REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 35 OF 2010

JOHN OTIENO ODHIAMBO …….....……APPELLANT /PLAINTIFF
VERSUS
DOMINION FAMRS (K) LTD .....……RESPONDENT /DEFENDANT

JUDGMENT

This is an appeal arising from the decision of the Honourable Mrs. Chepseba delivered on 18TH February 2010 Vide **Siaya SRMCCC NO. 3 of 2007**. The Memorandum of Appeal boast of seven (7) grounds. At the hearing however the counsel for the appellant consolidated the same and the main thrust of his appeal was whether or not the learned trial magistrate erred in law and in fact in dismissing the appellant's suit by basically relying on the Provisions of Order XXXI Rule 2 (2) of the then Civil Procedure Code. It was argued strongly that the trial court failed to appreciate that the Appellant at the time of filing the suit had attained the age of majority and thus the Provisions of Order XXXI did not apply.

The Appellant's counsel further contented that it was not proper for the court to have dismissed the suit having regard only to procedural technicalities and that the suit had proceeded to its logical end. In summary the Appellant's counsel contented that since there was no application by the defence (then) to have the suit dismissed by nature of the facts stated above. The court ought not to have dismissed the suit.

The counsel for the respondent on the other hand strongly opposed the said appeal and relied on the submissions made during the trial in the lower court. As far as counsel Ragot was concerned there was no suit properly so called as there was no verifying affidavit and therefore if anything the verifying affidavit dated 2nd May 2006 deponed to a plaint that was non existent at that particular time.

Having heard both rival arguments its not in dispute that the big issue for determination is whether or not the trial court was right in disallowing the appellant suit as the Appellant did not appoint a next of kin as required by Order XXXI of the Civil Procedure Act now Order 32. The relevant Section for purposes of this suit is Order 32 (2) which states:-

"32 (1) Where a suit is instituted by or on behalf of a minor with a next friend the defence may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented".

32 (2) Notice of such application shall be given to such person and the court after hearing his objection (if any) may make such order in the matter as it thinks fit".

In the case herein the plaintiff did swear the verifying affidavit on 2nd May 2006 prior to attaining the age of majority. According to his counsel he filed the appellant suit on 31st May 2007 when already the Appellant was nineteen (19) years as from the evidence on cross examination he was born on 23rd December 1989.

However, from my computation it would appear that at the time of filing the case the Appellant was eighteen (18) years old or there about. Was therefore the lack of next of kin fatal to the Appellant case? Although it would appear that the verifying affidavit was signed prior to the Appellant attaining the age of majority, nonetheless at the time of filing suit the appellant had attained the majority age. Verifying affidavit essentially does not go into the root or the substance of the case. Its purposes is to verify the averments and the contents in the plaint. In the instant case the verifying affidavit was sworn on 2nd May 2006. Paragraph 3 of the said affidavit states : "**That the content of the plaint have been read to me and therein verifying the correctness of the facts pleaded save for errors not herewith discerned and which may necessitate amendment".**

The same was filed contemporaneously with the plaint on 31st May 2007 almost one (1) year later. The question is what was the affidavit verifying?. According to the appellant's counsel the appellant verified and awaited till he attained the age of majority. Was there a suit to verified?. Was there a plaint at that particular time?.

Blacks Law Dictionary 8th Edition defines a plaint as " **a complaint or petition especially one intended to set aside an allegedly invalid testament".**

It further defines a complaint as "**the initial pleading that starts a civil action and states the basis for the courts jurisdiction, the basis for the plaintiff's claim and the demand for relief".**

From the above therefore it's manifestly clear that there must be a complaint. In the instant case there was no plaint at the time of the Appellant signing the verifying affidavit. There were no averments to be verified. A plaint becomes effective and operational once the plaint is filed at the registry. In short what the Appellant verified was merely a draft, if indeed there was such a plaint.

The upshot therefore is that there was no verifying affidavit as at 31/5/2007 when the case was filed. Perhaps if there was an affidavit properly so called then the court may not have arrived at the decision it reached. The Appellant further contended that it was incumbent upon the respondent to file a formal application in court as envisaged by Order 32 (2) quoted above. The rule doesn't put a demand on the defence. The same is merely an option. Being an adversarial system we operate on, the responded had the option to wait till the submission day. My attention is drawn further to a preliminary objection filed on 15th July 2009 by the respondent indicating that they will raise the same as the suit doesn't comply with the provisions of Order 31 (Rule 1 and 2). For some reason the same was abandoned. This should have been a wake up call to the Appellant to at least remedy the situation prior to proceeding to full trial. They choose not to.

I have gone through the authorities submitted by the parties and in particular the Appellant. The same are merely persuasive and doesn't assist the appellant's case. The Mulla authority (The code of Civil Procedure) buttresses the respondent case on the contrary.

I have further addressed myself on the other points raised by the appellant and specifically that the trial court ought to have assessed damages in any event. Prior to coming to this point its worthy to note that the appellant did not established negligence on the part of the respondent. His evidence was not corroborated. There was no reply to defence by the appellant meaning therefore that the defendant defence was not controverted. There was no further action by the police or any other party. There was no any defects on the respondent's motor vehicle. The upshot of this therefore is that no negligence was established against the respondent. Consequently, there shall not be need to proceed to assess any quantum in any event. The appeal for the above reasons must fail. The respondent shall have costs.

Dated, signed and delivered this 19th day of October 2011.

H. K. CHEMITEI
JUDGE

HKC/aao