IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & SICHALE, JJ.A)

CIVIL APPEAL NO. 212 OF 2015

BETWEEN

KENYA TRYPANOSOMIASIS

RESEARCH INSTITUTE...APPELLANT

VERSUS

ANTHONY KABIMBA GUSINJILU

(Suing for and on behalf of 112 plaintiffs).................RESPONDENTS

(Being an Appeal from the Ruling and order of the High Court of Kenya at Nairobi (Waweru, J.) dated 17th May, 2013 **in** ***HCCC No. 781 of 2003)***

JUDGMENT OF THE COURT

This appeal emanates from the ruling of the High Court (**Waweru, J.)** dated 16th May, 2013 relating to two applications dated 2nd August 2010 and 17th December 2010.

The salient facts which gave rise to the appeal are that the respondent, **Anthony Kabimba Gusinjilu**, filed a suit against the appellant in the High Court on his own behalf and that of 112 other plaintiffs seeking payment of their retirement benefits under an early retirement scheme. On 19th December, 2003 the Court, by consent of the parties, entered judgment on admission against the appellant and the matter was fixed for assessment of damages. Judgment on damages was entered on 10th July, 2009 but unbeknown to the Court and the appellant, the main respondent had passed away on 11th February 2008, after the consent judgment was entered but before the final judgment was pronounced.

Upon learning of the respondent's demise, the appellant filed a Notice of Motion dated 2nd August, 2010 before the High Court, seeking to review and set aside the Court's judgment and to strike out the entire suit on the grounds that there was an error apparent on the face of the record; the error being that the judgment entered on 10th July, 2009, was entered in favour of persons who are not parties to the suit. The review was also grounded on discovery of new information, which was the death of the plaintiff which in the appellant's view had resulted in the abatement of the suit.

In the aforementioned application the appellant argued that pursuant to **Order XXIII Rule 3(2)** of the old **Civil procedure Rules**, the suit had abated by operation of the law. Moreover, when the court delivered its judgment, no application had been filed within a year of the main respondent's death to substitute him with his personal representative.

Predictably, this application was followed by a Chamber Summons dated 17th December,2010 pursuant to **Order 24, rule 3 and rule 7 (2)** of the **Civil Procedure Rules**, seeking orders that:

1. The suit which abated by operation of law after the death of the plaintiff be revived;

2. Leave be granted to substitute the deceased Plaintiff with three applicants**: Simon Onkoba Mogere, John Oino Aminga and Jane Adoyo Abok**.

In the application, the applicants admitted that the suit had abated by operation of law after the death of the plaintiff but that they nonetheless sought the Court's indulgence on the grounds that their former advocate failed to execute their timely instructions to file the appropriate application for substitution immediately after the main respondent's death.

The learned Judge weighed the arguments put forth on behalf of the parties and in a ruling dated 16th May, 2013, dismissed the appellant's application for review. The Court found that any of the other persons on whose behalf the suit was filed could apply to be a direct plaintiff and proceed with the suit. The court also stated that the suit did not abate 12 months after the death of the main respondent. Consequently, it held that the partial consent entered on 19th December, 2003 and judgment delivered on 10th July, 2009 were valid.

With regard to the application dated 17th December, 2010, the Court allowed the joinder of the three applicants as plaintiffs to act on their own behalf and on behalf of other plaintiffs. In the court's own words:

> ***"In the spirit of Article 159 (2) (d) of the Constitution and section 1A and 1B of the Civil Procedure Act, I will deem prayer 3 of the chamber summons dated 17th December 2010 to be an application under Order 1, rule 8(3) of the Rules. In doing so I note that there is no time limit within which application for joinder under the sub-rule may be made."***

Dissatisfied with this decision, the appellant filed the appeal before us on the grounds that the learned Judge erred by:

a. Misdirecting himself on the provisions of the then Order 1, Rule 8 (1), (2) and (3) of the Civil Procedure Rules.

b. Failing to appreciate that the plaintiff was deceased when formal proof was conducted and could not prove his claim nor had the 112 plaintiffs joined the proceedings to prove their respective claims.

c. Misdirected himself on the provisions of the then Order XXIII Rule 3

(2).

d. Enjoining the three applicants to the suit after judgment.

At the hearing of the appeal, learned counsel, **Mr. Burugu** appeared for the appellant while **Mr. Simon Onkoba** appeared in person on his behalf and that of 112 others. Both parties relied entirely on their written submissions.

The appellant, while reiterating its position at the High Court maintained that the judgment was erroneous given that there was no plaintiff on record. According to the appellant, the deceased respondent was the only plaintiff on record and only his legal representative could apply for substitution within a year of his death, yet no such application had been filed. He also took issue with the learned Judge's interpretation of the provisions of **Order 1 Rule 8(3)** of the **Civil Procedure Rules** and argued that any person who wished to join the proceedings as a plaintiff and ventilate his individual interest in a representative suit had to comply with the said provision without exception. The appellant zealously opposed the Superior Court's interpretation that the intention of the rule was only to facilitate direct participation in the suit by any person on whose behalf the representative suit was filed.

The learned Judge was also faulted for failing to appreciate that the 112 claimants who did not join the proceedings under **Order I Rule 8(3)** failed to prove their individual claims and therefore could not benefit from the Judgment.

Lastly, it was argued that the learned Judge erred gravely by using **Article 159 (2) (d)** of the **Constitution** and **Section 1A and 1B** of the **Civil Procedure Act** to deem prayers for substitution under **Order 24 Rule 3(1) and 2 and 7(2)** to be joinder under the provisions of **Order 1 Rule (3)** of the Rules. As far as the appellant was concerned, the learned Judge could not use the aforementioned provisions when express statutory provisions were available to the respondent. It is on those grounds that the appellant urged us to allow the appeal.

In opposing the appeal, the respondent submitted that the consent Judgment entered on 19th December 2003 ensured that the cause of action as envisioned by **Order 24 Rule 1** of the **Civil Procedure Rules (2010)** survived until the final determination of the court on the payment of their dues. The respondent also emphasized the supremacy of the Constitution in protecting fundamental rights and submitted that technicalities should not be a bar to the enforcement of their fundamental rights.

We have considered the record, submissions by both parties and the law. The appeal herein challenges the exercise of discretion by the learned Judge in favour of the respondent by declining to review the judgment dated 10th July 2010 and consequently enjoining the three applicants as plaintiffs to act on their own behalf and on behalf of other plaintiffs.

We take cognizance of the principles which would entitle us to interfere with the exercise of the learned Judge's discretion in declining to review the judgement. Simply put, we can only interfere where the decision of the court is clearly wrong, where it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. ***(<u>Mbogo & Another vs. Shah</u> [1968] EA 93)***

In this case, the exercise of discretion was two-fold. The first was in declining to review and set aside the judgment dated 10th July 2010 and the second was in deeming the application by the respondents to be rightly before it by virtue of Article **159 2(d)** of the **Constitution** and Sections **1A and B** of the **Civil Procedure Act**.

A court's power to review a judgment or order stems from **Order 45** of the **Civil Procedure Rules (2010)** and **ORDER XLIV** of the previous Rules. Under the said order, a court can only review its orders if the following grounds exist: there must be discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and the application must have been made without undue delay.

The appellant's application for review was premised on the discovery of the main respondent's death. It was their argument that since the deceased plaintiff had not been substituted and neither had any party represented by the deceased applied to be enjoined as a plaintiff, then there was no plaintiff on record which amounted to an error apparent on the face of the record since the judgment concerned parties who were not plaintiffs.

It is common ground that the 113 plaintiffs who were former employees of the appellant had the same interest when filing the suit, which was to recover their dues as promised under an early retirement scheme. To this end, the deceased respondent was authorised by the112 plaintiffs to 'appear, plead or act' for them in the proceedings. The respondent then sought leave to file a representative suit on his behalf and on behalf of 112 others in Misc. Application 796 of 2003. The Application was brought under the provisions of **Order I, Rule 8 and Rule 12** of the previous **Civil Procedure Rules** and was subsequently allowed by **Hon Justice Nyamu** (as he then was). The Court also ordered the institution of the suit be advertised at least twice in the local dailies. This was never done.

It is also obvious that the suit filed by the 113 Plaintiffs did not meet the strict requirements of a representative suit under **Order I Rule 8**. We assume this is why the learned Judge went on to discuss the consent judgement on record dated 19th December 2003, which was agreed upon earlier on in the suit and which had a contractual effect. The consent on record was on admission against the appellant for the payment of the "trypension" dues together with the Insurance Company of East Africa forthwith to the plaintiffs.

The learned Judge's reasoning is rational. How could a party who acknowledged liability and agreed to pay "trypension" dues to all plaintiffs turn around and claim that there was no plaintiff on record by virtue of non-compliance of **Order 8 (3)** of the rules which states: **"Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit."**

Subsequently, the Court went on to find:-

> ***"The intention of this rule was to facilitate the direct participation in the suit by any person on whose behalf the representative suit is being prosecuted or defended. It doesn't not mean that a person who does not so apply and is not joined as a direct participant as a party cannot benefit from the fruits of such litigation!"***

In our view, the importance of service/notice in a representative suit cannot be disregarded. It serves among other things, to protect potential plaintiffs. It informs all affected members of the class of the presence of the suit, alerts them of the nature of the suit, enables them to know their representative and to have an opportunity to object to those representing them or opt out of the suit.

Compliance with **Order 1 Rule 8(2)** of the **Civil Procedure Rules** therefore goes to the substance of any representative suit. In our opinion, what was filed by the respondent qualified as a representative suit under **Order I Rule 12** of the old **Civil Procedure Rules** titled "Appearance of one or several plaintiffs or defendants for others". The Section states as follows:

> ***"12. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.***
>
> ***(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."***

The simple requirement is that one or more of the plaintiffs be nominated to act in the proceedings for the other plaintiffs. The authority must be given in writing by each of the other plaintiff and the authority must be filed in court. The result is that the nominated plaintiff(s) becomes the named plaintiff and acts in a representative capacity. He becomes an active plaintiff and is *dominus litis* with regards to taking control of the suit, initiating any processes and signing documents.

In ***Moon vs. Atherton*** ***[1972] 3 All ER 145,*** Lord Denning stated the following with regard to removal of a plaintiff in a representative suit:

> **"In** ***a representative action, the one person who is named as plaintiff is, of course, a full party to the action. The others, who are not named, but whom she represents are also parties to the action. They are all bound by the eventual decision in the case. They are not full parties because they are not liable individually for the costs. That was held by Eve J in Price v Rhondda Urban District Council. But they are parties because they are bound by the result.***
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> ***What then is to happen when the named plaintiff decides to withdraw? It seems to me that then it is open to any one of those whom she represents to come forward and take the place of the named plaintiff. The case comes within RSC Ord 15, r 6(2), which enables a party to be added, on giving his consent. It also comes within RSC Ord 20, r 5(1), which provides:***
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> ***'… the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."***

With the above sentiments in mind, two things are readily clear; that the appellant's application to strike out the entire suit for abatement by operation of law lacked merit and secondly, the best cause of action available to the other plaintiffs following the death of the respondent was to substitute a living plaintiff with the deceased under **Order 8 Rule 3** and not exclusively **Order 1 Rule 8(3)** of the of the **Civil Procedure Rules (2010)** as stated by the Judge. Although the decision reached by **Waweru J**. was correct, it was however not based on the correct reasoning. Nonetheless, whether we agree with the reasoning of the learned Judge is immaterial as it would be wrong for this Court to interfere with the exercise of the trial Judge's discretion merely because this Court's reasoning would have been different.

We do not find it necessary to engage on the appellant's contention that the failure of the Court to appreciate that at the time formal proof was conducted the deceased plaintiff and the 112 plaintiffs were not present to prove their individual claims. A perusal of both applications and submissions by the appellant in the High Court, clearly show that this issue was not raised before the trial court, and was only taken up during the appeal before this Court. The respondent was therefore not given the opportunity to respond to it in his pleadings or in his evidence before Court and as it is, the issue was never addressed by the learned Judge. In our view, introducing this new issue would involve an analysis of the sufficiency of the evidence of the actuary who gave an account of each member's entitlement depending on the years worked and the amount paid to each retiree. We therefore do not think that this issue can be raised for the first time on appeal. We stand guided by the sentiments of this Court in ***Securicor (Kenya) Ltd v. EA Drappers Ltd and Another*** ***(1987) KLR 338***, where it was stated that:

> ***"the Court of Appeal has a discretion to admit a new point at appeal but that the discretion must be exercise sparingly, the evidence must all be on record, the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below."***

Similarly, in ***Attorney General vs. Revolving Tower Restaurant, (1988) KLR 462***, the Court of Appeal held in case the facts bearing upon the new point had not been fully explored to show the relevance of the new point of law the court would therefore not allow that new point.

The issues raised by the appellant seem to us to be largely related to issues of law. The appellant disputes the learned Judge's interpretation of **Order I Rule**

8. The import of the non-compliance of **Order 8(3)** as raised by the appellant cannot also be said to be a mere error on the face of the record. Although the appellant has an unfettered right to seek review, the same cannot be successfully maintained on the basis that the decision of the Court was wrong due to its wrong application of the law. But it can be challenged on appeal.

This Court in ***Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*** described an error on the face of the

record as follows:

> ***"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."***

Lastly, having established that the respondent's application dated 17th December 2010 had been brought under the wrong law, we agree with the court's finding that the irregularity was not serious enough to prevent the court from exercising its discretion, hearing and determining the said application on its merit. Taking note that the rules of procedure should be used as handmaids of justice but not to defeat it, the court weighed the issues before it and found that there would be no injustice visited on the appellant in the spirit of **Article 159 (2)(d)** of the **Constitution** and Sections **1A and B** of the **Civil Procedure Act**.

Indeed, the purpose of amendments of pleadings is to bring forth disputed matters and ensure that they are determined with finality. Amendments may be allowed at any stage of the proceedings but not when they significantly change the core of the dispute. In our view, by deeming the application as rightly before it, and by allowing substitution of parties, the trial court did not change the substance of the claim and there was no prejudice occasioned by the amendment. We therefore decline to accede to the appellant's invitation to find that the failure to cite the correct provision of the law renders the application defective. In doing so, we take guidance from the case of ***Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 others [2013] eKLR*****, Petition No. 5 of 2013 SC,** where the court stated:

> ***"The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course."***

Accordingly, there is no reason to justify our interference with the learned Judge's discretion. We find that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 25th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR