



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 34 OF 2015

HALAN SLIME AGENCIES LIMITED.....APPELLANT

V E R S U S

ABDIAZIZ ADAN.....1ST RESPONDENT

LIBERTY AFRIKA TECHNOLOGIES LTD.....2ND RESPONDENT

SAFARICOM LIMITED.....3RD RESPONDENT

(Being an appeal against the ruling of the Chief Magistrate's Court given at Nairobi by Hon. R. A. Oganyo on 19th January 2015 in Civil Suit No. 4845 of 2013)

JUDGEMENT

1) Halan Slime Agencies Ltd, the appellant herein, filed the summons dated 17th November 2014, before the Chief Magistrate's Court in which it sought for *inter alia* to be granted leave to be enjoined as a 2nd Interested Party in the suit. The summons was served upon Abdiaziz Adan, Liberty Afrika Technologies Ltd and Safaricom Ltd, the 1st, 2nd and 3rd respondents herein respectively.

2) The 2nd and 3rd respondents did not oppose the application. However, the 1st respondent filed a replying affidavit he swore to oppose the appellant's summons. The application was heard and dismissed by Hon. R. A. Oganyo, learned Chief Magistrate vide her ruling delivered on 19th January 2015.

3) The appellant being dissatisfied with the dismissal order, preferred this appeal and put forward the following grounds:

i. The honourable magistrate erred in law and in fact in finding that the appellant was not a necessary party to the suit.

ii. The learned magistrate erred in law and in fact in failing to find that the claim by the appellant was an issue that related to the question involved in the suit.

iii. The honourable magistrate erred in law and in fact in finding that the appellant was not directly affected by the cause of action in the suit.

iv. The honourable magistrate erred in law and in fact in holding that the joinder was an afterthought when no evidence of the same was produced.

4) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions.

5) Before determining the substance of this appeal, I think it is appropriate to set out the brief background of this appeal. In the year 2008, Safaricom Ltd (3rd respondent) introduced a caller ring back tone service commonly known as 'Skiza' whereby subscribers can customize the ring back tone on their Safaricom line by leasing a ringtone.

6) By various content provision agreement between Liberty Afrika technologies Ltd (2nd respondent) and Safaricom Ltd (3rd respondent), the 2nd respondent assigned to the 3rd respondent their respective rights, licenses and sub-licences to various musical works (hereinafter called 'the content').

- 7) The substantive suit was filed by Liberty Afrika Technologies Ltd (2nd respondent) against Abdiaziz Adan (1st respondent) in which the 2nd respondent accused the 1st respondent of breaching the terms and conditions of the contract executed on 4th December 2012.
- 8) On appeal, the main issue which commend itself for determination is whether the appellant is a necessary party to the suit. It is the submission of the appellant that it demonstrated that it was interested in the subject matter of the suit as it was the owner of the songs claimed by the 1st respondent and was therefore entitled to part if not all the revenue that the 1st respondent had laid claim and which the court had granted to the 1st respondent.
- 9) The appellant further submitted that the decision of the directly, negatively affected the appellant as the ownership of the songs and the revenue therefrom were in contention between the appellant and the 1st respondent.
- 10) It is further the submission of the appellant that the joinder would have assisted the court in making a determination of all the questions involved in the suit in so far as the questions in issue related to the suit and would have also prevented the filing of separate suits.
- 11) The 3rd respondent urged this court to allow the appeal. It is the submission of the 3rd respondent that it is prudent that the appellant be enjoined as a party in the proceedings before the trial court so that all the parties can present evidence in support of their claim for ownership of content.
- 12) It was further argued that if the order of enjoiner is not granted the appellant may be forced to file a separate suit raising the possibility of the courts giving conflicting decisions. It was further argued that if the order of enjoiner is granted precious judicial time may be saved.
- 13) The 1st respondent strenuously opposed the appeal. It is the submission of the 1st respondent that the appellant is not a party to the contract between the 1st respondent and the 3rd respondent and since there is no privity of contract the appellant cannot be treated as a necessary party. It was also pointed out that the appellant had not made any demands or laid any basis to the 2nd and 3rd respondents on any dues owing to themselves.
- 14) It is also the argument of the 1st respondent that the appellant has not demonstrated the stake it holds in being enjoined in the suit which basically touches on the contractual obligations between the 1st and 3rd respondent as per the contract dated 4th December 2012.
- 15) I have carefully examined the ruling of the learned Chief Magistrate delivered on 16.1.2015. The learned Chief Magistrate framed the question for determination that is to say as to whether the proposed interested parties named in the respective applications are necessary parties to the suit before her for the effectual and complete adjudication of the questions involved in the suit.
- 16) She went ahead and cited the provisions of Order 1 rule 10(2) of the Civil Procedure Rules. The learned Chief Magistrate stated that the issue in dispute in the suit is the digital content proceeds spelt out in the licensing agreement dated 4.12.2012. She went ahead to hold that the interested parties are not privy to that agreement hence they are not directly affected by the suit. It was also pointed out that the licensing agreement between the appellant and the 2nd respondent dated 4.12.2012 was not listed in the agreement between the 2nd respondent and the 3rd respondent.
- 17) The trial magistrate formed the opinion that if the appellant's request to be enjoined is allowed it will further delay the execution of the court's two decisions made on 25.11.2013 and 17.11.2013.
- 18) Having re-evaluated the arguments made before the trial court and having considered the rival written submissions from both sides, I have come to the following conclusions in this matter. It is apparent from the appellant's application filed before the trial court that there was an agreement between the appellant and the 2nd respondent for the content as shown in the agreements annexed to the supporting affidavit of Abdulahi Abdisalam Haji.
- 19) It would also appear that there is the uploaded generated print out from the 3rd respondent which has not been controverted by the 1st respondent save for the fact that its authenticity is questioned. It would appear from the material placed before the trial court that the appellant is a shareholder of the content that was uploaded by the 3rd respondent, therefore if the appellant is not enjoined to the suit it is bound to file another suit against the respondents over the same subject matter.
- 20) The main issue argued by the 1st respondent is that the appellant has no interest to the claim since it has no privity of contract. That assertion appears to have been watered down by the important affidavit evidence tendered by both the appellant and the 3rd respondent.
- 21) It is also clear in my mind that no prejudice would have been visited upon the 1st respondent had the order for enjoiner been made. The 1st respondent would have had an opportunity to respond and dispute the appellant's claims. It is in the opinion of this court that on the basis of the material placed before the trial court and before this court that the joinder of the appellant to the suit would assist the court in making a determination of all the questions raised in the suit.
- 22) In fact, contrary to the trial court's assertion that delay may occur, the joinder would have prevented wastage of judicial time and the duplicity of suits.
- 23) In the end, I allow the appeal. Consequently, the order dismissing the appellant's motion made on 16.1.2015 is set aside and is substituted with an order allowing the motion. In the circumstances of this appeal, I am convinced that a fair order on costs is to direct which I hereby do that each party meets its own costs of the appeal and the application.

Dated, Signed and Delivered in open court this 16th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents