



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 26 of 2005

MT. KENYA PETROLEUM DISTRIBUTORS LTD.....APPELLANT

VERSUS

KRISHAN BEHAL & SONS.....RESPONDENT

(Appeal from original Ruling of the Senior Resident Magistrate's Court at

Nanyuki (S.M. KIBUNJA – S.R.M) in SRMCC.No.32 of 2001 dated 21st September, 2001.)

J U D G M E N T

This is an appeal arising from the Ruling of the Senior Resident Magistrate's Court at Nanyuki (**Mr. S.M. Kibunja – SRM presiding**) delivered on 21st September, 2001. By that Ruling the learned Magistrate dismissed the appellant's application for summary judgment dated 27th July, 2001. By the same token the learned Magistrate also dismissed the respondent's application to strike out the suit on the basis that both applications sought "**drastic measures to solve defects that could easily be rectified by amendments.**" The trial court then proceeded to order that the plaint be amended so as to indicate the real names of the person or persons instead of the business name, which amendment was to be effected within fourteen (14) days from the date thereof. It is this ruling that has provoked this appeal. Through **Messrs Muteithia, Kibera & Co. Advocates**, the appellant who was the plaintiff in the suit before the trial court faults the learned Magistrate's ruling on the following grounds that:-

- 1. The learned Senior Resident Magistrate erred in ordering that the plaintiff amends its plaint in order to sue the people trading as Krishan Behal & Sons in their individual names which was not all necessary as the said Krishan Behal & sons had been properly sued in its firm name. Secondly, no such orders had been prayed for by either of the parties.**
- 2. The learned Senior Resident Magistrate erred in refusing to allow the appellant's application for summary judgment dated the 27th day of July, 2001.**
- 3. The learned Senior Resident Magistrate erred in failing to consider the appellant's application for summary judgment dated 27th day of July 2001 on the merits, which caused him wrongly to disallow the same.**
- 4. The learned Senior Resident Magistrate erred in effectively partially allowing the respondent's application dated 29th June, 2001 while it had no merit whatsoever.**
- 5. The leaned Senior Resident Magistrate erred in failing to strike out the respondent's replying affidavit filed in reply to the application for summary judgment despite the same having been filed and served on the very day that the application was heard.**

Briefly the facts leading to this appeal are as follows. By a plaint dated 11th June, 2001 and filed in court on 12th June, 2001, the appellant sought judgment against the respondent who was the defendant in the suit before the subordinate court for Kshs.295,260/= on account of petroleum products sold to the respondent by the appellant at the respondent's

instance and request between the years 2000 – 2004. In the alternative the appellant claimed the said amount on the footing of dishonoured cheques issued by the respondent to the appellant in purported settlement of the debt which cheques upon presentation for payment were dishonoured. When the respondent was served with the plaint, it reacted first by filing a memorandum of appearance and subsequent thereto, a defence. In the defence the respondent pleaded that it had not been properly sued and therefore the suit was incompetent, misconceived and bad in law.

By an application dated 29th June, 2001 the respondent prayed for the striking out of the appellant's suit aforesaid on the grounds that it did not disclose a reasonable cause of action and or it was an abuse of the process of court. The main contention by the respondent in that application was that the suit was a nullity as there was no proper person sued. That the appellant ought to have sued the partners in the respondent firm and not merely the respondent.

Stung by the respondent's application, the appellant also banged in an application seeking summary judgment on the grounds that the claim was liquidated and that the respondent was truly indebted to the appellant for the sum claimed in the plaint and was so indebted at the commencement of the suit. That the defence was abare denial and a sham merely meant to delay the course of justice. These two applications were then the subject of the ruling aforesaid that triggered this appeal.

When the appeal came up for hearing before me, **Ms Nderitu**, learned counsel appeared for the appellant. Neither the respondent nor its counsel was present. Having been satisfied that the respondent had been duly served with the hearing notice and there being no explanation for its absence, I directed that the appeal proceeds to hearing the absence of the respondent and or its counsel notwithstanding. **Ms Nderitu** opted to argue the appeal by way of written submissions. The court did not see anything wrong with that position. Accordingly the court allowed the appellant to argue its appeal by way of written submissions. Subsequent thereto, appellant's written submissions were filed and I have had occasion to carefully read and consider them together with the authorities cited.

The learned Magistrate refused to grant the appellant's application for summary judgment on the grounds that a proper person had not been sued and proceeded to order the appellant to amend its plaint in order to sue the people trading as **Krishan Behal & Sons** in their individual names. I do not think, as correctly submitted by **Ms Nderitu** that this order had any legal basis. Paragraph 2 of the plaint was categorical. It was framed thus;

“.....The defendant, which is a Civil Engineering Contractor handling various projects around the country, is a firm which is sued as such under order XXIX of the Civil Procedure Rules....”

It cannot be any clearer than this that the respondent had been sued as a firm. *Order XXIX* provides interlia;

“.....any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and address of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct....”

The learned Magistrate clearly therefore fell into error when he ordered the appellant to amend its plaint in order that those people, if any, behind **Krishan Behal & Sons** should stand up and be sued in their individual capacity. To my mind the respondent had been properly brought into the suit. It had been sued as a firm which is allowed for under our Civil Procedure Rules aforesaid. In the case of **Rohit C. Doshi V Nawaz Transport Company (1982 – 88) 1 KAR 72**, the Court of Appeal consisting of Madan, Law JJA and Hancox Ag.J observed:-

“.....Order 29 rule 9 makes useable (sic) businesses in the name in which they are carried on by persons who thus conceal their names. That is what the administrators are doing in this case, but they say the firm cannot be sued in its own name even in respect of an acknowledged debt owing to it. That is plain nonsense. If successful, the administrator's contention would open the door wide to fraud. The suit was not filed against a dead person, it should be looked upon as having been filed against a business firm which is carrying on business and which may be sued under the rule of order 29, an artificial person though it may be but it is created by statute by the application of the Civil Procedure Rules. The decree will not be a nullity....”

Finally in the case of **Car and General V Marende T/A Marende Company Advocates and another (2003) 2 EA.384**, the High Court Held:

“.....order XXXIX (sic) rule 1 of the Civil Procedure Rules allows a party to sue a firm in its name even if it no longer exists or is dissolved. Partners are jointly and severally liable for the wrongful acts or omission of any of them which cause loss of damage to third persons, if such acts are committed by a partner in the ordinary cause of the firm's business or without the authority of his co-partners. The plaintiff was therefore entitled to bring the

action against the firm as M was one of the two partners in the firm.....”

I also note that although the learned Magistrate ordered the appellant to amend its pleadings, none of the parties had made any application to that effect. Although under *order VIA rule 3 & 5* of the Civil Procedure Rules, the court has wide discretion to order amendment of pleadings even *suo moto*, that discretion cannot be exercised capriciously but on sound judicial principles. I do not think in the circumstances of this case, the learned Magistrate acted on sound judicial principles. In saying so, I am fortified by the fact that despite the extensive arguments made by learned counsel to the two applications, the learned Magistrate in rather a short, shrift and terse ruling failed to appreciate the issues ventilated before him in the said ruling. To my mind, this is a classic example of a pedestrian ruling. It was escapist in the sense that he avoided to rule on the weighty issues canvassed before him and took the easier route of asking parties to amend their pleadings on the basis that the orders sought in the two applications were drastic. In the end, the learned Magistrate made an order that was not asked for and in a way and without knowing agreed to some extent with the respondent's contention that the suit before court was a nullity.

From the foregoing it is also apparent that the trial court did not consider the appellant's application for summary judgment on merit. I do not see how an application for summary judgment can be cured by an order for amendment. The application for summary judgment was clearly merited. It was well supported by documentary evidence. There was common ground that the respondent had been appellant's customer over the years. There is evidence of the respondent having placed an order on its own letter heads for the supply of petroleum products. There was evidence that the petroleum products were collected by the respondent going by copies of the duly signed delivery notes. An invoice No.4969 for Ksh.294,260/= was consequently raised and the respondent purported to settle the invoice vide its cheque No.001929 which was dishonoured and debt note No.514 for Ksh.295,260/= for the bounced cheque raised which included Ksh.1,000/= surcharge on the bounced cheque. The respondent has not countered any of these facts. Indeed a perusal of the defence filed leads one to the irresistible conclusion that it was a bare denial, a sham defence meant to delay the course of justice and it raised no issues for trial. I think that it was in the light of overwhelming evidence lined against it by the appellant as aforesaid that the respondent chose to clutch on the straws by unnecessarily relying on technicalities to defeat the appellant's suit. However its day of reckoning has at long last arrived. There was no basis for the learned Magistrate's refusal to grant the appellant's application for summary judgment. I am therefore satisfied that the appeal has merit and I allow it. Accordingly I would set aside the orders made by the learned Magistrate on the 21st September, 2001. Instead I order that the appellant's application dated 27th July, 2001 for summary judgment be and is hereby allowed with costs to the appellant. The respondent's application dated 29th June, 2001 be and is hereby dismissed with costs as well to the appellant. The costs of this appeal and the main suit in the subordinate court shall be borne by the respondent.

Dated and delivered at Nyeri this 9th day of October, 2008.

M.S.A. MAKHANDIA

JUDGE