



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL 184 OF 2011

SAMUEL OGODO WAGA.....PLAINTIFF

VERSUS

FISH PROCESSORS.....DEFENDANT

JUDGMENT

The appellant herein **Samuel Ogodo Waga** filed this appeal against the Ruling dated 23rd November 2011 from the Lower Court citing the following grounds:-

- 1. The trial Magistrate erred in law and facts in holding that the suit to proceed for full hearing in disregard to the defects and fatality in the Plaint which are grave injustice and incurable.**
- 2. The trial Magistrate erred in law and facts in failure to consider the Replying Affidavit s filed was vexatious, scandalous, abuse of Court Process and meant to embarrass and delay the fair trial of the suit.**
- 3. The trial Magistrate erred in law and facts in failure to consider that the counter claims as filed and issues pleaded therein were admitted by the respondent despite having been opposed on the law of Limitations of Action Act.**
- 4. The trial Magistrate erred in law by misdirecting her mind even after quoting Order 8 Rule 3 (2) and the same time she overlooked Order 2 Rule 14.**
- 5. The trial Magistrate erred in law and facts for failure to exhaustively deliberate on issued raised at the hearing and thereon came and failed to make a conclusive Ruling.**
- 6. The Ruling occasioned a miscarriage of Justice and so far is subverting the Rule of Law and Judicial practice and not meritorious.**

I have heard the applicant herein as well as the counsel for the respondent.

The gist of the appellant's appeal although the grounds are mixed up is the issue of whether or not the trial magistrate misdirected herself when she arrived at her Ruling.

The appellant in his application dated 4th August 2011 had sought the following prayers:-

- (1) That leave be granted for the applicant to amend his statements of defence.
- (2) That the attached defence be deemed as duly filed upon payment of court fees.
- (3) Cost be in the cause.

As is the Rule now this court will not interfere with a finding of fact unless the finding is based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles in reaching the finding. See **Mwanasokoni =vs= Kenya Bus Service Ltd 1985 KLR 932**.

The trial court found for a fact that there were defects on the draft amended defence. The court proceeded to direct that:-

“the defendant to file afresh amended defence which duly complies with the Rules as set out under Order 8 Rule 7 (2) of the Civil Procedure Act together with a verifying affidavit as is provided for under Order 7 Rule 5 verifying the pleadings in the counterclaim in terms of the defamation and commission earnings cause of action. The defendant to file and serve the said amended defence within the next fourteen (14) days from the date hereof. Once served the plaintiff to file their replying affidavit within fourteen (14) days as well under Order 7 Rule 11”.

Order 8 Rule 7 (2) of the Civil Procedure Rules provides that:-

“All amendments shall be shown by striking out in red ink all deleted words, but in a manner as to leave them legible, and by underlining in red in all added words”.

This was what the trial court needed to be done. I have read the pleadings and the Ruling of the court. With great positive pending of the law the trial court did accommodate the appellant.

All that the appellant needed to do was to simply comply with what the trial court had ordered. Leave was granted, which he was seeking, and he was ordered to file an amended defence and counterclaim within fourteen (14) days.

My finding in the premises is that this appeal is unmeritorious I shall disallow it with cost to the respondent.

Dated, signed and delivered at Kisumu this 26th day of July 2012

H. K. CHEMITEI

JUDGE
HKC/ao