



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 51B of 1999

JAMES MUCHORI MAINA.....APPELLANT

=VERSUS=

THE KENYA POWER & LIGHTING COMPANY LTD.....RESPONDENT

(Being an Appeal against the Ruling of Miss Wanjala - Ag. Resident Magistrate in ELD.

CMCC NO. 344 OF 1998 Dated 21st June,1999)

JUDGMENT

This is an appeal from the ruling of the acting Resident Magistrate at Eldoret - Ms.J.A. Wanjala which was given on 21st June, 1999. The appeal was filed by Omollo, Buluma & Co. Advocates on behalf of the appellant – through a Memorandum of Appeal dated 30th June,1999.

The appeal has 4 (four) grounds of appeal as per the Memorandum of Appeal, that:-

1. The learned trial magistrate erred in law in disallowing the appellant's application dated 12th February, 1999.
2. The learned trial magistrate erred in law and fact in relying on grounds of opposition and replying affidavit filed by Kibichiy & Co. Advocates when the said firm has never been on record for the respondent.
3. The learned trial magistrate erred in law and fact in finding that leave to join the Attorney General out of time had not been obtained.
4. The learned trial magistrate erred in law and fact in importing facts into the case that had not been presented before her.

At the hearing of the appeal, Mr. Cheluget for the appellant argued grounds 1 and 2 together and grounds 3 and 4 together. He submitted that the learned magistrate erred in dismissing the appellant's application to join the Attorney General as a defendant. The learned magistrate dismissed the application on the ground that the application was late. This was contrary to **Order VIA rule 3 and 5 and Order I rule 10 Civil Procedure Rules** which provides that a party can enjoin any other party at any time of the proceedings. He submitted that it was necessary to join the Attorney General as a party for the matters before the court to be considered fully, New facts came to be known later as was evidenced in the

affidavit of Moses Buluma Advocate. In terms of **section 3 Civil Procedure Act, (Cap 21)**, a court can make orders for determination of matters on merit. In his view, without joining the Attorney General, it would not be possible to have a proper case on the issues.

On grounds 3 and 4 he submitted that when they sought leave to amend the plaint, grounds of opposition were filed by Kibichiy & Co. Advocates who were not on record for the defendant. The advocates on record were Hamilton Harrison & Mathews. Mr. Kibichiy also argued against the joining of the Attorney-General in the proceedings, when he did not have a basis for arguing on behalf of the Attorney-General.

Mr. Kamau for the respondent opposed the appeal. He submitted that the appeal was incurably defective. **Under order XLI rule 1(A) Civil Procedure Rules**, it was mandatory for the appellant to have filed a certified copy of the order appealed from. This was not done. **Section 2 of the Civil Procedure Act (Cap.21)** defines an order. **Section 75 of the Civil Procedure Act (Cap 21)** provides that an appeal can lie only from an order and not a ruling. Therefore the appeal should be dismissed.

Secondly, in the application before the magistrate, there was no prayer for joining the Attorney-General as a party. The appellant could not be granted what he did not pray for. The applicant only annexed an amended plaint. The magistrate had the discretion to allow or disallow an application for amendment. The magistrate disallowed the application, as the defence case had commenced. No explanation was given for the late request for amendment of the plaint. Also the Attorney General had not been served with a notice as required **under section 13 A of the Government Proceedings Act (Cap.40)**. No proceedings could therefore be sustained against the Attorney-General.

In his view, the magistrate would be making an order in futility if she allowed the application. He also submitted that limitation of actions would apply under the **Public Authorities Limitations Act**. He sought to rely on the case of **Mbogo –vs – Shah (1968) EA 93**.

On the argument that Kibichiy & Company Advocates were not on record, he submitted that a consent had been recorded by the parties. That consent was binding on both parties and the court. It was a form of contract. He sought to rely on the case of **Kenya Commercial Bank Ltd =vs= Benjoh- Nairobi Civil Appeal No. 276 of 1997**. He also sought to rely on the case of **Flora Wasike =vs= Ndungunya {1985} KLR 370**. In his view, Mr. Kibichiy was acting on behalf of Hamilton Harrison and Mathews Advocates. He further stated that in the case of **Jadiel Nyaga – Nyeri Civil Appeal No. 59 of 1997**, it was held that a party to a suit of malicious prosecution had to join the Attorney-General at the beginning not in the middle of the suit.

In a brief reply Mr. Cheluget submitted that the notice to the Attorney- General should not arise in this appeal. It was a matter for determination in another court. He was also of the view that the filing of the ruling of the lower court was sufficient. There was no need to file the order on appeal. He cited **Order III rule 12 Civil Procedure Rules** and submitted that withdrawal of an advocate from record had to be done by way of Chamber Summons. On whether the proceedings against the Attorney-General were statute barred, he argued that that would arise when leave to joint the Attorney – General was granted.

This appeal arises from a ruling of Miss A.J. Wanjala acting Resident Magistrate Eldoret delivered on 12th June,1999. In that ruling the learned magistrate dismissed an application by the plaintiff dated 12th February,1999 to amend the plaint. That application was made after the defence case had commenced, as D.W. 1 had already testified in court on 17th December,1998. I have considered the submissions of both Counsel who appeared for the parties. I have also perused the pleadings filed and the record. The appeal raises a number of issues which I will now proceed to deal with.

The first issue is whether the learned magistrate erred in dismissing the application to amend the plaint and join the Attorney-General as a party on the ground that it was late. The application was brought after the defendant had already started giving evidence through D.W.1. Mr. Cheluget has argued that a plaint can be amended at any time of the proceedings to join a party. He relied on **Order VIA rule 3 and 5 and Order I rule 10 Civil procedure Rules**.

I have perused the said provisions of the law. It is clear to me that a new party may be joined at any time during proceedings in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit. In granting an order for amendment of pleadings to add a new party, the court can make any orders or give terms as it deems fit. In my view, the court can allow amendment of pleadings to add a new party even if the plaintiff has closed his case and the defence has started giving evidence. Since the word used is “**may**” my view is that the court has discretion. However, the request for amendment to add another party after the plaintiff has closed his case, per se, should not be enough reason to disallow the application. Additionally, **Order VIA rule 3(2) provides** that a court may grant leave for such amendment even if the relevant period of limitation has expired.

The second issue is whether Mr. Kibichiy & Co. Advocates were properly on record at the hearing of the application. Counsel for the appellant has argued that Mr. Kibichiy was not properly on record. That Hamilton Harrison and Mathews were the advocates for the respondent on record. Counsel for the respondent has argued that there was a consent recorded between the parties acknowledging that Mr. Kibichiy was properly on record, so that issue should not arise on appeal.

I have perused the record of proceedings before the learned magistrate. On 16/3/1999 when the application for amendment of plaint came for hearing before the learned magistrate, the issue as to whether Mr. Kibichiy was properly on record was raised. The learned magistrate gave the parties time to consult. Then a consent was recorded by Counsel for the parties that Mr. Kibichiy was properly on record, and the application proceeded for hearing. Mr. Buluma was present for the applicant /appellant and agreed to the consent.

A consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of **Kenya Commercial Bank Ltd =vs= Benjoh Amalgamated Ltd. – Nairobi Civil Appeal No. 276 of 1997**, wherein the Court of Appeal applied the reasoning in the case of **Flora Wasike –vs- Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA** (as he then was) stated-

“ It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.

The appellant herein has not challenged the consent in any way. That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal.

The third issue is whether the Attorney-General should have been served with notice of intention to sue before the application for joining him as a party was filed and argued. I have perused section **13A** of the **Government Proceedings Act (Cap 40)**. Section **13A(1)** provides:

“ 13 A(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings”.

Section 13 of the Government Proceedings Act provides that service on the Government means service on the Attorney – General. Proceedings against the Government are defined in section 2 of the Act as including a claim by way of set-off or counterclaim raised in proceedings by the Government.

What was before the learned magistrate was an application for leave to join the Attorney – General as a defendant. Though there was no specific prayer on the face of the application to join the Attorney-General, the proposed amended plaint included the Attorney –General as second defendant. Counsel for the appellant has argued that the applicability of section 13A of the Government Proceedings Act will arise after leave is granted. I do not agree with him. The application was an application for leave to amend the plaint to join the Attorney –General as a party. The proposed amended plaint was annexed to

the Chamber Summons dated 12th February, 1999. The Attorney General is named in the amended plaint as 2nd defendant. Prayer (b) of the Chamber Summons prayed for orders that the annexed amended plaint be deemed as properly filed subject to payment of court fees.

From the way that the prayers in the application were made, I am of the view that the application was a way of commencing proceedings against the Government. Otherwise there should have been no prayer that the draft amended plaint be deemed as filed. Therefore, in my view, the Attorney – General should have been served with a notice of intention to sue. The provisions in **section 13A of the Government Proceedings Act (Cap 40)** are mandatory. Therefore the failure to serve the Attorney –General with a notice of intention to sue meant that the appellant did not comply with mandatory legal provisions. That was fatal to the application seeking to join the Attorney- General as a defendant.

The next issue is whether the appeal is defective as no order or decree was filed in the record of appeal. Counsel for the appellant has argued that, though no order or decree was filed, the ruling which was filed was adequate. I have perused **Order XLI rule 1 A Civil Procedure Rules**. The rule provides :-

“ 1A. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79 B of the Act until such certified copy is filed”.

Clearly, the law as stated above is that the filing of the decree or order with the memorandum of appeal is mandatory. The court has discretion to allow more time within which the decree or order should be filed by the appellant, if the same was not filed with the memorandum of appeal. The appellant’s Counsel is not seeking for time within which to file a certified copy of the decree or order in a supplementary record of appeal. Instead, he has sought to rely on the fact that the ruling was filed to be adequate .

In my view, the ruling filed did not meet the requirement for filing the decree or order, which is a mandatory requirement of law. Therefore in my view, the appeal is incompetent and has to be dismissed.

For the above reasons, I dismiss the appeal with costs to the respondent.

Dated at Eldoret this 2nd day of November 2005.

GEORGE DULU,

Ag. Judge.

In the presence of:-