



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CIVIL APPEAL NO. 179 OF 2006**

**BETWEEN**

**CHARLES WANYAMA OKUYUMBA .....1<sup>st</sup> APPELLANT**

**ABSOLOM SITATI .....2<sup>nd</sup> APPELLANT**

**HENDRICKSIKUKU.....3<sup>rd</sup> APPELLANT**

**JOHN OKELLO ..... 4<sup>th</sup> APPELLANT**

**AND**

**M/S PAN AFRICA PAPER MILLS E. A. LTD .....RESPONDENT**

***(Appeal from a Ruling of the High Court of Kenya at***

***Kakamega (G. B. M. Kariuki, J) dated 24<sup>th</sup> June 2005***

**in**

**KAKAMEGA HCCC No. 50 OF 2004)**

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**JUDGEMENT OF THE COURT**

This appeal arises from a Ruling of the High Court of Kenya at Kakamega (G. B. M. Kariuki, J) (as he then was) given on 24<sup>th</sup> June, 2005 in Kakamega HCCC No. 50 of 2004. The appellant did not avail to us all the pleadings. It is therefore not clear why as appears from the material before us the appellants were allowed to maintain 2 suits against the respondent apparently on the same cause of action. We say this because it would appear that the original suit was Eldoret HCCC NO. 342 of 1997 where the parties were the first to fourth appellants against the respondent. On 30<sup>th</sup> July, 2002 Etyang, J (as he then was) ordered, upon application, that the suit be transferred to the High Court of Kenya, Bungoma, for hearing and disposal. The matter became Bungoma HCCC No. 103 of 2002.

Yet in the Ruling appealed from the following statement is made by the learned judge:

**“...This suit was transferred from the High Court in Eldoret to this court by an order dated 30.7.2002 by the Honourable Mr. Justice A. G. A. Etyang.**

**It was given a new suit No. Kakamega H.C.C.C. No 50 of 2004 in place of the previous No. Eldoret High Court Civil No. 342 of 1997.....”**

The application that led to the Ruling appealed from was filed on 11<sup>th</sup> February, 2004 in Bungoma HCCC No. 103 of 2002. But the Ruling is found in Kakamega HCCC No. 50 of 2004. It is not clear how the case numbers were being dealt with.

The appeal does not however stand or fall on the apparent confusion in the case numbers.

Eldoret HCCC No. 342 of 1997 came on 9<sup>th</sup> August, 1999 before A. Visram, Commissioner of Assize (as he then was) when a preliminary objection was taken by the defendant who argued that the suit was incompetent because it purported to be a representative suit but no leave had been sought or obtained to institute a representative suit. The objection was vigorously opposed by counsel for the plaintiffs. In a considered Ruling delivered on 10<sup>th</sup> November, 1999 the said Commissioner of Assize dismissed from the suit unnamed 287 employees but ordered that the suit by the four plaintiffs proceed to hearing. This Ruling was not appealed.

By Chamber Summons filed on 11<sup>th</sup> February, 2004 in Bungoma HCCC NO. 103 of 2002 the plaintiffs prayed inter alia for leave to be granted to allow the plaintiffs to pursue proceedings on behalf of themselves and 287 others named in the body of the Plaint in Eldoret HCCC No. 342 of 1997. G. B. M. Kariuki, J (as he then was) heard the application and in a considered Ruling dismissed the same as being without merit and being an abuse of the process of the court. This Ruling provoked this appeal.

In the Memorandum of Appeal filed in this Court the appellants Charles Wamalwa, Absolom Sitati, John Okello and Hendrick Sikuku have taken 14 grounds of appeal which are difficult to compress and which we must thus set out in full as filed: These were:

**“1.That the entire ruling is contrary to the law and based on erroneous analogies to the proceeding as relayed from Eldoret High Court, to Bungoma High Court and then to Kakamega High Court.**

**2.That the judge's ruling is too involved with procedural law and issues at the expense of any relevance to labour Law and Employment Law related application.**

**3.That the learned judge was too embroiled in personalized attacks against counsel for the applicants to have – in the process failed to see and appreciate legal merits of the applications besides the Civil Procedural concerns – over highlighted in the ruling.**

**4.That the learned judge erred in law- to stipulate that the application to join parties to any proceeding – already in place could be time barred at all – where disputed issues in the plaint and defence are joined.**

**5.That the judge failed to understand and appreciate that inspite of the previous rulings – striking out the 287 employees / applicants from the proceedings there was no bar against the same to re institute the application to be joined to the proceedings and in any case – nothing against the court itself directing that such other parties be enjoined to the proceedings.**

**6.That the learned judge to see and appreciate that the defendant / respondent had in their defence – stated that counsel for plaintiffs / applicant had no instructions to institute the suit or the proceedings – hence the affidavit by counsel was validly in response and very much apposite:**

having been pushed into the arena in the first instance by the defence.

**7. That the learned judge failed to see and appreciate the legal implication of an application for summary judgement or admission against one of the parties if successful – as obviating the need for neither counsel or any other deponent from being called upon to testify on any evidential issues – as such exaggerates principle, and essence under order 18 rule 2 – hence inappropriate and adverse observation meant to justify the dismissal of the application.**

**8. That the learned judge was overtly hostile and biased against anything said or submitted by counsel for the applicants and even deliberately distorted or avoided to record the same – whilst make pious observation on what is not recorded.**

**9. That the learned judge's ruling stands oblivious to other statutory procedures under the Employment Act – Cap 226 and the Trade Union Act – in relation to the applicants claims besides the civil procedural rules which the exaggerates in relation to these proceedings by employees for the benefit of employees- without prejudice to the defendant.**

**10. That the learned judge failed to understand and appreciate the inherent legal duty on the part of the court to join the 287 employees to these proceeding even if previous application had failed to do so or inspite of previous dismissals which did not categorically prevent the litigants to request court to be joined into the proceedings.**

**11. That the learned judge failed to understand there was no prejudice to be suffered by and / or caused to the defendant company which had agreed to pay its dismissed employees as per the attached or annexed agreements.**

**12. That the learned judge failed to see the obvious adverse orders sought to be set aside – in the context of the proceedings in relation to the 287 employees being disbarred from pursuing their claims for terminal benefits already embraced by mutual agreement of 12<sup>th</sup> May, 1997 – for release.**

**13. That the learned judge's ruling is a broadside indulgence in abusive invectives without helpful and decisive legal analogies and application of relevant principle to issue of joining parties to the existing proceeding – vis avis the interest of the applicants and respondents.**

**14. That for reasons wherefore the applicants pray for setting aside the ruling of 24<sup>th</sup> June, 2005 and further pray for joining the 287 employees applicants to the proceedings in order to do justice in this matter with costs against the defendant/respondent.”**

The appeal came before us for hearing on 15<sup>th</sup> May, 2013 when the appellants were represented by learned counsel Mr. Athunga while learned counsel Mrs. Khayo appeared for the respondent. Counsel for the appellants submitted that the learned judge failed to appreciate the law on joinder of parties, that the suit was a representative one and the judge erred in finding the application to be res judicata. He submitted further that the judge erred in attacking the affidavit sworn on behalf of the appellants by their counsel.

Counsel for the respondent submitted that the suit filed where four plaintiffs were named but 287 other persons named only in the body of the plaint was bad in law as related to the said 287 as the plaintiffs did not seek leave of the court to institute a representative suit. Due notice was given by the defendant in the defence that preliminary points of law would be taken but the plaintiffs did not take heed. Counsel submitted further that the 287 employees of the defendant had been dismissed from the suit, an application for review was refused and an application such as the one before Justice G. B. M. Kariuki could not succeed.

These, then, were the opposing positions taken by counsel for the parties in this appeal.

The application dated 11<sup>th</sup> April, 2004 leading to the Ruling appealed from sought orders which may be summarized as follows:

**(i) The court be pleased to grant leave to the applicants to pursue the proceedings in representative capacity in respect of themselves and all other parties named at paragraph 6 of the plaint in Eldoret HCC No. 342 of 1997.**

**(ii) previous orders adverse to the interest of the applicants and those listed in the said plaint be set aside.**

**(iii) Interlocutory judgment be entered against the defendant in respect of claims of terminal benefits.**

**(iv) Costs**

The heading of the Plaint in the Eldoret HCCC No. 342 of 1997 named four plaintiffs who were described as suing “... **(on behalf of themselves and 287 other employees of M/s PAN AFRICAN PAPER MILLS EAST AFRICAN LIMITED – wrongfully and unlawfully dismissed on or about 24/2/97 by the employer) ....**” This averment was repeated at paragraph 1 of the Plaint.

In the defence filed by the defendant, allegations in the plaint were denied. The following was taken as a defence at paragraph 4 thereof:

**“This suit is bad in law as no orders of the court have been sought nor obtained to institute representative suit on behalf of the 287 persons named in paragraph 6 of the Plaint. The Defendant will raise a preliminary objection in that regard.”**

This is the preliminary objection which was taken by the respondent before Commissioner Visram (as he then was) who dismissed the 287 unnamed plaintiffs from the suit on 10<sup>th</sup> November, 1999. An application to review this order was heard on 18<sup>th</sup> September, 2000 and was dismissed on 9<sup>th</sup> October, 2000.

Justice G. B M. Kariuki, after hearing the parties on the application referred to, stated inter alia:

**“ ...The application dated 11.2.2004 seeks yet again orders for the plaintiffs to prosecute the suit in a representative capacity that is to say on their own behalf and on behalf of the numerous persons named in paragraph 6 of the original plaint. These are the same persons in respect of whom the plaintiff's application was dismissed on 10th November, 1999. No appeal was preferred against that decision. The matter is now res judicata. Mr. Wekulo submitted that his clients did not seek to review those orders. But in absence of review, on what other legal basis would his clients revisit the issue in respect of which orders were given on 11.10.99 (sic)?. And even if the application was not for review, it would hopelessly be wanting in merit not least because of the extreme dilatoriness but also for want of legitimate grounds on which it can be founded. Moreover, having regard to the nebulous manner in which the orders sought were couched the court would not be inclined to grant the same because it is plain to see that the plaintiffs are seeking to camouflage the reliefs sought in vague language when in fact they are seeking the very same orders the court has determined are not available to them. This is mischievous and the application is an abuse of the process of the court...”**

The Ruling of Commissioner Visram given on 10<sup>th</sup> November, 1999 was not appealed. An application to review the orders therefrom was dismissed and there was no appeal against the order of dismissal.

The principles upon which this Court can interfere with the exercise of discretion of the judge at the High Court are well established. This court must, to interfere, be satisfied that the judge has misdirected

himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice - See **Mbogo & Another v Shah [1968] EA 93; Ephantus Mwangi & Another v Wambugu [1983/4] 2 KCA 100 at 108 and Civil Appeal No. 203 of 2002 Sumaria & Another v Allied Industries Limited. (ur)**

The application before the learned judge was on the same issue that had been taken before Commissioner Visram who had dismissed parties named in the body of that Plaint without the plaintiffs seeking leave to file a representative suit. That Ruling was not appealed; a review application was dismissed. By filing the application that led to the Ruling appealed from the appellants were clearly abusing the court process because the Order of Commissioner Visram still stood.

We agree with Justice G. B. M. Kariuki that the appellants were trying to obtain from the back door what they had failed to get regularly. The application dated 11<sup>th</sup> February, 2004 which was brought about 5 years from the date 287 employees were dismissed from the suit was a camouflage which intended to irregularly revive issues that had been dealt with by the court.

The various grounds raised by the appellants in the Memorandum of Appeal are without any basis in law at all. The appeal has no merit and we dismiss it with costs to the respondent. The respondent shall also have costs of the court below.

***Dated and Delivered at Kisumu this 12<sup>th</sup> day of July 2013***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**