Kwamboka v ARM Cement (Civil Appeal E066 of 2023)
[2024] KEHC 5734 (KLR) (Civ) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5734 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E066 OF 2023

WM MUSYOKA, J

MAY 14, 2024

BETWEEN

HAPPINESS KWAMBOKA ..... APPELLANT

AND

ARM CEMENT ..... RESPONDENT

(An appeal arising from the judgement of Hon. Mochache, Adjudicator, delivered on 14th October 2022, in Milimani SCCC CMM No. E3621 of 2022)

JUDGMENT

1. Let me start by stating that there is some element of confusion in this matter, on the order or decree that is appealed against. In the heading, it refers to the judgement of 14th October 2022; while in the prayer it refers to a judgement delivered on 25th November 2022. The grounds of appeal appear to revolve around the decision of 25th November 2022.

2. For avoidance of doubt, the heading states:

> " (Appeal from the Judgement of the Small Claims Court at Nairobi on 14th October 2022 by Honourable Mochache on SCCC Comm E3621 OF 2022)."

Prayer 1 in the memorandum of appeal prays:

> " That the judgment of the Honourable Court delivered on 25th November 2022, be reversed, varied or set aside."

3. Pleadings are to be drafted in a manner that is not confusing, so that the court is clear on the issues that are for determination before it, without being forced to have to figure out what the parties meant.

As indicated above, from the grounds it would appear that the appeal targets the decision of 25th November 2022, and I shall proceed to determine this appeal in that belief.

4. Tightness in drafting and crafting of pleadings, and other court documents, is not required only of Advocates and other court users, the courts themselves should also be vigilant. I say so because the file in Milimani SCCC Comm E3621 of 2022 has 2 judgements, one was delivered on 14th October 2022, and the other on 25th November 2022. There can only be 1 judgement in a case, which finally and completely disposes of the matter, by determining all the issues in dispute or controversy. Where it becomes necessary to dispose of a matter in stages, for whatever reason, the initial decision or preliminary judgement would be interlocutory, and the last decision would be the final judgement. A decision which determines an aspect of the matter, without finally disposing of the suit, cannot be a judgement. Preliminary judgements are not headed or titled "judgement," and they usually take the form of rulings, in which the preliminary judgement or decree is pronounced. Any determination that comes after a decision labelled "judgement" has been delivered or tendered, cannot be a judgement, and must take the form of a ruling. Crucially, the decision which disposes of an application is a ruling, not a judgement.

5. Looking at the 2 judgements herein, there is no doubt, in my mind, that that of 14th October 2022, disposed of the suit finally, for it was founded on the viva voce proceedings conducted by the court, on 21st September 2022. The judgement of 25th November 2022 was a decision on an application for entry of judgement against a third party. A determination on that application could not possibly take the form of a judgement, the court having already delivered another judgement, which had finally dealt with and disposed of the issues. It could only be a ruling, allowing or dismissing the application.

6. Be that as it may. The claim before the trial court was by the respondent, wherein the respondent had supplied the appellant with cement. Whilst the appellant paid part of the purchase price, Kshs. 254,300.00 remained outstanding. The appellant denied the claim, and instead blamed a third party, one Patrick Githinji, who she sought to be joined, and an order for his joinder was made.

7. A hearing was conducted, where the respondent presented 1 witness, and the appellant testified on her own behalf. The appellant did not cross-examine the respondent's witness, for her Advocate stated that there was no need, for the appellant had admitted the claim, and that a judgement could be entered against her, who would then seek indemnity from the third party, Patrick Githinji. The appellant testified that the said third party was her customer, and cement would be delivered to him by the respondent, on her instructions.

8. At the conclusion of the oral hearing, on 21st September 2022, the appellant asked the court to enter an interlocutory judgement against the third party, and an order to that effect was made. Judgement followed, on 14th October 2022. The court ruled that it was satisfied that the respondent had proved its claim against the appellant, as she did not even dispute the debt. It was further ruled that the third party, Patrick Githinji, had not participated in the proceedings, despite being served, noting that interlocutory judgement had been entered against the said third party. It further ruled that the appellant was entitled to indemnity and or contribution from the third party. Judgement was entered in favour of the respondent, as against the appellant; and it was decreed that the appellant was entitled to indemnity from the third party.

9. Subsequent to the delivery of the judgement of 14th October 2022, the respondent filed an application, dated 19th October 2022, seeking that the judgement entered on 14th October 2022, be entered against the third party, on grounds that the appellant had failed to settle the same. In the end, the court dismissed the application, in the "judgement" it delivered on 5th November 2022, on grounds that

there was no privity of contract between the respondent and the third party, to justify judgement being entered in favour of the respondent against the said third party.

10. It was that judgement that prompted the filing of the appeal herein. The memorandum of appeal, dated 13th December 2022, identifies 2 grounds of appeal, but only 1 is really a ground of appeal, that the small claims court was not bound by the *Civil Procedure Rules*.

11. Directions were given on disposal of the appeal, by way of written submissions. These were given on 2nd August 2023. The appellant complied, by filing written submissions, which I have read through, and noted the arguments made. I have not come across submissions by the respondent.

12. The dispute on appeal is a storm in a teacup. The whole case rests on privity of contract, and a party who was not privy to a contract cannot be made to bear the burden of that contract. See *Agricultural Finance Corporation v. Lengetia Ltd & another* [1985] KLR 765 [1985] eKLR (Hancox, Nyarangi JJA, & Platt, Ag JA), *Kenya National Capital Corporation Ltd v. Albert Mario Cordeiro & another* [2014] eKLR (Visram, Maraga, Okwengu, JJA) and *William Muthee Muthami v. Bank of Baroda* [2014] eKLR (Kihara Kariuki (PCA), Ouko & Mohammed, JJA).

13. The contract to supply cement was between the appellant and the respondent, the third party was not privy to it. The appellant ordered cement from the respondent, which the appellant paid for or was supposed to pay for, upon the same being supplied. The third party was not part of that arrangement. He had a separate arrangement with the appellant, where the appellant would supply her with cement, and he was expected to pay the appellant for that cement. It could be that the cement, sometimes, moved directly from the respondent to the third party, but that would be upon instructions from the appellant. The third party never dealt directly with the respondent, in terms of it ordering cement from the respondent, the orders came from the appellant. The fact that the respondent delivered cement at sites operated by the third party, did not make the third party privy to the contract between the appellant and the respondent. The respondent could only look up, for payment, to the person with whom it had a contract, and that was the appellant. No contractual liability or responsibility could accrue, from the said contract, upon the third party, to entitle the respondent enforce the contract against the third party.

14. The confusion in this matter arose when the court allowed the joinder of the third party as such, for contribution or indemnity. Contribution and indemnity are principles that apply mainly in torts, especially that of negligence, where loss or damage is occasioned by the acts of 2 or more parties, and so the court has to assess the degree of contribution, to that loss or damage, by the 2 or more parties, so as to get them to contribute to making good the loss or damage, to the extent of their contribution, or to indemnify the party ultimately found liable by the court for such loss or damage. That would not arise in a case such as the instant one, of breach of contract, where a party has failed to settle some contractual amount. A third party, who is not privy to that contract, cannot be dragged into the dispute, on grounds of contribution and indemnity. There would be absolutely no basis upon which such a party can be made to pay for the sins or misdeeds or omissions of another.

15. On the issue of the joinder of the third party in this case, I find that there was a mistake that the trial court made. The application of the doctrine of privity of contract, precluded the joinder in question, for reasons that should be clear from what I have stated above. The said third party could not have contributed to the breach of the contract to which he was not privy. He could not be called upon to settle a debt, arising from a contract to which he was not privy. He should not have been joined to the suit at all. Indeed, the trial court appeared to come to that realisation, in its purported judgement of 25th November 2022, which substantially contradicts that of 14th October 2022, so far as the liability of the third party, to the respondent, is concerned. Some of the orders that the trial court made, in its

judgement of 14th October 2022, cannot possibly stand together with the conclusions that it arrived at in the ruling of 25th November 2022.

16. In view of what I have discussed above, there can be no merit whatsoever to the appeal herein, and I hereby dismiss the same. The respondent did not participate in the appeal, and so there shall be no orders on costs. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 14TH DAY OF MAY 2024

WM MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Kadu, instructed by Masire & Mogusu, Advocates for the appellant.