



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CIVIL APPEAL 3 OF 2004

MT. KENYA PETROLEUM DISTRIBUTION LTD.....APPELLANT

Versus

KRISHAN BEHAL & SONS.....RESPONDENT

=AND=

CIVIL APPEAL CASE NO. 4 OF 2004

MT. KENYA PETROLEIUM DISTRIBUTORS LTD.....APPELLANTS

Versus

KRISHAN BEHAL & SONS.....RESPONDENTS

(Being an appeal filed out of time by virtue of the order of the High Court enlarging time issued on 23rd December 2003 in HC. MISC.APPLICATION NO. 3 of 2002 from the ruling of His Honour Mr. S. Kibunja, Senior Resident Magistrate, Nanyuki, in Nanyuki Senior Resident Magistrate's Court Civil Suit No. 34 of 2001 delivered on 21st September 2001)

JUDGMENT

This judgment relates to two appeals namely Civil Appeal No. 3 and No. 4 of 2004. Both Appeals were filed by Mt. Kenya Petroleum Distributors Ltd. against the Respondent Krishan Bahal & Sons. Appeal No. 3 of 2004 relates to the Lower Court's claim for recovery of Ksh.31,001 and in respect of Appeal No. 4 of 2004 for the claim of Ksh.294,260. These two claims relate to supply of petroleum products for which it is alleged the Respondent refused, failed and neglected to settle. The summons were served on a person called Sonu Behal and thereafter a Memorandum of Appearance and a Defence were filed on behalf of the Respondent by a firm of advocates. In the 2nd paragraph of the Plaint the Appellant pleaded:

"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....."

Paragraphs 2 and 3 of the defence filed on behalf of the Respondent pleaded:

"2. The Defendant while not denying that it is a

Civil engineering firm denies that it has been sued in compliance with Order XXIX of the Civil Procedure Rules.

3. The Defendant states that there is no competent suit before the court on the basis of which the Plaintiff can seek the redress it has sought.”

It ought to be noted that the pleadings of the Appellant and the Respondent were exactly the same in both suits except for the amount claimed. The Respondent in the Lower Court in both the suits filed a Chamber Summons dated 29th June 2001 seeking the striking out of the Appellants' suits on the ground that the same does not disclose reasonable cause. The Appellant on its part filed a Notice of Motion in both Lower Court suits dated 27th July 2001 seeking the entry of summary judgment as prayed in the Plaintiff. Both those applications were argued together and despite the extensive arguments of both counsels the court in its ruling failed to capture the said arguments and granted orders that were not prayed for by the parties. The short ruling is as follows:

“Having heard M/S Njeri Adv. of G.B.M. Kariuki & Co. Adv. for the Defendants and Mr. Muteithia Adv. of M/S Muteithia Kibira & Co. Adv., in the applications by chamber summons dated 29.6.01 (filed on 2.7.01 and that undated application filed on 27.7.01 and having perused the supporting and replying affidavit and the precedents provided to court I find the prayers in the two applications are without merit as they ask for drastic measures to solve defects that could easily be rectified by amendments.

While rejecting both applications without order as to costs and though not specifically prayed for by any of the parties the court directs that the plaintiff be amended to inter alia indicate the real name of the persons or persons sued instead of the business name. This amendment should be carried out and served in 14 days and thereafter the def. will be at liberty to file and serve amended defence if any in 14 days.

The Appellant being aggrieved by that ruling preferred these two appeals. The grounds of Appeal. The Appellant brought the following grounds of Appeal:

- 1. THE Learned Senior Resident Magistrate erred in ordering that the Plaintiff amends its Plaintiff in order to sue the people trading as Krishan Behal & Sons in their individual names – which was not at 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 the 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 Learned 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.**

As it will be recalled the Respondent was sued as a firm. Order XXIX rule 1 (1) provides that partners carrying on business may be sued in the name of the firm. The Learned Magistrate was in error therefore in ordering the Appellant to amend the plaintiff to sue the persons rather than the business name. That Rule provides:

“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 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 Respondent in seeking the dismissal of the two suits at the lower court stated in the supporting affidavit that the suits were a nullity because a proper person had not been sued. The Respondent did not lay down the basis of that allegation and more importantly it was not clear, if the Appellant had indeed sued the wrong party, who were the correct parties. Even as the court ordered the Appellant to amend their complaints the court did not order the Respondent to supply information of the Defendant's partners who were to be substituted in the suits. Although the courts are empowered by *Order VI Rule 3* to order an amendment of pleadings instead of striking out, that power cannot be used to cause a party to sue another party who it did not intend to sue. The Court of Appeal in the case of **ROHIT C. DOSHI -V- NAWAZ TRANSPORT COMPANY (1982-88)1 KAR** approved a holding of an Indian case which found that a case where a firm had been sued and a decree obtained thereof was a good decree. The finding was as follows:

“If it were to be held that a decree obtained.....in a suit instituted against an assumed name is a void decree, it would lead to manifest hardship, would open a wide door to fraud and would sap the credit on which the commercial dealings largely rest.”

Moreover since the Learned Magistrate was considering the parties applications together she/he ought to have considered the annexures of the Appellants' application which were orders made on fax letter head of the Defendant and also an order for petroleum made on an order form in the name of the Defendant. Who then was the Appellant to sue if not the Defendant?

I have also considered the Appellants' applications for summary judgment in both suits. Those applications were supported by the Respondent's order for the petroleum products. The Respondent in its Replying Affidavit did not at all respond to that evidence and accordingly there was no reason why the Learned Magistrate failed to enter summary judgment as prayed. I have examined the Respondent's defence and its replying affidavit and the same do not raise a defence to the Appellant's claim. I therefore find that the Appellant's appeal does succeed in the following manner:

- 1. That the Learned Magistrate's Order in SRMCC NO. 33 and NO 34 of 2001 (Nanyuki) delivered on 21st September 2001 to the effect that the Appellant do amend its Complaints in those suits and also disallowing the Appellant's application dated 27th July 2001 hereby set aside.***
- 2. That the court does hereby allow with costs Appellants' application dated 27th July 2001 to the effect that judgment is hereby entered for the appellant as prayed in SRMCC NO. 33 and NO. 34 of 2001 (Nanyuki).***
- 3. The Appellant is awarded costs of these appeals.***

Dated and delivered at Nyeri this 29th day of June 2007.

MARY KASANGO

JUDGE