REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL 390 OF 2002

JOHN K. KABUCHI ……..…..…. APPELLANT

VERSUS

SURE MOTOR COMPANY LIMITED ….....……. 1ST RESPONDENT

JOSEPH K. MURAGE ……..……. 2ND RESPONDENT

SUSAN ACHIENG KASERA ……...……. 3RD RESPONDENT

(An appeal from the Ruling/Order of the Hon. N. A. Owino

in Milimani Commercial Courts Civil Suit No. 8101 of 2000
delivered on 27th June, 2002)

JUDGMENT

By a Plaint filed in the lower court on 11th October, 2000, the Respondents (Plaintiffs in the lower court) sued the Appellant to prevent him from repossessing a motor vehicle which was at the center of a dispute between them. The 1st Plaintiff in that suit was named as “Sure Motors Company Ltd”. A verifying affidavit filed with that Plaint, sworn by one Francis Njuguna Ndegwa (hereinafter “Ndegwa”) stated that he, Ndegwa, was the director of the 1st Plaintiff Company.

The Defendant (now the Appellant) filed his defence and counter-claim to the aforesaid action. The suit was heard, and at the close of the testimony, and before submissions, the Appellant (defendant) accidentally discovered that “Sure Motors Co. Ltd”, the 1st Plaintiff, was not a limited liability company, but only a “firm” registered under the Registration of Business Names Act (Cap 499). He immediately applied to join the proprietor of that firm, Ndegwa, to the suit. This was necessary to pursue his counterclaim and to eventually execute the decree in the event of his success in the counterclaim.

The lower court disallowed the application mainly on the grounds that the case had been closed; and that to allow joinder of a new party at that late stage would mean “re-opening the case afresh”.

It is against that Ruling that the Appellant has preferred this appeal, on the following six grounds outlined in the Memorandum of Appeal.

> ***1. The learned trial Magistrate erred in law and in fact by dismissing the Defendant’s application and declining to grant the Orders sought.***
>
> ***2. The learned trial Magistrate erred in law and in fact in failing to appreciate inter alia the law relating to amendment of pleadings and addition of parties as set out under the statutory***

provisions of the Civil Procedure Act and rules under which the application was brought.

3. The learned trial Magistrate erred in law and in fact by failing to appreciate the fact that Francis Njuguna Ndegwa had himself admitted that Sure Motors Company Limited did not exist and therefore any consequential Orders against it would be null and void and unenforceable and the Court would be acting in vain by delivering a mere paper Judgment.

4. The learned trial Magistrate erred in law and in fact by failing to appreciate that by admitting that Sure Motors Company Limited did not exist then Francis Njuguna Ndegwa who carried out his business in the name and style of Sure Motors and who had indeed instituted the suit was a necessary party to enable the Court conclusively determine all the issues in controversy between the parties.

5. The learned trial Magistrate erred in law and in fact by disregarding the Appellant's submissions and all the judicial decisions and authorities cited before her.

6. The learned trial Magistrate erred in law and in fact by wrongfully exercising her discretion in dismissing the Appellants Application in the face of overwhelming thirst by the Appellant for justice on the basis of facts which were not challenged by the Respondents in accordance with the laid down principles and allowing herself to be influenced by extraneous matters.

Mr Tiego, Counsel for the Appellant, argued that had the 1st Respondent not misrepresented in the first place by filing his suit in the wrong name, the application to join the new party would not have been necessary; that in any event a party could be added to the suit under Order 1 Rule 10 of the Civil Procedure Rules at any stage of the suit, and that pleadings could be amended under Order 6 A Rule 3 at any stage of the suit.

Mr Kimani, for the 1st and 2nd Respondents, argued that the application to amend was made after the case had closed, and, therefore, it was proper for the Magistrate to disallow the same.

Order 1 Rule 10 (1) of the Civil Procedure Rules states 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".

Clearly, the Court has a discretion to order the addition of a party "at any stage" of the suit. This means at any time before Judgment. Similarly, Order 6 Rule 3 allows for amendment of pleadings "at any stage" of the suit. The court's discretion should be exercised judiciously with a view to achieving the ends of justice. In my view, such an application to add a party or amend should not be rejected only on the ground that the suit would have to be re-opened afresh. So, if the hearing has to start all over again, and if that is in the best interest of Justice, that is exactly what the Court should do, and where necessary, condemn the guilty party with an order of costs. Here, in this case, if there was a "guilty" party, it was the 1st Respondent, and specifically Ndegwa, who misrepresented the status of his "firm", and who swore a false affidavit. Instead of condemning him for his blatant disregard of court process, and for swearing a false affidavit, which, of course, is a criminal offence, the Magistrate rewarded him with an opportunity to escape from his obligations to answer the counter-claim against him. That clearly was a most unjust decision.

In ***Central Kenya Ltd vs Trust Bank Ltd & Others (C. A. 222 of 1998, Nairobi)*** the Court of Appeal had the opportunity to consider both Orders 1 Rule 10 and 6 A Rule 3 extensively, and stated as follows:

"The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and

Rao, in which the learned authors state:

> ***"that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."***

It said further:

> ***"Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs {See, Beoco Ltd vs Alfa Laval Co. Ltd (1994)4 ALL ER. 464}".***

The Respondent's Counsel cited to me the decision of the Queen's Bench Division in the English case of ***Loutfi vs C. Czarnikow, Ltd (1952) 2 AEP 823*** where the court held that:

> ***"Unless there is very good ground and strong justification for so doing, the court should be reluctant to grant amendments of the pleadings after the close of the case but before judgment, even though it has been indicated in the course of the hearing that some amendment might be asked for."***

This case is of limited persuasive value, but in any event I find that in the case before me, there was strong justification for allowing the amendment sought, and the lower court clearly erred in disallowing the Appellant's application dated 22nd February, 2002.

Accordingly, and for reasons outlined, I allow this appeal; set aside the lower court's Ruling and Order made the 27th June, 2002, and allow the Appellant's application dated 22nd June, 2002 as prayed. I also award the costs of this appeal to the Appellant, but order that the costs of the application dated 22nd February, 2002 be in the cause, and abide the final result of the lower court suit.

Dated and delivered at Nairobi this 19th day of July, 2005.

ALNASHIR VISRAM

JUDGE