



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: AKIWUMI, TUNOI & O'KUBASU, J.J.A.)
CIVIL APPEAL NO. 245 OF 1999

BETWEEN

ABDISHUKRI MAALIM AHMED
YUSSUF KULMEI KING APPELLANTS
AND
THE COMMISSIONER OF CUSTOMS AND EXCISE
THE KENYA REVENUE AUTHORITY RESPONDENTS

(An appeal from the ruling of the High Court of Kenya at
Mombasa (Khaminwa, Commissioner of Assize) dated
26th October, 1999

in

H.C.C.C. NO. 115 OF 1998)

JUDGMENT OF THE COURT

This is the unsuccessful second and third plaintiffs' appeal, with leave of the superior court at Mombasa (Mrs. Khaminwa, Commissioner of Assize) from a decision given on 26th October, 1999, whereby it dismissed their application and refused to give leave to enter judgment in default of appearance and defence against the second and third defendants in the suit, now the respondents in this appeal.

Kersam Limited, the first plaintiff in the suit, carries on the business of import, export and general trading entailing the importation and handling of goods in transit through Kenya to other countries. In or about July, 1997, the appellants allegedly engaged Kersam Limited to clear and forward two consignments comprising 3800 metric tonnes of sugar in transit from London through the Port of Mombasa to Kigali in the Republic of Rwanda. Under the Customs and Excise regulations governing the entry and passage of transit goods in Kenya, Kersam Limited was required to execute a transit bond for Shs.40,000,000/=.

It is averred by the appellants that Kersam Limited as their agent executed with African Banking Corporation, the Bank, the first defendant in the suit, a transit Bond No. GB6910/97 in favour of the Commissioner of Customs and Excise, the first respondent, binding Kersam Limited and the Bank to pay to the first respondent the sum of Shs.40,000,000/= in the event that the goods which were the subject of the transit Bond were not exported out of Kenya to its eventual destination. It is further averred that the appellants jointly contributed the said sum in varying amounts. The sum was placed under a fixed deposit account held by the Bank and pledged it as security to execute a transit Bond in favour of the first respondent for the exportation and transportation of the transit sugar cargo.

It was the appellants' case that the goods covered under the Bond had been exported out of the country to their final destination and the requisite exportation documents had been lodged with the first respondent. Consequently, it was contended that it was incumbent upon it to cancel the Bond. But,

without any justifiable cause, the first respondent demanded that the Bank do pay to it a total of Shs.39,787,520/= in purported satisfaction of the obligation of Kersam Limited and the Bank covered under the Bond.

By a plaint dated 9th April, 1998, Kersam Limited instituted a suit against the Bank and the respondents claiming a declaration and an injunction. This was amended in due course, and; on 28th January, 1999 there was filed, with leave, a documentation headed "Plaint for Second and Third plaintiffs" adding two additional plaintiffs, now the appellant in this appeal.

It is said that it is to this plaint that the Attorney General failed to enter an appearance or file a defence. The learned Commissioner of Assize being of the view that there was no default on the part of the second and third respondents, held also, that the second plaint was irregularly filed.

On the other hand, the appellants' position is simple. They contend that the second and third appellants were enjoined into the suit by the Court granting leave on 22nd January, 1999 and the second and third respondents having been served with summons to enter appearance on 1st February, 1999, they were required by the provisions of **Order 8 Rule 1(2)** of the Civil Procedure Rules to file their respective defences within 15 days from the date of appearance. Since no defence was indisputably filed, the appellants claim that leave to enter judgment against them should have been granted.

Once the application for leave under **Order 9(A) rule 7** of the Civil Procedure Rules was made, the respondents were required by **Order 50** to file their grounds of opposition. They were also required to file their defences. Neither of these having been done, the appellants contend that the exercise of the discretion by the Court could have only gone in their favour.

The position of the superior court in this matter was one essentially concerning the exercise of the Court's discretion. The circumstances in which this Court will interfere with the exercise of that discretion is now well settled. As was said by the Court of Appeal in **MBOGO & ANOTHER VS. SHAH 1968** **E.A. 93:**

"a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

The learned Commissioner of Assize, quite obviously, did not consider or give effect to the clear provisions of **Order 50** of the Rules requiring grounds of opposition to be filed to an application. Admittedly, this had not been done and was completely overlooked. Nor did the learned Commissioner of Assize give effect to the fact that not only was a defence not filed within the prescribed time, but, it was not filed at all and nothing was heard of the respondents until 4th October, 1999, when an appearance was filed.

It is worthy of note that up to the time of the hearing of this appeal there was no defence on record. These, in our view, were significant facts which the learned Commissioner of Assize ought to have taken into account in the exercise of her discretion.

Before we turn to the particular grounds on which the exercise of the court's discretion is attacked in this case on behalf of the appellants, we should like to make one or two general observations about the Court's approach to appeals of this nature from the exercise of a Judge's discretion.

In England, the House of Lords has in a series of recent decisions reminded its Court of Appeal that its function is to review the exercise of the Judge's discretion and not to entertain an appeal from it in the sense of being invited to substitute its own discretion for that of the Judge. It appears to us, with respect, that there is an ever increasing tendency on the part of the profession to use a decision of a High Court Judge in a matter of discretion as a mere conduit pipe to this Court. If we are right in this belief, the sooner it is appreciated that that is a practice that cannot be tolerated, the better.

Sometimes it is also said that a Judge's discretion can be attacked if it is wholly wrongly exercised. But, in our view, the greatest caution should be adopted in that approach because it comes perilously close to a means of substituting this Court's discretion for that of the High Court Judge; and that is not permissible.

With those general observations in mind, we now turn to the grounds on which the ruling of the learned Commissioner of Assize is attacked in this appeal.

Let it be said straight away that she did not deal with this in a peremptory manner. Her ruling was not extempore. She fully reviewed the history of the matter and set out the principles which she had to apply. In all these, she did not falter.

The only attack made on the ruling is, we understand, as follows: The appellants advocate strongly relied on the failure of the respondents to file the grounds of opposition and their defence. In failing to consider this, the learned Commissioner of Assize failed to take into account relevant procedural provisions set out in the Civil Procedure Rules which govern the conduct of litigation. To this, there has been no answer. No explanation has been advanced why this omission occurred, and even if the learned Commissioner of Assize were minded to excuse this omission, no material was placed before her to enable her to exercise her discretion against the appellants.

We are, therefore, satisfied and content to say that it has been demonstrated to our minds that the learned Commissioner of Assize based the exercise of her discretion on wrong consideration.

As the appeal in our view must succeed, it is not strictly necessary to deal with ground 3 of the grounds of appeal which complained that the Commissioner erred in construing Order 1 rules 1, 2 and 10 of the Civil Procedure Rules to mean that when various persons are joined into a suit they ought to file one plaintiff, and by implication be represented by one Counsel. In principle joinder of parties is allowed as of right, subject to the discretionary power of the court. The substitution and the addition of parties should be necessary for the determination of the real matter in dispute. Though the heading of the amended plaintiff in this case may be said to be bad, no new suit was filed in the Registry and the amendment actually done amounted to a technical amendment which did not in any way cause prejudice to the respondents. Moreover, the respondents were under no misapprehension as to the identity of the true additional plaintiffs. Again, the respondents took no objection to the amended plaintiff at their earliest possible moment. The names of the added plaintiffs form an integral part of the Amended Plaintiff, and had the objection been taken in the defence the defect would have been cured accordingly.

We observe that Hayanga, J. in giving leave to amend the original plaintiff so as to incorporate the appellants as coplaintiffs held that the case between the appellants and the respondents is based on common questions of fact and law and that the claims arose from the same transactions or series of transactions in which all parties were involved and that it would embarrass the trial of the suit or cause delay if separate trials were held. We agree with him as we think that this is the correct position in law. No appeal was preferred against the learned Judge's ruling.

For the above reasons we allow the appeal. It must follow that the appellants' application made to the superior court and dated 24th March, 1999, must be allowed with costs. In consequence whereof leave is hereby granted to the appellants to enter judgment in default of appearance and defence against the second and third respondents jointly and severally as prayed in their plaintiff.

As the substratum of the suit has been laid to rest, it is hoped that the Bank which has, in our view, a sham and not a good defence, will see the futility of engaging in a protracted trial and should, in order to save unnecessary costs and allay fears by the appellants that their deposit was in jeopardy, bring this matter to a speedy rest. In this regard we direct that the suit against the Bank be disposed of in the superior court on a priority basis.

The appellants shall have the costs of this appeal and of the application in the superior court against the respondents.

Dated and delivered at Nairobi this 11th day of February, 2000.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR