



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 300 OF 2017

ASC METAL, BELGIUM.....PLAINTIFF/RESPONDENT

VERSUS

BLUE NILE (EAST AFRICA) LIMITED.....DEFENDANT/APPLICANT

BLUE NILE WIRE PRODUCTS LIMITED.....PROPOSED 1ST THIRD PARTY

KOTNI RAMASANKARA RAO.....PROPOSED 2ND THIRD PARTY

RULING

1. This Ruling relates to an Exparte Chamber Summons Application dated 3rd April 2018, brought under Sections 3A and 1A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Order 15 Rule 15 of the Civil Procedure Rules and all enabling provisions of law.

2. The Applicant is seeking for orders;-

(a) That leave be granted for the Defendant to take out a Third Party Notice to the Proposed 1st and 2nd Third Party;

(b) That a Third Party Notice be and is hereby issued to the 1st and 2nd Third Parties herein to be enjoined in this matter;

(c) That upon hearing and determination of this Application, a Third Party Notice be served upon the 1st and 2nd Third Parties herein and they be deemed admitted as the 1st and 2nd Third Party and be allowed to file their responses.

(d) That the costs of this application be in the cause.

3. The Application is supported vide an affidavit in support dated 3rd April 2018, sworn by Mohamed Said Chute, a Director of the Defendant/Applicant Company. He deposed that the Proposed 2nd Third Party was an employee and/or director of the Defendant for many years and had a key role in its operations and freely interacted with customers and suppliers. That it came to the attention of the Defendant and its directors that the proposed 2nd Third Party had incorporated the proposed 1st Third Party so as to further his business interest. Further when questioned on conflict of interest, the Proposed 2nd Third Party alleged there is none.

4. However, upon the institution of this suit, it has come to the attention of the Defendant that the Proposed 2nd Third Party has issued instructions to the Plaintiff herein, to change documents related to goods supplied to the Proposed 1st Third Party, to appear as if the said goods had been supplied to the Defendant. That the Plaintiff received the illegal instructions of changing the party to be invoiced for the goods it supplied to the proposed 1st Third Party without the approval of the directors of the Defendant herein. Thus, the Proposed 1st and 2nd Third Parties with the connivance of the Plaintiff have created a liability on the Defendant without its knowledge or involvement of its directors.

5. Therefore, it is unfair for the Plaintiff to burden the Defendant with the claim herein, yet it all along knew that its customer was the Proposed 1st Third Party and not the Defendant, since it has no business dealings with the Defendant in any way or at all. That the Defendant's operations will be brought to a halt if it were to be forced to carry a financial burden for goods it did not receive or benefit from and therefore this suit is highly injurious to its operations and business activities.

6. Therefore, it is only proper and just that the orders sought herein be allowed to enable all the active participants in the subject matter be heard on merit.

7. However, the Application was opposed vide a Replying Affidavit dated 6th June 2018, sworn by Jagannagham Rao Botu, a Director of the proposed 1st Third Party's Company. He deposed that the Application seeking to enjoin the Company is a non-starter as the Applicant has not told the Court why it did not reject the goods worth USD 610,490.85. Further, Mrs. Linda Gode Yusuf, who is a director of the Proposed 1st Third Party, has not equivocally denied that the signatures appearing in the pro forma invoices produced as item 1-9 in the Plaintiff's List of Documents are copies bearing her signature and are the same as the ones appearing in other documents.

8. That further, the Applicant, sent two letters dated 10th September 2014 and 18th November 2015, acknowledging the outstanding balance and apologized for the delay in making payments and even sought for time.

9. That in respect of ground (a) of the Chamber Summons, the Proposed 1st Third Party, is independent from the Applicant and there is no privity of contract in respect of the dealings between the Plaintiff and the Applicant and in respect of ground (c) and (d) of the Chamber Summons, the Applicant has not demonstrated how the Proposed 1st and 2nd Third Parties benefited from the transaction. That, in any event, the Applicant and its directors were aware of the incorporation therefore cannot be deemed to be a secret.

10. Further, Lidia Gode Yusuf is a director of the Proposed 1st Third Party with majority shareholding from the date of the incorporation and/or during the material transactions. In the circumstances, the contents of the Affidavit of Mohamed Said Chute are false, to allege that the Proposed 1st Third Party was fraudulently incorporated.

11. It was averred that no document has been exhibited to the Court to show the illegal and unlawful acts alluded to. The goods in question as per the documents, which speak for themselves, were in the Applicant's name and if any goods ended up with the Proposed Third Party, the same were properly invoiced, delivered and paid to the Applicant. Further, the Applicant has not exhibited to the Court the said changes alluded to in ground (f) of the Chamber summons nor evidence exhibited to show changes and/or fraud alluded to the Proposed Third Party.

12. That it defeats logic why the Applicant made part payment on 10th December 2014 and 19th January 2015, as evidenced by the copies of funds transfer for KCB to the tune of USD 50,000 and countersigned by one Lidia Gode Yusuf. Therefore, the Applicant's deposition is an inconsistent claim and does not reflect the conduct of a party which had been defrauded by the Proposed 1st Third Party.

13. Further, the Proposed 1st Third Party is a stranger to the allegation as to who asked about conflict of interest relating to the employment of the Proposed 2nd Third Party. That the Proposed 1st Third Party's only connection to the goods is above board for which invoices were raised by the Proposed 1st Third Party after delivery and have no connection whatsoever with it in relation to this case ordered from the Applicant's goods which were delivered and subsequently invoiced and paid for to the Applicant.

14. The parties disposed of the application by filing submissions. The Applicant reiterated the background facts and stressed that the Proposed 2nd Third Party, resigned from the Defendant and went to manage the Proposed 1st third party and transferred his minority shares to a Canadian emigrant just before the Plaintiff started claiming for the goods delivered. That the action by the Proposed 2nd Third Party and the benefit by the Proposed 1st Third Party from goods supplied by the Plaintiff lays a basis for this Application seeking to enjoin them in the suit instituted by the Plaintiff.

15. The Applicant relied on the case of; Oceanfreight (EA) Ltd vs Technomatic Ltd & Another (2010) eKLR, where the Court held that;-

“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.”

16. He further stated that;

“from the several authorities canvassed by counsels 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 was that, 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.”

17. That based on the authority above, the Proposed 1st and 2nd Third Parties ought to be called upon to indemnify the Defendant for the goods supplied by the Plaintiff.

18. The Plaintiff also filed submissions. Though I note that they did not file any Replying Affidavit. Be that as it were, it submitted that it brought this suit against the defendant to recover USD 505,490.85 being the outstanding balance owed to it by the Defendant for the supply of Equal Angles worth USD 610,490.85. That the Defendant has paid USD 105,000.00 in settlement of the amount owed and acknowledged and admitted that the goods were supplied and committed to settle the outstanding balance.

19. That if the joinder of the proposed third parties to the suit, will bring all the parties on board and the underlying issues be resolved and enable it realize the monies owed to it then it has no objection to the same.

20. The proposed 1st and 2nd third parties filed their submissions and argued that the Court has a absolute discretion to allow the Application. However, it must be exercised judiciously. That the Defendant has not met the threshold provided for under Order 15 Rule 1(a) of the Civil

Procedure Rules, 2010 in that no indemnity or contribution is pleaded against the proposed 1st and 2nd Third parties.

21. Furthermore, it is noteworthy that the subject matter of this suit, the Defendant has admitted to the debt in its various correspondences to the Plaintiff with 10th September 2014 and 18th November 2015 produced as exhibits.

22. That the Defendant has admitted the debt as stated herein, and the goods supplied to the Proposed 1st third party are fully paid for. Therefore the grounds advanced by the Defendant are inconsistent and vexatious as the Defendant has not shown the Honourable Court how the proposed third parties contributed to the debt against the Plaintiff.

23. That the joinder of the proposed 1st and 2nd third parties to the proceedings would offend the doctrine of privity of contract because the issues in dispute are quite limited. From a cursory look of the pleadings the Plaintiff supplied goods to the defendants which were duly delivered and receipt acknowledged. Consequently, the defendant proceeded to partially pay for them. There was no contract express that conferred upon the Defendant a right of indemnity as against the third party and thus the current proceedings are an abuse of the Court process.

24. The case of; Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) EKLK, was cited where the Court held that;

“in law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 Rule 15-22 of the Civil Procedure Rules. And, liability between the Defendant and the third party, but of course, after the Court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant and has given directions under Order 1 Rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the Defendant and cannot be a bona fide issue triable between the Defendant and the Plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue as all for purposes of liability between the Plaintiff and the Defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out.”

25. I have considered the application, the affidavit in support and reply thereto and the arguments advanced by the parties, and find that the only issue to consider is whether the applicant has laid the basis for grant of the orders sought. Basically, the Applicant avers that the proposed third parties have colluded and/or connived with the Plaintiff to shift the liability of the proposed 1st third party to the Defendant/Applicant. However, it suffices to note that none of the allegations as deposed to in the Affidavit in support of the application are backed by evidence.

26. In particular, the Applicant avers under paragraph (4) of the affidavit sworn by Mohammed Said Chute, in support of the application that the proposed 2nd third party incorporated the proposed 1st third party. But there is no evidence to support the same. Annexure of a document to show the directors of this proposed 1st third party would have been adequate and would have showed whether in the given circumstances there would then be conflict of interest between the business of the proposed 1st third party and the Defendant. The saving grace is that the incorporation has not been denied.

27. Of great importance are averments under paragraph (6) of the said affidavit, where it is averred that the proposed 2nd third party issued instructions to the Plaintiff to change documents related to goods supplied to the proposed 1st third party to appear as if the goods had been supplied to the Defendant. The Affidavit shows that there is an annexure attached and marked “LGY-1” being a copy of the falsified document with changes. However, the said document is not annexed to the document. This was the main ground relied on by the Applicant to prove that it is liable to pay for the goods allegedly supplied to it by the Plaintiff and/or that the Plaintiff and the proposed 1st and 2nd third parties connived to create a liability on the Defendant.

28. Indeed, in response to these allegations, Mr. Rao Botu, a Director of the proposed 1st Third Party’s Company averred under paragraph (11) of the Replying Affidavit that no documents has been exhibited to show that the Plaintiff and the proposed 1st third party committed the illegal and unlawful acts alluded to them and/or made the said changes.

29. The proposed 1st third party has also raised the issue of indemnity which has not been responded to by the Applicant. The provisions of Order 1 rule 15 of the Civil Procedure Rules, 2010 states as follows;

“15. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the

effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.”

30. I have noted from the application that the Applicant cited Order 15 rule 15 of the Civil Procedure Rules, but order 15 has only two rules, rule (1) and (2), and even then, it deals with framing of issues.

31. It is therefore clear that all the allegations, in the affidavit in the Affidavit in support of the application are unsubstantiated. Similarly, the Defendant is not making a claim of contribution and/or indemnity against the proposed 1st and 2nd third parties. In the given circumstances, I find that the application has not merit. Indeed, if the Applicant avers that there has been fraudulent alteration of documents, they can use the same in their defence against the Plaintiff and/or report the matter to the criminal investigation agency. Therefore failure to allow the application herein will not prejudice the Applicant. The application is thus dismissed with orders as to costs in favour of the proposed 1st third party who swore a Replying affidavit in opposition to the application. The 2nd Proposed party did not file a Replying Affidavit in response to the Application. However the costs in favour of the Plaintiff will abide the outcome of the main suit.

32. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 1st day of October, 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Senten for the Plaintiff

Mr. Wangila for the Defendant

No appearance for the for the Proposed/ Applicants 1st and 2nd third parties

DennisCourt Assistant