REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 289 OF 2019

THE ANTI-COUNTERFEIT AGENCY.....APPELLANT

VERSUS

PETER MUGUCIA.....1ST RESPONDENT

ROSE THAARA NJUE.....2ND RESPONDENT

JUDGMENT

The Respondents herein are the Plaintiffs in Civil Suit Number 45 of 2019 which they commenced vide a Plaint dated the 27th December, 2018, in which they have sued the Appellant herein claiming Kshs. 18,571,400/= plus costs of the suit and interest on the claimed sum at court rate.

In the Plaint, the Respondents claim that, on or about the 20th March, 2018, the agents of the Appellant in the company of unknown Caucasian man and three uniformed and armed policemen arrived at the Respondents 'shop and seized assorted Computer stationery products of different brands. That in the afternoon of the same day, the same officers proceeded to the Respondents' home and seized more computer stationery which they carried away together with other items that they found in the premises which items are described in the inventory filed in the Respondents' list of documents.

The Respondents averred that the said seizure of their goods was illegal and a breach of their Constitutional right to fair administrative action. They contended that the seizure of their stock has resulted in them suffering great financial loss in the sum of Kshs. 18, 571,400/= being the value of the goods, which sum they have claimed from the Appellant.

The Appellant filed its statement of defence and Counter- Claim, on the 12th February, 2019 in which it denied the Respondents' claim. In its counter- claim, it averred that it communicated to the Respondents regarding formal release of the seized goods but the Respondents' have failed to attend the agency for formal release of the said goods which have continued to incur storage fees at Kshs. 10,000/= per day from 27th June, 2018 to date, which the Appellant has claimed from the Respondents.

In the alternative and without prejudice to the foregoing, the Appellant invites the Court to make a determination that the seized goods are counterfeits in accordance with Section 25(3) of the Anti- Counterfeit Act and issue an order of forfeiture of the seized goods to the state for destruction.

A reply to the defence and defence to the Counter Claim was filed on the 26th February,2019.

On the 3rd April, 2019, Counsel for the Appellant filed an application dated the 2nd day of April, 2019 to strike out the Plaint on the grounds that it discloses no cause of action and that the same is scandalous, frivolous and vexatious and that it may prejudice, embarrass or delay the fair trial of the action.

The Appellant filed yet another application dated the 2nd April, 2019, on the 3rd April, 2019 seeking to enjoin Hewlett-Packard Development Company, L.P, Canon Kabushiki Kaisha, Kyocera Corporation, Seiko Epson Kabushiki Kaisha and Halliday Finch Limited as parties to the suit.

On the 11th April, 2019, the firm of Ojiambo and Company advocates, filed a similar application dated 10th April, 2019 to have the same parties named in the Appellant's application dated the 2nd April, 2019 and filed on 3rd April, 2019 enjoined in the suit.

The record shows that the Application dated the 10th April, 2019 came up for interpartes hearing on the 17th April, 2019 when Counsel for the Respondents indicated to the trial court his intention to challenge the said application. Still on the same date, Mr. Odera advocate for the

appellant informed the court that he had filed a similar application dated the 2nd April, 2019 and he requested that the two applications be heard together.

The matter was next listed on the 9th May, 2019 and on the said date, Counsel for the Respondents herein raised an objection to the effect that he had not be served with a notice of appointment of advocates by Counsel for the applicants in the application dated the 10th April, 2019.

In his response, Mr Makambo advocate submitted that he was properly on record as the proposed 2nd,5th defendants are not parties to the suit and hence, under order 9 Rule 7, he was not required to file a notice of appointment of advocates. In support of that contention he relied on the case of ***Kazungu Ngawa Vs. Mistri Naran*** and argued that it is only after the order is granted that he can file a notice of appointment of advocates.

Mr. Odera counsel for the Appellant herein, associated himself with the submissions made by Mr. Makambo advocate on the provisions of Order 1 Rule, 10 (4) of the Civil Procedure Rules and argued that it is only after a party has been added to the suit and has been served with the summons that can then enter appearance in the suit and file a defence. He submitted that Order 9 Rule 7 only applies to the existing defendants and that it is not in all cases that Counsel should enter appearance for instance in a case where a party is filing suit. He urged the Court to treat this as one of such cases. He also urged the Court to treat this as a technicality that can be cured as no prejudice will be occasioned to the Respondents as there is a similar application dated the 2nd April, 2019.

In his rejoinder, Mr. Goa submitted that a notice of appointment is critical as it shows that a party has been instructed. He argued that the applicants are based in the United States of America and Japan and Counsel can be held liable if he does not have instructions. He concluded by submitting that Order 1 Rule 10 (4) is not applicable.

Upon hearing the parties on the objection, the learned Magistrate delivered his Ruling, on the 9th May, 2019 in which he held that the intended 2nd to 5th defendants are not properly before the Court and as such their application is incompetent and he proceeded to dismiss the same.

Being aggrieved by the decision of the trial Court, the defendant filed the Appeal herein and has listed five (5) grounds of Appeal in the Memorandum of Appeal dated the 30th May, 2019. In my considered view, the said grounds can be collapsed into three (3) grounds as follows;

1) The Learned Magistrate erred in law and in fact when he pronounced himself on the issue of addition of parties when that was not the issue before him.

> ***2) The Learned Magistrate erred in law and in fact in failing to find and hold that a Notice of appointment is not a prerequisite for a party seeking to be enjoined in a suit and thereby arrived at an erroneous decision dismissing the application for addition of parties.***
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> ***3) The Learned Magistrate erred in law and in fact in failing to apply the rules of natural justice requiring that parties be heard before a determination is made when he pronounced himself on the joinder applications which had not been urged before him.***

The appeal was canvassed by way of written submissions. The Appellant filed its submissions on the 20th January, 2020 but the Respondents did not file any submissions.

The court has considered the proceedings before the trial court, grounds of Appeal and the submissions filed by the Appellant herein. In its submissions, the Appellant has submitted that in delivering its ruling, the Learned Magistrate went beyond the purview of the objection raised and made pronouncements that touched on the merits of the pending applications for joinder. In this regard, Counsel for the Appellant cited the case of ***Dakianga Distributors Vs Kenya Seed Company (2015) Eklr*** wherein the court adopted with approval the sentiments of the ***Supreme Court of Malawi Railways Limited Vs. Nyasulu MWSC 3*** to the effect that;

> ***"It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings".***

Which position was also restated by the court in the case of ***Independent Electoral and Boundaries Commission & another Vs. Stephen Mutinda Mule & others (2014) Eklr.***

Further and without prejudice to the foregoing submissions, Counsel for the Appellant contended that the Learned Magistrate applied the wrong principles on addition of parties thereby arriving at a defective decision. He submitted that Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon an application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit, to be added as a party. He relied on the case of ***JMK V MWM & another (2015) Eklr.***

As regards the factors that the Court should consider in determining whether or not to allow an application for joinder of parties, the Appellant cited the case of ***Lucy Nungari Ngigi & 128 others vs. National Bank of Kenya Limited & another (2015)*** and submitted that if the issue of joinder was properly before the court, the learned Magistrate ought to have addressed himself to those principles.

The Appellant contended that in failing to find and hold that a Notice of appointment is not a prerequisite for a party seeking to be enjoined

is a suit, the Learned Magistrate erred in law and in fact thereby arriving at an erroneous decision dismissing the application for addition of parties. He argued that Order 9 Rule 1 of the Civil Procedure Rules is not applicable in the case before the trial Court in that the intended applicants did not participate in the proceedings nor did they get sued or defend themselves in person, and hence making the said provision disjunctive and consequently inapplicable in relation to the matter before the trial court. Counsel cited the case of ***Iway Africa Limited Vs Infonet Africa Limited & another (2019) Eklr*** in which the court extensively considered the instances when the filing of a Notice of appointment of advocates are mandatory and submitted that the trial court erred in holding that Memorandum of appearance is a legal requirement whose absence rendered the application filed by the firm of Ojiambo & Company incompetent and liable to be struck out. This, he submitted, would amount to giving due regard to technicalities of procedure contrary to Article 159 (2) (d) of the Constitution and would defeat the overriding objectives as set out in Sections 1A of the Civil Procedure Act.

Finally, Counsel for the Appellant contended that the Learned Magistrate failed to apply the rules of natural justice that requires that parties be heard before a determination is made and cited Article 50 of the Constitution in that regard. The cases of ***JMK Vs MWM (supra)*** and that of ***Pinnacle Projects Limited Vs Presbyterian Church of East Africa, Ngong Parish & another (2019) Eklr*** were relied on. He urged the court to allow the appeal.

As earlier stated, the Respondents did not file any submissions in the Appeal.

The Court has considered the grounds of the Appeal and the submissions filed by the Appellant. I now proceed to consider the grounds of Appeal as set out hereinabove and I propose to consider them simultaneously.

Being guided by the record of the proceedings, this court is able to confirm that on the 9th May, 2019, Counsel for the Respondents sought directions from the Court regarding the joinder applications filed by the Appellant and the firm of Ojiambo & Company Advocates and indicated that he was yet to be served with the latter's Notice of Appointment. Following the said objection, counsels made submissions on the same, which submissions I have highlighted elsewhere in this judgment. In their respective submissions, Counsels restricted themselves to the issue of Notice of appointment of advocates and not the substantive applications for joinder that were pending before the trial Court and the record can confirm that fact.

In the Civil Procedure Act, the requirement for filing of Notice of appointment of Advocates is provided for under Order 9 Rule 7 of the Civil Procedure Rules which provides as follows;

> ***"Where a party, after having sued or the defendant in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications".***

In his ruling and on this issue, the Learned Magistrate stated that Memorandum of appearance is a legal document provided for in law that has a place in the Civil proceedings and it is not a mere technicality as it gives vital information such as the physical address of the Counsel appearing in the matter. He also stated that the same document signifies that counsel has authority to act on behalf of a party and is therefore fully instructed in the matter.

In the case of ***Iway Africa Limited(Supra),*** the court had this to say regarding instances when filing of a Notice of appointment are mandatory;

> ***"……From the reading of order 9 Rule 1 of the Civil Procedure Rules, and my understanding of the said provision, there is nothing that requires a formal Notice of Appointment of an advocate. The above Order 9 Rule 7 is clear that it is only in a situation where a party after suing or defending a suit in person, appoints an Advocate to act in the case or matter on his behalf, he or she shall give notice of appointment of an Advocate or notice of change as the case may be. This is because there are situations in which Notice of Appointment of an Advocate is not necessary or required such as where an Advocate files a Plaint for the Plaintiff; Petition; Originating summons; or filing Memorandum of appearance or defence. In view of this, I find Order 9 Rule 1 of the Civil Procedure Rules having no express provision or having no specific provision requiring a filing of a document entitled "Notice of appointment of an Advocate" there is no basis for requiring a party, such as the garnishee in the instant case, to file a document that is mandatorily required to be filed before taking part in the filed proceedings'***
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> ***The most important consideration to be had in a matter is for a party to be given its description and provide full details of address for ease of service; and once that is done and it is clear where to serve the party and who is representing the party, a Notice of Appointment of Advocates which would give the same information would add no value to the matter nor change anything as far as the representation of the party and address of the same is concerned"***.

In the matter herein, the applicants are not yet parties to the suit. The applications sought to have them enjoined as parties to the suit. Order 9 Rule 7 applies in a case where a party having sued or defended in person, appoints an advocate to act in the cause or the matter on his behalf. In that regard, therefore, I fully associate myself with the position taken by the Court in the case of ***Iway (Supra)*** and hold that Notice of Appointment of Advocates was not necessary at that stage but latter in the proceedings after the successful joinder of the applicants. It is only at that point that they effectively become parties to the suit and not before.

The other two grounds of Appeal are related. On the first ground of appeal, the record is very clear on what was before the Court on the 9th May, 2019. It shows that what was argued was the objection by the counsel for the Respondents herein and the same touched and concerned Notice of Appointment of Advocates by the counsel of intended applicants. I can confirm from the record that the Counsels did not argue any of the substantive applications dated the 2nd April, 2019 or the 10th April, 2019.

In his ruling, the learned Magistrate went beyond the objection and pronounced himself on the issue of addition of parties when the issue was

not before him for determination. In the case of ***Dakianga Distributors (supra)*** wherein the court adopted with approval the case of Malawi Railways Limited (supra), the court held;

> ***"It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice".***

The same principle was also enunciated in the case of Independent Electoral & Boundaries Commission (supra) wherein the court held;

> ***"…… The learned Judge, no matter how well intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before it. To that extent, she committed a reversible error, and the appeal succeeds on that score"*** (Emphasis added).

I concur with the submissions by the counsel for the Appellant that by making the pronouncements on the merits of the application as he did, the Learned Magistrate denied the applicants an opportunity to be heard which is against the rules of natural justice requiring the parties to be heard before a determination is made. The same is also contrary to Article 50 of the Constitution which provides as follows;

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".***

The Courts of justice have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. See the case of ***JMK Vs MWM (Supra).***

In view of the foregoing, I find and hold that the Appeal herein has merits and the same is allowed. The ruling and /or orders of the Hon Magistrate in the ruling delivered on the 9th May, 2019 are set aside. The applications dated 2nd April, 2019 and 10th April. be heard by a different Magistrate.

The Appellant is awarded the Costs of the Appeal.

Dated, delivered and signed this 23rd day of July, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondents