



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NYARANGI, GACHUHI & MASIME JJ A)

CIVIL APPEAL NO 59 OF 1986

JIWA..... APPELLANT

VERSUS

JIWA & ANOTHER..... RESPONDENTS

(Appeal from the Ruling/Order of the High Court of Kenya at Nairobi (Rauf J) dated 15th July, 1985 in Civil Case No 851 of 1985)

JUDGMENT

This is an interlocutory appeal by Hussein Mohammedali Jiwa, the plaintiff, as we shall call him, from a decision of Rauf, J in the High Court, Nairobi, on 15th July, 1985. The decision was given on a chamber summons taken out by the defendants under Order 6 rule 13 of the Civil Procedure Rules (the Rules) against the plaintiff for orders that:

- (1) the plaintiff has no cause of action against the defendants;
- (2) the plaint discloses no cause of action; and
- (3) the suit be dismissed with costs.

To make the appeal intelligible, it is necessary to say something about the background, though not, we think, very much.

On September 11th, 1984, Mohamedali Nazerali Jiwa appointed Naushad Hussein Mohamedali Jiwa, the plaintiff, to be his attorney and generally in relation to his interest in the above mentioned title to do anything and everything that he himself could do, and for him in his name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers thereby given.

By a plaint dated March 23rd, 1985, the plaintiff, a duly constituted attorney of Mohamedali Nazerali Jiwa, brought an action against the defendants, Hussein Nazerali Jiwa and Mariambai Jiwa claiming that on or about December 23rd, 1976, he, plaintiff, and the defendants became registered as absolute proprietors of all that parcel of land situated in Mombasa and known as Mombasa/ Block XXVIII/22 but that on or about February 20th, 1980, the defendants fraudulently caused the register of the material property to be rectified by the Land Registrar, Mombasa and the name of Mohamedali Nazerali Jiwa was removed from the title of the parcel of land. The plaintiff prayed for judgment against the defendants jointly and severally for: a temporary injunction to restrain the defendants from alienating, disposing off

the land or registering any instrument or transaction over the land; a declaration that the rectification of the register of the parcel of land is fraudulent and unlawful; an order directing the restoration of the name of Mohamedali Nazerali Jiwa in the title of the parcel of land; accounts of the rents collected and payments of the amount due to Mohamedali Nazerali Jiwa and costs of the suit.

In June, 1985, the defendants served their defence on the plaintiff. In it they contended, *inter alia*, that the plaintiff discloses no cause of action, that either during the period stated or at any other time, Mohamedali Nazerali Jiwa was a proprietor of the parcel of land, that by a deed of settlement dated July 27th, 1956, a Mrs Kulsumbai Nazerali, the registered proprietrix of the parcel of land created a trust in respect of the parcel of land and appointed a principal, first defendant and one Nazerali Jiwa joint trustees of the settlement and to hold the land as trustees, that Nazerali Jiwa died in February, 1958 and his interest in the land became vested in the two surviving trustees, the principal retired on August 15th, 1973, the second defendant was appointed a new trustee and at his retirement the principal, Mrs Nazerali and the defendants agreed that an instrument of transfer would be executed by the principal to transfer his interest in the land in favour of the defendants but no such instrument was executed. The defendants therefore claimed that the plaintiff ceased to have any right, title or interest in the parcel of land. The defendants admitted having had the register rectified but denied it was done fraudulently. Thereafter the defendants took out a chamber summons under order 6 rule 13 of the Rules seeking

(i) an order that the plaintiff has no cause of action against the defendants;

(ii) an order that the plaintiff discloses no cause of action

; and

(iii) an order that the suit be dismissed with costs.

The matter was before the Judge on July 9th, 1985 and the upshot was that the Judge granted the defendants' application with costs. The instant appeal challenges the Judge's decision on the grounds that the judge ought to have substituted the proper plaintiff and that the Judge erred in expecting an application before he could substitute the proper plaintiff.

It is against that background that we come to the first contention of the appellant, that having regard to the power of attorney, all the powers had to be exercised in the name of the principal. Secondly, that looking at the plaintiff and the written statement of defence, there are serious matters in controversy and the plaintiff did not have the time to apply for either substitution or addition. Counsel urged that the Judge was invited to substitute the correct name and submitted that the Judge erred in refusing to do so without an application. On the strength of the facts deposed to by Mr Machira, it was argued by Mr Kivuitu that the judge should have substituted the correct name in the exercise of his discretion.

For the respondent, on the other hand, it was argued that the plaintiff persisted to the end that the plaintiff was right and that there was no need for an amendment. The judge gave an indication to Mr Machira that the plaintiff was defective. It was submitted by Mr Sampson that on that basis it could not be said that the judge erred in principle in not substituting the proper name. We were pressed to consider whether the judge has arrived at such a wrong decision that this court should upset the exercise of the unfettered discretion of the judge.

The first and real question for the judge was whether in the entire circumstances of the case, it was in the interest of justice for him to exercise his discretion and order Naushad Hussein Mohamedali Jiwa to be substituted. When this question falls to be considered and answered regard must be had to Order 1 rule 10 of the Rules which provides,

“10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added

as plaintiff upon such terms as the court thinks fit.

(2) 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 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 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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

There is no doubt that in the instant case the plaintiff could not sue the defendants in his own name. The suit was therefore instituted in the name of the wrong person as plaintiff. The character of the property, the subjectmatter of the action was residential and commercial. It was substantial, too. But the matter does not stop there. For our part it is of the utmost importance that there is an allegation of fraud and a claim that there was a Deed of Settlement by which a Mrs Nazerali, “the registered proprietor of the suit premises created a trust in respect of the suit premises”. It seems to us the court could only effectually and completely adjudicate upon and settle all questions involved in the suit after the substitution of the plaintiff by Mohamedali Nazerali Jiwa. As we see it, the suit was instituted through a *bona fide* error.

In our view this case is clearly covered by Order 1 rule 10(2) of the Rules.

Under sub-rule (2) the judge could at any stage of the proceedings, “either upon or without the application of either party,’ exercise his discretion and order the substitution of the proper party.

The fact that there was no formal application for an order of substitution and/ or that Mr Machira argued that there was nothing wrong with the plaint could not, in the slightest, fetter the exercise of the judge’s discretion. It will be observed that sub-rule (2) of rule 10 negatives emphatically the proposition of the Judge that there are circumstances when it would be unreasonable and injudicious for the court to exercise its discretion without an application of either party.

Plainly, the judge misapprehended sub-rule (2) of the rule 10 in the exercise of his discretion and as a result reached a wrong conclusion. This court should, therefore, interfere with the exercise of the discretion: *Mbogo v Shah* , [1968] EA 93 at page 94, Letter H-I and at page 96 Letter G-H. We have no hesitation in saying that this appeal must be and is hereby ordered to be allowed, the decision of the High Court set aside and substituted with an order that Mohamedali Nazerali Jiwa be added as plaintiff.

The appellant shall be awarded the costs of this Court and of the High Court.

Dated and Delivered at Mombasa this 9th January, 1990

J.O NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O. MASIME

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JUDGE OF APPEAL