



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO. 70 OF 2009

BETWEEN

PRAVIN BOWRY APPELLANT

VERSUS

JOHN WARD 1ST RESPONDENT

THE STANDARD LIMITED 2ND RESPONDENT

(Being an appeal from the Order of the High Court of Kenya at Nairobi (Sitati, J.) dated on 31st October, 2008

in

HCCC No. 1062 of 2005)

JUDGMENT OF THE COURT

This is an appeal from the Ruling delivered on 31st October, 2008 by R.N. Sitati, J., in **Nairobi HCCC No. 1062 of 2005** where the learned judge dismissed an application by the appellant, **Pravin Bowry**, who had sought various orders – in the main, that his name be struck out from the suit; that the amended plaint be struck out; that the suit against him be dismissed and that costs be awarded to him.

That suit has not been heard at all and is still pending at the High Court despite its having been filed there over 10 years ago.

A brief history of the matter will suffice for purposes of determination of this appeal. **John Ward**, an English citizen resident in Suffolk, England sued

The Standard Limited, a Kenyan newspaper claiming various forms of damages for publications carried in an issue relating to the 2nd respondent. The 2nd respondent delivered a statement of defence where the 1st respondent's claim was denied and various defences taken.

By an application which is not on record but which was the subject of the Ruling of J.L.A. Osiemo, J,

delivered on 5th May, 2006, the 2nd respondent applied that the appellant be made a party to the suit as 2nd defendant. That application was allowed after hearing the respondents. The situation so remained until the appellant moved the High Court for orders which we have already set out Ruling whereof provoked this appeal.

The learned judge who heard the application, in essence, while dismissing the application found that a party to a suit needed not consult a party which it intended to join as a co-defendant before joining such a party as a defendant to a suit. The learned judge found, also, that the appellant having not asked for review of the (said) orders of Osiero, J, and having not appealed, it was not available to the appellant to make the application which was made before the learned judge.

There are 12 grounds set out in the Memorandum of Appeal filed on behalf of the appellant by his advocates.

The appellant in essence faults the learned judge for holding that she was being asked to sit on appeal over a decision of a judge of concurrent jurisdiction; the learned judge is faulted for holding that the appellant should have appealed the decision of Osiero, J; the learned judge is faulted for holding that the appellant should have applied for review of the orders of Osiero, J; the learned judge is said to have erred in failing to appreciate that the 2nd respondent's application represented the first opportunity that the appellant had to present his case; that the learned judge erred in failing to appreciate that the 2nd respondent's application had been brought under wrong provisions of law; that the learned judge failed to appreciate that the 2nd respondent's application was an attack on the 1st respondent's claim against him which claim the 1st respondent did not wish to prosecute against him; that the learned judge erred in dismissing the appellant's application when the 1st respondent had conceded to the same; that the effect of the learned judge's holding is to compel the 1st respondent to prosecute a suit against the appellant against his will; that the orders were a violation of the appellant's fundamental rights and were unjust; that orders were effectively made without hearing the appellant and that the orders were therefore unjust. Finally, that the learned judge was wrong to award costs to the 1st respondent who had effectively conceded to the application. For all these, it is proposed that the appeal be allowed; that the orders of the High Court be set aside; that the application dated 3rd July, 2007 be allowed and that costs here and below be awarded to the appellant.

When the appeal came for hearing before us the advocate for the 2nd respondent did not appear though served with a hearing notice. The advocates for the 1st respondent and for the appellant chose to proceed by way of written submissions which they did not even wish to highlight and the whole matter was left for our determination based on the record of appeal and the said submissions.

The appellant in the said submissions questions the procedure adopted by the 2nd respondent in filing the Notice of Motion application which joined him to the suit and challenges the finding of the learned judge and also whether an appeal or an application for review would have been the proper course to follow. The appellant submits that he filed the application before the High Court ruling whereof is the subject of this appeal timeously after getting to know that he had been made a party. The appellant submits that an order for joinder of parties is not an appealable order and no appeal lies therefrom as the same does not amount to a decree which substantively determines the rights of parties. The appellant further submits that because the 1st respondent had opposed an order for joinder of parties the court had no jurisdiction to make the order.

The 1st respondent submits that it is the 2nd respondent which published an article that carried defamatory material made by the appellant and that since the High Court had decided that both parties be jointly sued and enjoined that decision should hold. The 1st respondent submits that he had initially opposed joinder for fear that joinder would cause delay and that its fears had been proved right because the case at the High Court has been pending for over 10 years now.

We have considered the record of appeal, submissions made and the law.

As already stated the 2nd respondent moved the High Court in an application and the High Court ordered that the appellant be made a co-defendant to the suit. That order made on 5th of May, 2006 was neither appealed nor was an application for review made. The appellant instead by a Notice of Motion dated 3rd July, 2007 moved the High Court for orders already set out. The learned judge who handled the application considered the same and found it to have no merit. The learned judge held:

“In the first place, it is clear that a defendant need not be consulted before he is enjoined in the suit (see Lombard Banking case, above). So that the 2nd defendant herein did not have to be consulted before being brought into this suit. But more importantly, I find that the reasons put forward by the applicant in seeking to have the name of the 2nd defendant struck out are reasons that could support an application for review or form the basis of an appeal to the Court of Appeal. The applicant has not asked me to review the Order granted by Osiemo J on 5/05/2006; such an application would have been perfectly in order if it was apparent that there was a mistake on the face of the record. This point was not canvassed before me in the instant application for striking out the 2nd defendant’s name after he was joined as a party to the suit. If this had been an application for review, I would have been guided by the principles set out in the National Bank of Kenya Ltd. -vs- Ndungu Njau case (above) namely that such error or omission must be self evident and should not require an elaborate argument to be established. The arguments put forth by the applicant in the instant application is that the learned judge acted without the benefit of the law. In my humble view, such a reason would not have formed the basis for an application for review but for an appeal. Neither the plaintiff nor the 2nd defendant appealed the ruling of Osiemo, J dated 5/05/2006. In the circumstances, for the applicant to ask me to grant the orders sought by his application would and indeed does amount to asking me to sit on appeal over a decision made consciously by my brother judge with parallel jurisdiction to mine. The applicant ought to have gone to the Court of Appeal on the issue.

I also find and hold that the applicant’s contention that his being enjoined in the suit would deprive him of his right to raise the defence of limitation does not hold water. The applicant would be at liberty to file his defence in accordance with the rules and if satisfied that the suit against him is statute barred, proceed to apply to have the same struck out on that ground. It is also true, that the plaintiff opposed the 1st defendant’s application to join the plaintiff in these proceedings. The plaintiff said that the court applied the wrong principles of law in doing so. The avenue open for the plaintiff was to go to the Court of Appeal over the same but as matters stand now, the plaintiff has to contend with the discomfort of having the 2nd defendant in the proceedings although it is the 1st defendant who brought the 2nd defendant on board. The plaintiff has duly amended his plaint and no prejudice would be occasioned to him save eventually perhaps the question of costs if the case against the 2nd defendant is lost.”

Order I rule 10 of the **Civil Procedure Rules** provides for substitution and addition of parties to suits. Under **rule 2** thereof the court may at any stage of proceedings either upon or without the application of either party and on such terms that 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 to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be added. **Rule 4** provides for the manner in which the plaint is to be amended where a defendant has been added to the suit.

There is no requirement under the said provisions for a draft of the pleading to be amended to be included as is the procedure in an ordinary application for amendment of pleadings. There is no requirement as there is in an ordinary application to join a third party for leave of the court to be sought. An applicant need only file the application and there is no requirement to serve that application upon the party intended to be joined as a co-defendant. Indeed the court itself may add such a party to the suit so that such

addition will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The Supreme Court in

Uganda in considering a provision similar to **Order 1 rule 10** of the **Civil Procedure Rules** in the case of **Deported Asians Property Custodian Board v. Jaffer Brothers Limited** (1999) I EA 55 (SCU) had this to say:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter...”

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (emphasis by underline).

Commenting on this provision, the learned authors of **Sarkar’s Code of Civil**

Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

The exercise of this jurisdiction is pegged upon the discretion of the court in making a determination as to whether the party sought to be added will facilitate the effectual and complete settlement of all the questions in the suit.

This Court sitting at Mombasa in **Civicon Limited v. Kivuwatt Limited & 2 others** [2015] eKLR (Civil Appeal No. 45 of 2014) identified that the provisions of **Order I** of the **Civil Procedure Rules** call for the exercise of discretion and had this to say of the same:

“Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.”

.....

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the

execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

The issue was also the subject of consideration by this Court in **Meme v. Republic** [2004] KLR 637 where it was held that joinder of parties will be permissible:

“(i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;

(ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and

(iii) Where the joinder will prevent a likely course of proliferated litigation.”

The exercise of this discretion to add a party as a co-defendant is also in consonance with the provisions of **Order 1 rule 3** of the **Civil Procedure**

Rules which provides that:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

The addition of a party will result in the amendment of pleadings to effect the joinder allowing the parties to either lay a claim of right or defend themselves against any claim made by the added party. This leeway to the amendment of pleadings is acceptable only to the extent that it does not cause any prejudice

or injustice which cannot be compensated by costs. This Court adopted the same approach in **Central Kenya Ltd. v. Trust Bank & 4 Others**, CA. No. 222 of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464).”

On the appellant's complaint that he could not appeal against the order of Osiemo, J. **Rule 75** of our **Rules** provides that:

“75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the

Registrar of the superior court.”

This Court in **Commercial Bank of Africa Ltd. v. Isaac Kamau Ndirangu** Civil Appeal No. 157 of 1991 interpreted “any person” as anyone who is adversely affected by the decision. This means that the definition of a person is not restricted to the parties in the proceedings culminating in the decision sought to be appealed.

In **Mwanzi Road Properties Ltd v. Maina Muchiri & another** [1996] eKLR (Civil Application No. Nai 69 of 1996) this Court confirmed the right of an affected person, though not party to the superior court's proceedings, to file an appeal to the Court of Appeal or apply to be a party to the proceedings in the Court of Appeal. The Court expressed itself thus:

“We think with respect that the learned single judge of this Court did fall into error when he put the right of appeal against refusal by Bosire J. as superceding right of an affected party to file a notice of appeal even if he was not a party to the suit. The two procedures stand on their own and the earlier one does not oust the later.”

In **Central Kenya Limited v. Trust Bank Ltd and Others** (supra), this Court stated that:

“The paramount consideration is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit”.

It will therefore be seen that the learned judge confronted with an application whose effect was to attack a ruling of a judge of concurrent jurisdiction was right to hold as she did that the appellant was wrong to adopt the procedure and move the court as he did. We may indeed say that it was necessary for the appellant to be added as a co-defendant because it is difficult to see how the suit against the 2nd respondent can be separated from the suit against the appellant. This appeal has no merit and we accordingly dismiss it.

On the issue of costs the appellant complains that the High Court erred in awarding costs to the 2nd respondent when that respondent had supported the appellant's application. That complaint is well founded. The learned judge should not have awarded costs to the 2nd respondent. We set aside that part of the order.

The appellant shall meet the costs of the 1st respondent.

Dated and Delivered at Nairobi this 13th day of November, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR