REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 139 OF 2016

JOSEPH PIETER AUGUST MARIE JENSEN.....APPLICANT

VERSUS

KENYA ORIENT COMPANY LTD.....RESPONDENT

J U D G M E N T

1. On, 23/09/2016, Hon. Mutunga (RM) delivered a ruling by which the plaintiffs suit was dismissed and made the following conclusion:-

> **"From the record, it is clear that the current plaintiff is different.**
>
> **The Respondent herein who's to substitute the plaintiff without leave of the court. It is procedural that a party to a suit ought to have the permission of the court to enjoin but the plaintiff close not to. The court is aware of the provisions of Article 159 of the Constitution of technicalities but the mistake is grave. It cannot be cured. It is not know why a new person was introduced yet the former one had a power of attorney to representation. I have read the submissions and authorities therein and have found applicants application to have merit and it is hereby allowed as to Prayer I & II".**

2. The application giving rise to the decision made the following prayers:-

> **1. This suit be struck out for being an abuse of the court proceeds.**
>
> **2. The costs of this application be provided for**.

3. The reasons advanced to ground the application were that the suit having been filed in the month of July 2015 in the name of one Fredrick Thuranira M'rukunga, the plant was, without leave, amended by substitution of that plaintiff by one Joseph Peter August Maria Jensen, at a time the defendant had not been served with summons. It was also contended that there was prospects of grave prejudice to the defendant who was unable to file a defence to the suit which in any event had not been verified by an affidavit of the plaintiff and the suit was thus an abuse of the court process.

4. In opposition to that application, the plaintiff filed grounds of opposition dated 20/9/2015 in which it was contended that the application was anchored upon archaic and frivolous mentality which had been set aside by the constitutional provisions which abhor technicalities; that there was a design to delay the just determination of the suit; that since amendment, of the plaint the defendant had itself amended the statement of defence and was estopped from alleging prejudice; that the plaintiff was a holder of power of attorney with authority to sustain the suit and that the substitution of the plaintiff had left the cause of action intact.

5. Both counsel filed submissions which apparently address not only the notice of motion but also the notice of preliminary objection which faulted the suit on account of lack of privity of contract and lack of locus standi.

6. From the record of appeal filed, the only issue for determination is whether the plaintiff suit was so bad as to be subject to the draconian remedy of being struck out.

7. The Law on when a court would struck out the suit is now well developed and entrenched that a pleading that befits being struck out must be the kind that is so week and hopelessly untenable showing no semblance of a cause as to be incapable of remedy by an amendment [1]. For a suit to be struck out for being an abuse of the court process pursuant to Order 2 Rule 15(1) d, the applicant must show that the pleading as filed is no more that a pretence, phantom and not intended to seek a bonafide and legal remedy. The matter must be intended to achieve purposes other than legitimate justifiable legal right[2]. The often quoted decision in this area and which has stood the test of time is that phrase by Madan JA in ***DT Dobie vs Muchina [1982] KLR*** when the judge said:-

> **"No suit ought to be summary dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by an amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by an amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it".**

8. In the matter at hand, the original plaint, pleaded a cause of action grounded upon a contract of insurance by which the plaintiff sought to enforce the terms of the contract mandating that disputes over the policy be referred to arbitration among other reliefs. Together with that plaint was filed a list of documents which included a certificate of insurance together with correspondence to show there was a contract of insurance as well as a police abstract on road traffic accident and a power of attorney. The claim of their having been a contract of insurance was expressly admitted in the amended statement of defence. That fact alone presents to this court a situation demonstrating that there was atleast a semblance of a cause of action if not an outright straight forward cause founded on a contract. When such facts present themselves, the court must remember that its duty is not to summarily and hastily shut its doors to litigants before hearing the evidence on the merits. Way back in 2007, the Court of Appeal had reiterated the established position of the need to sustain litigation for purposes of a affording to parties their day in court rather than acting with haste to drive parties from the seat of justice. In **Cresent Construction Co. Ltd vs Delphis Bank Ltd [2007] eKLR** the court said:-

> **"It is to be exercised with greatest care and causion. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time honoured principle. At the same time it is unfair to drug a person to the seat of justice when the case is purportedly brought against him is a nonstarter".**

9. Having looked at the plaint and the defence filed I do not consider the suit to have been a nonstarter to merit being struck out. There was infact absolutely no material to paint the plaint as an abuse of the court process.

10. This being a first appeal, and while being well aware that the trial court reached the impugned decision in the exercise of its judicial discretion, I am also aware that in a first appeal the court proceeds by way of a re-trial (*see* ***Selle vs Associated Auto Boat Co. Ltd [1968] E.A. 123.***

11. I have had the chance to peruse the entire record pursuint to my mandate and I am convinced that the claim as pleaded did reveal a cause of action and was not subject to being struck out as the trial court did.

12. Is it true that the amended plaint was filed without leave of the court? The record filed shown that the defendant filed an appearance on the 17/8/2015 and served the same day while the amended plaint was filed on 20/8/2015 some 3 days later.

13. Under Order 8 Rule 1 a party is permitted to amend his pleading at anytime before the pleadings close. By the time the plaintiff filed the amended plaint, the pleadings had not closed and the plaintiff cannot be accused of effecting an amendment without the leave of the court. He was by law entitled to amend without the leave of the court.

14. The law permitted the amendment as effected because the pleadings had not closed. It is also not in dispute that an amendment cannot be refused merely because it introduces a new party of new capacity a party sues or is sued or that it introduces a new cause of action. Even where there is a cause to reject the amendment, the remedy is to seek such rejection but not to strike out the suit. I have said enough to show that the striking out of the suit by the trial court was uncalled for and must be set aside for the ends of justice to be met.

15. I therefore allow the appeal, set aside the Orders of the trial court dated the 23/9/2016 and in its place substitute therefore an Order that the defendants Notice of Motion dated 17/9/2015 be dismissed with costs.

16. The suit before the trial court is reinstated to be heard by another Magistrate other than Hon. (Mr) Mutunga, RM.

17. The costs of the appeal are awarded to the appellant.

Dated and delivered at Mombasa this 18th day of January 2019.

P.J.O. OTIENO

JUDGE

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[1] Kiranga Estates Ltd vs National Bank Ltd [2012] eKLR

[2] Jubilee Insurance Co. Ltd vs Grace Buyona Mbinda [2016] eKLR