



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Tunoi & Shah JJ A)

CIVIL APPEAL NO 178 OF 2000

P C DESAIAPPELLANT

VERSUS

NAVIN M PATEL T/A SANDPIPERS CONSTRUCTIONS & CIVIL

ENGINEERING SERVICES & 13 OTHERS..... RESPONDENTS

(An appeal from an Order/Ruling of the High Court of Kenya at Nairobi

(Mr Justice Hayanga) dated 29th day of January 1998 in

HCCC No 473 of 1997)

JUDGMENT

The appellant, P C Desai, is one of the defendants in HCCC No 473 of 1997. In the plaint he is described as Immediate Past Chairman of Premier Club (the Club). The Chairman of the Club and 13 other members of the Club were sued by the first respondent, Navin M Patel trading as Sandpipers Constructions & Civil Engineering Services, in their capacity as members of the Managing Committee of the Club for alleged nonpayment for work done and materials supplied by the first respondent to "the defendant". The plaint filed in the superior court purports to show that the members of the Managing Committee of the Club are sued on behalf of themselves and all other members of the Club. In addition the Club itself is sued as "The Premier Club".

On 14th April, 1997 the appellant lodged an application in the superior court, by way of a chamber summons, seeking to strike out the plaint on the grounds that:

- "(a) The work carried out by the plaintiff, if any, was for and on behalf of Premier Club.
- (b) Any actions should be against the Registered Trustees of Premier Club.
- (c) It does not allege that the defendant, P C Desai entered into any contract with the plaintiff.
- (d) No representation order has been made.
- (e) It is frivolous, vexatious and an abuse of the process of the Court".

The appellant's application in the superior court was stated to be brought under order 6 rule 13 of the

Civil Procedure Rules. The fifth ground upon which it was brought refers clearly to order 6 rule 13(1) (b) and (d) of the Civil Procedure Rules although there is no specific reference to sub-rule (1) (b) and (d) in the title of the chamber summons lodged in the superior court on 14th April 1997.

The application as drawn by the appellant's advocates is sketchy; so is the affidavit sworn in support thereof. One would have expected the application to state the precise sub-rule on which it was based. Similarly the appellant's advocates ought to have shown by way of annexing to the affidavit a copy of the document of title showing who the legal owners of the Club are. As it turned out Miss Gathaara who appeared for the first respondent confirmed that the Club property is owned by its trustees under the Trustees (Perpetual Succession) Act, Cap 164 Laws of Kenya. The Club property therefore vests in a body corporate consisting of the trustees in terms of section 4 of the said Act.

The application to strike out the plaint was dismissed by the superior court (Hayanga, J) on the grounds that it did not indicate precisely the sub-rules of order 6 rule 13 (1) under which it was brought. However, the learned judge considered the application on "substantial arguments" (merits) should he have been wrong on such dismissal order. Such dismissal by the learned judge is the subject of the first ground of appeal upon which this appeal is based. That ground states:

"1.The judge erred in law in his finding that it is not enough for a pleader who has not distinguished his grounds under order 6 rule 13 (1) of the Civil Procedure Rules to rely on order 50 rule 12".

This Court in the case of *Melika vs Mbuvi* (Civil Appeal No 267 of 1997) (unreported), in regard to non-reference to specific sub-rules of order 6 rule 13 (1) said:

"We accept that the particular sub-rule of rule 13 of order VI of the Civil Procedure Rules, under which the application to strike out is made, should be specified and that, when the application has been brought to strike out a pleading on the only ground of it disclosing no cause of action, no affidavit evidence may be relied upon. We at the same time note that there is no bar to such an application to strike out a pleading being based on any or all of the grounds mentioned in the rule, provided that such grounds have been specified."

We have already pointed out earlier, that the grounds upon which the application was based clearly referred to rule 13(1)(b) and (d) of order VI. Therefore there was no prejudice resulting from lack of specific reference to the sub-rules as the respondent to the application in the superior court obviously was aware of the objections taken on the plaint, namely, that a wrong party was sued and that therefore that party wanted the suit as against him struck out.

So, what was effectively before the learned judge? It was a plaint filed against wrong parties. The suit should have been filed against the Registered Trustees of the Premier Club, as the swimming pool in question was built for the Club and it becomes part of the Club property. It is and must be obvious that the work of building a swimming pool must have been carried out for the Club and not the members of the Managing Committee of the Club.

Grounds 1,3 and 4 of the appeal therefore succeed. Grounds 1 and 4 are synonymous. The second ground we think, correctly points out that the learned judge failed to appreciate that the work carried out by the first respondent was for the Club and not for the Managing Committee.

The plaint as drawn purports to sue the Managing Committee and the Club. The members of the Managing Committee are sued on behalf of themselves and also on behalf of all other members of the Club. As it stood, the suit was clearly a representative suit and the first respondent ought to have (assuming he had sued correct parties) applied under order 1 rule 8 of the Civil Procedure Rules for directions to the effect that the plaintiff (the first respondent here) gives notice of institution of the suit to all members either personally or by public advertisement if personal service was not reasonably practicable. This was not done but in view of what we are going to say this will no more be necessary.

The learned judge appreciated that the power to strike out a pleading is not to be lightly exercised. But

when it is clear that wrong parties are sued and when the correct party to be sued is known no purpose could be served by letting the wrong party remain on record. A Court has a right to stop an action at a stage when it is known that a wrong party is sued rather than allow the plaintiff to vex such party with litigation. A Court has the power, in proper circumstances, to arrest a wrong action and we are of the view that the learned judge ought to have dismissed the defendants from the suit whilst granting leave to the plaintiff to sue the correct party. We were informed from the bar that the Registered Trustees of the Club have been enjoined in the proceedings in the superior court. The learned judge in fact ordered, and in our view correctly so, that the plaintiff do amend his pleading to implead the proper defendant if the facts necessitate such substitution. Now that, subject of course to any defence the trustees may have, the correct party has been brought into the proceedings, we see no reason to let the original defendants remain on record.

This appeal is therefore allowed. The names of the original defendants are struck out. The appellant will have costs of the suit and costs of the application in the superior court as well as costs of this appeal, as against the first respondent. The other respondents will have no costs as they did not make any application in the superior court. These are our orders.

Dated and Delivered at Nairobi this 6th day of July, 2001

J.E. GICHERU

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

A.B.SHAH

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JUDGE OF APPEAL