



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, SHAH & KEIWUA, JJ.A.)

CIVIL APPEAL NO. 181 OF 2000

BETWEEN

SURYAKANT BHAGWANJI RAJA SHAH APPELLANT

AND

APERIT INVESTMENTS S.A. FIRST RESPONDENT

SATISHCANDRA BHIMBJI SHAH SECOND RESPONDENT

(Appeal from a Ruling of the High Court at Nairobi, O’Kubasu J, dated 24th February 1999,

in

HCCC No 3906 of 1991)

JUDGMENT OF THE COURT

This appeal by the defendant, now the appellant, from the ruling of the superior court, (O’Kubasu, J. as he then was) was delivered on 24th February, 1999 whereby it gave leave to amend the pleadings in accordance with the Amended Pleadings annexed to the Amended Chamber Summons dated 31st July, 1998, raises a short but interesting question whether the learned Judge correctly construed and interpreted **Articles 85 and 86 of the Panamanian Law No. 32 of 1927** and that country's Code of Commerce. The appeal, also, is one of its rare kind to call for the interpretation of foreign statutes by this Court and is a clear manifestation of how our country is presently greatly immersed in the globalisation of commerce.

What are the facts underpinning the suit in the court below; and generally, this appeal? They are briefly as follows. The first, plaintiff, Aperit Investment S.A. and who is the first respondent herein, is (was) a limited liability company incorporated in the Republic of Panama. The second plaintiff, the second respondent herein, is an international businessman while the appellant is a banker and financier residing both in Nairobi and London. Both parties are Directors of several companies, local and international. It is averred in paragraph 3 of the pleadings that one Rohit Mulji Shah and the second respondent were directors of Prontex Export Agencies Limited and S. R. Commodities (K) Limited which companies held coffee export licences and were registered exporters with the Central Bank of Kenya. However, they were put in receivership on 10th March 1988. It is alleged in paragraph 4 of the pleadings that during the year 1983 the second respondent approached the appellant with the view to securing financial credit facilities for the two companies with Biashara Bank of Kenya Limited and Investments and Mortgages Limited of which

the appellant was a director, if the second respondent could make arrangements with his companies to allow the appellant to use foreign exchange generated by the sales of coffee by the companies in the foreign markets until the need arose for remitting the same to the Central Bank of Kenya. The parties mutually accepted the scheme of arrangement. The appellant secured financial credit facilities and the companies purchased coffee in bulk. On exportation of coffee the companies would forward the necessary documents to Biashara Bank of Kenya Limited who in turn forwarded them to Mount Credit Corporation of London of which the appellant was also a director. The coffee proceeds were eventually to be transferred into respondents' bank accounts in Zurich, Switzerland.

The parties also conjured up a scheme whereby the second respondent was to give to the appellant pre-signed cash receipt forms on his bank account each to the value of U.S. one million Dollars to enable the appellant to withdraw the monies from the account. The appellant was to refund the monies thus received to the second respondent who would then credit the first respondent's account in Zurich. The required funds would then be remitted to the Central Bank of Kenya and upon converting the foreign exchange earned into Kenya Shillings was to pay the monies to Biashara Bank of Kenya Limited and Investments and Mortgages Limited to settle the credit facilities so granted. Through this scheme the appellant arranged for substantial financial credit facilities to be given to the said companies which carried on the business of coffee on a very large scale until April, 1987 when the Government of Kenya discovered that a very substantial amount of foreign exchange was not being remitted by these companies and it reacted by detaining and charging the appellant and the second respondent amongst others with contravening various provisions of the **Exchange Control Act Cap 113 Laws of Kenya**.

It is averred in paragraphs 10 to 16 of the plaint that the appellant made many unauthorised and irregular entries in the respondents' accounts and unlawfully disposed of cash from them converting it into his own use and thereby wrongfully depriving the respondents of it. The first respondent, therefore, prayed for judgment against the appellant for US\$34,827,675.84; US\$16,808,925.63; US\$11,000,000.00 and US\$8,000,000.00 or their equivalent in Kenya Shillings; interest and costs of the suit. The second respondent sought judgment against the appellant for US\$7,000,000.00, interest and costs.

In his defence dated 30th September, 1991, the appellant specifically traversed each paragraph of the plaint in seriatim and denied the entire claim. However, for the purposes of this appeal, we will only refer to those parts of the defence which we think are of relevance. The appellant admitted:-

(a) That he is a Banker;

(b) That in 1983 he was a Director and principal shareholder of Investments and Mortgages Ltd (I&M) which is a financial institution registered in Kenya;

(c) That he (the appellant) was at all material times a Director of Mount Credit Corporation Ltd which was in 1983 a licensed deposit taking company incorporated in England and which in 1987 became a Bank under the name of Mount Banking Corporation Ltd.

He contended that if the agreements and loans alleged in the Plaint were made, they would be illegal agreements and loans contrary to the **Exchange Control Act** in so far as they provided for the lending of foreign currency proceeds of sale of Kenya coffee by S.R. Commodities (K) Ltd. (SRC) and Prontex Export Agencies Ltd (PEA) to the appellant and any loans pursuant to such agreements would be illegal and irrecoverable.

The appellant further maintained that Habib Bank Ag Zurich holds in Switzerland a confirmation and Power of Attorney duly signed by the second respondent as Attorney of the first respondent. The power donated to him is valid and fully effectual and it did also ratify and confirm all transactions authorised by the appellant on behalf of the first respondent up to 1985 as regards all accounts held by it in the Zurich bank. The appellant contended that the respondents were estopped by the said confirmation and Power of Attorney from alleging that any withdrawals from the accounts were irregular or without authority until such confirmation and power were revoked. Moreover, he averred, any claim for the return of the sums allegedly irregularly withdrawn by him is now barred by limitation. Whatever payments he caused to be

made were with due authority of the first respondent's Attorney and denied that he deprived it of any sum in any currency.

On 19th June, 1998, about seven years after the institution of the suit the first respondent brought in the superior court an application by way of a Chamber Summons (later amended) expressed to be brought under **Order VI A Rules 3, 5 and 8 of the Civil Procedure Rules** for leave to amend the plaint. The amendment sought were as follow:-

"3A.The Second Plaintiff and the said Rohit Mulji Shah were at all material times the two General Attorneys of the First Plaintiff, and the Second Plaintiff herein is and has been since 2nd July 1981, the sole shareholder of the First Plaintiff.

3B.The First Plaintiff herein had passed a resolution on 25th May 1988 to have it dissolved voluntarily and the First Plaintiff is in the course of winding up or liquidation.

3C.The trustees and/or liquidators of the First Plaintiff herein have ratified and adopted the institution of this proceedings for and on behalf of the First Plaintiff by the present Advocate on record, which proceedings were instituted on the instructions of the Second Plaintiff herein, and the said trustees and/or liquidators have instructed the present Advocate on record to continue with the conduct of this action for and on behalf of the First Plaintiff herein until the same is finalized."

The first respondent was dissolved on 25th May, 1988 pursuant to a shareholders' voluntary resolution which resolution was duly recorded at the Panama Public Registry on 2nd July, 1998. The main reason why the amendment is sought is to put on record ratification of the institution of the suit by the trustees or liquidators. Mr. Shah, for the applicant, has submitted both in the Court below and in this appeal that the Panamanian Law allowed them to continue with all judicial and administrative affairs of the company even after the expiry of three years after the company's shareholders resolved to wind up the company. He argued that the first respondent legally exists and even existed at the time the suit was lodged in the superior court. To buttress his submissions he has placed much reliance on the legal opinions of T. M. Lopez Armueles and Johanna Dimas both practising Panamanian Attorneys who have availed the superior court of their affidavits seeking to interpret the provisions of the Panamanian Law relating to dissolution and liquidation of mercantile corporations.

Mr. Deverell, for the appellant in the superior court, filed grounds of opposition under **Order L rule 16 of the Civil Procedure Rules**. He contended that the first respondent having been dissolved on 25th May, 1988, had no **locus standi** to file the suit nor the application and, moreover, it had no right or capacity to instruct Mr. A. L. R. Shah to represent it.

We are in agreement with the learned Judge that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs. See Eastern Bakery v Castelino [1958] E.A. 461. We also adopt the dictum of Madan J.A. (as he then was) in D. T. Dobie & Company (Kenya) Ltd. V. Joseph Mbaria Muchira and Another - Civil Appeal No. 37 of 1978 (unreported) when he said:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclose no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

Miss Janmohamed has strenuously argued that the amendments allowed by the learned trial judge have caused grave injustice and prejudice to the appellant that no amount of costs can compensate. She averred that the first respondent not being in existence the suit plainly and obviously discloses no reasonable cause of action and no amendment can inject it with life.

However, in our view, the outcome of this appeal will depend very largely on our interpretation of Articles 85 and 86 of the Panamanian Corporation Law which provide as follows:-

"ARTICLE 85:All corporations, whether they expire by their own limitation or by dissolution, shall nevertheless continue to exist for the term of three years from such expiration or dissolution for the express purpose of initiating such special proceedings as may be deemed convenient, defending suits against them, arranging its affairs, dispose of and convey its property and to divide its capital stock, but under no circumstance may it continue the business for which said corporation was established.

"ARTICLE 86:When any corporation expires by its own limitation or by dissolution, the Directors shall act as trustees of such corporation with full power to settle the affairs, collect the outstanding debts, sell and convey its property and divide the moneys and property among the stockholders, after paying the debts of the corporation; and moreover they shall have authority to initiate judicial proceedings in the name of the corporation with respect to its credits and assets and to represent the company when such proceedings are started against the company."

Mr. Arias is a graduate of the University of Virginia and Cambridge University. He has been a Panamanian Attorney in practice since 1989. In his affidavit filed in support of the appellant's opposition to the suit by the first respondent depones that under the Panamanian Law the last registered directors of a dissolved company, acting as trustees in dissolution, have up to three years in which to put into motion the liquidation of the assets of the company and distribute net assets to the shareholders. After a company has been dissolved, a shareholder has no intrinsic authority to act for and on behalf of company unless authorised by the last registered directors of the dissolved company. He averred that the first respondent company had ceased to exist by the time the suit was instituted in Kenya and the purported ratification of the filing of the suit seven years after dissolution was wrong as the Trustees had no power to do so. He took issue and did not agree with the averment by the Trustees that the Panamanian Code of Commerce was applicable in dissolution of Corporations.

On the other hand, Mr. Armuelles, a Masters of Law graduate of Tulane Law School and a Panamanian Attorney since 1991 deponed as follows in his affidavit dated 24th September, 1998:-

"4. It is important to mention that under Panamanian Law, the liquidation process may take as much time as reasonably required to www.kenyalawreports.or.ke 11 be completed, meaning that there is no specific limit for its duration.

5..... I would like to point out that the status of the first plaintiff for liquidation purposes has not changed since the London Affidavit was sworn meaning April of 1995 and the time of the Kenya Affidavit that is to say September of 1998. In a few words the First Plaintiff would continue to exist solely for liquidation purposes until such time as its liquidation process is completed and the pertinent final accounts have been prepared by its trustees/liquidators.

8..... As a final matter, I have also read a copy of the joint affidavit sworn on 14th May, 1998 by the trustees/liquidators of the First Plaintiff where they indicate that the liquidation of the First Plaintiff has not been completed and that the First Plaintiff's final accounts have yet to be elaborated. In view of the foregoing, I am of the opinion that the trustees/liquidators have power and obligation to carry out any acts necessary to achieve the completion of the First Plaintiff's liquidation proceedings including the ratification of the filing of the above captioned suit."

When a foreign company has been dissolved or has otherwise ceased to exist by the law of the country where it was incorporated, the English Courts do not recognise it as an existing entity, and it cannot sue or be sued in England. See **Russian and English Bank v Baring Brothers & Co. Ltd** [1932] 1Ch. 435 in which Eve J. said:-

"If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person."

We think that the same position applies to Kenya. When, as in this case, the Panamanian or any other foreign company has gone into voluntary winding up or has been dissolved or wound up by the law of Panama, its domicil, Kenyan Courts do not recognise it as an existing entity and it cannot sue or be sued in Kenya. In the eyes of our law a defunct corporation seeking to maintain an action or suit is no entity at all but a mere name only, with no legal existence and a non-existent person cannot sue.

Dissolution is a question of fact to be decided by the Judge alone on the evidence given in the particular case with respect to foreign law. See **Lazard Brothers & Co. v Midland Bank [1933] A.C. 289**. In the case before us, it is admitted by the parties that the suit was filed three years after the first respondent company went into voluntary winding up and that ratification took place ten years after the voluntary winding up of the first respondent company in 1988. It is common ground that the suit by the first respondent was filed more than 3 years after it went into voluntary winding up and that at the time the suit was filed Mr. A.L.R. Shah had no authority in law to file the suit on behalf of the first respondent. Under Article 86 the Trustees are given power to do certain things in post-dissolution process. The three

Trustees were directors at the time of dissolution and became Trustees of the first respondent company after it was dissolved. The Article does not say within what time this exercise is to be completed because this is dealt with in **Article 85**.

Mr. Armuelles interprets the Articles to mean that the liquidation process may take as much time as is reasonably required to be completed, meaning that there is no specific limit for its duration. Thus, according to his understanding the first respondent company would continue to exist solely for liquidation purposes until final accounts have been prepared by its Trustees who have obligation to carry out any acts necessary to finalize the first respondent's liquidation. However, even if this were the position, the superior court was not told of how far the liquidation process had reached. But it is worthy of note herein that we are not dealing with distribution of assets but whether steps can be initiated to take legal proceedings after the period of three years had expired.

It is not suggested that the **Panamanian Code of Commerce or the Corporation Law** can ratify suits commenced outside the three year period mandated by **Article 85**. The period taken by the first respondent company was inordinately long. In our view, it had, by its conduct, done what might fairly be regarded as equivalent to a waiver of a right to institute proceedings against the appellant. By its neglect it had abandoned its right to sue. It had, infact, slept upon its rights and allowed a long time to elapse to the detriment of the appellant. To allow it, now, to validate the suit would gravely prejudice the interests of the appellant.

The learned Judge in a reserved ruling observed:

"We had to peruse affidavits sworn by legal experts in Panamanian Law. We have been given what appears to be conflicting interpretation of the legal position."

Later in the ruling he observed:

"I have now carefully read the Code of Commerce and the Articles cited on the Panamanian Law together with the opinions of the three legal experts (Arais, Dimas and Lopez) and I find there can be no certainty as regards legal position."

These excerpts of the ruling only show that the learned Judge was not satisfied with what the position in law was; and in that situation, he was bound to dismiss the application.

It is trite that a plaintiff will not be allowed to amend his pleadings so as to introduce or revive a cause of action or to revive an action which is barred by the statute at the time of the attempted amendment. We have no hesitation in holding that in this instance the amendments mooted by the first respondent were a

veiled attempt to resurrect a timebarred cause of action. Further, we are satisfied that the amendment to plead ratification of the original filing of the plaint without any semblance of authority long after the expiry of the relevant limitation period did not fall within any of the exceptions set out in **sub-rules (3), (4) and (5) of Order 6A Rule 3 of the Code of Civil Procedure.**

In the particular circumstances of the matter before us, we think that the correct interpretation of **Articles 85 and 86** and the **Code of Commerce of Panama** is that the first respondent continued to exist for the limited period of three years after it went into voluntary winding up for the limited purpose of "**initiating such special proceedings as may be deemed convenient**". It, therefore, had no power through its Trustee liquidators or at all in 1998, ten years after the process of voluntary winding up began, to ratify the filing of the suit filed in 1991, without authority. Even if we were wrong in our interpretation we would have no hesitation in holding that the first respondent had taken unreasonably long time in completing the process of winding up and liquidation and was guilty of laches, and, consequently did not deserve leave to amend the pleadings.

With great respect to the learned Judge, we think that the material presented before him established that under the Panamanian Law the first respondent was not in existence at the time the suit was instituted in Kenya. Further, the Trustee liquidators had no power and authority to effect ratification in May, 1998 of the filing of the suit in 1991.

We allow the appeal and set aside the ruling and order of the superior court dated 24th February, 1999. We substitute therefor an order dismissing with costs the application for leave to amend the plaint. The appellants shall have the costs of the appeal.

From what we have said it follows that the first respondent had no authority in law to commence proceedings in Kenya in 1991. Its claim, therefore, cannot stand and using our powers as donated by **section 3 (2) of the Appellate Jurisdiction Act** we strike out the claim by the first respondent and we do so **ex debito justitiae**. The first respondent's claim against the appellants, in the superior court, is struck out with costs.

Dated and delivered at Nairobi this 17th day of May, 2002.

P. K. TUNOI

.....

JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

M. Ole KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR