REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 174 of 2009

SOUTH NYANZA SUGAR CO. LTD. ……..…….. APPELLANT

AND

DAVID OTIENO ONGACHO ……..…….. RESPONDENT

(Being an appeal from the judgment and decision of Hon. Wewa, SRM,

dated 28th 2009 in the Original Kisii CMCC NO.436 of 2003)

RULING

1. The application which is before me is the Notice of Motion dated 8th December 2009 brought under **Order XLI Rule 2** of the **old CPR** and **section 3A** of the**CPA, Cap 121** of the **Laws of Kenya**. The respondent/applicant wants this court to grant orders in terms of the following prayers, that is to say that:-

1) The applicant herein David Otieno Ongacho is not a proper party to the appeal and the suit.

2) There is no valid appeal against the date of the subordinate court being CMCC No.436 of 2003.

3) The appeal filed herein be dismissed.

4) *The costs of this application and of the appeal be provided for.*

2. The application is supported by the grounds that are set out on the face thereof and by the supporting affidavit sworn by Ezekiel Oduk advocate and dated 9th November 2009. The applicant avers that the case in the court below, being CMCC No.436 of 2006 was heard and

determined with the delivery of judgment on 3rd December 2008. That the said suit was between Kerina Akello Ounga and South Nyanza Sugar Company Limited. It is contended that the appeal herein is between South Nyanza Sugar Company and David Otieno Ongacho and that as such the appeal does not therefore relate to the decree of the case in the lower court. The applicant therefore wants the appeal herein to be dismissed.

3. The application is opposed vide the Replying Affidavit sworn by Geoffrey O. Yogo advocate who has the conduct of this matter on behalf of the appellant/respondent. The gist of the Replying Affidavit is that the mistake that was made in drawing the appeal has since been rectified through an

amendment. From the said Replying Affidavit, David Otieno Ongacho was an appellant in another case which M/s Geoffrey O. Yogo's firm was handling.

4. When this application came up for hearing, Mr. Oduk advocate urged this court to allow the application. Reliance was placed on the provisions of **section 79 G**of the **CPA**which reads:-

"79 G. Every appeal from a subordinate court to the High Court shall

be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a

copy of the decree or order."

5. It was argued that the purported amendment cannot stand because of the statute of limitation and that **section 79 G** of the **CPA**offers a complete defence to this appeal. Reliance was also placed on **Milla's Code of Civil Procedure at p.1596**where the learned author states in part:-

"Section 22 of the Limitation of Actions Act provides, amongst other

things, that when, after the institution of a suit, a party is added as a plaintiff or a defendant, the date of addition is to be considered as regards that party as the date of the institution of the suit. The date of addition is the date of the application for impleading the new party and not the date of the order thereon. However, if the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such a plaintiff or a defendant be deemed to have been instituted on any earlier date."

6. As regards this appeal, counsel for the respondent/applicant contended that Kerina Akello Ounga is entitled to plead the provisions of **section 79 G** of the **CPA** because there is no demonstration of good faith on the part of the appellant/respondent in substituting the respondent's name with that of Kerina Akello Ounga. Reliance was also placed on the following authorities:- **(i) Mabro –vs- Eagle Star** and **British Dominion Insurance Co. Ltd. [1932] 1 KB 485** where the court held *inter alia* that **"the court will not, under Order XVI r.2 allow a person to be added as plaintiff to an action, if thereby the defence of statute of Limitation**

would be defeated. (ii) **Lucy –vs- W.T. Henleys Telegraph Works Co. Ltd. & another [1970] 1 QB 393** where it was held that as a defendant allowing a party to join the suit outside the Limitation period would deprive them of the defence afforded by the relevant provision of the law. LORD Denning MR dissented from the majority decision in the following words:-

"There is no justification for the widows being left out in the cold. If

the widows had issued fresh writs against I.C.I, they would have been barred by section 3 (4) of the Act of 1963. But they are not issuing fresh writs. They are seeking to join I.C.I as defendants to existing writs. Parliament did not intend that widows should be in a worse position than living claimants. The words "the action" in section 3 (4) of the Act of 1963 can be construed as meaning "the action which the widow brings in respect of the death of her husband" in order to avoid absurdities and produce a just result. The "relevant action" for the purpose of application for leave under s.2 (2) is not the main action but the joinder of I.C.I. It is a plain case to join I.C.I under

R.S.C., order 15 r. 6 which gives a very wide power of joinder not limited by R.S.C Order 20 r.5 (3) (4) (5). The statute of Limitation does not confer any right on the defendant, it only imposes a time limit on the plaintiff."

7. Counsel for the applicant also relied on the case of **Liff –vs- Peasley & another [1980] 1 All ER 623** where the court held that an amendment does not operate in retrospect and that a party who is joined has an accrued right to raise the defence of limitation. For the above reasons, counsel urged the court to allow the application as prayed and to dismiss the appeal.

8. In response, counsel for the appellant/respondent contended that the provisions of **section 79 G** of the **CPA** do not come to the aid of the respondent/applicant because the appeal as it stands was filed within the stipulated time for filing of the appeal. Counsel also contended that both parties in this matter are not in doubt as to who the parties in the lower court case were. Counsel contended further that **Order 42 Rule 3**of the **CPR, 2010** is clear on when an appellant can amend. The rule reads:-

"3(1) The appellant may amend his Memorandum of Appeal without

leave at any time before the court gives directions under rule 13.

(2) After the time limited by sub rule (1) the court may, on application

permit the appellant to amend his memorandum of appeal."

9. It was contended further on behalf of the appellant/respondent that the authorities cited by the respondent/applicant do not support his case and further that no prejudice would be suffered by the respondent/

applicant because of the proposed amendment. Counsel also relied on **Article 159** of the **Constitution**in urging the court not to be chained to technicalities in deciding this application.

10. In reply, counsel for the applicant/respondent said that the proposed amendment intended to bring a completely new party into this

appeal outside the period of limitation and that as such the same is not admissible. Counsel also argued that the respondent/applicant will be greatly prejudiced if the application is refused and the amendment allowed.

11. I have now considered the opposing views in this matter. I have considered the law as cited. It is not in doubt that the case in the lower court being Kisii CMCC No.436 of 2003 was between the appellant and Kerina Akello Ounga who was the plaintiff. There is also evidence that there was another case between the appellant and David Otieno Ongacho, the party who was made a respondent in this appeal. After considering all the facts surrounding this matter, I would agree with the dissenting judgment of Lord Denning M.R in the **Lucy case** (above) that the appeal having been filed on time, and the fact being known to both parties that Kerina Akello Ounga was the plaintiff in the lower court case which is the subject of this appeal, then it follows that no new party is being brought into this appeal by the proposed amendment. I am satisfied with the explanation given by the appellant/respondent for the mix-up. My view is that if Kerina Akello Ounga had not been a party in the suit below, I would have agreed with the respondent/

applicant's contention that the appellant is, through the proposed amendment, bringing on board a new party into the appeal. I am persuaded that the provisions of **Article 159** of the **Constitution of Kenya** and **Sections 1A** and **1B** of the **CPA** do provide a safety valve for the appellant/respondent in this case. The appellant has an inalienable right of appeal which will not be denied him.

12. In the premises, I find no merit in this application. The same is accordingly dismissed but the appellant/respondent shall pay costs of the application to the respondent/applicant.

13. Finally, the delay in delivering this ruling is very much regretted. At the time it was due, the court was engaged in other official engagements which included hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

Dated and delivered at Kisii this 25th day of October, 2012

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. Ojiro (present) for Appellant/Respondent

Mr. Oduk (absent) for Respondent/Applicant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.