REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 261 OF 2011

BETWEEN

CENTRE FOR PEACE AND DEMOCRACY ..... APPELLANT

(CEPAD) BOARD OF DIRECTORS

AND

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD ….....RESPONDENT

(Appeal from the Ruling & Order of the High Court of Kenya at Kisumu (Nambuye, J.) dated 28th day of September, 2011

in

MISC. APPL. NO. 7 OF 2011

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JUDGMENT OF THE COURT

The appeal before us is brought by Centre for Peace and Democracy (CEPAD) Board of Directors. One, ***Michael Juma Otieno,*** (Michael) at the time or times relevant to the litigation claimed to be the Chairman of CEPAD. The respondent is the Non-Governmental Organizations Co-ordination Board. It was also the respondent before the High Court. It would appear that at the High Court the following joined the fray:- ***Martin Lutta Omondi Ochola, Busaba Liawo, Abila Odongo*** and ***Christine Awuor Otiri*** who described themselves as directors of Centre For Peace and Democracy (CEPAD).

The facts leading to the appeal are really not in dispute and are as follows. On 19th January, 2011 CEPAD lodged an application for leave to apply for an order of mandamus to compel the respondent to

register the list of officials purportedly elected during a special meeting of CEPAD held on 29th October, 2010. That application was lodged under ***Order 53 Rules (1)*** and ***(2)*** of the Civil Procedure Rules – ***Chapter 21*** Laws of Kenya. The application was accompanied by a statutory statement and a verifying affidavit. The latter was sworn by the said Michael who described himself as the Chairperson of Board of Directors of CEPAD. In the former, the said Michael was described as the applicant for the judicial review order of mandamus.

The application for leave was heard and allowed by ***Nambuye J.***, *(as she then was)* on 20th January, 2011.

Pursuant to that leave, the substantive application for the said order was lodged on 21st January, 2011. The application was set for hearing on 10th March, 2011. On being served, the respondent appointed M/s ***Otieno, Yogo, Ojuro*** & Co. Advocates to represent it in the matter. That firm of advocates filed a Notice of Appointment of Advocates on 10th March, 2011. Mr ***Otieno,*** learned counsel, of that firm attended the court when the application came up for hearing, and informed the court that he would appear for ***"interested parties"*** and would require time to respond to the application. Mr. ***Amondi,*** learned counsel who appeared for the CEPAD at the same time, applied for leave to amend the statutory statement accompanying the application which leave was granted. The amended statement was filed on the same date, 10th March, 2011.

The amendment introduced the Board of Directors of the Centre for Peace and Democracy (CEPAD) as the applicant in place of the said Michael whose description in the statement was ***"the duly elected chairman of the Centre for Peace and Democracy (CEPAD) following elections held on 29th October, 2010"*** and had authority to write the statement on behalf of CEPAD Board.

The amendment elicited the filing of a Notice of Preliminary Objection and Grounds of opposition which were lodged on 10th April, 2011. The issues raised in the two documents were the same. We shall therefore hereinbelow only reproduce the grounds in the Notice of Preliminary Objection which were that:

" (i) The application does not lie in so far as Michael Juma Otieno has not obtained leave to file Notice of Motion and the same does not lie.

ii. ***There was never a resolution by the interested parties to bring these proceedings hence the same are brought without authority and thus does not lie.***

iii. ***The Notice of Motion now stands without a Statement of facts and cannot thus lie."***

When the substantive application came up for hearing on 31st March, 2011 before Nambuye, J, the learned Judge ordered the hearing of the Preliminary Objection to be on 11th May, 2011 and in the interim directed parties to file written submissions on the same. The record shows however, that no hearing took place on 11th May, 2011 but on 18th of the same month when the written submissions were highlighted.

Having heard and read the submissions, the learned Judge concluded:

> ***"Herein leave was granted in vain in that it was granted to CEPAD when infact CEPAD had no statement in place to support it on the one hand, on the other hand the statement describing Michael Juma Otieno as the applicant had no application in the name of Michael Juma Otieno as the applicant for which the statement could be employed to support. The leave having been so granted in vain, it means that the substantive application has no basis on which to stand firstly because the grant of leave on which it is anchored is faulty. And secondly even the amended statement is faulty as explained herein.***

For the reasons given in the assessment the substantive application filed on 21-1-2011 is invalid and cannot hold and the same is struck out. If the ex-parte applicant is still aggrieved they are at liberty to seek alternative remedy."

It is against that order that this appeal was brought which is premised upon seven (7) grounds but which were condensed into three grounds by Mr. ***Amondi,*** learned counsel who argued the appeal on behalf of the appellant. Learned counsel abandoned ground one (1) and argued grounds 2, 3 and 5 together ground 4 separately and grounds 6 and 7 together.

The appellant complained in grounds 2,3 and 5 that the issues raised in the Preliminary Objection were ***res judicata*** by reason of the fact that leave had already been obtained. In ground 4 the appellant complained that the learned Judge erred in law and in fact in finding that *"the defect leading to the amendment of the statutory statement was incurable."* In grounds 6 and 7 the appellant complained that the learned Judge erred in law and fact in considering irrelevant authorities and extraneous matters.

Mr. Amondi submitted, before us, that once leave was granted on 20th January, 2011 issues regarding the same became *res judicata*. We understood, Mr Amondi as urging the proposition that once leave had been granted, it could not be questioned. Learned counsel further submitted that the learned Judge of the High Court in considering the Preliminary Objection, went outside the scope of the complaint raised by the respondent and ended up determining issues not raised. In learned counsel's view, the appellant's error in the statutory statement was a mere typographical one which was curable and should not have resulted in the striking out of the Notice of Motion.

Mr. Otieno in response, contended that, leave was granted to Michael and it was only him who could have lodged the substantive Notice of Motion and once he was removed from the proceedings the substituted party would not proceed with the motion on notice as it had obtained no leave to do so. In counsel's view, the amendment in the statutory statement to introduce a new party was substantial and not typographical as the appellant contended. Mr. Otieno further submitted that the issue was not *res judicata* as leave had been granted ex parte and could not have been challenged at the time of granting it. Learned counsel also contended that under the NGO Act bodies registered under that Act are bodies corporate with power to sue and be sued. It was therefore counsel's view that the body which instituted the judicial review proceedings had no capacity to do so.

Both counsel placed reliance on various authorities which we have considered. We have also given due consideration to the record, the grounds of appeal argued before us and submissions of learned counsel. We shall consider the issue of *res judicata* first. *Res judicata* is explained in ***Section 7*** of the Civil Procedure Act which reads:

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been substantially raised, and has been heard and finally decided by such court."

And Explanation (3) reads:-

"The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other."

The above provisions, in our view, leave no doubt in our minds that *res judicata* plea was unavailable to the appellant in the matter before us. First, the notice of motion in which leave was granted proceeded ex-parte as mandatorily required by Order ***53 rule (1)(2)*** of the Civil Procedure Rules. The respondent did not therefore participate at that stage.

It therefore did not deny or admit anything in the appellant's said notice of motion; indeed it had no opportunity to do so. Secondly, the appellant sought and was granted leave to amend its statutory

statement and did amend the statement in the substantive notice of motion.The respondent's challenge regarding the statutory statement could only be made when the amendment was filed and served. ***Rule 4(1)*** of Order ***53*** aforesaid reads:

> **"4(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall subject as hereinafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set in the said statement."**

It is plain from the above provisions of rule 4(1) of Order 53, that the statement which accompanied the application for leave may be relied upon in the substantive notice of motion. A complaint against such a statement would therefore automatically be a complaint against the application in which leave was sought and granted. The argument that issues raised at the application for leave stage were *res judicata* is therefore, in our view, clearly misconceived.

The second cluster of issues raised by the appellant was that the defect in the statutory statement which was amended was typographical and should not have resulted in the entire notice of motion being struck out. The appellant changed the name of the applicant in the statutory statement from Michael to the appellant's name. The learned Judge of the High Court said of that amendment as follows:

> ***"(4) The applicant in the ex-parte application is indicated as Centre for Peace and Democracy (CEPAD) Board of Directors. The verifying affidavit is deponed by one Michael Juma. The initial statement filed on the 17-1-2011 in support of the ex-parte application shows the name of the applicant as Michael Juma Otieno. This is the statement as well as the verifying affidavit together with annextures which formed the basis of the documentation for leave and on the basis of which leave was sought and granted by the court on 20-1- 2011.***
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> ***(5) It is trite and as demonstrated by the relevant rules that the paper work which supported the application for leave is the same paper work which is to support the substantive application which was duly filed on 21-1-2011. Infact towards the end of ground 3 in the body of the application it is clearly indicated:- "And which application is supported by the statement and verifying affidavit of Michael Juma Otieno both dated and sworn respective (sic) on the 17th January 2011 and filed in this court and supported by such other or further reasons and arguments as shall be addressed at the hearing thereof.***
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> **….....**
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> **….....**
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> ***"8 (1) The amendment cannot be described as a typographical error because in the ex-parte application the applicant is described as (CEPAD).The affidavit is deponed by one Michael Juma Otieno as a director of (CEPAd). Where as the original statement describes Michael Juma as the applicant. It means that the original application and the statement were not in tandem and infact had the court scrutinized them, it would have declined leave.***
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> **….....**
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> **….....**

2. ***The discrepancy herein is fundamental because the centrol (sic) entity in the proceedings of this notice is the applicant and if there is doubt as to which entity is the applicant, then the proceedings are bad in law and they cannot hold. This fundamentality goes to affect the validity of the order of leave to apply for judicial review granted herein since it was not procedurally granted. As at 21-1-2011 (sic). The applicant in the application was CEPAD and in order for that leave to hold the application ought to have been supported by a statement from***

CEPAD which is not the case herein. As at 21-2-2011 it had not been demonstrated in the statement that Michael Juma Otieno was acting on behalf of CEPAD infact the verifying affidavit does not state that he was deponing it on behalf of CEPAD but he was deponing the verifying affidavit in his capacity as the chairperson of CEPAD."

The learned Judge in the end determined that the defect was not a procedural technicality and that without a proper description of the applicant, the substratum of the application was absent which rendered the substantive motion incompetent. We have no reason to differ with the learned Judge of the High Court. The statutory statement is a mandatory requirement for the grant of leave and for the issue of the substantive order. We appreciate that under rule 4(2) of Order 53 aforesaid, a statement may indeed be amended on the application of the applicant. That leave to amend, in our view, does not extend to substituting the applicant given the provisions of rules 1(2) and 4 of the said Order. As found by the learned Judge of the High Court, the applicant is the central focus of the application under the said Order as it is the applicant who seeks relief after being aggrieved. The grieving party in our view, may not be changed after leave to commence proceedings for orders of judicial review has been granted, because such change would invalidate the accompanying documents which should be the same for both the application for leave and the application for the substantive order. That is why the learned Judge stated that if the defect had been brought to her notice she could not have granted leave to seek the substantive order. We have therefore no difficulty in finding that the defect in the statutory statement was not typographical or procedural as argued by the appellant. It went to the root of the entire substantive notice of motion. Article ***159 (2)*** of the Constitution 2010 could not therefore come to the aid of the appellant.

The last cluster of issues raised by the appellant was that the learned Judge of the High Court considered extraneous matters not argued before her and took into account decisions which had no bearing whatsoever on the matter before her. Having considered the record and in particular the ruling of the learned Judge, we have, with respect to counsel for the appellant, not identified any extraneous matters allegedly considered by the learned Judge. The learned Judge, as is her wont, considered in great detail, the grounds of the Preliminary Objection; the requirements of Order 53; the ex-parte proceedings before her; the submissions made to her; the cases cited to her; the principles enunciated therein and applied those principles to the matter before her. It is unfortunate that that admirable effort became a source of complaint on the part of the appellant. We think the appellant's complaint in that regard was not well taken and we find it absolutely without merit.

We have said enough, we think, to show that we are satisfied the learned Judge came to the correct decision on the matter before her and we must uphold her ruling. That being our view of the matter, we order that this appeal be and is hereby dismissed with costs thereof to the respondent.

The status of the interested parties in these appeal was not made clear. They are therefore not entitled to any costs.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2014

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

….....

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