IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO.62 OF 2016

BETWEEN

CHRISTOPHER ORINA KENYARIRI t/a

KENYARIRI & ASSOCIATES ADVOCATES.....…APPELLANT

AND

SALAMA BEACH HOTEL LIMITED.....……..……..…..1ST RESPONDENT

HANS JUERGEN LANGER..... 2ND RESPONDENT

TOURISTIC & TECHNOLOGY GMBH.....3RD RESPONDENT

ACCREDO AG.....4TH RESPONDENT

(Appeal from the judgmentand decree of the High Court of Kenya at Malindi, (Chitembwe, J.) dated 24th March 2016

in

HCCANo. 17 of 2014)

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JUDGMENT OF THE COURT

The parties to this interlocutory appeal have, deliberately or otherwise, rendered the litigation leading to the appeal an unnecessarily convoluted and tangled legal affair. A straightforward advocate-client dispute over fees has spewed out numerous applications and references, both in the High Court and in this Court, which have achieved nothing but obfuscation of the issue in dispute and delay of resolution of the suit. On our part, we do not think it is necessary to venture into the legal thicket created by the parties in order resolve this appeal. The heart of the matter is the advocate's application of 11th November 2015, which ***Chitembwe, J***. dismissed on 7th April 2016. Accordingly we do not deem it necessary to delve minutely into the background, save only in outline for the necessary context.

The appeal arises out of a dispute between an advocate (the appellant) and his clients (the respondents)

over the advocate's fees. After the relationship became sour, the appellant filed some 11 advocate/client bills of costs for taxation, some in Nairobi and others in Malindi. The bills were taxed and he was awarded a total of ***Kshs 5,034,095.95/-***. Aggrieved by the awards of the taxing officer, the respondents filed references under the ***Advocates Act***, which were heard and determined. Thereafter they filed ***Civil Suit No. 20 of 205*** in the High Court at Malindi, contending that they had paid to the appellant a total of ***Kshs 7,874,799/-*** and that he owed them ***Kshs. 2,840,703.05/-.*** Accordingly they prayed for, among othersa declaration that the appellant was indebted to them; an order for accounts; and stay of execution of the taxed costs. From then on, it was one application after another, culminating in an application by the appellant dated 11th November 2015,which is the subject of this appeal, seeking to strike out the suit.

The application was taken out under ***Order 2 Rule 2 15(1)(b)*** and ***Order 51*** of the ***Civil Procedure Rules***. From the application, the supporting affidavit and the appellant's submissions before the High Court, the grounds on which the appellant sought to strike out the suit, were that the respondents had flouted orders made by the High Court on 5th October 2015 granting them leave to amend the plaint. As a result the appellant claimed that he was disabled from amending his defence and occasioned prejudice. He also complained that the respondents had failed to comply with ***Order 8*** of the Civil Procedure Rules, which sets out how amendments to pleadings should be effected. The other ground as set out in the appellant's affidavit in support of the application, was drafted in fairly vague terms as follows:

> ***"The plaintiffs (respondents) have refused to obey the law of institution of suits and hence the defendant (applicant) who is an advocate of this Honourable Court and a reputable scholar continues to suffer prejudice.***

Clearly that is what the late ***Madan, JA.*** (as he then was) would have described as "a masterpiece of obscurity" (See ***Choitram v. Nazari [1976-1985] EA 52).*** In straightforward terms, from his submissions before the High Court the appellant was complaining in the above ground that the respondents ought to have filed the suit in Nairobi rather than in Malindi because he resides in Nairobi.

In their grounds of objection dated 4th December 2015 and submissions before the High Court, the respondents opposed the application contending that they had duly filed and served their amended plaint on 19th November 2015 and that although the amendment was outside the time specified by the Court, by virtue of section 95 of the Civil Procedure Act the court had discretion to extend time.

Chitembwe, J. dismissed the application with costs on 7th April 2016, holding that the appellant was retained by the respondents to render legal services in both Nairobi and Malindi and that in any case, if the appellant was aggrieved by the filing of the suit in Malindi rather than in Nairobi, the solution was not to strike out the suit but to apply to transfer it to Nairobi. As regards the manner of amendment of the plaint, the learned judge was of the view that the amendments which were introduced were clearly discernible and that what the appellant was raising was a mere technicality which did not prejudice him. The appellant was aggrieved by the ruling and lodged a notice of appeal on 12th April 2016 and this appeal on 11th August 2016. Not to be outdone, on 14th September 2016, the respondents filed a Notice of Motion under ***rule 84*** of the rules of this Court seeking to strike out the appeal on the ground that the notice of appeal was not served upon them within 7 days of the filing as required by ***rule 77(1)*** or at all. It was also contended that the record of appeal was filed outside 60 days from the date of the ruling without leave and that it did not contain a primary document, namely a certified copy of the ruling appealed from.

The appellant filed his grounds of objection to the application to strike out the appeal on 7th October 2016, contending among others, that the respondents' application was barred by the proviso to rule 84; that the record of appeal was filed within the prescribed time; that the letter bespeaking proceedings, the notice of appeal and the record of appeal were all duly and timeously served upon the respondents' advocates; that the order appealed against was certified; that there was no requirement that the ruling appealed against must be certified; and that the respondents were at liberty to file a supplementary record of appeal to bring on record any document they alleged was omitted in the record of appeal.

By consent of the parties, we directed that both the appeal and the application to strike it out be heard

together, through written submissions. On the date scheduled for highlighting of the submissions, only the appellant had filed his submissions, which he relied upon. Mr. Gikandi, learned counsel holding brief for Mr. Ndegwa, learned counsel for the respondent urged us to consider the submissions made by the parties in the High Court.

We have duly considered the record of appeal, the grounds of appeal, the ruling by the learned judge and the respondents' application to strike out the appeal and the appellant's written submissions. We shall first determine the application to strike out the appeal and proceed to consider the appeal, only if we are satisfied that the appeal is competent and that the application to strike it out is not merited.

The record shows that the appellant lodged his notice of appeal on 12th April 2016, which was within 14 days from the date of the ruling as required by rule 75(2). There is also on record the appellant's letter dated 12th April 2016 addressed to the Deputy Registrar, applying for certified copies of the ruling and proceedings. That application was made within 30 days of the ruling as required by the proviso to rule 82 (1). The appellant's process-server, ***Hadson Chanzu*** swore an affidavit of service in which he deposed that he served upon the respondent's advocates at their offices in Shankardass House, Moi Avenue, Nairobi, both the letter bespeaking the proceedings and a copy of the notice of appeal on 15th April 2016. The respondents have not controverted these depositions, and we accordingly accept them. From second affidavit of service by the same process-server, the respondent's advocates were served with the record of appeal on 15th August 2016. They acknowledged receipt and there is on record a copy of a page of the record of appeal duly stamped and endorsed by the respondents' advocates.

From the foregoing the application to strike out the appeal is properly before us because it was filed within 30 days of service of the record of appeal as required by the proviso to rule 84. (See ***National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another, CA No. Nai. 238 of 2005).*** However, having found that the respondents were duly served with the notice of appeal and a copy of the letter bespeaking the proceedings within the prescribed period, the appellant had 60 days from the date of collection of the proceedings to file the appeal. (See ***David Kinyanjui Njenga & 2 Others v. Maureen Waithera Mwenje & Another, CA No. 104 of 2011)***. From the certificate of delay, the appellant paid for and collected the proceedings on 20th June 2016. Since the appeal was filed on 11th August 2016, it was filed within the time prescribed by rule 82. There is no merit in the complaint that it was filed out of time.

As regards the alleged lack of a certified copy of the ruling in the record of appeal, we do not think there is any substance in the complaint. What ***rule 87(1)*** requires to be certified is the decree or order, not the judgment or ruling appealed from. There is a certified copy of the order on page 96 of the record of appeal. The application to strike out the appeal has no merit and is hereby dismissed with costs to the appellant.

Turning to the merits of the appeal, the appellant impugns the ruling of the High Court on the grounds that the learned judge erred by failing to hold that Order 8 Rule 7 on amendments is in mandatory terms and by allowing amendments effected in violation of the rule to stand. It was submitted thatthe amendments were not endorsed with the date of the order allowing the respondents to effect them; that the deleted words were not struck out in red; and that the amended plaint did not bear the date of the original plaint. For those reasons we were urged to find that the plaint was incurably defective and should have been struck out.

Next the appellant submitted that the learned judge erred by failing to hold that the suit was an abuse of the process of the court and in violation of the *res judicata* rule. Indeed, the learned judge was criticized for failing to address those twin issues in the ruling. It was the appellant's submission that the issues raised by the respondents in the suit were the same issues they had raised in applications heard and dismissed by the learned judge on 19th June 2015 and by ***Angote, J***. on 26th September 2014 and 14th April 2015.

Lastly the appellant submitted that the learned judge erred by sustaining the suit, which was filed in Malindi rather than Nairobi where he resides. In his view, the cause of action arose in Nairobi where he

received instructions and where payments to him by the respondents were effected.

Starting with the appellant's complaint that the learned judge failed to determine the question whether the suit was *res judicata* and therefore an abuse of the process of the court, we have no hesitation in holding that the complaint is bereft of substance. The application before the learned judge for sticking out the suit was based on the arguments that it was wrongfully filed in Malindi rather than in Nairobi and that the respondents had not amended their plaint as required by the Civil Procedure Rules. The appellant did not raise the issue of *res judicata* and could not have legitimately expected the learned judge to address or pronounce himself on it. The matter is being raised for the first time in this appeal, which we cannot entertain.

In his written submissions in the High Court dated 14th December 2015, this is what the appellant said, verbatim:

> ***"Your Lordship, I will address my application hereof*** *(sic)* ***on two issues only, and which issues I believe, your ruling hereof*** *(sic)* ***will address thus:***
>
> ***1.Does the suit by the plaintiff comply with section 15 of the Civil Procedure Act, chapter 21 Laws of Kenya?***
>
> ***2. Does the suit by the plaintiff comply with Order 8 of the Civil Procedure Rules on amendment of pleadings?"***

Those therefore were the crisp and only issues before the learned judge. As has been stated time without number, a court will not determine or base its decision on unpleaded issues. However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. (See ***Odd Jobs v. Mubea*** ***[1970] 476, and Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA No 296 of 2001)***. The parties neither raised the issue of *res judicata,* nor canvassed or left it to the learned judge to decide. As this Court stated in ***Kenya Ports Authority v. Kuston*** ***[2009] 2 EA 212***, the responsibility of a court is to rule on the evidence or issues on record and not to introduce extraneous matters not dealt with by the parties.

On the question of amendments, Order 8 rule 7 of the Civil Procedure Rules, which the appellant complains was not complied with is in the following terms:

> "***7. (1) Every pleading and other documents 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 the amendment was made.***
>
> ***(2) 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 underlining in red ink all added words.***
>
> ***(3) Colours other than red shall be used for further amendments to the same document."***

It is not in dispute that the amended plaint was not endorsed with the date of amendment or the date of the order allowing the amendment. As regards the amendments themselves and the colour thereof, the learned judge found they were in colour and that it was readily apparent what was introduced by the amendment. But the appellant contends that rules must be followed strictly because they have a purpose and that the use of the word "shall" in the above rules imports a mandatory requirement.

In our view, the use of the word ***"shall"*** alone is not the decisive factor because whether the use of the word ***"shall"*** and ***"may"*** imports a mandatory or discretionary requirement depends on the context. In this case the more important question is whether the parties and the court could tell what alterations the respondents had introduced to their pleadings. The learned judge found that there was no challenge in that regard. Again, although the amended plaint was not endorsed with the date of the order allowing the amendment, there was no dispute that the court had allowed the amendment and the relevant date was 5th

October 2015. The more relevant question is what prejudice these lapses have occasioned the appellant, particularly if the amendments are clear and legible as found by the trial judge.

It is these kinds of technical lapses, which do not occasion any irremediable prejudice, that ***Article 159 (d)*** of the ***Constitution*** and the overriding objective in ***section 1A & B*** of the Civil Procedure Act as well as in section ***3A & B of the Appellate Jurisdiction Act*** seek to obviate. Since the promulgation of the Constitution and the adoption of the overriding objective, the trend in the courts of this country has been to strive to sustain rather than to strike out pleadings on technicalities, which do not occasion any prejudice. In ***Nicholas Salat v. IEBC & 6 Others, CA (Application) No 228 of 2013,)*** the majority of this Court stated:

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."***

(See also ***E. Muriu Kamau & Another v. National Bank of Kenya Ltd., CA No. 258 of 2009 (UR180/2009))***.

On the last issue, section 15 of the Civil Procedure Act makes provision on where suits should be filed and requires that suits should be filed where the defendant lives or where the cause of action arises. We really do not understand why the appellant, who describes himself as a reputable scholar, bothered to raise this objection in respect of a suit filed in the High Court. Way back in 1958, the former Court of Appeal for Eastern Africa held, in ***Riddesbarger v. Robson [1958] EA 375***, that section 15 of the Civil Procedure Ordinance (Now section 15 of the Civil Procedure Act) applies only to subordinate courts and not to the High Court. The reasoning of ***Forbes, JA***. was that because the jurisdiction of the High Court (then known as Supreme Court) was provided for by the Kenya Colony Order-in-Council and was national, original and unlimited, it could not be limited by section 15 of the Ordinance. This was simplybecause the Order-in-Council was juridically a higher norm that the Ordinance. This Court upheld that position in ***Francis Ndichu Gathogo v Evans Kitazi Ondansa & Another, CA. No. 287 of 2002***, where it reiterated that the jurisdiction of the High Court under the Constitution, being national, original and unlimited, could not be limited by section 15. In addition the Court was of the view that section 15 was subject to the preceeding provisions of the Act, which deal with the subordinate courts, rather than the High Court. The High Court has followed that view in a number of decisions, among them***Gitau John Kimemia v. Unilever Tea Company Ltd*** **HCCC No. 63 of 2007;** ***Jane Wambui Weru v. Overseas Private Inv. Corp & 3 Others***; ***HCCC No. 83 of 2012***; and ***Aly Jamal v. Erastus George Momanyi & 2 Others, HCCC No. 34 of 2014.***

We must reiterate that the High Court of Kenya remains one and the same court, only that it sits at different locations in the country, such as Malindi and Nairobi. The location where it sits cannot therefore affect its jurisdiction. The practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits. That is not in any way to suggest that such requirements or practice is unreasonable or unnecessary; it is intended to reduce costs of transporting witnesses from one corner of the country to another for hearing of cases and to expedite hearing and determination of suits, thus giving meaning to the overriding objective and the constitutional value in Article 159 which emphasize the need to reduce costs and delay in the hearing and determination of suits. (See ***Gitiha v. Family Finance Building Society & Others [2013] 1 EA 75).***

The view that that filling a suit in any station of the High Court does not render the suit a nullity is further buttressed by the provisions of ***Order 47 Rule 6, which*** provides as follows:

> ***"6. (1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.***
>
> ***(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:***
>
> ***Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case."***

We are satisfied that the issues taken up by the appellant regarding the amendment of the plaint and the place where the suit was filed are objections of a technical character, the kind that the Supreme Court had in mind in ***Lamanken Aramat v. Harun Maitamei Lempaka, SC Petition No 5 of 2014*** where the Court stated:

> ***"[123] A Court dealing with a question of procedure, where jurisdiction is not expressly limited in scope... may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character."***

We find this appeal to be wholly lacking in merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Mombasa this 10th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR