



**Gazebo Industries Ltd v Rift Valley (K) Ltd & 2 others (Civil Suit 271 of 2017)
[2024] KEHC 881 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 271 OF 2017
FG MUGAMBI, J
JANUARY 30, 2024**

BETWEEN

GAZEBO INDUSTRIES LTD PLAINTIFF

AND

RIFT VALLEY(K) LTD 1ST DEFENDANT

KENYA RAILWAYS CORPORATION 2ND DEFENDANT

EAST AFRICA RAIL & HANDLING LOGISTICS LTD 3RD DEFENDANT

RULING

1. For determination is the plaintiff's amended Notice of Motion application dated 4th February 2022 brought under article 159 of the *Constitution of Kenya*, sections 1A, 1B, 3, 3A and 38 of the *Civil Procedure Act*, section 3 of the *Judicature Act* and order 39 of the *Civil Procedure Rules 2010*.
2. The plaintiff seeks orders compelling the 3rd defendant to open its workshops and storage facilities for purposes of inspection of the goods attached by this Court's ruling of May 8, 2018, for the 3rd defendant to account for the whereabouts of the said goods and for the Managing Director of the 3rd defendant to be cross examined on the whereabouts of the goods.
3. The application further seeks a finding that the 3rd defendant has converted and used the said goods, that a warrant of arrest do issue against its Acting Managing Director, Phillip Mainga, and that he be cited for contempt of court and committed to jail. It further seeks an order of sequestration against his property and/or the property of the 3rd defendant. The application seeks that attachment be permitted against the 3rd defendant for enforcement of the value of the decretal sum.
4. The plaintiff's case is that pursuant to a preliminary decree issued against the 1st defendant on May 8, 2018, the plaintiff made numerous attempts at proclaiming the assets owned by the 1st defendant. The



particular assets in question were 50 traction motors armature with shafts and 12,000 sleepers supplied by the plaintiff to the 1st defendant which were at the time in the possession of the 3rd defendant.

5. The attempts proved futile as the 3rd defendant kept the goods out of the plaintiff's reach and instead continued to utilise some of the attached assets while transferring others from its workshops in Nairobi to undisclosed locations with the goal of frustrating the plaintiff's ability to execute the said court order. The plaintiff also takes issue with the 3rd defendant's Acting Managing Director for failing to give an account of the said goods.
6. The application was opposed. The 3rd defendant firstly denies the jurisdiction of this Court to order an attachment or execution pursuant to section 88 of the *Kenya Railways Corporation Act*. Secondly, it argued that the said orders should not be allowed since the 3rd defendant is neither a party nor a judgement debtor in this suit to warrant an application for attachment as sought.
7. The 3rd defendant described the application as an abuse of the court process. It notes that vide a consent order issued on July 10, 2019, there was already a joint inspection of all the specified workshops of the 3rd defendant to establish the whereabouts of the alleged goods as sought by the plaintiff. The plaintiff was able to locate some of the goods which were left in the said stores by the 1st defendant, although most of them had been utilised by the 1st defendant prior to the termination of the Concession Agreement on July 31, 2017.
8. The 3rd defendant argues that the prayer to have its Acting Managing Director, cited for contempt of court and committed to jail is incapable of being amended as the same had been considered and determined by the Court vide its ruling of April 26, 2021. The issue is not also pleaded in the subject proceedings and in any event such a determination will require a full hearing to have the same determined.
9. The 3rd defendant finally took issue with the disguised attempt by the plaintiff to release the defendant from its contractual obligations by purporting to have the Court hold the 3rd defendant responsible for a transaction it is a complete stranger to simply because the Corporation is a public body.

Analysis

10. I have carefully considered the pleadings, evidence and written submissions filed by the rival parties in this matter. The main issue for consideration is whether the prayers sought against the 3rd defendant can issue against it.
11. I note from the record that this dispute has always been between the plaintiff and the 1st defendant against whom the plaintiff obtained summary judgment. From what I see, an application filed by the plaintiff and dated September 19, 2017 to have the alleged 2nd and 3rd defendants enjoined to the suit was dismissed vide a ruling of this Court, (Nzioka, J), dated May 8, 2018. The Learned Judge pronounced herself as follows:

“In my considered opinion the parties required to be joined as parties herein are necessary but at the stage of execution. I say so because the final judgment has been entered in this matter under order 36 rule 1 of the *Civil Procedure Rules*, basically bringing the matter between the 1st defendant and the 3rd defendant to an end. Therefore, there are no pending issues for determination and the joining of these parties will serve no interest of justice.

Be that as it were, the plaintiff/applicant will suffer no prejudice if the joinder is denied, as they, can still pursue the 3rd parties to recover any assets held in trust or irregularly acquired.”



12. No subsequent decision has been placed before me in which the alleged 3rd defendant was subsequently enjoined to the proceedings. The continued reference is therefore, to say the least, inaccurate and misleading as there is no such party as the 2nd and 3rd defendant in this suit. Having so found, the question is whether the orders sought herein can be enforced against the so-called 3rd defendant, Kenya Railways Corporation (hereinafter the Corporation).
13. The Court of Appeal dealt with a similar situation in *Earnest Orwa Mwai v Abdul S. Hasbid & another*, [1995] eKLR and took the view that an order made in proceedings to which [the appellant] was not a party could not bind the appellant. The same position that parties not before the Court may not be bound by orders granted therein was also enunciated by another bench in *Town Council of Ol'kalou v Ng'ang'a General Store*, Civil Appeal No. 269 of 1997.
14. The justification for this is the cardinal rule anchored on the fundamental principle of natural justice that a party cannot be condemned unheard. In *Kiai Mbaki & 2 others v Gichuhi Macharia & another*, [2005] eKLR the court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”
15. It is not in contest that the Corporation is not a party to this suit. I find the prayers in the amended notice of motion to be mischievous and misleading noting that the discretion to order joinder of any party at any point in the proceedings under order 1 rule 10 is one reserved for the Court only. I have already stated that this Court earlier on declined such an application. It is not clear therefore under what heading the orders in the amended notice of motion are targeted at an alleged 3rd defendant who is nonexistent for all intents and purposes.
16. In any case, noting the directions of this Court on May 8, 2018, no steps have been taken by the applicant to have the Corporation enjoined if at all the applicant had the intention of pursuing it for the execution of its decree. It goes without saying that the main purpose why a party may be joined to a suit is to claim some relief from such a party. Since the alleged 3rd defendant was not the judgment debtor in the suit, I fail to understand the basis on which the application is made.
17. In *Musa Ogaro Osoro v Wakenya Pamoja Sacco Ltd & another*, [2016] eKLR, which the Corporation has referred to, this Court made the following observations:

“I note that the office of the EACC has been mentioned severally by the plaintiff and indeed the main gist of the plaintiff's instant application is to obtain orders of injunction restraining the said EACC from summoning, questioning, harassing or charging the plaintiff in court. It is however noteworthy that the said EACC is not a party to this suit thereby making the issuance of an order against such a party not only irregular and untenable but also an exercise in futility.”
18. Having so found, I do not think that I need to go into the merits of the application because in any case, to make any orders against a party who is not a party in the dispute before the Court would be against the rules of natural justice and equally an exercise in futility.

Determination

19. In conclusion, the only order that commends itself is that the application dated February 4, 2022 is dismissed with costs awarded to the Kenya Railways Corporation.



DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE

