REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 7 OF 2016

SHEIKH MOHAMED NUNOW.....APPELLANT

VERSUS

ALI IBRAHIM HASSAN.....RESPONDENT

JUDGEMENT

1. By a plaint lodged on 23/4/2015 the plaintiff Sheikh Mohamed Nunow/Appellant herein was seeking relief that the defendant/respondent be restrained from interfering with running of Masjid Nur *inter alia.*

2. Defence and counter-claim was filed in which the Respondent denied appellant claim and also sought relief that an injunction be issued restraining the appellant inter alia from interfering with the management and smooth running of Wajir Masjid Nur Mosque.

3. After a ruling on absence of authority to sue on behalf of the mosque members, the plaint was amended as directed by the court to rectify the situation vide amended plaint dated 13/9/2015.

4. The ruling of 19/8/2015 the court directed that the appellant to amend plaint on issue of authority which had to be included in the plaint to comply with Order 4 Rule 1 Civil Procedure Rules *inter alia*.

5. The suit proceeded into full hearing and the court made the verdict that the appellant's suit and claim was incompetent for want of the authority fron other mentioned interested persons but on counter-claim the court issued an injunction against appellant as prayed in despite the fact that there was no authority of other mentioned interested persons.

6. Being aggrieved by the aforesaid verdict the appellant lodged instant appeal and set out 9 grounds of appeal which can be compressed into 3 grounds namely:

1. Whether appellant suit was incompetent for want of authority?

2. If above is in negative ,what is the appropriet order in the circumstances of the instant dispute?

3. Whether counter-claim had merit?

4. What is the order as to costs?

7. The court directed that submissions be filed to canvass the appeal and on record the court found same and presumed that the parties had exchanged the same .

APPELLANT SUBMISSION

8. The Appellant contends that the learned principle Magistrate misdirected himself as to the interpretation of Order 4 rule 1 of the Civil procedure Rules. It is his submission, that the matter of authority to sue on the part of the plaintiff has been determined in a ruling by Hon. Rogoncho, RM dated 19th August, 2015.

9. Based on the ruling by Hon. Rogoncho, Resident Magistrate, the Appellant proceeded to file an amended plaint and annexed the names and signatures of the members of the committee that he was suing on behalf.

10. The Respondent did not contest the nature of the amended plaint nor did he raise any objection as to its validity. It is surprising therefore, that the learned magistrate sought to premise his judgement on an already determined issue. The said ruling was not challenged through a review or appeal, and therefore, stands uncontested.

11. The court cannot avoid determining substansive merits of a case in favor of procedural technicalities. Article 159 (2) (d) of the constitution of Kenya, 2010 provides that **'justice shall be administered without undue regard to procedural technicalities.'**

12. Even if the Amended plaint would have been defective, the Defendant did not demonstrate any prejudice they would suffer if the same was admitted as a proper pleading in court. In **First National Finance Bank Limited v Universal Apparels (EPZ) Ltd & 2 others [2017] eKLR, Ochieng J,** held that article 159 (2) (d) should be construed as a shield, not a sword. It should be construed to protect a substansive suit to be heard on its merits, not to be struck out.

13. The trial magistrate failed to be guided by the ruling dated **19th August 2015** allowing the Appellant to amend the pleadings and include the authority to sue as is done in the amended plaint. Pursuant to said ruling, the Appellant and the Respondent filed and served their amended plaint and defence respectively.

14. Notably, the issue of the competence of the pleadings did not arise at any stage during trial after the parties filed and served their amended plaint and Defense counter-claim.That the trial court had discretion and jurisdiction not to strike out a plaint where the verifying affidavit was sworn without the authority of other plaintiffs.

15. In lieu it could allow the parties to remedy the situation by complying with the rules of procedure which was done in compliance to the ruling by Hon. Rogoncho, Resident Magistrate.

16. See in the case of **Research International East Africa Ltd v Julius Arisi & 213 Others [2007] eKLR, C.A At Nairobi Civil Appeal No. 321 of 2003** the Court of Appeal.

17. The ruling by Hon. Rogoncho provided directions as to the remedies available without the authority to sue by the plaintiff by delivering a ruling dated 19th August 2015, which directed the parties to amend their pleadings.

18. Consequently,the plaintiff amended the plaint and and attached a written authority to sue in compliance with Order 4 rule 1. Therefore, the premise of the judgement on the technical ground that the plaint was defective is a misapplication of the law by the learned trial magistrate.

19. The Honourable magistrate as he then was became a court of appeal by revisiting and making a decision on an issue that had already been canvassed by the litigants.The learned magistrate ought not to have dismissed the whole suit since the case by the plaintiff suing on his behalf could still stand against the defendant even without the other plaintiffs.

20. See **Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others [2016] eKLR** where the court held that;**'**

> **"In view of the foregoing and with regard to the competence of this suit and to the instant application, it is my view that even if the 2nd and 10th plaintiff's suit was declared a non-starter for failure to authorize the 1st plaintiff to swear respective affidavits on their behalf, the 1st plaintiff's claim against the defendants shall still stand."**

21. It is submitted that this Honorable Court to hold that the determination that the plaint filed by the Appellant was incompetent by Hon. Cherono was misconceived in law and ought to be overturned by this court.

RESPONDENT'S SUBMIMSSIONS:

22. The respondent submits on grounds 1, 5 and 7 that they are all based on the interpretation and import of Order 4 rule (1) sub rule 3 which provides;

> **"Where there are several plaintiffs one of them with written authority filed with a verifying affidavit on behalf of the others...."**

23. This issue was indeed dealt with at a preliminary stage. The court using its discretion ordered the appellant to comply with the mandatory requirements of Order 4 rule 1 sub rule 3. The appellant never complied. Page 141 of the record of appeal.

24. The court directed:

> **7) "Pursuant to section 100 of the Civil Procedure Act, I hereby grant the plaintiff/respondent time to amend the plaint on the issue of the authority by the alleged co-plaintiffs. The same to be filed and served within 15 days from today."**

25. The appellant chose not to comply despite the magnanimity of the court. The requirement under Order 4 (1) (3) is mandatory, the court could have proceeded and dismissed the suit as being incompetent but gave a window for amendment which the appellant declined to use.

26. The court should not allow the appellant to have a second bite of the cherry. In any case it is a bit too late. The appellant declined to comply with requirements of the law and directions of the court. It must be therefore be ready to suffer the consequences.

27. He urges the court to find that the court did not error. On the grounds: 2, 3, 4 and 8; the trial court did not error in law and fact as it is only the respondent who tendered evidence proving that he was elected and registered by SUPKEM and even the local community.

28. The elections were done in open and well documented. The appellant did not produce any evidence, documentary or otherwise to prove he was elected as a leader of the Majid Nur Committee. The SUPKEM and Council of Imam and preachers do not recognise him as having any role in the leadership of the Masjid.

29. The testimony of the appellant is disjointed, unfounded and without any basis. The lower court did not have otherwise other than holding the respondent was the bona fide Chairman of Masjid Nur.The running of the affairs of religious organizations is best left to the organizations unless there is a clear breach of the said organizations constitution.

30. Nothing was demonstrated by the appellant to show that there was a breach of any constitution. See **(Tanui and 4 Others vs Birech and 11 Others [1991] KLR 510).**

31. On ground 6 and 9, the respondent's submission is that the learned magistrate did evaluate the evidence and found for the respondent. In page 198 of the record of appeal, line 11, the learned magistrate stated, ***"from the evaluation of the evidence adduced by both plaintiff and the defendant"*** and pages 190 to 197 the learned magistrate went through all the testimonies of the witnesses and finalised by evaluating the same.

32. The decision was therefore based on the courts evaluation of all testimonies and evidence presented to court.

Cross Appeal:

33. On cross-appeal,it is the submission of the respondent that the trial court erred in law and fact by failing to award costs for the counter appeal despite finding the counter-claim.

34. Costs follow the event; the event in this case was the counter-claim. Unless there are good reasons, which must be stated, the winner must be awarded cost. In this regards, the respondent was declared winner in the counter-claim and it was expected that the costs would be awarded to him. It was not.

ANALYSIS AND DETERMINATION:

35. The duty of the court in a first appeal such as this one was stated in **Selle & another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** in the following terms:

> **"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

36. This same position had been taken by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484.**
>
> **'My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.'"**

37. The appropriate standard of review established in these cases can be stated in three complementary principles:

(a). First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

(b). In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

(c). It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

38. After analysing evidence the trial court concluded that –

"In the amended plaint dated 3rd September 2015, the plaintiff in the heading has stated that he is suing on his own behalf and on behalf of the members of the Masjid Nur Mosque. As a representative suit, it was incumbent upon the plaintiff to list the members of whose behalf he is instituting this suit. In paragraph 3 thereof the plaintiff has given the names of fifteen (15) members elected as officials of Masjid Nur Mosque. Those fifteen 15 members ought to have been listed in the heading of the suit as representing Masjid Nur Mosque. The fifteen members should also have appended their signatures in a pater which should be filed together as part of the pleadings as a proof of such authority to the filing of this suit. That is a requirement under Order 4 rule 1 sub-rule 3 which reads as follows;-

> **".....where there are several plaintiffs one of them with written authority filed with a verifying affidavit on behalf of the others....."**

In Kenya Agricultural Research Institute (K.A.R.I.) vs Farah Ali, Chairman Ishahakia Self Help Group and Another (2011) eKLR Wendo J (as she then was) held thus:

> **"In my view, the plaintiff has to demonstrate that this suit is properly filed and not just brought by a busy body or an officer who has no authority. Such authority should be exhibited....."**

Failure to annex a list of names of officials and their signatures duly filed with the verifying affidavit is a serious mistake that goes into the very substance of this suit. Such a mistake in my view is not of a technical nature that can be cured by the provisions of Article 15a of the Constitution of Kenya 2010. A suit that is filed without authority becomes incompetent and ought to be struck out. I have also noted that the subject of this suit is a mosque which is a religious organization and that where there are internal issues of management arising in such an organization, the principal overtime has been that the courts are reluctant to interfere with such internal management issues unless the Constitution of such association is such that there has been a clear contravention of rules of natural justice.

In Tanui and 4 Others vs Birech & 11 Others (1991) KLR at page 510, the Court of Appeal stated as follows;

> **"While it is not the business of the high court or the court of appeal to involve itself in the day to day running of institutions such as the church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the high court and the court of appeal would not only be entitled to but is under a duty to compel it, either,** by injunction or otherwise, to obey its constitution...."

The defendant and his witnesses have produced exhibits showing that he registered Masjid Nur as an Association under the Societies Act. The certificate of registration No. SOC/65587 dated 13/11/2013 was produced as an exhibit in this case. The defendant also produced minutes of a meeting held on 18/10/2011 in which he was elected as chairman of the Masjid Nur Committee. The other members of the committee elected included Musa Dima as the vice chairman, Ahmed Abdi Sabdow secretary, Majid Hassan Salim treasurer, Mohamed Abulla Awad vice treasurer, Bare Mohamed Mumin member, Jimale Issack member, Ali Abdi Ali member, Yasin Arte member, Maalim Mohmed Noor Jimale member and Jelle Hassan member. The plaintiff did not produce any such minutes showing that he was elected together with his group. The defendant has stated that they are signatories to the bank accounts of Masjid Nur Mosque.From evaluation of the evidence adduced by both the plaintiff and the defendant, it is clear in my mind that the plaintiff's suit and claim is incompetent for want of authority."

39. It is apparent that the trial court dismissed the suit on technicalities on the basis of the absence of the authority given by the other persons on whose behalf the suit was also instituted.The court was of the view that such omission could not be cured by the provisions of Article 159 (2) (d) of the constitution of Kenya, 2010 which provides that 'justice shall be administered without undue regard to procedural technicalities.'

40. In the case of **Hezekia Kipkorir Maritim & 10 Others v Philip Kipkoech Tenai & 2 others [2016] eKLR** the court held that;'

"In view of the foregoing and with regard to the competence of this suit and to the instant application, it is my view that even if the 2nd and 10th plaintiff's suit was declared a non-starter for failure to authorize the 1st plaintiff to swear respective affidavits on their behalf, the 1st plaintiff's claim against the defendants shall still stand."

41. The claim before the court was for the appellant and also for other persons interested and thus the appellant could have prosecuted his case even without enjoining other persons or without claiming on their behalf just like the counter-claim was entertained without enjoining other persons purportedly elected together with the respondent.

42. The other option was to go by the holding in the case of **Research International East Africa Ltd v Julius Arisi & 213 Others [2007] eKLR,**

> **"In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, ……. and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing. Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules. The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule.This Court has jurisdiction to make any order that the superior court could have made. We have considered whether the 213 respondents should be given another opportunity to comply with the rule."**

43. The court trial court having found a short cut of disposing the matter herein, it did not do its statutory duty of evaluating the evidence as it had already determined that the suit was incompetent.This court does not intend to determine the matter on merit but to give parties an opportunity to ventility the dispute before another magistrate and if they are mindful go for mediation or arbitration.

44. Thus the court finds merit in the instant appeal as supported by Article 159 (2) (d) of the constitution of Kenya, 2010 which provides that 'justice shall be administered without undue regard to procedural technicalities.'

45. Thus the court makes the following orders;

i. The appeal is allowed to the extent that the trial court orders on claim and counter-claim are set aside and matter referred back to the magistrate court in Wajir to be heard denovo.

ii. The appellant will have 30 days to amend plaint and lodge it attached with authority signed by other persons mentioned as committee members allegedly elected together with him or opt to proceed on his own behalf only.

iii. The respondent will have 14 days to file any amendment he deems fit after service with amended plaint f any.

iv. The appellant deficiency in pleadings attracks penalty on costs of ksh 20,000 to be paid to the respondents in any event.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF APRIL, 2020.

……..…

C. KARIUKI

JUDGE