REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL CASE 751 OF 2003

JOYCE WANJIKU (Suing through her

mother and next of friend Joyce Wanjiku Mwangi…….. PLAINTIFF

VERSUS

NDITHINI CATHOLIC MISSION……..…….....…. RESPONDENT

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J U D G M E N T

On 24/2/04 the Appellant moved to this court challenging the Ruling of the Principal Magistrate, Ms Betty Rashid, at Thika, dated 30/9/03 in Civil Suit No. 30 of 2001, on the following grounds:

(a) That the Learned Magistrate erred in law and in fact in granting the application dated 7/7/03 as prayed.

(b) The Lower Court erred in law and in fact in allowing the application without considering the merits of the Respondents arguments;

(c) Learned Magistrate erred in law and in fact in failing to exercise her discretion judicially;

(d) Learned Magistrate erred in law and in fact in failing to appreciate that the interests of justice dictated that the said application be dismissed.

(e) The Lower court erred in law and in fact in coming to the conclusion that it did without any or any good reason or sufficient cause.

Wherefore the appellant prays that this appeal be allowed, set aside the said Ruling and all consequential orders thereto; dismiss the application dated 7/7/03; such other orders as may be appropriate in the circumstances.

At the commencement of the hearing of this appeal, Learned Counsels for both sides, Mr. Mbugua, for the appellant and Mrs. Thangei, for the Respondent, by consent, agreed to conduct the appeal by way of written submissions.

The appeal arose from the Ruling of the Lower Court, dated 30/9/03, on an application by the Plaintiff for leave to file amended plaint.

The brief facts of the dispute is that the Respondent – Rose Wanjiru – (minor) suing through her mother and next friend – Joyce Wanjiku Mwangi – sued Ndithini Catholic Mission in respect of some alleged injuries suffered by the minor in an accident which occurred on 17/12/1999.

On 17/4/03, the Appellant [Defendant in the lower court] filed the application above, seeking leave of the court to receive the evidence of a witness, by name of Sister Jane Nderi, who was about to leave the country. By that time, no evidence had been taken by the court from the Plaintiff or her witnesses. By consent of the parties, the application was allowed on 8/5/03, and Sister Jane Wambui Nderi gave evidence for the defence on 12/5/03.

From her evidence it transpired that the Plaintiff (now Respondent) had sued the wrong party, and the Respondent sought by an application to amend the plaint so as to substitute the name of the Defendant with the names of the Trustees of Little Daughters of St. Joseph. That application was filed in court on 11/7/03, and argued in court on 9/9/03 and 30/9/03.

The gist of the issues raised at the hearing of the application for amendment was "whether or not the Plaintiff was right in seeking to amend the Plaint to substitute the defendant after the testimony of D.W. 1 – Sister Jane Wambui Nderi – and whether the Amendments were prejudicial to the defendant whose only witness had by now left the jurisdiction of the court, and whether or not the amendment would occasion injustice to the Appellant.

On 30/9/03, the application was granted, the brief Ruling of the Lower Court simply stating "**Since no final orders have been given in this case, application is allowed as prayed."**

The appellants case is that the application should not have been allowed because, it is a principle of law that amendments which are substantial in nature, affecting the identity of the parties should not be allowed as they would prejudice the other party. Secondly such amendments can only be allowed where the damage which may arise as a result of the amendment can be cured by way of costs. In the present case, argues the appellant, no amount of costs would compensate the appellant given that the principal witness of the appellant was no longer within the court's jurisdiction.

The thrust of the appellants case is simply stated, as follows. The application for the amended plaint, seeking substitution of the Appellant for the original Defendant should not have been allowed because, where an amendment, like the one herein, is allowed, the rights of the new party – the appellant herein – start when the application - substitution – was granted. Effectively, that is when the suit is instituted as far as the new party – Appellant – is concerned. The decision in ATIENO V. OMORO [1985] KLR 677, **a** decision by this court, [holding No. 4] clearly shows that "**the amending order should be treated as if there had been a fresh suit on the date the orders were made."**

The question then is whether such factor was considered by the lower court. If it had been; it would have been apparent that the Respondent would have been barred by the statute of limitation from suing the appellant, if time was calculated from the date of the order of amendment backwards to when the injuries complained of were sustained.

In opposition, the Respondents case raises five points, the most potent of them all being that the appeal is defective by virtue of its being lodged or filed by a non-party to the case. The appellant – Ndithini Catholic Mission - is not a party to the suit, having been removed, and substituted, by the amendment of the Plaint by the Trustees of Little Daughters of St. Joseph.

The other grounds of opposition to the appeal and the appellants submissions are: when an amendment can be allowed; Limitation; Distinction between application for Amendment and joinder of new party; and Discretion of the court.

However, in my humble view, the four foregoing grounds hinge on the appellant/applicant /or person being a party to the suit, especially at the appellate stage. Legally, there is no way that a person can file an appeal in a matter where it is not a party.

The whole process behind the Respondents case start with Section 100 of the Civil Procedure Act, Cap. 21, Laws of Kenya, which provides:

"**The court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendment's shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.**

The above section grants the court, not only the power but also the discretion in effecting such amendments in proceedings, at any time. That is amplified by order 6 A rule 5(1) which provides:

"**For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."**

But the rule is not applicable in relation to judgments or orders. To me the more crucial provisions are found in Order 1rule 10 of the Civil Procedure Rules, the relevant parts thereof being sub-rules (1) (2) and (4)

Sub-rule (1) reads as follows:

"**Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit."**

Sub- rule (2)

"**The court may at any stage in the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant be struck out, and the name of any person who ought to have been joined, whether as 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 the questions involved in the suit, be added."**

And finally, sub – rule (4)

"**where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary and amended copies of the summons and of the plaint shall be served on the new Defendant and, if the court thinks fit, on the original defendant."**

The purpose of quoting the above provisions is to reiterate that the court has not only the power to substitute, add or strike out any party, if such an amendment is necessary for effectual and complete disposition of the controversial issues.

Accordingly, the Ruling of the lower court was not only legal but also judicially justified.

The upshot of the above is that with effect from 30/9/03 when the application for amendment was delivered, the appellant herein ceased to be a party to the suit herein and the new Defendants were The Trustees of the Little Daughters of St. Joseph, and the Ndithini Catholic Mission ceased to be a party to the suit herein.

Consequently, by the time the appeal herein was filed, on 24/2/04, it was filed by a stranger to the suit, unknown to the law.

If there are any issues, including limitation of action, that is a matter to be raised by the Defendant to the suit – Trustees of the Little Daughters of St. Joseph, not by a stranger to the suit.

Finally, it is imperative to observe that the appeal herein is rather strange in that whereas the suit against the appellant was terminated by its being substituted and another defendant brought in, the appellant appears to be effectively saying that the Plaintiff/Respondent should continue with the suit against the appellant, even against the Respondent's will and interests.

In my view, if the appellant feels that it was wrongly sued, but the claim has been terminated by virtue of that wrong joinder, the only remedy to the appellant is to claim for costs, but not to appeal in a matter to which they are not a party.

All in all therefore, and for the above reasons, the appeal is dismissed with costs to the Respondent and against the appellant.

DATED and delivered in Nairobi this 27th day of March, 2007.

O.K. MUTUNGI

JUDGE