



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 158 of 1997

FREDRICK OJODEPLAINTIFF

VERSUS

KENYA POST & TELECOMMUNICATION CORPORATION.....DEFENDANT

RULING

This is an application by chamber summons dated 18th August 2008 brought by the Plaintiff in this suit under Order XXIII Rule 9 of the Civil Procedure Rules and also section 3A of the Civil Procedure Act praying for orders that

“This ...court be pleased to grant leave for the Plaintiff’s suit herein to be continued as against the POSTAL CORPORATION OF KENYA in place of the defunct KENYA POST AND TELECOMMUNICATION CORPORATION.”

That is because this suit having been filed by the Plaintiff against Kenya Post and Telecommunication Corporation on 21st January 1997, the Defendant Corporation became defunct in the year 1998 giving rise to three new bodies, namely, Telcom Kenya Limited.

The Communication Commission of Kenya.

The Postal Corporation of Kenya.

by virtue of Legal Notice No.154 of 1999.

As a result the Kenya Post And Telecommunication Corporation transferred and vested its assets, liabilities including legal proceedings to the three entities respectively. But for unknown reason, that corporation said nothing about the existence of this suit and whether it was transferred to any of the three entities.

The suit arose because the Plaintiff who had been employed by Kenya Post And Telecommunication Corporation as a Postal Superintendent claimed he had been unlawfully and irregularly dismissed by the Kenya Post And Telecommunication. Following the transformation of Kenya Post And Telecommunication Corporation, into the three entities, the Plaintiff thinks and believes that his line of operation and area of business was transferred to the Postal Corporation of Kenya together with the liabilities therein. That is why the Plaintiff has filed this Chamber Summons to be able to put the Postal Corporation of Kenya, in the place of the defunct Kenya Post And Telecommunication Corporation.

Having been served with the Chamber summons, the Postal Corporation of Kenya not only filed its replying affidavit but went ahead to file Notice of Preliminary Objection stating among other things that prayers sought in the Chamber summons are incapable of being granted, that the assets and liabilities of Kenya Post And Telecommunication Corporation the Minister had transferred to Postal Corporation of Kenya did not include this civil suit. But the ground which attracts me more is the one stating that the Plaintiff has not complied with the mandatory provisions of section 24 (a) of the Postal Corporation of Kenya Act (No. 3 of 1998), which requires that before legal action or proceedings are commenced against the Corporation, a one month notice must be served upon the Post Master General by the Plaintiff or his agents. It is the Respondent’s argument, that such notice had not been given before this suit was filed and that therefore there exists no suit to be continued against the Postal Corporation of Kenya in this matter.

It appears to me that for a court to decide such an issue in an application like this one is like deciding a case which has a Plaintiff without a Defendant because the Defendant has died and has not been substituted – and deciding it upon instigation by a person who is not a party in the suit.

As it was pointed out by the Court of Appeal in the case of TELKOM KENYA LTD –vs- JEREMIAH ACHILA GOGO & ANOTHER Civil Appeal No.153 of 2004, Order XXIII Rule 9 of the Civil Procedure Rules sub-rule (1)

“The sub-rule is silent on who is supposed to move the court for leave,”

but that Court went ahead to suppose that the party who seeks the court’s assistance is the one to apply.

It follows that for the Respondent in the Chamber Summons before me in this matter to be able to say in court that the suit does not exist and to be entitled to a court order to that effect, the Respondent has to accept to come into the suit as a Defendant. That way the Respondent will also be able to move the court in the suit in respect of a number of other court orders in favour of the Respondent. Today the Respondent is in this Chamber Summons but is not yet in the suit and he should not therefore in this Chamber Summons get court orders in his favour which court orders determine the suit in which he is not yet a party.

Having reached that conclusion, do I need to say more? I do not think so.

Accordingly, Chamber Summons dated 18th August 2008 be and is hereby granted in terms of prayer (a) and that leave be valid for 60 days from the date of this ruling to enable the plaintiff have necessary amendments effected.

Costs of the Chamber Summons be in the cause.

Dated this 3rd day of August 2009.

J.M. KHAMONI

JUDGE

Present

Mr. Agwara for the Applicant

Mr. Muthuku for the Respondent

Court clerk - Florence