



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 255 OF 1995

Shariff Mohamed A. Omar.....APPELLANT

versus

Bontempi Luigi & 3 Others.....RESPONDENT

JUDGMENT

October 30,2002 Onyancha J delivered the following judgement.

The application already argued is dated 30.10.2002. it is brought by the plaintiff who seeks for leave of court to be granted to him to amend his plaint to the effect of transposing the 2nd Defendant to being the 2nd plaintiff. The application is based on the ground that the plaintiff's claim being the reliefs which first and foremost are to the benefit of the 2nd Defendant, the company in which both the plaintiff and other defendant claim a share, it would be necessary that the 2nd defendant be made a claimant rather than a defendant. He claims that such an amendment would place the parties in a position where the ends of justice would be met. The plaintiff further argued that his failure to join the 2nd defendant as a plaintiff came about because at the time of filing the case, the 1st and 3rd defendant controlled the affairs of the company and that the reliefs sought in the plaint and the evidenced so far recorded would support the sought amendments.

The 1st, 3rd and 4th defendants saw it differently. They see the application to amend as coming too late in the day when they have spent too much money to sustain the defence of 2nd defendant. They further see the defendants being prejudiced by the amendments sought although they did not put their finger on the alleged prejudice. They also argued that if the 2nd plaintiff is made a defendant a lot of evidence on the record will not be challengeable at this stage as it cannot be availed for cross examination at this stage when the plaintiff has closed his case.

I have considered the evidence put forward by both parties, after also examining the reliefs sought in the plaint and after carefully perusing the evidence so far recorded. I find that the first person to benefit if the accounts are taken and if the company's property allegedly illegally taken by the 1st, 3rd and 4th defendant, supposing this will be proven, will be the 2nd Defendant, first and foremost. Whether or not the plaintiff and 1st, 3rd and 4th defendant will benefit at the end of the day will depend on whether or not the company's property and funds will be protected, secured and returned to it, if any are found unlawfully taken. It would therefore make sense if the second defendant were plaintiff and not a

defendant.

The applicant brought this application under Order 1, Rule 10(2) and S. 3A of the Civil Procedure Act. The defendants opposing this application rejected the said order, rule and section as the correct one to have been used to seek the amendment sought. I have considered the provisions of order 1 Rule 10(2) and section 3 A of Civil Procedure Act. I am of the view and I so hold, that the plaintiff used the proper order, rule and Section to come before this court in the matter he did. Order 1 Rule 10(2) states:-

“The court may at any stage of 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 as defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

My understanding of this section is that the application can be brought by either party or the court may act on its own, to either strike out or add the name of party as plaintiff or as defendant. The court cannot be said to have power to strike out or add any party and at the same time be told that it has no power to transpose a party from one side of the divide to the other side. The court by this provision can strike out a party and then proceed to add the same party on the opposite side. If this cannot be denied, I do not see what would prevent the court straight away transposing the plaintiff to become the defendant and vice versa. The court would only need to be certain that such transposition is for the purpose of enabling it to effectually and completely adjudicate upon and settle all questions involved in the suit. The court should also have been satisfied that the party to be added or transposed to either position is proper and necessary in the transposed position to accomplish the above-mentioned purpose. It might be fitting to add at this stage that apart from the power of this court to add or strike out or transpose a party under order 1, Rule 10(2), this court in my opinion, has inherent powers to do so under section 3A of the Civil Procedure Act.

The Defendants herein argued that the applicant's application should not be allowed because it is coming too late in the day. I would agree that the application has been brought somewhat late in the day but may view, considering the provisions of the law discussed above and the purpose therefore, is that nothing would defeat the purpose intended by the legislature which is that the striking or addition or transposition of a party will be done in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Here the main question involved is whether or not parties herein have fraudulently taken away the 2nd defendant's property and funds and if so how the same should first and foremost be accounted for before the sharing out in accordance with the parties' shares. It would in my view not only be proper but necessary that the 2nd defendant who would first and foremost benefit, be the plaintiff in order to receive back the property it was deprived of, if it is so proved.

It is my view also and I so hold that such an amendment may be allowed at any stage of the proceedings as provided under Order 1, Rule 10 (2) subject only to the law of limitation. The court's discretion in my view is very wide, the object being to avoid multiplicity of suits and conflicts of decisions. The applicant argued that he made the mistake of making the 2nd defendant at the time of filing the suit. It would appear from the authorities however and I so hold, that while striking out or adding a party under Order 1 Rule 10(1) such a mistake made at the filing stage has a bearing as to whether or not there should be a granting or a refusal of the application to amend, but under sub-rule Rule 10(2) such mistake is of no importance and under the latter the court would proceed to transpose a party whether or not the applicant made a mistake at the time of filling a plaint.

Having come to the above conclusions I find that it is not only proper but also necessary to transpose the 2nd defendant to be the 2nd plaintiff forthwith. I do not find it necessary that the 2nd defendant should be required to give any other additional evidence other than the evidence already on the record and the evidence to come from the 1st, 3rd and 4th defendants, if any, plus any other evidence adduced or to be adduced by the said defendants or their witness. Nevertheless any party to this case would be granted liberty to apply for further cross examination necessitated by the transposition herein allowed

immediately the amendment herein allowed is put in place. The amendment is being allowed late but considering the provisions under which it is brought and also considering the nature of this suit, I will allow the defendant to argue the issue of costs to have same settled now rather later. The upshot is therefore that the application is allowed with costs to 1st, 2nd, and 4th defendants. I make the following orders.

ORDERS:

1. Application allowed and the 2nd defendant is hereby transposed to be the 2nd plaintiff.
2. the 1st, 3rd and 4th defendant at liberty to cross-examine the present plaintiff in relation to the new position immediately the amendment is put in place
3. the current plaintiff to amend the plaint file and serve the same within 10 days from the date hereof, the amendment being limited only to the transpositions as allowed herein.
4. Costs of this application to the 1st, 3rd and 4th defendants to be argued and ascertained immediately and in any case before further hearing.
5. Hearing the date to be fixed in the court.

Dated and delivered at Mombasa this 30th day of October, 2002.

October 30,2002

Onyancha J