



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU & AKIWUMI, JJ. A. & BOSIRE, AG. J.A.)

CIVIL APPEAL NO. 12 OF 1996

BETWEEN

PETER NJERU MUGO.....APPELLANT

AND

JIMBA CREDIT CORPORATION LTD.....1ST RESPONDENT

GEORGE GIKUBU MBUTHIA.....2ND RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Justice Ole Keiwua) dated 3rd November 1995

IN

H.C.C.C. NO. 937 OF 1986)

JUDGEMENT OF THE COURT

In the Nairobi High Court Civil case No. 937 of 1986, the appellant in this appeal was the second defendant while the first and second respondent herein were the first defendant and plaintiff respectively. By a plaint dated 25th March, 1986 and filed in the superior court on the same day, the second respondent sought judgement jointly and severally against the first respondent and the appellant for the nullification of the sale by public auction on 13th February, 1986 and/or restriction of the first respondent from transferring L.R. NO. Nairobi /Block 73/225 to the appellant who had purchased the same in the said auction. That sale was pursuant to the first respondent’s exercise of its power of sale under section 74 (1) and (2) of the Registered Land Act, Chapter 300 of the Laws of Kenya. The appellant’s relevant statement of defence and/or amended defence and counterclaim to the second respondent’s suit in the superior court is not in the record of this appeal. However, the first respondent’s reply to the appellant’s amended defence and counterclaim dated 5th April, 1990 and filed in the superior court on the 9th of the same month indicate that the appellant in an amended defence and counterclaim had sought damages from the first respondent. Subsequent thereto, the appellant issued and served the first respondent with a notice purportedly under Order 1 rule 21(1)(b) of the Civil Procedure Rules, hereinafter referred to as the Rules, and filed in the superior court on 29th October, 1991. In that notice, the appellant claimed against the first respondent:

1. Specific performance of the contract of sale and transfer of L.R. NO. Nairobi/Block 73/225 arising from the sale by public auction of the said premises as is mentioned above;
2. Special and general damages;
3. Indemnity against any order that may be made against him; and
4. Costs of the proceedings relating to the aforementioned suit premises.

Pursuant to the order of the superior court dated 5th December, 1991 the first respondent replied to the appellants notice in its answer dated 11th December, 1991.

On 18th February, 1992 the superior court granted the appellant's application dated 2nd January, 1992 and made under Orders XII and VI rules 6 and 13(1) respectively of the Rules and ordered specific performance of the contract of sale and transfer of the suit premises, L. R. NO. Nairobi/Block 73/225, to the appellant by the first respondent with a direction that in the event of the first respondent failing or refusing to sign the necessary documents in respect thereof, the same were to be executed by the registrar of the superior court on behalf of the first respondent. The first respondent's reply to the appellant's amended defence and counterclaim dated 5th April, 1990 and filed in the superior court four days later on the 9th of the same month was struck out. In a subsequent ruling dated 5th December, 1994 in an application by the appellant purportedly under Order XII rule 6 of the Rules, the superior court dismissed with costs the 2nd respondent's claim against the appellant and observed that as for damages, if the appellant was entitled to any, the same were to be a matter for assessment.

When the issue of assessment of damages came up for hearing in the superior court on 14th Jene, 1995, a consent was recorded by the parties to the effect that the appellant's claim against the first respondent was to be limited to special and general damages together with costs. The matter was then adjourned and when it came up again on 31st October, 1995, the appellant's contended that the first respondent had no defence to claim for special and general damages since its reply to his amended defence and counterclaim which latter, according to him, were made under Order VIII rule 7 of the Rules had been struck out on 18th February, 1992 as is outlined above. For that reason, according to him, he was entitled to proceed with the assessment of damages against the first respondent ex parte. As the appellants claim for special and general damages against the first respondent was one of the matters for determination in the notice issued and served on the first respondent by the appellant under Order 1 rule 21 of the Rules, the first respondent countered the appellant's contention by submitting that on account of that notice, to which it had given its response, it was entitled to defend its liability to the appellant in special and general damages.

In his ruling dated 3rd November, 1995, the superior court judge, M. ole Keiwua, J., observed that the appellant's defence and counterclaim did not comply with the requirements of Order VIII rule 7 of the Rules in that the appellant did not add to the title of his defence "a further title similar to little in the plaint setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action." According to the learned judge therefore, the appellant's counterclaim against the first respondent was misplaced as Order 1 rule 21 of the Rules was the only basis for claims between co-defendants. In rejecting therefore the appellants attempt to exclude the first respondent from defending its liability to the appellant in special and general damages, the learned judge had this to say.

"by.....rule 21 Order 1 the co-defendant('s) claim is equated to the position of the third party under rule 18 Order 1 in which a defence or answer to the claim is permitted from such co-defendant. The first defendant has here filed such answer and it is in the file and must be tried....."

The appellant's central complaint in his appeal to this court is against the observations and conclusions of the learned judge as are outlined above. His appeal therefore turns on whether or not those observations

and conclusions by the learned judge as relates to the provision of Orders 1 and VIII rules 21 and 7 respectively of the rules were correct.

Order 1 rule 21(1) and (2) of the Rules is in the following terms:

“21 (1) Where a defendant desires to claim against another person who is already a party to the suit

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(a) that he is entitled to contribution or indemnity; or

(b) That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff;

(c) That any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other persons or between any or either of them, the defendant may without leave issue and serve on such other persons a notice making such claim or specifying such question or issue.

(2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.”

The procedure to be adopted as is referred to above is set out in rule 28 of the Order aforementioned. That rule provides that:

“18. If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgement as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

Besides the foregoing provisions, Order VIII rule 7 of the Rules provides that:

“7. Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting for the names of all persons who, if such counterclaim were to be enforced by cross action, would be defendants to such cross action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.”

From the material before us, there is no evidence that the appellant’s relevant defence and/or amended defence and counterclaim complied with the provisions of Order VIII rule 7 of the Rules. The superior court judge held that there was no such compliance and we have nothing to go by to dispute that holding. In the circumstances, the appellant could not avail himself of the provisions of the aforesaid rule. In any event, the order of the superior court dated 5th December, 1991, pursuant to which the first respondent responded to the appellant’s notice referred to earlier in this judgement, was a clear manifestation that the issues raised in that notice in regard to the liability of the first respondent to the appellant were proper for trial as between them – Order 1 rule 18 of the rules as is set out above refers. We can therefore find no fault in the observations and conclusions made by the superior court judge as are outlined above. On account of the relevant provisions of Order 1 rule 21 of the Rules as are set out above, the rejection of the

appellant's attempt to exclude the first respondent from defending its liability to the appellant in special and general damages was proper and we consider this appeal unmeritorious. The same is dismissed with costs to the first respondent only for the reason that the second respondent appears to have had little or no role at all in the subject-matter of this appeal both here and in the court below.

Dated and delivered at Nairobi this 20th day of December, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR