



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.3 OF 2018

GULSAN INSAAT S.T.N.V.T.A.S.....APPELLANT

VERSUS

NASIBO DOYO DUBA.....1ST RESPONDENT

ROBA JILLO FALANA.....2ND RESPONDENT

RULING

The respondents filed civil suit number 20 of 2016 in their capacity as the legal representatives of the estate of Abdi Roba Jillo. The suit was filed against GULSAN CONSTRUCTION COMPANY LIMITED. A defence was duly filed before the trial Court indicating the name of the defendant as Gulsan Construction Company. The word limited was omitted. After the conclusion of the suit, this appeal was filed by Gulsan INSTAAT S.T.N.V.T.A.S. The respondent filed a notice of preliminary objection based on the following two grounds:-

1. That the Appeal filed herein is incompetent for having been filed by a stranger to the original suit.

2. That the Appeal has been filed by GULSAN INSAAT SAYAYITURZIM NAKLIYAT VETICARET ANONIM SIRKETI CO. LTD whereas the Defendant in the Lower Court was GULSAN CONSTRUCTION COMPANY LTD.

Mr. Orayo Counsel for the respondent submit that the appeal has been filed by a stranger and should be struck out. The appellant was not a party to the original suit. If Gulsan Construction Company Limited was not the correct party, they would have indicated it in the defense. The appellant should not be accorded audience in the appeal.

Mr. Kiogora, Counsel for the appellant, opposed the preliminary objection. Counsel maintain that the appellant's name is Turkish. No prejudice has been shown by the respondents. The two names are used interchangeably. The appellant was ordered to deposit Kenya shillings three million by the court and that order was complied with. Even the respondent made reference to the name of the appellant in its documents. It is the respondent who introduced the name of the appellant.

The Preliminary objection raises the issue as to whether the appeal should be struck out for having been filed by a stranger who was not a party before the trial court. I have noted that apart from the name Gulsan Insaat S.T.N.V.T. A.S a notice of motion dated 18.04.2018 was filed in the name of JIANGI ZHONGMEI ENGINEERING CONSTRUCTION COMPANY LIMITED. The respondent filed their written submissions before the trial court and indicated the defendant's name as JIANXI ZHONGMEI ENGINEERING CONSTRUCTION COMPANY LTD. The submissions refer to that company as the defendant.

The entire record of appeal does not show how the names of Gulsan Construction Company Ltd., Gulsan construction company, Gulsan Insaat S.T.N.V.T.A.S or Zhongmel Engineering construction Company Ltd came about. There is no official search from the registrar of companies showing who the proper defendant or appellant ought to be. The respondents may even have problems if it is discovered that there is no company by the name Gulsan Construction Company Ltd as no official search was conducted before the suit was filed. The defence admitted the description of the parties as stated in the plaint. This does not give the respondents any comfort or proof that the defendant company does exist. It is the respondents in their written submissions who also introduced the name Jiangxi Engineering Construction Company Ltd. Where did the respondents get the name from. This is a fatal industrial accident claim. There are no documents like employment agreement between the deceased and a specific company.

Order 1 rule 9 states as follows:-

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.

Section 2 of the Civil procedure Act defines a “suit” as “**all Civil proceedings commenced in any manner prescribed**.” In my view, the provisions of order 1 rule 9 can be extended to appeals. No appeal should be defeated simply because the appellant’s name has been wrongly stated or because there is misjoinder or non-joinder of the parties. This is not a situation where a party who has nothing to do with the dispute has decided to file an appeal. In view of the fact that it is the parties themselves who have been giving different description of the defendant, I do find that it is in the interest of justice that the appeal should not be struck out. What is being raised by the preliminary objection will not resolve the dispute. The defendant can come back to court and seek extension of time to file an appeal in the manner described in the plaint should this appeal be struck out.

Order 1B of the Civil Procedure Rules provides for timeous disposal of proceedings. The issue being raised by the respondents is curable through amendment of the memorandum of appeal as provided under order 42. This court has not given directions on how the appeal will be determined. An amendment to the memorandum of appeal shall not prejudice the respondents. The respondents can also be faulted for having introduced a name which is different from the one stated in the plaint.

In the end, I do find that the preliminary objection lacks merit and is hereby dismissed. I do further order that the appellant do file an amended record of appeal and memorandum of appeal and indicate the name of the appellant as GULSAN CONSTRUCTION COMPANY LIMITED instead of GULSAN INSAAT S.T.N.V.T.A.S within 14 days hereof. Costs of the Preliminary Objection shall follow the outcome of the appeal.

Dated, Signed and Delivered at Marsabit this 21st day of January, 2019

S. CHITEMBWE

JUDGE