REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 97 OF 1999

(Appeal from the Ruling of the Senior Resident Magistrate at Kakamega, Mrs. W. A. Juma, dated 11.3.1999 in SRMCC No. 70 of 1994)

BETWEEN

KENYA COMMERCIAL BANK LTD……..APPELLANT

V E R S U S

JOHN BENJAMIN WANYAMA…….....RESPONDENT

RULING

The Appeal herein was filed on 24th May 2002 against the Ruling of the learned Senior Resident Magistrate Mrs. W. A. JUMA, dated 11.3.1999 in suit No. SRMCC No. 70 of 1994 at Kakamega. The advocates who filed the appeal and signed the Memorandum of Appeal dated 30.11.1999 on behalf of the appellants were Messrs Khamati, Minishi & Company.

On 2nd July 2007, an amended record of Appeal was filed in this court by Shitsama & Company as the Advocates for the Appellant.

When the appeal came up for hearing on 4th July 2007, Mrs. Osotsi, learned counsel for the Responden,t raised a point of law in which she contended that the amended record of Appeal was incompetent and urged the court to strike it out. When the appeal came up for directions earlier on 13.12.2006, Mrs. Osotsi indicated that she would raise a point of law that the appeal is incompetent and would urge the court to strike it out. The court directed that the issue of whether the appeal is competent (which the Respondent intended to raise) could be raised on the day of the hearing.

In her submission that the amended record of appeal should be struck out, Mrs. Osotsi contended that Rule 1B (1) and (2) of Order XLI of the Civil Procedure Rules had not been complied in that no leave of court had been sought or obtained to amend the record of Appeal. The said rule stipulates:-

Rule 1B (1) "The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 8B."

(2) "After the time limited by subrule (1) the court may, on application by summons, permit the appellant to amend his memorandum of appeal."

It was Mrs. Osotsi's contention that the amended record of appeal was a nullity and urged the court to strike it out. It was Mrs. Osotsi's further contention that the firm of M/S Shitsama and Company was not properly on record for the simple reason that M/S Minishi, Khamati & Company were the advocates on record having signed and filed the original record and further, because there was no Notice of Appointment filed, Messrs Shitsama & Company could not be said to be properly on record. This, she opined, exacerbated the irregularity of the amended record as M/S Shitsama & Company were improperly on record.

The court was referred to Rule 80 of the Court of Appeal Rules under the Appellate Jurisdiction Act Cap 9 of the laws of Kenya

entitles a person "*affected by an appeal to apply to the court to strike out the Notice of appeal ……*" The said Rules do not apply to the High Court. They apply to the Court of Appeal and are known as The Court of Appeal Rules. They are to the Court of Appeal what the Civil Procedure Rules are to the High Court and the lower courts. Indeed The Appellate Jurisdiction Act, Chapter 9 of the laws of Kenya confers to the Court of Appeal jurisdiction to hear appeals from the High Court. The case cited by Mrs. Osotsi *(namely Chemigas Ltd. v. BOC Kenya Ltd. C.A. Civil Appeal No. 169 of 2000 at Nairobi (unreported)* relates to Rule 80 of the said Court of Appeal Rules and has no relevance.

Mr. Shitsama, learned counsel for the Respondent, contended that the point by Mrs. Osotsi had no merit. He said he was counsel when directions were being given and no objection was taken to his appearing. He submitted that he had filed and served the record of appeal and the issue of competence or otherwise of the record of appeal had been overtaken by events. He further contended that Shitsama & Company were acting jointly with Khamati, Minishi & Company and that the old record of appeal and the fact that Shitsama & Co. were in the new record alone acting for the Appellant did not prejudice the Respondent.

The point the court has to determine is whether the Appellant breached the Civil Procedure Rules and if so whether the amended record of appeal should be struck out.

Rule 1B (1) of Order XLI of the Civil Procedure Rules requires an application to be made by summons where directions have already been given under Rule 8B of Order XLI of the Civil Procedure Rules for permission to amend the Memorandum of Appeal. It is implicit from the rules that permission of the court to effect amendment to the memorandum of Appeal after directions have been given must be sought and obtained before any valid amendment can be made. In the instant case, the memorandum of Appeal was amended on 2-7-2007 without permission of court and directions were given on 13.12.2006. Clearly the amendment was after directions had been given. Mr. Shitsama did not pretend to have sought or obtained leave to amend the memorandum of Appeal. As the amendment to the memorandum of Appeal was effected without permission of the court, Mrs. Osotsi was quite right in her contention on this point because the amendment was in breach of Rule 1B (2) of the Civil Procedure Rules. The amendment was improper, irregular and invalid.

As regards legal representation, the advocates on record in the appeal were Khamati, Minishi & Company and at no time have they been replaced through the filing of a Notice of change of Advocates. Mr. Shitsama submitted that Shitsama & Company were acting jointly with Khamati Minishi & Company for the Appellant.

There is no provision in the rules for two firms of Advocates to be on record contemporaneously or concurrently. And this is for good reason. It would be chaotic if there was on record more than one firm. From which firm would pleadings be expected, who would be served, who would take responsibility or be held responsible for actions or omissions of the party represented by such firms? The long and short of the matter is that the contention by Mr. Shitsama cannot hold good. The rules do not recognize the position he articulated. The rationale for requiring an advocate or one firm of Advocates to act for a party and sign pleadings and receive service on behalf of such party is designed to ensure that such advocate or firm does take responsibility for the matter and is accountable to court and the client he or it represents. The law does not bar a party from utilizing the services of more than one advocate or more than one firm of advocates in a matter but where this is done, it is the advocate or firm of advocates on record who

engage a senior counsel to lead. The rules of practice recognize that in complex matters a senior counsel may be hired to lead and it is for this reason that costs are sometimes enhanced and a certificate for two counsel given by court. Mr. Shitsama's position was not that he was engaged as a leading counsel. The position he alluded to was that his firm was acting jointly with the firm also on record. That is an anomalous situation.

The fact that Mr. Shitsama had appeared in the matter earlier does not take away or preclude the right of the Respondent to take up the point which is a point of law.

It is my finding that the amended record of Appeal is incompetent as the amendment was without the permission of the court under Rule 1B (2) of Order XLI of the Civil Procedure Rules. I hereby strike it out and award costs to the Respondent. It is also my finding that M/S Shitsama & Company are not properly on record.

Dated, delivered and signed at Kakamega this 8th day of November, 2007.

G. B. M. KARIUKI

J U D G E