



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, MWILU & GATEMBU, J.J.A)**

**CIVIL APPEAL NO. 3 OF 2006**

**BETWEEN**

**GIDEON MURIUKI .....1<sup>ST</sup> APPELLANT**

**CHARLES KAMARI .....2<sup>ND</sup> APPELLANT**

**AND**

**CLEOPHAS WEKESA .....1<sup>ST</sup> RESPONDENT**

**THE CO-PERATIVE BANK OF KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kubo, J.) dated 16<sup>th</sup> May, 2005*

*in*

**H.C.C.C. NO. 23 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. In this appeal, we are called upon to determine whether the learned Judge of the High Court (B. P. Kubo, J) properly exercised his discretion in refusing to allow the appellants’ application under rule 13(1)(a) of Order 6 of the Civil Procedure Rules to strike out the first respondent’s suit against them.

**The background**

2. By a plaint filed in the High Court on 10<sup>th</sup> January 2003 the 1<sup>st</sup> respondent commenced suit

- against the 2<sup>nd</sup> respondent (the bank) and against the appellants claiming that he was wrongfully dismissed from his employment with the bank in February 2002. He sought relief for loss of earnings, special and (general) damages.
3. In an amended plaint filed on 6<sup>th</sup> March 2003 the 1<sup>st</sup> respondent set out in greater detail the particulars of alleged wrongful dismissal; pleaded further that the termination of his employment was actuated by “*bad faith, ulterior motives and malicious machinations*” and asserted that the appellants deliberately engineered his removal from the bank.
  4. In its defence filed on 4<sup>th</sup> April 2003 the bank pleaded that the 1<sup>st</sup> respondent’s employment was legally and lawfully terminated by way of summary dismissal on 4<sup>th</sup> February 2002 for gross misconduct.
  5. In their separate statements of defence, the appellants pleaded that they were wrongfully joined as parties in the suit; that no specific allegations were made by the 1<sup>st</sup> respondent against them; and that they would in due course apply to have their names struck out from the suit.
  6. On 5<sup>th</sup> May 2003 the appellants presented an application before the court under rule 13(1)(a) of Order 6 of the Civil Procedure Rules by which they applied for orders “*to strike out the Amended plaint filed on 6<sup>th</sup> March 2003*” and for the dismissal of the suit against them.
  7. Before the appellants’ application of 5<sup>th</sup> May 2003 could be heard and determined, the 1<sup>st</sup> respondent presented an application to the court on 11<sup>th</sup> February 2004 seeking to amend the plaint to incorporate a plea of “conspiracy” on the part of the appellants. The appellants opposed that application. It was heard by J. B. Ojwang, Judge (as he then was) and dismissed in a ruling delivered on 26<sup>th</sup> March 2004. When dismissing that application, the learned Judge directed that the appellants’ application of 5<sup>th</sup> May 2003 be fixed for hearing.
  8. Subsequently, B. P. Kubo, J heard the application filed on 5<sup>th</sup> May 2003 and dismissed it in a ruling delivered on 16<sup>th</sup> May 2005. When dismissing the application, the learned Judge stated:

***“The wrongful acts ascribed by the plaintiff to the defendants were stated very generally in the original plaint filed on 10<sup>th</sup> January, 2003 and the amended plaint filed on 6<sup>th</sup> March, 2003 seeks to provide clearer averments in the plaintiff’s complaint against the 1<sup>st</sup> defendant through the acts of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff’s averments in the amended plaint constitute pleas of material particular acts which if proved to have been committed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the course of their employment with the 1<sup>st</sup> defendant would establish liability of the 1<sup>st</sup> defendant. Whether or not the plaintiff will eventually be able to mount evidence to prove his claims against the defendants is, of course, a matter to be determined by the court during trial of the main suit and not to be indulged in at this interlocutory stage.”***
  9. That ruling is the subject of this appeal.

### **The appeal and submissions by counsel**

10. The appellants’ framed seven grounds of appeal in their memorandum of appeal. During the hearing of the appeal however, learned counsel for the appellants Mr. Echessa Werimo stressed that the learned Judge misdirected himself when he based his finding that a cause of action was disclosed against the appellants on “the amended plaint.” According to counsel, an amended plaint did not exist because the 1<sup>st</sup> respondent’s application for leave to amend the plaint presented to the court on 11<sup>th</sup> February 2004 was dismissed by the court in the ruling given by J. B. Ojwang, Ag, Judge on 26<sup>th</sup> March 2004.

11. According to Mr. Werimo, the claim against the appellants that the Judge should have considered was the claim as framed in the original plaint filed on 10<sup>th</sup> January 2003. If the judge properly directed himself in that regard, counsel argued, he should have found that the plaint filed on 10<sup>th</sup> January 2003 did not disclose a cause of action against the appellants.
12. The other grounds of appeal as contained in the memorandum of appeal amount to this: that the learned Judge erred in failing to appreciate that the 1<sup>st</sup> respondent's claim was founded wholly on a contract of employment between the bank and the 1<sup>st</sup> respondent and in failing to find that the appellants were wrongly joined.
13. Counsel for the appellants submitted that the 1<sup>st</sup> respondent's claim is centered on an alleged breach of contract between himself and the bank; that the appellants are employees of the bank; that if there was any breach of the employment contract, a claim can only lie against the bank as there is no contract of employment between the 1<sup>st</sup> respondent and the appellants; that clearly, the 1<sup>st</sup> respondent has no right to relief as against the appellant; that the learned Judge failed to heed the doctrine of corporate personality pronounced in the landmark decision in **Salomon vs. Salomon and Co Ltd [1897] A. C 22** that a company is a separate legal entity; and that the decision of the learned Judge is therefore erroneous.
14. Opposing the appeal, Dr. Khaminwa learned counsel for the 1<sup>st</sup> respondent submitted that based on the pleadings the appellants were involved in irregular transactions against the bank which the 1<sup>st</sup> respondent queried resulting in his dismissal; that the learned Judge of the High Court was clearly alive to the nature of claim and properly exercised his discretion in refusing to strike out the claim against the appellants; that the appellants have not demonstrated how the learned Judge exercised his discretion improperly and there is therefore no basis for interfering with the decision of the Judge; and that the parties should be given an opportunity to have the suit which is still pending before the High Court tried and determined on its merits.

### **Determination**

15. When dismissing the appellants' application to strike out the first respondent's suit under rule 13(1)(a) of Order 6 of the Civil Procedure Rules the learned Judge was exercising judicial discretion. That is to say exercise of the powers of the court under that provision involves the exercise of discretion by the Court.
16. This Court can only interfere with the exercise of discretion by a lower court where the court has not exercised its discretion judiciously; where it has misdirected itself in some matter with the result that it arrives at a wrong decision; or where it is manifest that the decision of the lower court is clearly wrong. In the often cited words of Sir Charles Newbold P. in **Mbogo & Another V Shah [1968] EA 93** at page 95:

***“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.....”***
17. This Court should, therefore, not substitute the lower court's discretion with its own discretion or interfere with it unless it is shown that the lower court was clearly wrong because of misdirection or for failing to take into account matters that should have been taken into account or for taking into account matters that should not have been taken into account. [See also **Matiba v Moi & 2 others, 2008 1 KLR 670**].
18. The questions with which we have to contend therefore are: Whether the learned Judge of the High Court misdirected himself in some matter with the result that he arrived at a wrong decision?

Is it manifest that the learned Judge's decision is clearly wrong? In answering those questions, the first matter to consider is whether the learned Judge erred in basing his consideration as to whether a cause of action was disclosed on the amended plaintiff.

19. In our view, counsel for the appellants was mistaken in submitting that the learned Judge should have confined himself to the original plaintiff filed on 10<sup>th</sup> January 2003 when addressing the question whether a cause of action was disclosed against the appellants. That is because what the 1<sup>st</sup> respondent sought to do in his application that was rejected by Ojwang J was to further amend the amended plaintiff filed on 6<sup>th</sup> March 2003. That is clearly discernible from the ruling of Ojwang J where the learned Judge stated:

***“It is to be noted that this is the second time the Plaintiff/Applicant is seeking leave to amend the original plaintiff, dated 10<sup>th</sup> January, 2003 and filed on the same day. This plaintiff was amended on 6<sup>th</sup> March, 2003 and filed on the same day. After that first amendment took place, the second and third defendants drew a chamber summons application, dated 2<sup>nd</sup> May, 2003 and filed it on 5<sup>th</sup> May, 2003. The application was challenging the Amended plaintiff of 6<sup>th</sup> March, 2003 and seeking Orders to strike it out, as against the second and third defendants.***

***Now the said Chamber Summons application of 2<sup>nd</sup> May, 2003 has yet to be heard; and the second and third defendants (sic) have lodged their Grounds of opposition of 16<sup>th</sup> February, 2004 contending that the plaintiffs (sic) current Chamber***

***Summons application, of 11<sup>th</sup> February, 2004 to further amend the plaintiff, is intended to derail the pending application for the dismissal of the suit as against the second and third defendants.”***

20. Quite clearly therefore, the amended plaintiff filed on the 6<sup>th</sup> March 2003 was the basis upon which Kubo, J, had to determine whether a cause of action was disclosed against the appellants. Indeed, it is the amended plaintiff filed on 6<sup>th</sup> March 2003 that the appellants moved the court to strike out in their application filed in court on 5<sup>th</sup> May 2003. There is therefore no merit in the submission by counsel for the appellant that the learned Judge erred in referring to and basing his decision as to whether a cause of action was disclosed on the amended plaintiff.

21. We turn now to the question whether the learned Judge failed to appreciate that the 1<sup>st</sup> respondent's claim was founded wholly on a contract of employment between the bank and the 1<sup>st</sup> respondent; and whether the learned Judge was wrong in refusing to uphold the contention that the appellants were wrongly joined in the action.

22. The learned Judge did demonstrably appreciate that the thrust of the 1<sup>st</sup> respondent's complaint was for breach of employment contract and that the bank is in law a separate legal entity. That much is clear from the following lengthy extract from the Judge's ruling:

***“The pleadings establish that the main suit is centered on alleged breach of contract of employment between the plaintiff and 1<sup>st</sup> defendant which is a body corporate. It is trite law that a body corporate is an artificial person, a creature of law. Such body transacts its business through human agents. It follows that when a body corporate is accused of wrongdoing, some human hand or mind must have been involved in bringing about the wrong complained of. The amended plaintiff avers at paragraphs 2, 3 and 4 that the 1<sup>st</sup> defendant is a limited liability company; that the 2<sup>nd</sup> defendant was at the material time the Managing Director of the 1<sup>st</sup> defendant, i.e. Co-operative Bank of Kenya Ltd, whose address was given as P.O. Box 48321, Nairobi; and that the 3<sup>rd</sup> defendant was the Chief Manager Co-operative Merchant Bank, whose address was also given as P.O. Box 48321, Nairobi. Ex-***

*facie, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants appear to have held senior positions in or connected with the 1<sup>st</sup> defendant as a Bank. And the plaintiff avers in his amended plaint that when, as an employee of the 1<sup>st</sup> defendant, he queried irregular transactions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the said defendants instigated or induced the 1<sup>st</sup> defendant as common employer of himself and 2<sup>nd</sup> and 3<sup>rd</sup> defendants to dismiss him (plaintiff) to protect themselves.*

*In such scenario as above, it seems to me to be inevitable or imperative for the plaintiff, while bringing his action under contract law against the 1<sup>st</sup> defendant, to link up the perceived wrongful act of the 1<sup>st</sup> defendant with related wrongful acts of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants under tort law if his (plaintiff's) action against the 1<sup>st</sup> defendant is to have any hope of succeeding. And this is in line with Order 1 rules 3 and 10 (2) cited by the plaintiff in support of his grounds of opposition to the chamber summons of 2<sup>nd</sup> May, 2003”*

23. The learned Judge was therefore alive to the principle of Company Law as to the corporate personality of the bank. He was also conscious that whether the first respondent's claims against the appellants would be sustained or not would be a matter for the trial Court. Clearly the learned Judge took into account the relevant factors and came to the conclusion that this was not a proper case to order the striking out of the appellant from the suit at that stage. We think the learned Judge exercised his discretion on the correct principles. Our role is not to substitute our discretion with that of the learned Judge.

24. The circumstances in this case are not very different from those in the case of **Dr. Evans Kidero vs Andrew Omtata Okoth and others** Civil Appeal No. 140 of 1992 [2014] eKLR where this Court held that “*whether the allegations made ..... against ..... the respondents in the petition are sustainable is a matter for determination during the hearing of the petition .....*”

25. We are therefore not satisfied that this is a proper case for us to interfere with the lower court's discretion and decision. The appeal fails and it is dismissed.

26. The costs of the appeal will abide the outcome of the main suit in the High Court.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of March, 2015.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**