Paragon Electronics Limited v Maersk (K) Limited (Civil Appeal E262 of 2022) [2024] KEHC 5883 (KLR) (Civ) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5883 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E262 OF 2022

HI ONG'UDI, J

MAY 24, 2024

BETWEEN

PARAGON ELECTRONICS LIMITED .... APPELLANT

AND

MAERSK(K) LIMITED .... RESPONDENT

(Being an appeal against the Ruling and Order of the Chief Magistrate Court at Nairobi- dated 30th March, 2022 delivered in Nairobi MCCC No. 3441 of 2014 by Honourable P. Muholi (PM))

JUDGMENT

1. This interlocutory appeal arose from the ruling and order delivered on 30th March, 2022 Nairobi Magistrate Court CMCC No. 3441 of 2014. In the said ruling the court allowed the respondent to amend its defence and introduce a counterclaim. The appellant was given time to respond to the counter claim. Dissatisfied with the Ruling, the Appellant (Plaintiff in the trial Court suit) lodged this Appeal based on the following grounds; -
    1. That the Honourable Court erred in law by disregarding and failing to consider the Appellant's key responses and rebuttals to the Respondent's Application dated 5th October, 2021.
    2. The Honourable Court erred in fact and in law by considering and allowing the Respondent's application dated 5th October 2021, notwithstanding the fact that the affidavit in support of the application was sworn by an advocate and the depositions therein are contestable issues.
    3. The Honourable Court erred in fact and in law by giving the Respondent audience and entertaining its application dated 5th October 2021, yet the Respondent is in absolute contempt of the court orders given on 30th March 2021.

4. The Honourable Court erred in fact and in law by failing to appreciate and hold that the Respondent's proposed amendments would introduce a claim that is time barred and is otherwise based on no cause of action in law.

5. The Honourable Court erred in fact and in law by failing to appreciate and hold that the Respondent was guilty of laches and indolence.

6. The Honourable Court erred in fact and in law by failing to appreciate and hold that the Respondent's proposed amendments arose from facts and issues that are divergent and unrelated to the Plaintiff's claim hence would be the subject of a separate suit.

7. The Honourable Court erred in fact and in law by failing to appreciate and hold that the Respondent's proposed amendments would amount to improper lifting of the corporate veil.

8. The Honourable Court erred in fact and in law by arriving at a decision which is prejudicial to the Appellant, by forming an opinion on the facts forming the subject of the suit and trial at large.

9. The Honourable Court wrongly exercised his discretion in contravention of the laid down laws relating to amendments of pleadings, basis of counterclaims, limitation of action, right to fair hearing, lifting of corporate veil and Equity.

2. A summary of the facts leading to the impugned ruling is that by an application dated 5th October, 2021, the respondent sought to amend its defence and introduce a counterclaim on the basis that the parties had entered into a consent on 2nd July, 2014, before Hon Obulutsa, to open a joint account and for the appellant herein to deposit a sum of USD($) 14,520 within 3 days of opening the account and upon compliance with the aforesaid deposit, the container under the Bill lading Number 602987409 be released to the appellant within 3 days.

3. Subsequently, the Account at NCBA bank (Formerly NIC Bank) was opened and the appellant by its letter of 3rd October, 2014, informed the respondent that the money had been credited to the said account on 30th September, 2014 and enclosed a copy of a transfer slip. It is stated that it's on the strength of this communication and transfer slip that the respondent released the said container.

4. In the course of hearing, there was a change of advocates which was raised before the court on 12th July, 2019. The Court directed a new account to be opened in the same bank and the money held in the said joint account be transferred to the new account. The parties complied and opened a new account, however, in the process of transferring the said funds to the new account, the respondent was informed by NCBA bank by the email of 2nd December, 2019 that no money was ever credited to the said account.

5. That despite raising this issue with the appellant, no measures were taken to remedy the said situation and have the funds deposited in the account in line with the consent court order of 2nd July, 2014. It is on this premise, that the respondent sought for the court's leave to amend its defence and introduce a counterclaim, bringing these issues on board.

6. The appellant herein opposed the application on the grounds interalia that the affidavit in support was sworn by an advocate, when the issues therein are contested and the fact that no statement was filed in court to ascertain the allegations raised. Further that the allegations of fraud raised in the counterclaim are time barred having been filed over 7 years from the alleged occurrence of the fraud.

7. The Appeal was canvassed by written submissions.

Appellant's submissions

8. These are dated 24/8/2023 having been filed by AKO Advocates LLP. Counsel submitted from the onset that the trial Magistrate failed to make a decision on key issues raised such as; whether an advocate can swear an affidavit on behalf of a client on contested issues, whether the respondent was in contempt of a court order, whether the application is time barred and whether allowing the application would cause injustice to the appellant and instead, made a sweeping statement that that the appellant did not indicate the prejudice it was likely to suffer if the amendments are allowed . On that basis, Counsel argued that the ruling was made in disregard of the appellant's responses and thus the decision ought to be set aside. On this, he relied on the case of *Apex Steel Limited v Onesmus Mutuku Komu*[2021] eKLR.

9. On the second ground, Counsel submitted that it is common ground that advocates should not swear affidavits on behalf of their clients where the deponed issues are contested. Similarly, that the issues raised in the amended defence and counterclaim are hotly contested issues as such the client, and not the advocate, ought to have sworn the affidavit. In support of this view, counsel relied on the case of *Republic v Nairobi City County Government and 6 Others Ex parte Mike Sonko Mbuvi* [2015] eKLR and the case of *Francis Kimutai Bii v Kaisugu(Kenya) Ltd*[2016] eKLR.

10. On contempt of court, counsel submitted that the respondent failed to provide statements of the joint account in disregard of the court directions of 30th March, 2021. Therefore, he should not have been given any audience by the court to canvass the subject application. In support of this view, he relied on the case of *Fred Matiang'i the Cabinet secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others* [2015] eKLR.

11. With regard to grounds number 5 and 6 of the Appeal, counsel submitted that the account, the subject of the counterclaim, was opened in 2014 and the proposed amendments were being sought for in 2021, after about 7 years. Further that the allegations raised therein are on fraud and misrepresentation on the status of the joint account, which should have been brought within 3 years in line with Section 4(2) of the *Limitation of actions Act*.

12. He argued further that the extension of time provided for under section 26(c) of the *Limitation of Actions Act*, cannot cure such lapse. Additionally, the respondent did not seek leave to introduce the said amendments out of time. In support of these arguments, counsel relied on the case of *Margaret Wairimu Magugu v Karura Investment Limited & 4 others* [2019] eKLR.

13. It was also submitted that the cause of action being introduced in the counterclaim is not related to the claim for breach of contract raised in the plaint, therefore such amendments should not be allowed. In support of this view, he relied on the dictum in *Central Kenya Limited v Trust Bank Limited* (2000) E.A 365.

14. Finally, it was argued that the amendment seeks to introduce a prayer for lifting of a corporate veil without any basis. He therefore prayed for the Appeal to be allowed.

Respondent's submissions

15. These are dated 6/09/2023 and filed by Oraro & company advocates. Counsel compounded the grounds of appeal to three issues; whether the application met the criteria for grant of leave to amend the defence, whether the issues introduced by the amendments were time barred and whether the respondent's advocate could swear an affidavit on the respondent's behalf.

16. On the first issue, counsel submitted that amendments of pleadings are governed by Order 8 of the *Civil Procedure Rules* as read with Section 100 of the *Civil Procedure Act*. That the principle of amendment of pleadings in civil proceedings is that amendments before trial should be freely granted. Hence the trial court was justified in granting leave to amend considering that the suit had not yet proceeded for hearing.

17. Counsel submitted that the essence of amendments of pleadings are to aid the court in determining the real question in issue. On this, he relied on the case of *Central Kenya Limited v Trust Bank Limited* [2000] eKLR and the case of *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR.

18. Similarly, that the issue raised in the amended pleadings revolves around the purported deposit of USD 14,520 into a NCBA account, which in fact was never the case as communicated by the bank. Additionally, that the amendments brought out the fraudulent dealing of the appellant who alleged to have deposited money in the Joint account and sought for the release of the same to them in their plaint. Therefore, the issues raised in the amendments are related to the subject matter as they relate to transactions that occurred in the course of hearing of the case herein.

19. It was also submitted that during hearing of the application, the subject of this Appeal, the appellant did not clarify whether any money was indeed deposited in the NCBA Bank.

20. On whether the respondent was in contempt of court order, it was argued that the bank statement alluded to was requested for by a joint letter of the respondent and the appellants' former advocates dated 4th February, 2020 but none was given because there was no money deposited in the said account as stated by NCBA Bank via email to the respondent's advocates on 2nd December, 2019.

21. On the allegations that the amendments are time barred, counsel submitted that the cause of action did not arise in 2014 when the consent was entered but on 2nd December, 2019, when they received the email from NIC bank indicating that no funds were ever credited in the joint account. He argued that the appellant cannot turn around and mount objection on limitation of action, when infact, he is the one that misrepresented the fact and made the respondent believe that the funds had been deposited in the joint account by writing the letter dated 3rd October, 2014 enclosing a funds transfer slip purporting to confirm the said transfer.

22. Further that the appellant amended its plaint dated 13th March, 2017, seeking for eventual release of the money held in the joint account. Also that the statement of Bulent Gulbahar, the appellant's witness confirmed that the said money was deposited into the joint account. On that note, it was argued that the appellant was the mastermind of the misrepresentation and fraudulent activities as such, it should not be allowed to go unaddressed. In support of this, he relied on the case of *Kenya Ports Authority v Timberland(K) Limited* [2017] eKLR.

23. It was also argued that the allegations that the issues are time barred is premature and cannot be addressed at the leave stage as was stated in the case of *Ramco Investment Limited v Nairobi City Water and Sewerage Company Limited* [2017] eKLR. In any event an application for amendment of pleadings can be made at any time as long as the issues being raised are material and crucial for determination of the subject matter. In support of this, counsel relied on the case of *Barnabas Kariuki v Nyeri Water and Sewerage Company Limited* [2016] eKLR and the case of Central Kenya Limited v Trust Bank Limited (*Supra*). It was argued further that the appellant did not state the prejudice it will suffer that cannot be compensated by costs.

24. On the advocate swearing an affidavit instead of its client, Counsel submitted that the issues deponed in the said affidavit relate to the consent order and the subsequent transaction that occurred thereafter, which he had knowledge of, as such, he is allowed under Order 19 Rule 3(1) of the *Civil Procedure Rules* to swear an affidavit in support of such facts .To support this, Counsel cited the case of *Regina Waithira Mwangi Gitau v Boniface Nthenge* [2015] eKLR and the case of *Kamlesh M. A Pattni v Nasir Ibrahim Ali & 2 Others* [2005] eKLR.

25. On lifting of the corporate veil, counsel cited *Halsbury's Laws of England*, 4th Edn Reissue, Vol. 7(1), para. 90 which addresses the issue of piercing the veil of incorporation and states that:-

> "Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents directing and controlling the activities of the company."

26. In conclusion, Counsel, urged this Court to dismiss the Appeal with costs, for lacking merit.

Analysis and Determination

27. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law and I find the issues falling for determination to be as follows; -

    i. Whether it was proper for the advocate to swear the affidavit in support of the application for amendments.

    ii. Whether the respondent was in contempt of the court order of 30th March, 2021.

    iii. Whether the amendments introduced a new cause of action.

    iv. Whether the respondent was guilty of laches.

    v. Whether the amendments could amount to improperly lifting of the corporate veil.

28. Regarding the first issue, it is a general rule that advocates should never swear affidavits on their clients behalf because they will be reporting what has been told to them and not telling what is within their own knowledge and belief, thus, they will be reporting hearsay. Order 19 Rule 3 (1) of the *Civil Procedure Rules*, 2010 provides that:

> "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

29. Further, Rule 9 of the *Advocates (Practice) Rules* states:

> "No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:Provided that this rule does not prevent an advocate from

giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matters in which he acts or appears."

30. Therefore, an affidavit sworn by an Advocate that is limited to facts which he/she is capable of proving on his own knowledge and does not disclose any issue necessitating his/her cross-examination is not flawed. This is the position in:

Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR, citing its decision in *Salama Beach Ltd v Mario Rossi*, Ca. No. 10 Of 2015:

> "As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v Ali & 2 Others*, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters."

31. Similarly, in this case, the supporting affidavit sworn by Mr. John Mbaluto advocate, makes only inferences from the court record and what transpired in the case before the trial court regarding the depositing of money in a joint account of the parties, pursuant to the consent order entered between the parties on 2nd July, 2014. I also note that John Mbaluto Advocate was on record for the respondent in the case before the lower court. Therefore, these are matters in the court's record and within the advocates' knowledge, which as a result, was improper for the advocate to swear an affidavit on the same.

32. It is also important to note that the verifying affidavit of the defence and counterclaim was sworn by the Natasha Nyakerario Gichuki, the respondent's legal counsel. Thus the contents of the defence and counterclaim have not been sworn by the advocate, that might necessitate his cross examination during trial.

33. On the second issue, whether the respondent was in contempt of the court order of 30th March, 2021, the appellant's counsel submitted that the respondent was in breach of the said court order by failing to provide a statement for the bank to ascertain whether money was deposited in the joint account or not. Thus, he lacked audience until the contempt is purged. The respondent on the other hand submitted that the statement could not be provided by the bank because as informed via email the account they are seeking a statement from was not funded.

34. I have looked at the proceedings of the trial court of 30th March, 2021 and no order was given by the court to that effect. Nonetheless, even if the said directions were given, the respondent has produced the email dated 2nd December, 2019 at page 193 of the Record of Appeal, written by Emily Oyugi, the Relationship manager-NIC Bank, who categorically informed the respondent's advocates that the joint account held by Henia Anzala & Associates and Oraro Advocates was not funded. It is not therefore possible to have obtained a bank statement for an account that was not funded. On that basis I do not find the respondent to have been in contempt of the Court Order.

35. On whether the amendments have introduced a new cause of action, counsel for the appellant submitted that the issue raised herein ought to be raised in a separate suit because they do not arise from the same transaction to be addressed in the same suit. The respondent maintained that the issue raised revolves around the consent order entered into between the parties on 2nd July, 2014 and therefore

forms part of the transaction in the suit and thus well fitted to be addressed by the same court under the same case.

36. In *Eastern Bakery v Castelino* [1958] EA 462 (CAU) the Court held at page 462 that:-

> " The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character ...."

37. Further, in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, the Court held that:-

> " ...that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action;...."

38. I have looked at the amended defence and counterclaim dated 21st April, 2022 and I note that the amendment added to the defence and counterclaim relates to the consent order of 2nd July, 2014 and the alleged failure by the appellant to deposit money into the said joint account in line with the said consent order. Thus, the issues raised are connected to the initial transaction of the appellant for release of the Container Bill lading number 602987409 and the payment of detention charges of USD 14,520, subject of the consent. This being the position I find that the amendments are interrelated to the suit and therefore best suited to be handled together with the main suit filed in the lower court.

39. Were the amendments time barred? Counsel for the appellant submitted that the subject of the amendments emanated from the consent order of 2014 and therefore 7 years had lapsed before the introduction of amendments, hence their being time barred. The respondent on the other hand submitted that the amendments were necessitated by the letter of NIC Bank dated 2nd December, 2019, when they discovered that no money was credited into the joint account.

40. The general power to grant orders for amendment is in Order 8 Rule 1 of the *Civil Procedure Rules*. The principles for consideration in an application for amendment of pleadings are set out in the Court of Appeal decision of *Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 147 of 1991. They are as follows:

    a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;

    b. the amendments should be timeously applied for;

    c. power to amend can be exercised by the court at any stage of the proceedings;

    d. that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; (emphasis is mine)

    e. the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaint the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation."

41. In order to determine, whether the amendments are time barred, it is important to know when the issues to be included in the amendments were discovered. Section 26 of the *Limitation of Actions Act* provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. This is the position in the case of *Justus Tureti Obara v Peter Koipeita Nengisoi* (2014) e KLR ,where Justice Okong'o held as follows: -

> " The proviso to Section 26(a) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial."

42. Similarly, in this case, the respondent stated that he proceeded to release the container on the presumption that money had been deposited in the joint account in 2014, based on the fact that the appellant had sent him a letter confirming the same and attached a copy of bank transfer slips. It was not until 2/12/2019 that they discovered no money had been deposited in the joint account necessitating the amendments made herein, thus the amendments are not time barred. No evidence was led to counter this assertion by the respondent. The respondent therefore put up a strong case on why the amendments were necessary. Therefore, since time started running on 2nd December, 2019, the respondent was well within time to bring the amendments. The rest will be argued during the hearing.

43. As regards the lifting of the corporate veil, Paragraph 90 of *Halsbury's Laws of England* 4th Edition (supra) details as follows:

> " 90. Piercing the corporate veil. Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced".

44. In this case, the basis upon, which the respondent sought to lift the appellant's corporate veil was fraud and misrepresentation, in obtaining the release of the container and failing to deposit money into a joint account as per the consent order entered between the parties. The prayer seeking for the lifting of the corporate veil was not a prayer made in the notice of motion the subject of the Appeal herein but in the amended defence and counterclaim, which is yet to be heard by the trial court. The appellant is objecting to the lifting of the corporate veil, when a decision is yet to be made by the trial court on the same for it to form the basis of this Appeal. I am of the humble view that the ground under this head is premature.

45. The upshot is that the Appeal lacks merit and is hereby dismissed with costs. Let the matter before the trial court be heard without any further delays.

46. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 24TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE