IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 78 OF 2011

BETWEEN

BHUDIA BUILDERS AND ERECTORS …..................................... APPELLANT

AND

IMA AGENCIES LIMITED ….. RESPONDENT

(Being an Appeal from the ruling and order given by the High Court of Kenya at Kisumu

(Karanja J.) dated 9th April, 2009

HCC NO. 23 OF 1993)

****

JUDGMENT OF THE COURT

This is an appeal against the decision of ***Karanja, J.*** delivered on 9th March, 2009 in which the suit filed in the High Court by the appellant, ***Bhudia Builders*** and ***Erectors,*** against the respondent, ***Ima Agencies Limited,*** was struck out on the ground that the suit was a nullity having been instituted by a non-existent person.

According to the plaint, the appellant claimed various reliefs including claims for Kshs.6.9 million or such sum as the court would find due being balance of construction cost; special damages of Kshs.1,500,787/= or such sum as the court would find due and in the alternative an assessment and payment of overheads expended by the appellant; delivery of certain documents and payment of proceeds of sale; an account of profits made; a declaration that the respondent held, upon a constructive trust for the appellant, 1/3rd share of profits on the sale of a joint project or such sum as the court would find due; an injunction restraining removal of assets out of jurisdiction or charging or alienating or

dealing with certain assets; general damages; further or in the alternative distribution of profits; Exemplary damages, alternatively aggrevated damages; alternatively Kshs.21,344,338/= on a quantum merut or such other sum as the court would find due; such further or other relief; costs and interest.

Those claims were made on the basis of a partnership the appellant alleged existed between it and the respondent.

The claims were denied in the defence delivered by the respondent. Of significance for the purpose of this Judgment was the averment that the respondent had no knowledge of the appellant's composition as set out in the plaint.

Several applications were subsequently made by both parties but the one giving rise to this appeal was made by the respondent on 2nd July, 2004. By that application the respondent sought the striking out of the appellant's suit for being incompetent for non-compliance with the provisions of the then ***Order XXIX Rule 1*** of the Civil Procedure Rules and the provisions of suits in respect of persons other than bodies-corporate. The application was supported by a brief affidavit of ***Mansukhlal Raichand Gudka,*** a director of the respondent. The supporting affidavit gave the main reason for seeking the striking out of the suit as the want of legal capacity of the plaintiff as a sole proprietorship to sue the respondent. In the respondent's view the appellant could not sue in it's firm name. *Order XXIX rule 1 of the former Civil Procedure Rules* was invoked as the basis for the application.

The record shows that the appellant opposed the application on the basis of Grounds of Opposition filed by its advocates. According to the appellant, there was no power to strike out pleadings under *Order XXIX rule 1 of the Civil Procedure Rules* invoked by the respondent. It was also the appellant's case that the respondent had not been misled and had known all along who it was dealing with and further that the application was an attempt to defeat the payment of a just debt.

The learned Judge of the High Court considered the application and concluded as follows:-

> ***" …... The legal principle is that a sole proprietor of a business concern has no legal authority to sue in the name of his firm as was the case herein. Consequently, Budhia Builders And Erectors' is the wrong plaintiff due to its non-existent legal personality. It cannot maintain this suit against the defendant without necessary*** *"locus-standi"*. ***The suit is therefore null and void*** *"ab initio"*.

As to whether the suit could be cured by amendment, the learned Judge of the High Court said:-

> ***"However, the general position emerging from the cited authorities is that a nullity cannot be amended. The suit is thus incurably defective."***

The learned Judge felt fortified by this Court's decision in the cases of ***Auto Garage and Another -Vs- Motokov [1973] EA 514, Macfoy -Vs- United Africa Co. Ltd [1961] 3 ALL ER 1169*** and ***Forthall Bakery Supply Co. -Vs- Fredrick Muigai Wangoe [1959] EA 474.***

In the end the learned Judge allowed the respondent's application and struck out the appellant's suit with no order as to costs.

That is the decision which triggered this appeal premised on twelve grounds of appeal. ***Mr. Mukabane,*** learned counsel for the appellant, however condensed the grounds into three clusters by arguing grounds *1, 2, 4, 5, 7, 8* and *9* together; grounds *3, 6* and *10* together and grounds *11* and *12* together. The 1st cluster complained of the respondent invoking the wrong provisions of the law; incorrect application of the law by the High Court; the failure to appreciate the parties' antecedent behaviour and reliance on technicalities. The 2nd cluster complained about failure of the learned Judge to appreciate the pleadings; the value of the subject matter; previous rulings in the file and the application for leave to amend the plaint which was pending in the file. The 3rd cluster complained

about the failure to take into account that the appellant had rendered services to the respondent which fact was disclosed in the pleadings and the failure to appreciate the authorities and facts placed before the High Court.

Mr. Mukabane submitted, in the main, that striking out the appellant's suit could only have been made under the provisions of the then ***Order VI rule 13 now Order 2 rule 15.*** In his view, failure to invoke those provisions rendered the application incompetent. He was further of the view that the court's inherent jurisdiction could not have been invoked to aid the respondent. Counsel further submitted that the plaint disclosed a reasonable cause of action and an amendment would have cured any defect in the description of the plaintiff and the appellant had applied for such amendment. Counsel emphasized that previous dealings between the parties were acknowledged by the respondent and an order for particulars would have adequately dealt with doubts if any existed in the mind of the respondent.

Mr. Yogo, learned counsel for the respondent, in response to the submissions of ***Mr. Mukabane***, among other things, submitted that the respondent's application to strike out the appellant's suit was filed prior to the application for leave to amend lodged by the appellant and in his view the learned Judge was perfectly entitled to consider the same in priority to the appellant's application which was lodged too late in the day.

Mr. Yogo agreed with the decision of the learned Judge in its interpretation of ***Order XXIX rule 1,*** *now* ***Order 30 rule 1 of the Civil Procedure Rules.*** In his view, a suit by a sole proprietor could only have been filed in the name of the proprietor which view, according to Mr. Yogo, was indeed confirmed by the appellant when it sought leave to amend the plaint. In his view the application for leave to amend the plaint was an admission that the suit was indeed a nullity. Relying on the decisions in ***McFoy -Vs- United Africa Co. Ltd*** (supra) and ***Omega Enterprises Ltd -Vs- K.T.D.C. & 2 Others (Civil Appeal No.59 of 1993),*** learned counsel submitted that a nullity cannot be cured even by amendment. On the argument that the respondent invoked incorrect provisions of the law, counsel submitted that once the issue of a nullity of the suit was raised, the learned Judge of the High Court had to make a finding on it and in counsel's view he made a correct finding which we should confirm and dismiss the appeal.

We have considered the grounds of appeal, the record of the High Court, counsel's submissions and the law. The starting point is the application dated 2nd July 2004 which the respondent made before the High Court. The respondent invoked ***Section 3 A of the Civil Procedure Act*** and the then ***Order XXIX rule 1 and Order VII rule 1 (a) and (b) of the Civil Procedure Rules.*** The application was for the following main Order:-

> ***"1. THAT the plaintiff's suit be struck out as being incompetent for non-compliance with the provisions of OXXIX Rule 1 and the provisions of suits by persons other than bodies."***

Order is in Rule the following terms:-

> ***"Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action partners in such firm, to be furnished and verified in such manner as the court may direct."***

The record shows that the learned Judge appreciated that this provision merely provides for the suing by partners or their being sued in the name of the firm. The learned Judge however, concluded, on the basis of authorities cited to him, that a sole proprietor of a business concern has no legal authority to sue in the name of his firm. Unfortunately he did not identify the authorities which said so or the relevant rule. The record however has the written submissions of counsel for the respondent before the High Court in which extracts were quoted from the English cases of ***Alexander Mountain and Company (suing as a firm) -Vs- Rumere Limited [1948] WN 243*** and ***Tetlow -Vs- Orele Ltd [1920]***

ch. 24. Lord Goddard C.J. at page 244 in the former case said:-

> *"It has been contended on behalf of the applicant that because the name of a firm had appeared in the writ the case was distinguishable from the* ***TETLOW*** *case (supra). But on the authority of* ***W. Hill & Son -Vs- Tannerhill*** *(supra) the firm name was really the equivalent of the actual name of the husband.*
>
> *Accordingly the writ contained two errors (1) the error of ostensibly suing in the name of a non-existing firm and (2) the error of really suing in the name of a dead man. There was therefore in the writ the same fatal error as in Tetlow case (supra) together with an additional error and it was fallacious to infer that the additional error nullified the fatal error.*
>
> *…..*
>
> *His lordship did not consider that* ***Order 16 rule 2,*** *was meant to apply to a mistake, such as the present one, concerning the practice of the court. That rule was really meant to apply to a slip. His decision was arrived at with regret and if he had power to allow the amendment to be made he certainly would have done so."*

And in the case of ***Tetlow -Vs- Orele Ltd*** (supra) ***Russel J***. stated at page 25:

> ***"In my opinion that rule means that, where an action has been commenced between two living parties by a living plaintiff, and the living plaintiff afterwards turns out to be the wrong person, an application may be made to court and the court can substitute another person for the living plaintiff or add another person as co-plaintiff as the case may be. But it does not justify the court in creating a plaintiff in an action for the first time …....."***

These two decisions would appear to have informed the finding of the learned Judge of the High Court that a principle exists that a sole proprietor of a business concern has no legal authority to sue in the name of his firm as was the case herein. With all due respect to the learned Judge we do not think that he should have considered the two cases as binding on him. At the very most in our view, the decisions would only be of persuasive value. We are certain that the two decisions have no binding force on us.

The learned Judge correctly in our view, found that there is no power conferred on the court to strike out a suit on the basis that it has been commenced in the name of a firm of a sole proprietor under *Order XXIX rule 1 now Order 30 rule 1 of the Civil Procedure Rules.* Yet following the above decisions, he held that a suit filed in the name of a firm of a sole proprietor is a nullity incapable of being cured by amendment. We think the provisions of ***rule 9 of Order XXIX*** were not brought to the attention of the learned Judge. The rule reads as follows:-

> ***" 9. Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit all rules under this Order shall apply."***
>
> The side note reads as follows:-
>
> ***"Suit against persons carrying on business in name other than his own."***

Our understanding of *rule 9* is that a sole proprietorship may be sued in its firm name in which event the provisions of the entire *Order XXIX* apply so far as the nature of the case will permit. The rule therefore recognizes that a sole proprietorship is an entity capable of being sued in the name of the firm. Can such an entity capable of being sued be described as non-existent? It would in our view be against public policy to allow an entity to be sued but deny it the right to sue.

We have perused the pleadings which were before the learned Judge and having done so, agree with counsel for the appellant that the respondent was in no doubt as to who it was dealing with. We only

quote a few parts thereof to illustrate the point. The respondent averred:

> ***"9. In answer to paragraph 6 of the plaint the Defendant states that, it authorized the plaintiff to supervise the construction on Developer/Employee basis and the plaintiff undertook to supervise the construction of two sample houses upon the Defendant's land at an estimated cost of Kshs.60,000.00/= per unit.***
>
> ***"12. As regards paragraph 7 of the plaint the Defendant states as follows:-***
>
> *(i) It denies that it was a term of the oral agreement that the plaintiff would supervise and substantially finance the construction to the stage of ring beam level below roofs and avers that the plaintiff being the Gudka brothers' family friend and a building contractor to wit, being without work, assured the Gudka's that he would commence the construction and obtain materials from his regular suppliers on payment and would be compensated for the cost and any interest incurred.*
>
> *"13.*
>
> *1). As expected the Defendant engaged the plaintiff who was known to the Defendant as a building contractor, undertook to use his best skill and was to be reimbursed for any expenses on materials and labour.*
>
> *"14 …...*
>
> *(v) As to paragraph 9.5 of the plaint, the Defendant admits that it applied for the loan and sought sufficient sums and actually repaid the plaintiff in excess of the building cost of the project.*
>
> *"…..*
>
> *….*
>
> *"22 In answer to paragraph 17 of the plaint, the Defendant states that payments were made to the Plaintiff as and when required to enable the continuance of the work continue on schedule.*
>
> *"…….*
>
> *…...*
>
> *"28. Paragraph 21 of the plaint is admitted save that the Defendant had reimbursed the plaintiff of all costs relating to materials and labour. The Plaintiff is put to strict proof of his interpretation as to partnership.*
>
> *"33. If the Plaintiff states that he received Kshs.1 Million from the Defendant on 15th November, 1991 the same is admitted subject to the plaintiff producing evidence of such payment. The Defendant states that the said payment was made on account of materials and labour expenses and the facts relating to drainage and roads are not within the Defendant's knowledge.*
>
> *"34. In answer to paragraphs 30 of 30.1 and 30.2 of the plaint, the Defendant denys (sic) that its named agents behaved in the manner suggested and puts the Plaintiff to strict proof. The Defendant states that it made payments to the Plaintiff on request and in accordance with availability of funds and the urgency of the requirement.*
>
> *…*

...

"36. The Defendant admits receiving the letter dated the 23rd of April, 1992 but states that having made full reimbursement for materials and labour to the Plaintiff it was under no obligations to enter into correspondence with the Plaintiff. The sum of Kshs.7,200,000.00/= set out is disputed and the Plaintiff is put to strict proof of his accounts.

"..

..

"37. As to paragraph 33 of the plaint the Defendant denies that its action of showing the Plaintiff efforts to sell the completed houses amounted to part performance and puts the plaintiff to strict proof. The Defendant states that further payment (if any) to the plaintiff would be subject to taking accounts and/or valuation of the construction work carried out by the Plaintiff.

"39 ....

…..........

The Defendant makes no admission as to the alleged representations set out in paragraphs 12, 17, 19, 23, 28 and 30.1 of the plaint and states that the plaintiff was a mere employee who was paid in full for all the materials, labour and services expended by himself in completing the Defendants housing project.

...

…

"46. In answer to paragraph 42 of the plaint, the Defendant states that no equity or estoppel place (sic) a burden upon it to pay the sum of Kshs.6.9 Million approximately and the Plaintiff's claim is a fishing exercise and an abuse of the process of the law. The Defendant shall take a preliminary point that the Plaintiff has to elect either to sue for Kshs.14,441,388.00/= or Kshs.6.9 million approximately."

The averments in the above paragraphs show beyond peradventive that the respondent and the appellant had some sort of relationship from which certain rights may have accrued. The description or misdescription of the appellant did not appear to be an issue. Both the appellant and the respondent were in no doubt as to the justiciability of the appellant's claim. In those premises would the appellant's claim be struck out for having been lodged by a non-entity? Was the appellant in the same position as that of a dead person as was the position in the case of ***Alexander Mountain company -Vs- Rumele*** *(supra)?* or was the appellant in the same position as that of a non-existent person as was the finding in ***Tetlow -Vs- Orele Ltd*** (supra) case?

Given the pleadings, we think not. Our *Civil Procedure Rules* also have ***order 1 rule 10 (formerly Order (1) Rule 10)*** which reads as follows:-

"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."***

Then we have ***Rule 9 of the same Order 1 of the Civil Procedure Rules*** which is in the following terms:-

> ***"9. No suit shall be defeated by reason of the misjoinder or non- joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it."***

The above provisions are designed for the court, as far as is lawfully possible, to focus on substance rather than form in considering matters before it, the concern of the court being to dispense substantive justice to those who seek the same. Happily this concern has received the ultimate sanction of the ***Supreme Law of the Land vide Article 159 (2) (d)*** which is in the following terms:-

> ***"(2) In exercising judicial authority the courts and tribunals shall be guided by the following principles …...........***

d. ***justice shall be administered without undue regard to procedural technicalities."***

In view of the above we find it difficult to accept that the learned Judge of the High Court applied the correct principles which we have demonstrated above in coming to the conclusion that the the appellant's suit was a nullity. The learned Judge was aware of the appellant's application for leave to amend its plaint. Yet for reasons which are not on the record the learned Judge decided to first consider the application for striking out the suit. In our view and with all due respect to the learned Judge, it was not proper to so proceed especially as a determination in favour of the respondent would shut out the appellant from the judgment seat thereby rendering its application for leave to amend otiose. Application for amendment whether filed late after application for striking out or not, should be heard first so that when application for striking out a suit is eventually heard, all facts and proper pleadings are before the court to act upon. In this case striking out was done before some vital aspects of the case were placed before the Court as application for amendment was never heard and decided.

We think we have said enough to show that, in our view, the approach of the learned Judge and his eventual determination of the application before him offended the provisions of the Civil Procedure Rules and did not advance the cause of justice.

For the foregoing reasons, we allow this appeal. The ruling and order of the learned Judge of the High Court delivered on 9th April, 2009 and all consequential orders are set aside. We order that this suit be reinstated. We further order that further proceedings in the High Court be heard before a Judge other than Karanja J. We award the costs of this appeal and of the High Court to the appellant.

Judgment accordingly.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2014

J.W. ONYANGO OTIENO

…...............................

JUDGE OF APPEAL

F. AZANGALALA

….................................

JUDGE OF APPEAL

S. ole KANTAI

…...............................

JUDGE OF APPEAL

I certify that this is the

true copy of the original

DEPUTY REGISTRAR