right to relief in respect of or arising out of the same act or transaction, or series of acts or transactions is alleged to exist whether jointly or severally or in the alternative, where if separate suits were brought against such persons any common question of law would arise. The trial magistrate also referred to Order 1 Rule 6 of the Civil Procedure Rules under which parties liable on the same contract may be enjoined in a suit.

12. The trial magistrate found that the 1st respondent's suit against the 2nd respondent was anchored on the agreement dated 5th April, 2003 and that the appellants were not parties to that agreement. The

magistrate found that the agreement between the 1st and 2nd respondent was separate from any agreement between the appellants and the 1st respondent. The trial magistrate found that although the appellants were impeaching the validity of their contract with the 2nd respondent, that was a subject of another suit i.e. HCCC No.136 of 2005. The trial magistrate found that there was no nexus between the appellants and the contract between the 1st and the 2nd respondent, which was subject of the suit before her. She further found that Jennifer Kositany had not shown locus. She found that there was no common relief or common question of law arising as between the 1st and 2nd respondents and the appellants. She noted that joining the appellants to the suit would only confuse the issues between the 1st and 2nd respondents and prejudice their respective rights. She therefore dismissed the application.

13. Being aggrieved by that ruling, the appellants filed an appeal in this court raising 4 grounds as follows:

(i) That the learned magistrate erred in law and fact in not appreciating that although the appellants were not privy to the green Leaf Contract dated 1st March, 2003 they were sufficiently interested in the matter owing to the litigation in the High Court in HCCC 126 of 2003 which concerned the ownership of the land upon which the Tea was being harvested from.

(ii) That the learned magistrate erred in law in misapprehending the proper application of the provisions of Order 1 Rule 3 and 10 of the Civil Procedure Rules and the relevant provisions of the law as regards joinder of parties in a suit.

(iii) That the learned magistrate erred in law and fact in not taking into account the materials annexed to the affidavit in support of the application and thereby wrongly refusing to join the applicants.

(iv) That the learned magistrate erred in law and fact when she failed to find that the appellants had established a counter-claim for declaration that the Green Leaf Agreement is invalid, that the appellants were entitled to accounts to be rendered by the 1st respondent and for an injunction.

14. Mr. Kiplenge who argued the appeal on behalf of the appellants, submitted that the 1st appellant was a registered proprietor of the suit land whilst the 2nd appellant is a director of the 1st appellant. He also maintained that the monies subject of the dispute was harvested from tea grown on the suit land. He maintained that the 2nd respondent had in fact no interest in the monies in dispute. Counsel further submitted that there was a High Court suit which dealt with the issue of the ownership of the suit land. He therefore urged the court to allow the appeal.

15. Mr. Wamwayi who appeared for the 1st respondent opposed the appeal. He maintained that the appellants were not privy to the Green Leaf Contract entered into between the 1st respondent and the 2nd respondent. He argued that the 1st respondent's suit was against the 2nd respondent for accounts in respect of monies owed by the 2nd respondent to the 1st respondent. Mr. Wamwayi therefore submitted that the trial magistrate was right in refusing the appellants leave to be enjoined in a matter to which they were not privy. Mr. Wamwayi further argued that the parties in HCCC No.136 of 2005 were completely different from those in the suit in the lower court and that the cause of action and the relief sought were also different. Further Mr. Wamwayi submitted that the trial magistrate properly dismissed the application as the appellants did not come to the court under the right provisions. He maintained that the appellants were challenging an agreement to which they were not privy. There was therefore no common question of fact or law. It was maintained that the ownership of the suit land was still an issue pending for determination in the Court of Appeal. It was maintained that the 2nd appellant did not demonstrate that she was a director of the 1st appellant nor did David Bor demonstrate any interest in the Tea. The court was therefore urged to dismiss the appeal.

16. I have carefully reconsidered the application, the affidavit in support and in reply as well as submissions which were made before the trial magistrate. I have also considered the grounds of appeal

and the submissions made before me in relation thereto. It is evident that the application dated 29th March, 2005 was brought under Order 1 Rule 10(2) of the Civil Procedure Rules. That rule deals with substitution and addition of parties and empowers the court to order that the name of any party who has been improperly joined in the suit be struck out and the name of any person who ought to have been joined whether as plaintiff or defendant be added to the suit to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

17. In this case, the appellants' chamber summons dated 29th March, 2005, did not seek to strike out or substitute any party to the suit. The appellants actually sought to be enjoined in the suit as additional defendants. In that regard, the trial magistrate was right that the application ought to have been brought under Order 1 Rule 3 of the Civil Procedure Rules. Under that rule, the court can only order persons to be joined as defendants to a suit where it is established that any right or relief in respect of, or arising from the same act or transaction is alleged to exist. Or where there is a common question of law or fact that would arise if separate suits were brought against such persons. The trial magistrate properly addressed her mind to this provision.

18. I find it clear, that the facts presented to the trial magistrate revealed two separate disputes involving different parties. The first dispute which was the subject of the 1st respondent's suit was a dispute involving the Green Leaf Tea Agreement signed between the 1st and 2nd respondents on 1st April, 2003. The appellants were neither party to nor privy to this agreement. The second dispute subject of the appellants' interest related to an agreement between the 1st respondent and the 1st appellant signed on 21st February, 2003 which related to the ownership of the suit property. The 2nd respondent was neither party to nor privy to this agreement. Clearly, although the two disputes revolve around the suit property, the disputes relate to different agreements involving different persons. The reliefs sought are not the same, nor are there any common questions of law or facts that arise. The dispute between the 1st respondent and the appellants can be properly determined independently. Indeed, there is already a suit between the 1st respondent and the appellants which is now subject of an appeal in the Court of Appeal. I find that the appellants failed to bring themselves within the circumstances provided under Order 1 Rule 3 of the Civil Procedure Rules and therefore the trial magistrate was right in rejecting their application. Accordingly, I find no substance in this appeal and do therefore dismiss it with costs.

Those shall be the orders of this court.

Dated and delivered this 4th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellants absent

Wamwayi for the 1st respondent

Erick – Court clerk