



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 358 OF 2013

BETWEEN

HANNAH MAINA T/A TAA FLOWER.....APPELLANT

AND

RIFT VALLEY BOTTLERS LIMITED.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya

at Eldoret (Mshila, J.), delivered on 9th October, 2013

in

ELDORET HCA NO. 107 OF 2010)

JUDGMENT OF THE COURT

1. This is a second appeal from the original judgment of **C. G. Mbogo**, C.M. in **C.M.C.C. No. 737 of 2004**. In the suit that was filed by the appellant, she stated that she entered into an agreement with a company known as Riva Flora Limited (*hereinafter "Riva"*) for supply of flowers between the months of June, 1999 and March, 2000.

2. Riva was a subsidiary of Rift Valley Bottlers Limited, the respondent. Riva was placed under receivership by ICDC Investment Company Limited, a debenture holder, who also appointed **Johnstone Walubengo** as the receiver/manager of Riva.

3. The appellant filed the suit against the receiver/manager and the respondent, jointly and severally, seeking to recover a sum of **Kshs.896,977.10** in respect of flowers supplied to Riva over the period stated above.

4. In their separate statements of defence, the two defendants denied the appellant's claim. They contended, *inter alia*, that there was no privity of contract between the appellant and the respondent; and that Riva was a separate and distinct legal entity from the respondent.

5. The trial magistrate entered judgment as prayed in favour of the appellant as against the receiver/manager and the respondent, jointly and severally. The respondent, being aggrieved by the said judgment, preferred an appeal to the High Court. Johnstone Walubengo had since ceased from being the receiver/manager of Riva, which was ultimately liquidated.

6. In the first appeal, the respondent argued, *inter alia*, that the trial court erred in law and in fact in failing to appreciate the fact that Riva, though a subsidiary of Rift Valley Bottlers Limited, the two companies were separate legal entities capable of suing and being sued in their own capacities.

7. The High Court (**Mshila, J.**) allowed the appeal and set aside the trial court's judgment. The learned judge held that the receiver/manager was a mere agent of the debenture holder and had no *locus standi* to be sued; that Riva had not been wound up and the appellant ought to have sued it; that there was no legal basis of suing the respondent as there was no privity of contract between the appellant and the respondent; that in the absence of fraud perpetrated by the respondent as the parent company, the respondent could not be held liable for the debts of its insolvent subsidiary since the two are separate and distinct legal entities.

8. That is the judgment that gave rise to this second appeal. Although the memorandum of appeal has four (4) grounds of appeal, **Mr. Mathai**, learned counsel for the appellant, argued only two grounds and abandoned the other two. He submitted that the learned judge erred in law and in fact in allowing the appeal on the basis of non-joinder and misjoinder of parties contrary to the provisions of **order 1 rule 9** of the **Civil Procedure Rules**; and secondly, in setting aside the entire judgment when no appeal was preferred by Johnstone Walubengo, the receiver/manager of Riva.

9. **Mr. Songok**, learned counsel for the respondent, opposed the appeal. He submitted that there was no privity of contract between the appellant and the respondent and therefore the learned judge made the right decision in dismissing the trial court's judgment.

10. We have considered the record of appeal as well as the brief submissions by counsel. In the appeal against the trial court's judgment, there were only two parties, Rift Valley Bottlers Limited, the appellant, and Hannah Maina, the respondent. The receiver/manager did not prefer any appeal. Rift Valley Bottlers Limited only prayed for the setting aside of the judgment against itself. The learned judge however set aside the trial court's judgment in its entirety, holding that there was non-joinder of Riva as a party and misjoinder of the respondent. While we believe that the learned judge arrived at a correct finding, we think that the issue of non-joinder of Riva as party to the proceedings was not raised at all.

11. **Order 1 rule 9** of the **Civil Procedure Rules** is emphatic that:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

12. As regards the issue of privity of contract, it is true the appellant had contracted with Riva and not the respondent. In the circumstances, the respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities. We are in agreement with the holding of the learned judge. The authority that she cited, **RE: SOUTHARD LIMITED [1979] 3 ALL ER 565** is quite apt:

“ ... a parent company may spawn a number of subsidiary companies, all directly or indirectly controlled by the shareholders of the parent company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.”

13. In view of the foregoing, we are persuaded that the learned judge ought to have set aside the trial court's judgment as against the respondent only, leaving the judgment against the receiver/manager to

stand, since there was no appeal against it, whether or not the appellant was capable of executing the decree, as against the receiver/manager. Consequently, this appeal is allowed to that extent only. Each party shall bear its own costs of the appeal as well as the appeal before the High Court.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

*I certify that this is
a true copy of the original.*

DEPUTY REGISTRAR.