



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU JA, ONYANGO-OTIENO & RINGERA AG JJ A)

CIVIL APPEALS NOS 5 AND 48 OF 2002 (CONSOLIDATED)

BETWEEN

ANTONY FRANCIS WAREHAM T/A AF WAREHAM.....APPELLANT

KIPRONO KITTONYAPPELLANT

TAXTAR INVESTMENTS LIMITEDAPPELLANT

AND

KENYA POST OFFICE SAVINGS BANKRESPONDENT

JUDGMENT OF THE COURT

We have before us two appeals, namely Civil Appeals Nos 5 And 48 of 2002 which were consolidated for the purpose of hearing. In Civil Appeal Number 5, the appellant is one Anthony Francis Warehem T/A A F Warehem and the respondent is the Kenya Post Office Savings Bank. In Civil Appeal No 48 the appellants are Kiprono Kitony and Taxtar Investments Ltd and the respondent is the same Kenya Post Office Savings Bank. Both appeals arise from the judgement and decree in the High Court Civil Suit No 3161 of 1997 in which the respondent was the plaintiff and the appellants were the first, second and third defendants respectively. For ease of reference we shall hereinafter refer to the appellant in appeal NO 5 as the 1st appellant and to the appellants in appeal No 48 as the 2nd and 3rd appellants respectively. The judgement and decree of the superior court (Commissioner of Assize, Philip Ransely, as he then was) which is appealed against ordered the first appellant on his part and the second and third appellants on their part to pay to the respondent the sums of Kshs 407,000/= and Kshs 1,757, 263 respectively together with interest thereon at 12% per annum from 16th December, 1997 until payment in full. It also ordered the respondent to amend its plaint to claim the aforesaid sum of Kshs 407, 000/= from the first appellant as money had and received and to implead the second and third appellants as principals, rather than agents, of the first appellant in the transaction giving rise to the suit.

The short background to the appeals is this. In the plaint filed in the superior court, the respondent sued the appellants jointly and severally for breach of contract to sell and deliver a dully cleared and transferred Peugeot 605 SRI motor vehicle to it and claimed the sum of Ksh 2,1644,263/= as special damages which were particularized for that breach of contract. It also claimed costs of the suit and interest on the damages and costs at commercial rates. It further claimed such further or other relief as the Court deemed just and fair. In the said plaint, the second and third appellants were impleaded as the lawful agents of the first appellant in connection with the said contract. In his statement of defence, the first appellant denied the existence of any contract between himself and the respondent and averred that if the contract pleaded in plaint existed and it purported to be made by him or on his behalf, the same was

made by the second appellant independently and he had no authority to make it on his behalf or to bind him to it. The first appellant denied that the second and third appellants were his agents. The second and third appellants in their statements of defence canvassed interesting defences. The second appellant admitted that he was the lawful agent of the first appellant in the transaction pleaded in the plaint and averred that as such he was incapable of being sued by the respondent. He also denied the breach of the contract if, any, between him and the respondent and further denied that the respondent had suffered the loss and damage pleaded. The third appellant for its part pleaded that it was a stranger to all allegations in the plaint and it had nothing to do with the transaction subject matter of the suit. It may be mentioned in passing that the third appellant is a limited liability company in which the second appellant was a director and a shareholder. In the reply to the defence, the respondent averred that by virtue of being the agent of the first appellant and in view of the circumstances of the case, the second and third appellants were in law capable of being sued by the respondent.

About 18 issues were agreed for trial. The principle ones were whether there was a contract between the first appellant and the respondent to supply the motor vehicle in question and to pay the duties therefore; whether the first appellant breached the terms of the said contract; whether the respondent was entitled to the special damages claimed in the plaint; and whether the second and third appellants were agents of the first appellant or what was the relationship between the first, second and third appellants.

After hearing the evidence adduced by the parties and the submissions of their advocates, Commissioner of Assize Ransely (as he then was) found (i) the 2nd appellants at all times dealt with the respondent as a principal in his own right; (ii) there was a breach of contract and the respondent had suffered the loss and damage claimed in the plaint; (iii) the first appellant had received and retained a sum of Kshs 407,000/= from a company known as Trans Africa Ltd belonging to one Nishit Patel, money which ought to have been refunded to the respondent as it involved an abortive purchase of a Land Rover Discovery by the respondent; and (iv) there was no claim for the said money in the plaint. The learned Commissioner of Assize felt that the first appellant should pay the aforesaid sum of Kshs 407, 000/= to the respondent and he ordered that the same be paid as money had and received. For that purpose he further ordered that the respondent should amend its plaint to reflect that fact and the amended plaint was to be submitted to the Court for approval within 14 days after the date of the judgement. He also gave leave to the respondent to further amend its plaint to plead that the second and third appellants were principles and not agents in the matter. In the result, the learned Commissioner of Assize gave judgement against the second and third appellants in the sum claimed less Kshs 407,000/= to be paid by the first appellant. He also ordered that the costs of the respondent be paid as to one quarter by the first appellant and three quarters by the second and third appellants and that interest would accrue on the judgement sums at court rates from the date of the filing of the plaint until payment in full. It is those findings and the consequential orders that have provoked this appeal.

The first appellant has presented six grounds of appeal namely, (1) that the learned Commissioner of Assize erred in considering matters which were neither placed before him nor issues within the suit filed by the plaintiff; (ii) that having found that the evidence of the appellant was truthfully and believable the learned Commissioner of Assize erred in not dismissing the suit; (iii) that it was not open for the learned Commissioner of Assize to enter judgement against the appellant for the sum of Kshs 407,000/= which had not been pleaded by the plaintiff; (iv) that the learned Commissioner of Assize erred in law in amending the plaint without an application by any of the parties; (v) that the learned Commissioner of Assize erred in amending the plaint at the stage of giving the judgement without affording the appellant the right to reply to the amended plaint and the right to address the amended plaint; (vi) that the learned Commissioner of Assize erred in entering judgement against the appellant for costs and interest while the evidence on record could not support such findings.

He asks for orders that the appeal be allowed and the judgement entered against the appellant in the superior court and all consequential orders be set aside; that the suit in the superior court be dismissed with costs to the appellant; that the respondent do refund to the appellant the sum of Kshs 407,000/= or any sum which it will have received from the appellant together with costs and interest.

The second and the third appellants on their part have presented four grounds of appeal, namely (i) the

learned Commissioner of Assize erred in law and in fact in holding that the 2nd defendant was principal and as such liable to the plaintiff; (ii) the learned Commissioner of Assize erred in law and in fact in holding that the 3rd defendant was liable to the plaintiff; (iii) the learned Commissioner of Assize erred in law and in fact in making findings contrary to the pleadings; (iv) the learned Commissioner of Assize erred in law and in fact in granting leave to the plaintiff to amend its plaint after judgement.

They ask for orders that the appeal be allowed and all consequential orders be set aside, that the suit in the superior court be dismissed with costs to them, and that the respondent do refund to them the sum of Kshs 1,757,263/= or any other sum which it will have received from them together with costs and interest.

Counsel for the first appellant argued that as it was evident from the pleadings that the respondent's claim was that the first appellant had through his agent(s), the second and third appellants, sold a motor vehicle to the respondent and yet the superior court had found that the second and third appellants were not agents of the first appellant but acted as principals for their own benefits, the superior court had no choice but to dismiss the respondent's claim against the first appellant. He also argued that the issue of the money received by the first appellant from the company of Nishit Patel was not before the Court and the respondent had not pleaded for the refund of any money had and received by the first appellant. Counsel contended further that by amending the plaint at the judgement stage, the superior court altered the nature of the case before it without affording the appellant an opportunity to respond to those amendments. In his view, that was a wrong exercise of discretion as it was totally prejudicial to the appellant. He contended that the learned Commissioner of Assize exceeded his jurisdiction by amending the plaint at the judgement stage on his own motion and in granting an order which had not been sought in the pleadings. He relied heavily on this Courts decision in *Nairobi City Council v Thabiti Enterprises Ltd* (Civil Appeal No 264 of 1996) (unreported) for the propositions that a judge does not have jurisdiction to determine a matter which has not been pleaded unless the pleadings are suitably amended; that it was a serious breach of a fundamental rule of pleadings to grant relief which has not been sought, and that there was no power to decide an issue not raised in the pleadings.

Counsel for the second and third appellants argued that as the respondents case against those appellants had been pleaded and formulated on the basis that they were agents of the first appellant and indeed the respondent's evidence was consistently to that effect, once the learned Commissioner of Assize found that those appellants were not agents but principals, he should have dismissed the respondent's case against them. He associated himself with the submissions of counsel for the first appellant that pleadings could not be amended after the judgement and, accordingly, he submitted that the superior court was in error to grant leave to the respondent to amend the plaint to implead the two appellants as principals.

Counsel for the respondent naturally defended the judgement of the superior court. He submitted that it was a reasonable decision which was based on the evidence tendered before the Court. He submitted that it was quite proper for the superior court to grant leave to amend the plaint after the judgement. In that regard, he contended that order 6A rule 3(1) permitted amendments to be made at any stage of the proceedings and the words in "any stage of the proceedings" would include even after the judgement. He also relied on rule 5(1) of the same order which provides that for the purpose of determining the real question in controversy between parties, or of correcting any defect or error in the proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs. Counsel further submitted that even if this Court disagreed with the superior court's exercise of discretion to amend the plaint at the stage it did, only the award of the sum of Kshs 407,000/= in favour of the respondent by the first appellant could not be sustained.

We have carefully considered the judgement of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the

evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings. Applying those principles to the circumstances of this case, it is clear that the respondent's cause of action in the superior court was breach of contract and the remedy sought was special damages flowing from such breach. The respondent did not plead a case for money had and received and did not pray for any such relief. It is also clear that the respondent's case was predicated on the pleadings that the second and third appellants were the agents of the first appellant in the transaction giving rise to the action. In those premises, it was *prima facie* not open to the superior court to make a finding that the respondent had established a case for money had and received by the first appellant and to make a specific award of Kshs 407,000/= in that respect. It was also *prima facie* imperative that the Court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore the Court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.

How did the superior court get over those formidable procedural hurdles? It granted leave to the respondent to amend its plaint to plead a cause of action for money had and received against the first appellant and to implead the second and third appellants as principals. And it did so at the stage of judgement and the amended plaint was to be approved by the Court and filed after the delivery of judgement. Could that lawfully be done? Counsel for the respondent invoked the provisions of order VIA rules 3(1) and 5(1) to justify the action taken by the learned Commissioner of Assize. Those provisions read:-

“3.(1) Subject to order I, rules 9 and 10, order XXIII rules 3, 4, 5 and 7 (none of which are relevant to the case at hand) and the following provisions of the rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.” (Underlining ours)

5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”

In our understanding rule 3(i) applies only where leave to amend has been sought by a party. It is the antithesis of rule 1 which permits amendments without leave before closure of pleadings. In the matter at hand the respondent did not seek leave to amend the plaint and, accordingly, rule 3 cannot avail it or be used to support the orders of the learned Commissioner of Assize. That leaves rule 5 for consideration. Under that rule the Court could on its own motion (and the superior court here acted on its own motion) order any document to be amended in such manner as it directs for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings. It should be noted that unlike rule 3, rule 5 does not empower the Court to exercise its power at any stage of the proceedings. Accordingly the issue of whether or not a court could order amendments after judgements must be determined without any presumption that there is a power to do so by dint of the express wording of the rule. Be that as it may, even after the rule had such express wording, the exercise of the discretion to order an amendment after judgement in the circumstances of this case could not pass unquestioned even though it is well established that the words “at any stage of the proceedings” mean and include before, or at, or after the trial, or even after judgement or on appeal (*The Duke of Buccleuch* [1892] P 201, *G L Baker Ltd v Mediway Building and Supplies Ltd* [1958] 3 ALL ER 540). We say so for the following reasons. First, it is clear that the power of the Court to order amendments *suo motu* is only to be exercised in order to raise the real question in controversy between the parties or to correct errors or defects in the proceedings. To our minds, questions in controversy between the parties should only be raised before or in the course of the trial in order to give the affected party an opportunity to adduce evidence thereon and make submissions. Such a purpose would not be served if the questions are raised *ex post facto* after the trial. Accordingly, it is to make nonsense of the rules of procedure to order

amendments touching on the issues of attack or defence after the trial. Secondly in our system of adversarial litigation, the Court performs the role of umpire; it does not have an inquisitorial function. It should not therefore descend into the arena of conflict by forcing on the parties amendments which those parties in their own self-interest, as they perceive it, have not asked for. Thirdly, it is a cardinal principle of procedural law that amendments should not be allowed or ordered if they would cause an injustice to the other side. In the matter at hand, it stands to reason that to change the nature of the respondents cause of action against the first appellant from breach of contract to one for money had and received, or to change the contracting capacity of the second and third appellants from agents (as averred and testified by the respondent) to principals (as the superior court thought the evidence disclosed) at the judgement stage and thereby denying the appellants a chance to respond to the amendments could not but be unjust.

We think we have said enough to show that in our considered view, a court should not exercise its power to order amendments *suo motu* after the trial except to correct minor slips and omissions which serve the purpose of perfecting the record. In the circumstances, the learned Commissioner of Assize was clearly wrong to exercise his power as he did by introducing a new cause of action and changing the nature of the respondent's case to the disadvantage of the appellants when the parties had no opportunity to address the same amendments, for he thereby prejudiced the appellants beyond what could be compensated in costs and thus occasioned them an injustice.

In the circumstances, we allow the appeals, set aside the judgement of the superior court, and substitute therefore an order dismissing the plaintiff's suit against the defendants with costs.

We award the costs of the appeal to the appellants.

Dated and delivered at Nairobi this 2nd day of July, 2004

O . O'KUBASU

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JUDGE OF APPEAL

J.W ONYANGO OTIENO

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JUDGE OF APPEAL

A.G RINGERA

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JUDGE OF APPEAL