



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A)

CIVIL APPEAL NO. 16 OF 2013

BETWEEN

KENYA WINE AGENCIES.....APPELLANT

VERSUS

1. TECHNOMATIC LIMITED

2. OCEAN FREIGHT (E.A. LIMITED).....RESPONDENTS

(An appeal against the Ruling of the High Court of Kenya at Mombasa (Ojwang J) dated 25th June, 2010

In

H.C.C. Suit No. 133 of 2009)

JUDGMENT OF THE COURT

[1] Litigation giving rise to the appeal before us, commenced with **High Court Civil Case No. 398 of 2005** which was filed at Nairobi Milimani Commercial Court by **Technomatic Limited** t/a **Promopack Company** (hereinafter referred to as the 1st respondent). The 1st respondent had sued **Kenya Wine Agencies Ltd** (hereinafter referred to as the appellant), seeking judgment as follows:

- a. Judgment to be entered against the appellant for Kshs.59,243,072.20/-
- b. A permanent injunction restraining the appellant from committing further breach of the contract between it and the 1st respondent entered into in February 2004.
- c. Damages for the breach of contract.
- d. A mandatory injunction compelling the appellant to perform its obligation under the contract entered into in February, 2004.
- e. Costs of this suit.

f. *Interests at Court rates*

[2] The appellant filed an amended defence and counter claim dated 25th October 2006, in which it admitted having entered into an agreement with the 1st respondent for supply and delivery of 3 million sleeved bottles, but denied that the agreed price was 90 million or that any storage and incidental charges were to be incurred. The appellant contended inter alia that the 1st respondent had unilaterally varied the contract and was attempting to unjustly enrich itself by defrauding the appellant. The appellant counter claimed a sum of Kshs.49,652,379.40/- being the amount to be incurred by it as a result of the 1st respondent's failure to supply the bottles as contracted. The appellant urged the Court to dismiss the 1st respondent's suit and enter judgment in the appellant's favour on the counter claim.

[3] While **High Court Civil Suit No. 398 of 2005** was still pending, ***Ocean Freight (E.A. Limited)*** (hereinafter referred to as the 2nd respondent) filed a suit at Mombasa High Court being **Civil Case NO. 133 of 2009** against the 1st respondent. As per the plaint dated 7th May 2009, the 2nd respondent sought judgment for return of 14 (fourteen) 20 (twenty) feet by 40 (forty) feet containers used to carry goods imported by the 1st respondent, and which the 1st respondent had failed to return. The 2nd respondent also sought judgment for \$ 537,694 (Kshs.41,026,052.20/-) being demurrage charges.

[4] The 1st respondent filed a defence to the 2nd respondent's claim in which it admitted having imported the goods but denied failing to return the containers and denied any contractual agreement to pay demurrage charges. The 1st respondent maintained that the 2nd respondent's suit was mischievous and filed contrary to **section 15** of the Civil Procedure Act as the cause of action did not arise in Mombasa.

[5] By a third party notice dated 7th July 2009, issued in Mombasa *High Court Civil Case No. 133 of 2009*, the 1st respondent sought to have the appellant joined in the suit as a third party contending that the demurrage charges arose from the contract entered into between the appellant and the 1st respondent for importation of bottles which were transported in the containers belonging to the appellant.

[6] The 1st respondent maintained that the failure by the appellant to honour its obligation under the contract, resulted in the bottles being stored in a warehouse pending the payment of the contractual sums including demurrage. The 1st respondent therefore sought indemnity, compensation or contribution from the appellant in regard to the 2nd respondent's claim.

[7] In response to the third party notice, the appellant filed a statement of defence in which it denied that it was liable to contribute, compensate or indemnify the 1st respondent against the 2nd respondent's claim. The appellant further averred that the 1st respondent having filed a suit against the appellant, i.e. *HCCC NO. 398 of 2005*, in which it was seeking amongst other things the payment of storage charges, it was improper, irregular, inequitable, and unjust for the 1st respondent to be allowed to maintain the third party proceedings as he was pursuing the same remedy in two Courts of concurrent jurisdiction.

[8] By a chamber summons dated 29th October 2009 brought in the suit in the High Court in Mombasa aforesaid, the appellant sought to have the third party notice issued by the 1st respondent struck out, or in the alternative the third party proceedings struck out. The application was heard by Ojwang J (*as he then was*). In his ruling, the judge rejected the appellant's prayers for striking out the 3rd party notice, but proceeded to order that the third party proceedings shall remain in abeyance pending the hearing and determination of Milimani Commercial Court *HCCC No. 398 of 2005*. The judge also ordered the appellant to bear the 1st respondent's costs in the application.

[9] Being aggrieved by that ruling, the appellant has filed a memorandum of appeal challenging the appeal on eight grounds. The grounds included the fact that having made a determination that the subject contract forming the dispute in *HCCC No. 133 of 2009* was already before the Court in *HCCC NO. 398 of 2005*, the judge erred in staying the suit instead of striking out the suit; that litigating the same matter already subject of another suit was contrary to the *sub judice* rule and against public policy, and that the

judge erred in ordering the appellant to bear the costs of the application when the appellant was partially successful.

[10] The appeal against the 2nd respondent was withdrawn just before the hearing of the appeal proceeded. **Mr. Simiyu** arguing the appeal on behalf of the appellant submitted that it was acknowledged by the counsel for the parties that the claim was basically the same in the two suits, one being a claim for demurrage charges and the other being a claim for storage charges. He maintained that the third party proceedings ought to have been struck out as the appellant was suffering prejudice having to face two claims and having to provide for it in its books of accounts as the claims remain pending.

[11] **Mr. Simiyu** relied on **Nishith Yogendara Patel vs. Pascale Mireille Baksh (nee-Patel) & Another [2009] eKLR** in which the Court of Appeal struck out a notice of motion, deprecating the attempt to pursue the same remedies in two applications filed in parallel Courts. As regards costs, Mr. Simiyu submitted that the appellant having succeeded albeit partially, the Court was not justified in penalizing the appellant to meet the costs of the 1st respondent. He therefore urged the Court to allow the appeal and strike out Mombasa *HCCC No. 133 of 2009*.

[12] **Mr. Njoroge** who was holding brief for the 1st respondent's counsel, submitted that the 1st respondent elected to take out third party proceedings against the appellant in *HCCC NO. 133 of 2009* as there was a contractual arrangement between the 1st respondent and the appellant, and that the judge having found that it was proper to have the appellant enjoined as a third party, the Court ought to have stayed the whole suit and not just the third party proceedings.

[13] Mr. Njoroge further submitted, that the only prejudice alleged by the appellant during the hearing of the application was the inconvenience of facing two suits. As regards the issue of costs, Mr. Njoroge argued that the appellant ought to have moved the Court on the issue during the third party directions, but instead chose to bring a substantive application. He noted that costs follow the event and are at the discretion of the Court.

[14] We have considered the appeal and the submissions which have been made before us. The appeal concerns a ruling made by the judge under **Order VI Rule 13(1) (b) (c) & (d)** of the Civil Procedure Rules and **section 3A** of the Civil Procedure Act. **Order VI Rule 13 (1)** of the Civil Procedure Rules states that:

“At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:

“(a)

(b).....

(c).....

[15] Thus, the power is a discretionary power that may be exercised by the Court under any of the circumstances provided under (a) to (d) of Rule 13 (1) of the order. In this case the grounds upon which the chamber summons was based, read together with the supporting affidavit which was sworn by **Doris N. Thangei**, basically alleged that the application for third party proceedings against the appellant were frivolous, vexatious and an abuse of the Court's process as the suit was filed in contravention of the *sub-judice* rule and secondly, the appellant was not privy to the contract and transactions between the 1st and 2nd respondent.

[16] In this regard, the learned judge had this to say:

“while taking note of the pendency of Milimani Commercial Court HCCC No. 398 of 2005, between the defendant and the applicant herein, this court perceives from the evidence that there exists a contractual arrangement between the defendant and the applicant and the

defendant apprehends failure to performs on that contract, on the part of the applicant herein as the reason for the suit (Mombasa HCCC NO. 133 of 2009) which the plaintiff has brought against the defendant. Even as another suit (Milimani Commercial Court HCCC No. 398 of 2005) pends, in which the defendant is the plaintiff and the applicant herein the defendant and part of the ground covered by that suit consists in the said contract between the applicant and the defendant in Mombasa HCCC No. 133 of 2009, the plaintiff in this suit is set to proceed with his claim. It is 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 in the plaintiff’s suit in Mombasa HCCC NO. 133 of 2009”

[17] It is trite law that a Court of Appeal will not disturb the exercise of discretion by a judge unless it is established that he has mis directed himself in some matter and has as a result arrived at a wrong decision or unless it is manifest from the case as a whole that he was clearly wrong in the exercise of his discretion and that as a result there has been injustice (see **Suter vs Kimala [2002] 2KLR 548**; **Maina vs. Mugiria[1983] EA 78**; and **Mbogo vs. Shah [1968] EA 93**

[18] The extract of the ruling that we have referred to clearly shows that the judge was alive to the issue before him and made an appropriate finding. Indeed, the judge appropriately directed himself as follows:

“ from the several authorities canvassed by counsel on both sides, it emerges, contrary to the applicant’s contentions, that joinder of third parties as may be prayed by the defendants, is not conceptually linked to contract, as such joinder may be sought in connection with different causes of action 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”.

[19] We find no reason to fault the judge for refusing to strike out the third party proceedings. It was evident that the 1st respondent’s claim against the appellant was intertwined with the disputes between the appellant and the 2nd respondent. The judge was dealing with the propriety of the third party proceedings and therefore, the judge could not stay the whole suit. Moreover, it is clear that no prejudice was caused to the appellant by the third party proceedings.

[20] As regards the issue of costs, the award of costs was within the discretion of the judge, and unless it is established that the discretion was not judicially exercised an appellate court cannot interfere with the exercise of that jurisdiction (see **Mariga vs. Musila [1984 KLR 253]**). In this case we find nothing suggesting that the judge did not exercise his discretion judicially in condemning the appellant to pay costs.

The upshot of the above is that we dismiss the appeal with costs.

Dated and delivered at Malindi this 20th day of March,2014

H.M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F.SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR