



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CIVIL APPEAL 234 OF 2006

TRUST BANK LTD.....APPELLANT

VERSUS

TRAILWAYS AUCTIONEERS LTD.....RESPONDENT

(An appeal from the ruling of the Honourable Miss Maina, Principal Magistrate in the Resident Magistrate's Court Civil Case No. EJ 705 of 1998 delivered on 21st March, 2008)

J U D G M E N T

1. This appeal arises from a ruling which was delivered in a suit filed in the Chief Magistrate's Court at Nairobi by the appellant Trust Bank Limited. By its plaint filed in the Court on 26th August, 1998, the appellant had sued Trailways Auctioneers Limited seeking judgment for Kshs.362,980.45. A defence was filed on 16th December, 1998 in which the defendant denied the existence of a legal person known as Trailways Auctioneers Limited and contended that the correct defendant ought to have been Peter K. Mbugua t/a Trailways Enterprises who was the holder of an account with the appellant. The defendant further denied that, that account was overdrawn to the tune of Kshs.362,980.45 or that the defendant owed the appellant the sum of Kshs.362,980.45. In the alternative the defendant contended that the rate of interest charged on the alleged loan or overdraft was excessive and unconscionable.
2. By an application dated 16th December, 2004 the appellant sought leave under Order 1 Rule 10, Order VIA Rules 3 and 5 of the Civil Procedure Rules and section 100 of the Civil Procedure Act, for leave to substitute Peter Kimuchu Mbugua carrying on business as Trailways Auctioneers and Trailways Enterprises as the defendant, and leave to amend the plaint accordingly. The defendant who was then acting in person did not file any response to the application. On 23rd August, 2005 the application was heard before the Principal Magistrate. The defendant's only response to the application was that the suit was an old matter filed before the appellant went in receivership.
3. In her ruling delivered on the 16th September, 2005 the Principal Magistrate ruled as follows:
“My finding is that the application has no merit. Although amendments should be allowed freely, the effects of these amendments would be to join a party against whom the cause of action would be time-barred. I do in the circumstances decline to grant the orders and dismiss the application with costs to the defendant/respondent.”
4. Being aggrieved by that ruling, the appellant moved the lower Court on 6th December, 2005 under Section 80 of the Civil Procedure Act and Order XLIV Rule 1 of the Civil Procedure Rules, seeking to have the order of 16th September, 2005 reviewed and set aside on the following grounds:

- (a) there is an error apparent on the face of the record
- (b) in dismissing the 1st appellant's application for amendment and substitution filed on 16th December, 2005 the learned Magistrate observed that the order could not be made as it would bring a new party to the suit outside the limitation period
- (c) the record clearly shows that the claims made against the intended new party are within time
- (d) the Court is bound to look at all documents properly, before determining the matters in controversy
- (e) neither party addressed the Court on the point of limitation as this was not an issue, and the order has therefore been made without a hearing
- (f) the application has been made without undue delay.

The defendant who was by then represented by counsel filed a replying affidavit. The motion was heard on 8th March, 2006.

5. Mr. Ogunde who appeared for the appellant urged the trial Magistrate to review the order of 16th September, 2005. He maintained that at the time the application for amendment was made, the record showed that the claim against Peter K. Mbugua whom the appellant intended to join as a party was within time. He pointed out to the Court that in the replying affidavit the defendant only challenged the validity of the memo and the promissory notes, which were issues for trial.

6. Mr. Mulanya who appeared for the defendant opposed the application, maintaining that there were no proper grounds for review, as there was no error apparent on the face of the record. Mr. Mulanya pointed out that the appellant's intended suit was time-barred and that the memorandum of understanding intended to be relied upon was not registered. He further contended that Peter K. Mbugua was a separate legal entity from the company sued. Mr. Malanya maintained that the appellant ought to have filed an appeal instead of the application for review.

7. In her short ruling delivered on 21st March, 2006, the trial Magistrate found that there was no error apparent on the face of the record as the facts deponed to, had been placed before the Court at the time it made its ruling. The parties were therefore heard on the application and it was erroneous for the appellant to say that parties were not given a hearing. The trial Magistrate therefore found no merit in the application for review, and dismissed it with costs.

8. The appellant has now moved to this Court appealing against the ruling delivered on 21st March, 2006 on the following grounds:

(i) The learned Magistrate erred in law and fact in finding that there was no mistake on the face of the record following her order of 16th September, 2005.

(ii) The learned Magistrate erred in law and fact in finding that there was no sufficient ground in reviewing her order of 16th September, 2005.

9. By consent of parties, written submissions were exchanged and filed and it was agreed that the Court deliver its judgment based on those submissions. For the appellant it was submitted that the appellant erroneously sued the defendant instead of the firm of Trailways Auctioneers, a firm whose sole proprietor Peter Kimochu Mbugua, had signed a memorandum undertaking to pay a sum of KShs.681,443.80 with interests as the sole proprietor of Trailways Enterprises and Trailways Auctioneers. It was submitted that the appellant produced all relevant documents to the Court, whilst the defendant did not file any documents in opposition to the application.

10. It was noted that the trial Magistrate dismissed the appellant's application, on the basis that the effect of the amendments would be to join a party against whom the cause of action was time-barred. It was maintained that there was an error on the face of the record as the issue of the limitation period did not arise during the hearing of the application, nor was it an issue arising from the pleadings. It was contended that limitation had to be pleaded, and dealt with at the hearing of the suit. It was maintained that the defendant had in fact admitted in its defence that the correct defendant in the suit was Peter Kimochu Mbugua t/a Trailways Auctioneers. It was pointed out that the appellant's counsel made a genuine mistake. Since there was no doubt as to the parties the appellant intended to sue, the subordinate Court ought to have allowed the application for amendment.

11. Relying on the case of ***Capital Fish (Kenya) Limited vs. Kenya Power and Lighting Company Ltd. HCCC 369 of 1998***, counsel for the appellant submitted that the lower Court had discretion to allow the amendments on pleadings as long as the amendments arose from the same facts. It was submitted that under section 80 of the Civil Procedure Act the Court had unfettered power to review an order. It was argued that the purpose of the review powers is to enable the Court to rectify mistakes which are apparent on the face of the record. In this case, it was alleged there was a mistake on the face of the record as the trial Magistrate based her decision on a matter not canvassed by the parties. It was also submitted that the trial Magistrate failed to appreciate the evidence on record which showed that the defendant was erroneously named as Trailways Auctioneers Ltd. and that the actual party who was participating in the proceedings was Peter Kimochu Mbugua.

12. The following authorities were relied upon in support of the appellant's submissions:

- (i) ***Mulla on the Code of Civil Procedure Act V of 1908***
- (ii) ***Mathias Charo vs. Francis Mutua Ngwatu HCCC No.624 of 1989 (Mombasa) (Unreported)***
- (iii) ***Nairobi City Council vs. Thabiti Enterprises Limited [1995-1998] 2E.A. 231***
- (iv) ***Nyamogo & Nyamogo Advocates vs. Kogo [2001] 1 E.A. 173***
- (v) ***Sadar Mohamed vs. Charan Singh Nand Singh and Another [1959] E.A. 793.***
- (vi) ***Chalicha FCS Ltd. vs. Odhiambo & 9 Others [1987] KLR 182***
- (vii) ***General Manager, E.A.R. & H.A. vs. Thierstein [1968] E.A. 354***

13. For the respondent it was submitted that at this stage the question for consideration is whether the appellant's application dated 30th November, 2005 had sufficient grounds to justify an order of review under order XLIV of the Civil Procedure Act(?) It was submitted that the appeal had no merits as the issues raised by the appellant in the application for review were issues which had been dealt with by the trial Magistrate. It was maintained that there was no error or mistake on the face of the record to justify the review. It was argued that the appellant ought to have filed an appeal against the trial Magistrate's findings on the issue of limitation as that was not a matter for review.

14. I have carefully considered the pleadings, the record of the lower Court, the submissions made before the lower Court, the submissions made before me and the authorities cited. The first thing which has struck me, is that while the suit in the lower Court was against the defendant i.e. Trailways Auctioneers Limited, a limited liability company, the appeal before me as is evident from the memorandum of appeal is against Trailways Auctioneers (presumably a firm). The record shows that although the appellant had sought to amend its plaint to sue Trailways Auctioneers instead of Trailways Auctioneers Limited, that application was rejected and therefore the proper party on record remained Trailways Auctioneers Limited. Trailways Auctioneers, not having been made a party to the suit the appeal against it is incompetent.

15. The above notwithstanding, I have considered whether there was an error apparent on the face of

the record to justify the review of the ruling delivered by the trial Magistrate on 16th September, 2005. Looking at the ruling of the trial Magistrate, it is evident that she declined to grant the application for amendments on the grounds that the effect of the amendments would be to join a party against whom the cause of action would be time-barred. From the applications and the submissions which were made before the trial Magistrate, it is evident that the issue of limitation was not one for adjudication by the trial Magistrate at that stage.

16. The appellant had sought to have another person substituted in place of the defendant. It was for that person after being enjoined in the suit to raise the defence of limitation, if it was applicable. The trial Magistrate had no mandate to deal with the issue of limitation at that stage. The application before the trial Magistrate was a simple application for amendment. The trial Magistrate ought to have been guided by the provisions of Order VIA Rule 3 & 5(1) of the Civil Procedure Rules, which gave her a general power to amend pleadings, provided the amendment is necessary for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings.

17. Moreover, Rule 3(2) of the Civil Procedure Rules provides as follows:

“Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.”

Therefore, even assuming that the appellant’s claim was statute barred, the trial Magistrate had discretion to allow the amendment provided it was just to do so, and the respondent was not likely to suffer any prejudice. From the record it is evident that the trial Magistrate did not address her mind to the exercise of this discretion, nor did the trial Magistrate address her mind to the defence filed by the defendant in which the existence of Trailways Auctioneers Limited was denied and the correct defendant stated to be Peter K. Mbugua t/a Trailways Enterprises.

18. Further, under Order 1 Rule 10(2) of the Civil Procedure Rules, the Court has powers to:

“order at any stage of the proceedings that the name of any party improperly joined whether as a plaintiff or defendant be struck out and the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

The trial Magistrate did not consider the necessity of the amendment to the appellant’s suit, nor did she consider whether the same was necessary to determine the real questions in controversy. Therefore it is evident that there was a glaring error on the face of the record, as the trial Magistrate failed to address the issues relevant to the application for amendment, and instead prematurely addressed and determined the issue of limitation, which was not an issue before her. In considering the application for review, the trial Magistrate failed to appreciate the above issues as she summarily dismissed the application without addressing the issues being raised.

19. For the above reasons, I would have allowed this appeal. However, the appellant having brought the appeal against a person who is not a party to the suit, the appeal is struck out as incompetent. Those shall be the orders of this Court.

Dated and delivered this 22nd day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mulanya for the appellant

Miss Gulenywa for the respondent

Eric, court clerk