Supagreen Oils Limited v Nyumu (Civil Appeal E204 of 2023)
[2025] KEHC 432 (KLR) (14 January 2025) (Judgment)

Neutral citation: [2025] KEHC 432 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E204 OF 2023

HM NYAGA, J

JANUARY 14, 2025

BETWEEN

SUPAGREEN OILS LIMITED ..... APPELLANT

AND

SAMMY NYUMU ..... RESPONDENT

JUDGMENT

1. Vide a claim filed in the small claims court, dated 10.2.2013 one John Waithaka Thuo sought payment of Ksh 869,660/- from the Respondent, being amount due from the Respondent for fuel supplied to his motor vehicles and which was not paid for.

2. Thereafter the Respondent filed his response in which he stated inter-alia that all the fuel /goods supplied were fully paid for.

3. The appellant then proceeded to file an amended claim dated 15.5.2023 in which it was substituted as the plaintiff in place of John Waithaka Thuo.

4. The case proceeded for hearing and on 27.7.2023, Judgement was delivered in which the court found that John Waithaka Thuo, lacked authority to act for the Appellant, a limited liability company as he had not completed with the provisions of order 4 Rule 1 (4) of the Civil Procedure Rule. The court proceeded to dismiss the claim with costs to the Respondent.

5. Aggrieved by the said judgement, the Appellant filed the memorandum of appeal herein, in which it raises the following grounds:-

    a. That the Honourable Magistrate erred in law and in fact in failing to appreciate both parties' submissions and testimonies when writing its judgment.

    b. That the Honourable Magistrate erred in law and in fact in dismissing the Appellants suit.

6. The Appellant thus prays that:

   a. This appeal be allowed and judgement of the trial court delivered on 27th July 2023 be set aside.

   b. That the prayers in the statement of claims be allowed.

   c. That the Appellant be awarded costs of this appeal

   d. Succession further orders on this Honourable court may deem just and expedient.

7. Directions were given that the Appeal be argued by way of written submissions. Both parties complied with the directions. I will not rehash their submissions word for word. It suffices to state that I have considered them and will where necessary refer to them in this judgement.

8. As has been correctly submitted, the duty of the first appellate court is to examine and evaluate the evidence tendered in the lower court and come to its own conclusion. This was stressed by the court in Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123 where it was held;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

9. From the Judgement of the lower court, it is clear that the suit was dismissed for non-compliance with order 4 Rule 1 (4) of the Civil Procedure Rules. They provide as follows:-

   Particulars of plaint [Order 4, rule 1.]

   (1) .....

   (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

   (3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

   (4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

   (5) The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counterclaims.

   (6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.

10. The Appellant has not really addressed itself to the issue above, and dwelt on the merits of the case itself. The Appellant submits that there was no doubt that the respondent owes the Appellant the sum claimed for and the invoices produced proved this fact.

11. The respondent submits that the issue of non-compliance with order 4 Rule 1 (d) was duly raised during the trial and no attempt was made to cure the anomaly.

12. As stated earlier, the suit was initially commenced in the name of John Waithaka Thuo. The claim was then amended and the plaintiff/claimant was substituted with the Appellant herein.

13. The Appellant as set out is a limited liability company. Thus, when it became the plaintiff, it ought to have complied with the provisions of order 4 Rule 1(4) of the Civil Procedure Rules. Evidently no written authority as Resolution was filed in court.

14. The importance of compliance with order 4 Rule 1 (4) was reiterated in Assia Pharmaceutical vs Nairobi Veterinary Centre Ltd (Milimani) HCCC No. 391 of 2020 cited by the Respondent. The court held as follows.

> It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect .... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the Articles of Association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

15. The rationale of the said rule was dicussed in Spire Bank Ltd vs Land Registrar And 2 others (2019) eKLR, the court held as follows:-

> It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.

16. There is no dispute that the Appellant did not file the requisite authority upon the amendment of the claim. Failure to do so, in my view, rendered the claim fatally defective ab initio.

17. Although Article 159 of *the Constitution* urges courts to do substantive justice over technicalities. I am of the view that order 4 Rule 1 (4) is not a mere technicality. It goes to the road of the legality of the Appellants claim as otherwise.

18. I am thus in agreement with the trial court that non-compliance with the Rules rendered the suit defective.

19. The trial court also found that the witness who testified was duly authorized. I do not think that order 4 Rule 1 (4) extends to a witness. It is restricted to a person authorized present or defend a suit on behalf if a corporation. A witness need not meet the threshold set out in the said rule. There is a difference

between a witness and a person authorized to bring suit. To that extent, the trial court erred in referring to such authority in respect a witness. Thus, as a witness, John Waithaka was competent to present the suit on behalf if the Appellant.

20. So, was the court right in dismissing the claim?

21. Ordinarily, the court that finds that a suit is incompetent is required to strikes it out. This gives the affected party to present a proper suit.

22. The court record shows that the issue was raised in the course of the trial but the Appellant never moved to cure the anomaly. This left the trial court with no option but to find the suit as incompetent.

23. Having considered the matter, I find that the trial court did not err when it found the suit to be incompetent. It correctly avoided other issues as it was expected that the Appellant if inclined, to would present a proper suit.

24. The issue that arises is the use of the words "dismissed". As can be clearly seen in the judgement, the court avoided looking at other issues after finding that the suit was incompetent.

25. In my view the court ought to have struck out the suit and not dismissed it. Although the two phrases are used interchangeably, they refer to different situations. The rule uses the words 'struck out'.

26. When a suit is struck out it is usually for procedural technicalities as related issues.

27. On the other hand when a suit is dismissed, the presumption is that it has been heard on merits and a final determination made.

28. In Enock Kirao Muhanji vs Hamid Abdalla Mbaruk [2013] eKLR the court discussed the use of the phrases "struck out" and dismissed. The court held as follows:-

> It is true, as argued by the Applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.
>
> The words "dismissed" and struck out" are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts.
>
> It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck court, the court should look at the circumstances of each case to arrive at a decision. The mere fact that the trial court uses the words "dismissed" does not expressly mean that a fresh suit cannot be filed if indeed the court meant that the suit should have been "struck out" so as to allow a party to file a fresh suit.'

29. Therefore once the trial court found that the suit was incompetent, it would have struck it out. That would have given the appellant a chance to present a fresh suit. The use of the word dismissed was erroneous as it connotes that the suit was determined on merits.

30. Consequently, while I agree with the lower court that the suit was incompetent, I hereby set aside the use of the word 'dismissed' and substitute it with the phrase "struck out". The Appellant will then have a chance to file a fresh suit, where applicable.

31. Other than the above finding, I find that the appeal cannot succeed and it is dismissed with costs.

SIGNED AND DELIVERED (VIRTUALLY) AT MERU THIS 14TH DAY OF JANUARY,2025.

H. M. NYAGA

JUDGE