



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 153 of 2004

TELKOM KENYA LTD
APPELLANT

AND

JEREMIAH ACHILA GOGO.....1ST
RESPONDENT

KENYA POSTS & TELECOMMUNICATIONS CORPORATION.....2ND
RESPONDENT

(An appeal from the ruling and orders of the High court of Kenya

Kisii (Kaburu bauni, J) dated 9th Bebruary, 2004

in

H.C.C.C. NO. 147 OF 1999)

JUDGMENT OF THE COURT

The appellant, Telkom Kenya Limited, is one of the successors of Kenya Posts and Telecommunications Corporation, the defendant in Kisii High Court Civil Case No. 147 of 1999, in which Jeremiah Achila Gogo had impleaded that corporation for damages, special, among other reliefs, for alleged wrongful termination of employment. The appellant, under Legal Notice No.132 of 2001, was named as successor of the Corporation as defendant in the above suit pursuant to paragraph 5(4) of the Third Schedule to the Kenya Communications Act, Act No.2 of 1998. The schedule deals with transitional provisions.

Summons to enter appearance and the plaint in the above suit were served upon Kenya Posts and Telecommunications Corporation (KPTC). It appeared by counsel, P.B. Jilani who was then its Corporation Secretary, and later filed a written statement of defence dated 23rd July, 1999. In that defence it denied the claim. Eventually the case came up for hearing before Wambilyanga J. who after hearing witnesses from both sides and submissions from counsel for the parties gave judgment against KPTC and awarded Kshs.400,000/= to the plaintiff, who is the respondent in the appeal before us. Execution proceedings followed. Assets of the Telkom Kenya Limited, the appellant herein, were

attached along with assets of Postal Corporation, the other successor of KPTC.

The two institutions filed objection proceedings pursuant to the provision of **Order 21 rule 56** of the Civil Procedure Rules, on the basis that they were not parties in the suit, and that notwithstanding Legal Notice No.132 of 2001, no steps had been taken to make them parties. It was contended on their behalf that KPTC had ceased to exist by the time judgment was given and therefore, in absence of any timeous notice to them of the existence of the suit, the judgment could not properly be enforced against them.

Kaburu Bauni J. heard the objection proceedings and was unimpressed by the appellant's submissions. He, however, upheld Postal Corporation's objection and ordered for the release of its property.

In the appeal before us challenging Kaburu Bauni J's decision dated 9th February, 2004, there is only one issue, namely, whether the failure by the respondent to apply for substitution of the defendant with the appellant, disentitled the respondent to the right to execute decree in the above suit against the appellant.

Legal Notice No.132 of 201, in pertinent part states:

“(c) the pending legal proceedings specified in part “c” of the schedule hereto which were instituted by or against Kenya Posts and Telecommunications Corporation shall be deemed to have been instituted by or against Telkom Kenya Ltd.”

The notice was signed by the Minister for Finance. There is no dispute that the respondent's case was one of the cases included in schedule ‘c’. The Legal Notice, as stated earlier, was published pursuant to paragraph 5(4) of the 3rd schedule to the Kenya Communications Act, Act No.2 of 1998, which provides as follows:-

“If on the vesting day, any suit, appeal, arbitration or other proceedings of whatever nature wheresoever instituted in relation to the business of the former Corporation which is by virtue of this section, transferred to the Commission, Company, or, the Corporation, as the case may be, shall not abate, be discontinued or be in any way prejudicially affected by reason of such transfer of the business of the former corporation or of anything contained in this Act, any suit, appeal, arbitration or other proceedings shall be continued, and enforced by or against the commission, company or the Corporation, as the case may be.”

It was conceded by the appellant that the respondent's suit was properly assigned to it. Its major complaint is that the assignment per se was insufficient to confer a right on the respondent to proceed against it. The respondent, it contends, should have moved the court to bring it on record. There is no clear provisions in the Civil Procedure Act and Rules made thereunder for the substitution of parties except in cases of death, bankruptcy and marriage of parties. The provision which appears to be relevant is **Order 23 rule 9** of the Civil Procedure Rules, which provides in sub-rule (1) that:

“In other cases of an assignment, creation, or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.”

The sub-rule is silent on who is supposed to move the court for leave, but we suppose the party who seeks the court's assistance is the one to apply.

Determination of this appeal depends largely on what interpretation is to be given to the term “deemed” as used in the Legal Notice.

In St. Aubyn (L.M.) v. A.G. [1951] 2 ALL ER. 473 at P.498 Lord Radcliffe attempted a definition of the word. He rendered himself thus:

“ The word ‘deemed’ is used a great deal in modern legislation- sometimes it is used to impose for

purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain – sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible”.

And Lord Viscount Simonds, in a later case, Barclays Bank Ltd v. Inland Revenue Commissioners [1961] AC 509 at P.523, cited the aforesaid definition and himself stated:

“I bear in mind what Lord Radcliffe said in St. Aubyn’s case about the word ‘deem’ but nevertheless regard its primary function as to bring in something which would otherwise be excluded.”

KPTC, was split through an Act of Parliament. In its wisdom, Parliament considered it necessary to make provision with regard to transitional issues, hence the promulgation of the Third Schedule. We earlier reproduced paragraph 5(4) of that schedule, which was intended to clear any uncertainty with regard to pending civil proceedings by spelling out who shall be deemed to be the plaintiff or defendant, as the case may be, presumably, to obviate uncertainty as to the rights and liabilities of the resultant corporations or companies. By so doing the new bodies were vested with rights which otherwise they would not have, and a reciprocal obligation regarding existing suits against KPTC.

But was it necessary to move the courts to substitute the new bodies in place of KPTC? We accept Viscount Simond’s definition of the term “deem” and hold that L.N. 132 of 2001, brought in Telkom Ltd, into this case, which otherwise would have been excluded. It is, however, our view that it would have been prudent and indeed better if an application had been made for purposes of obviating confusion, to make Telkom Ltd a party. Who would have made the application? The duty lay on both parties. The appellant should not think that it was only incumbent upon the respondent to make the application. It too, was obligated to apply more so, because it wanted to challenge the decision of the superior court against it.

Did the failure to apply vitiate any action which so far has been taken on record by the respondent? On the basis of the legal provisions we alluded to, we do not think so. The actions are deemed to have been taken against the correct party.

The appellant has complained that it was prejudiced by the omission to apply for substitution as it was unaware of the suit by the respondent against its predecessor. The superior court considered this aspect of the matter and held that the appellant did not suffer any prejudice as its corporation secretary had notice of it. Its corporation secretary was Mr. P.B. Jilani, an advocate of the High Court of Kenya, who is the person who entered appearance and filed defence on behalf of KPTC. He later became the Corporation Secretary of the appellant. In our view the superior court was entitled to come to that conclusion. The split of KPTC was an internal matter. The record of pending cases which were included in the schedule to L.N. 132 of 2001 must have been obtained from records of KPTC. The appellant knew or ought to have known of the pendency of the respondent’s claim and that there was an unsatisfied judgment against it. It should not lie in its mouth to now contend that it was not aware of the existence of the suit.

0.23 rule 9 Civil Procedure Rules was cited by counsel for the appellant, Mr. Shivaji, as providing guidance on how we should treat the appellant’s case. That provision deals with situations where a litigant has died, has become bankrupt or there has been marriage of parties, none of which situations arise here.

In the result we dismiss this appeal with costs.

Dated and delivered at Kisumu this 20th day of June, 2007

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR