REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 20 OF 1988

ITALIAN ENGINEERING WORKS …....…….. PLAINTIFF

VERSUS

GLORY CAR HIRE LTD……..…….. DEFENDANT

JUDGMENT

The plaintiff, Italian Engineering Works Ltd, a limited liability company incorporated in Kenya, brought action by plaint seeking a restraining order against the defendant, Glory Car Hire Ltd, also a limited liability company incorporated in Kenya with a registered office at Mombasa,from carrying out any construction work on a road reserve fronting its property known as Plot No 392/XXI/Mombasa. It also prayed for costs. The road whose road reserve is in issue is Liwatoni.

The defendant was served with summons to enter appearance and the plaint. It appeared and filed a written statement of defence in which it avered, *inter alia,* that the road reserve in question belonged to the Municipal Council of Mombasa,which had allocated it to it and authorized it to build thereon and occupy it for purposes of keeping and servicing its vehicles. A copy of the letter of allocation was annexed to the written statement.

Consequent upon the filling of that written statement the plaintiff successfully applied for leave to amend the plaint to include the Municipal Council of Mombasa as a party in the suit. It filed an amended plaint but the amendments were not underlined in red ink or crossings shown as required by the provisions of order VI A rule 7 Civil Procedure Rules.

The amended plaint was served on both the initial defendant, Glory Car Hire Ltd, and Municipal Council of Mombasa, with the latter shown as the second defendant, before the above order and rule were complied with. No objection was raised as to the form of the amended plaint and the proceedings went on as though everything was in order.

The second defendant did appear but failed to file defence.At the request of the plaintiff's advocate on record interlocutory judgment in default of defence was entered on 23rd March,1998. That having been the case there was no necessity for summons for directions. The suit was later set down for assessment of damages.

When the matter came for *ex parte* hearing, Mr Lumatete appeared for the second defendant. The 1st defendant was not involved in that hearing a consent order having earlier been made on an interlocutory application which order settled the issues in the suit between the plaintiff and the 1st defendant. The order read as follows:

"By consent 1st defendant to remove the corrugated iron sheet wall running along the boundary –line of the plaintiff's property within 7 days from the date hereof. The said defendant to remove all other fencing and corrugated iron sheet walls and to vacate the road reserve within 7 days of the plaintiff filing with the 2nd defendant a notice of commencement of works and starting construction on it's property.

In the event of the 1st defendant failing to remove the said fencing and to vacate the road reserve when the foundations are commenced by the plaintiff, the 1st defendant shall be deemed to be in contempt of court and the plaintiff shall be at liberty to apply for committal to civil jail of it's chief officers. No order for costs against the first defendant. Suit against the 2nd defendant to proceed."

Mr Lumatete raised three legal points. Firstly,that the plaint did not comply with the law with regard to form. Secondly, that the order reproduced above disposed of the issues in the suit except costs. Thirdly, that the 2nd defendant was under the law empowered to abolish old roads and create or adapt new ones and therefore had the full power to allocate the road reserve. I have deliberately started with the submissions of Mr Lumatete as the competency of the claim is in question.

Order VI A rule 7(1) Civil Procedures Rules reads:

"Every pleading and other document amended under this order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which amendment was made."

Sub rule (2) reads:

"All amendments shall be shown by striking out in red ink all deleted words but in such a manner as to leave them legible and by under lining in red ink all added words."

It is the second sub-rule which the plaintiff did not comply with and upon which Mr Lumatete's first submission was based . The sub-rule employs language which appears to be mandatory, but to my mind, the words, are merely directory. Failure to comply with the provision does not render invalid the pleading concerned. The whole purpose of showing the amendments is, to my mind, to warn the court and opposite party at all times that the original claim, had been amended. In other jurisdictions like India the plaint or any other pleadings to be amended is returned to the party seeking the amendment to effect the amendments and then resubmit it to the court. In some cases the amendments may be made on a separate paper, but not on the face of the pleadings. In yet other instances the amendments may be shown on the face of the pleadings (see *AIR Commentaries Civil Procedure Code,*Vol 2; 6th Ed p 2289) showing the deleted words and added words on the face of the pleadings is not to my mind, an essential requirements for the just decision of a suit. It is a requirement of expediency. A claim should not be thrown out merely for non-compliance with that requirement. In any case the court has inherent jurisdiction to do such things as are necessary in an action for the ends of justice. I exercise that jurisdiction and excuse the mistake of omission. I now turn to Mr Lumatete's second limb of his submission. Clearly the order made by consent on 13th March, 1998, and which I reproduced above, dealt with all the plaintiff's grievances except costs and damages. The claim for damages would lie against the 2nd defendant if the 2nd defendant's allocation to the 1st defendant of the road reserve along the Liwatoni road, and which adjoined the plaintiff's properties was improper and in excess of its powers.

Mr Kasmani submitted and in support thereof cited several provisions of the law that the powers of the 2nd defendant are clearly spelled out in legislation, but that they did not include the alienation of road reserves. Liwatoni Road is a public street by dint of S 16(9) (a) of the Street Adaption Act, Cap 406 Laws of Kenya. By dint of S 182 of the Local Government Act Cap 265 Laws of Kenya, it is one of those streets respecting which the Municipal Council of Mombasa has power of control and care. The power vested in it in that regard is to keep and maintain it for the benefit of the public at large. They have no power to close it or utilize it for any other purpose except upon prior compliance with the provisions of S 185 of the Local Goverments Act and after publication of a notice in the Kenya Gazette notifying all members of the public of the intention to close it, even temporary. The decision to close down a public street, or even to divert it to change its user requires a resolution of the council to which power has been

vested by legislation (s 182 above). Its chief officers have no power to make decisions which under the law must be made by the Council (*Municipal Board of Mombasa v Mohanlal Kala & Another* (1955) Vol 22 EACA 319).

In the above circumstances it is clear that the decision to allocate the road reserve to the 1st defendant was *ultra vires* the powers of the 2nd defendant. The 2nd defendant purported to alienate the road reserve when it could not legally do so. In any case the decision to allocate the road reserve meant the plaintiff's access to its property was blocked.

Their prior consent and approval was not sought. The 2nd defendant's action prompted the plaintiff to come to court. I declare that the allocation by the 2nd defendant of the part of the road reserve fronting the plaintiff's property to the 1st defendant was *ultra vires* the powers of the 2nd defendant.

The 2nd defendant is, therefore, liable to it (plaintiff) in damages. The plaintiff did not however establish by evidence the extent of damage it actually suffered. The only damage which I can make out from the facts and circumstances of the case, are the expenses incurred in this litigation. There was no evidence adduced to show that the plaintiff has been held back in the development of its properties by the presence of the 1st defendant on the road reserve. However, the second defendant having acted arbitrarily and contrary to the law, its action may be termed as oppressive. I will in the circumstances hold that apart from the costs of this litigation the 2nd defendant will pay a nominal amount of general damages, assessed at Kshs 5000/- and further sum of Kshs 2000/= exemplarily damages. Costs to be taxed if not agreed.

Dated and Delivered at Mombasa this 10th Day of July, 1989

S.E.O. BOSIRE

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JUDGE