IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SHAH, J.A. (IN CHAMBERS)

CIVIL APPEAL NO. 121 OF 1995

BETWEEN

FLORICULTURE INTERNATIONAL LIMITED…….APPELLANT

AND

CENTRAL KENYA LIMITED……..……1ST RESPONDENT

TRUST BANK LIMITED……..……..2ND RESPONDENT

TRUST FINANCE LIMITED……..……3RD RESPONDENT

FIRST NATIONAL FINANCE LIMITED…..……4TH RESPONDENT

(An appeal from the ruling/order of the High Court of Kenya at Nairobi (the Hon. Justice Andrew Hayanga) dated 7th July,1995

IN

H. C. C. C. NO. 1597 OF 1994

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RULING OF SHAH J. A.

The applicant (hereinafter referred to as “Floriculture”) filed Civil Appeal No. 121 of 1995 on 20th July, 1995 challenging the ruling /orders of Hayanga J. made on 7th July, 1995.

I note that the appeal was filed with extra-ordinary speed and alacrity.

The appeal is grounded on 14 grounds of appeal shown at pages 1 (A), 1(B) and 2(A) of the record of appeal.

The first amendment that Mr. Lubulellah seeks is addition of ground of appeal as follows:

‘ (1) The learned judge had no jurisdiction, either under S. 3A of the Civil Procedure Act or under 0.36

rule 3A (or any other provision) of the Civil Procedure Rules, to entertain the originating summons or the amended Originating summons or the amended Originating Summons filed by the first respondent."

The first respondent is Central Kenya Limited, a company, which at some time owned the properties subject of litigation in the superior court. I will refer to the first respondent as “Central Kenya.”

The application is opposed by Mr. Ngatia for Central Kenya and hence I will deal separately with each new ground of appeal sought to be added or amended.

The first amended sought has been set out by me. Mr. Lubulellah says in his affidavit that as a result of the hurry by which the appeal was filed he had not enough time to reflect on all its aspects.

Mr. Ngatia’s objection to this proposed ground (first amendment) is that the point was not argued before the learned judge in the superior court and as such this court would not have the benefit of the reasoning thereon by the learned judge.

As I see is the issue of jurisdiction can be argued at any time. I am not deciding here whether the court below had jurisdiction. That is not within my province in this application. It has been held in the case of Kenindia Assurance company Ltd. Vs Otiende (1989) 2 K A R 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not, (underlining mine) apply when the issue of sought to be raised de novo on appeal went to jurisdiction. The court in the Kenindia case (supra) stated at page 164

“But neither that admission nor the invitation can confer on the court jurisdiction when none exists.”

As I see it the first ground of appeal in the original memorandum of appeal alludes to the issue of jurisdiction somewhat, albeit not very clearly.

In my discretion I allow addition of the first proposed amendment.

The second amendment which Mr. Lubulellah seeks is addition of words “disputed questions of fact and allegations of fraud and/or misrepresentation” to original ground (1). Mr. Ngatia confirmed that he was asking the court below by an Originating Summons application to determine such disputes which (in my own view) are weighty and cannot form part of an O.S. application. The learned judge below has by reference to cases like Bhari vs Khan [1965] EA94, Kulsumbai vs Abdulhussein [1957] EA 700 and Kenya Commercial Bank vs Osebe [1982-88] 1 KAR 48 has himself appreciated the point. I see no sustainable objection to addition of the said words and I allow the said second amendment. Mr. Ngatia’s argument that the point was not raised in the court below is unsound, especially when it is not in dispute that the court below is being asked by an O. S. to adjudicate on fraud and misrepresentation. The applicant has every right to ventilate that point in this court.

The Third amendment which Mr. Lubulellah seeks is addition of words "(including the appellant)" in ground (3) of the Original grounds of appeal. Mr. Ngatia says it is pointless or superfluous. Let it be so. It does no harm to any one. No prejudice is occasioned. The objection in my view is unmeritorious and made for the sake of objection only. These remarks apply equally to the third amendment sought. The additional of the words'(first)’ and '(second)' to Original ground (4) does not occasion any prejudice to any one. Mr. Ngatia’s objection that the addition of word ‘(second)’ is not in Mr. Lubulellah’s province equally is groundless. It is what I would call much ado about nothing. I allow that amendment.

Mr. Ngatia most seriously objected to fifth amendment. He argued that as Floriculture had described

itself as first interested party and as it had filed on 30th June, 1995 application to review or set aside orders made against it when not (inter alia) a party to the original Originating Summons, it cannot now be heard to say that the learned judge erroneously entertained an application for injunction in proceedings commenced by an originating Summons; he argued further that Floriculture cannot now be heard, therefore, to say that an ex parte injunction was granted against it and fourth respondent when they were not parties to the Originating Summons; he also argued further that Floriculture cannot now therefore, be heard to say that continuation of ex-parte injunction on indefinite basis was wrong.

Let me say this straightway and I must say it as I am not here to express my doubts. I am here to express my opinion. It was so said by Hamilton J. in Lanston Monotype Corporation Ltd vs Anderson [1911] 2 KB 15 at p. 23.

"If a judge may doubt, whose business is to decide, and if a judge, whose business is to enforce Acts of Parliament, may express regret when he does so."

It is the business of the judges Scott Lindo vs Belisario [1795] 1 to send into the world, not doubts.

I have no doubt in my mind at all that the injunction granted by Hayanga J. on 20th June, 1995 was ex-parte in nature and he had no procedural jurisdiction to extend the same on unlimited time basis as he did at page 420 of the record of the appeal itself. He did so without hearing the injunction application on merits.

Mr. Ngatia was at some pains to show that the injunction originally granted on 20th June, 1995 was not ex-parte, as, Mr. Billing (Mr. Ngatia pointed out) was present. By agrement of all counsel I was referred to the record of appeal filed by Mr. Billing's clients (Trust Bank Ltd and Trust Finance Limited). This is Civil Appeal number 127 of 1993.

It is a matter of record that as some of the notes made by the learned superior court judge were not in the record of Civil Appeal No. 121 of 1995 all counsel agreed that I could look at and use record of C. A. No. 127 of 1993 for the purposes of this application. These notes are now included in the record of present application (C. A. No. 121 of 1995) after page 26 (in red) and before page 27 in red.

The application by Central kenya is at page 348 of the record of Civil Appeal No. 127 of 1995. It is intituled as a Chamber Summons under S. 3A and Order XXXIX of Civil Procedure Rules and actual seeks hearing of the application ex-parte in the first instance. In this appeal (C. A. No. 121 of 1995) it is at page335. The order (formal) drawn pursuant to orders made on 20th June, 1995 is at page 340 of the appeal and it clearly states "AND UPON HEARING the counsel for the plaintiff/applicant in the absence of the defendants) Respondent IT IS ORDERED" The record of proceedings at page 406 shows that Mr. Billing was present before Aluoch J. on 20th June, 1995 when Aluoch J. ordered that the application be placed before Hayanga J. straight away."

Mr. Billing is on record as saying (page 406) "I need time to take instruction." I accept what Mr. Billing said from the bar that is that he happened to know that some application was going to be made that day, ex-parte.

I have no doubt therefore that the orders of 20th June, 1995 were made on an ex-parte basis and such orders were extended by the lerned judge on 7th July, 1995, for an indefinite period.

The record of appeal at page 413 shows that Aluoch J. made orders that the application be mentioned (underlining mine) before Hayanga J. on 14th July, 1995.

On 4th July, 1995 Hayanga J. (on the mention date) proceeded to hear and allow (1) an oral application for very substantial amendments to the originating summons filed by Central Kenya (See pages 395 to 399) of the record appeal (2) an oral application for direction as to the future course of hearing and (3) indefinite extension of injunction granted. These orders he made on 7th July, 1995 in a 6 page ruling. He also ordered that "the suit be heard after these" on a day to day basis until completion.

I note that the proposed amended Originating Summons (page395) sought orders including damages. I need not here point out the unwarranted and wrong mode of seeking such drastic remedies by an Originating Summons. Even order 36 rule 10 gives discretion only to the court to treat an Originating Summons as a plaint. It is not axiomatic or as of course. All these points can only be canvassed at the time of hearing of an order 36 rule 8A application by a chamber summons as mandatorily provided by Order 36 rule 12 for the Civil Procedure Rules.

All parties affected by orders made on the said mention date had objected to the orders as sought being made. Yet these orders were made and I see no reason whatsoever why the fifth amendment ought not to be allowed as to enable this court (full bench) to go into these arguments at length.

I bear in mind that this court (full bench) is the final court in our Republic and it has every right and in fact obligation to call for a full argument. I would be the last judge to stop a party from arguing his appeal fully.

Whether the amended grounds succeed eventually or not is not is not a matter for me to go into at this stage. My function is to see if the arguments in the proposed grounds are such as to receive a full hearing by a full bench of this court. The proposed amended grounds of appeal would also include the sixth amended ground as it concerns a point which was canvassed before the learned judge. Mr. Lubulellah specifically raised the issue of S. 23 (1) of Cap. 281 (The Registration of Titles Act) before the learned judge.

I see no merit in the arguments advanced in opposition to the application for amendment and I allow the application in its entirety. The applicant is at liberty to file, on or before the 17th October, 1995 the amended memorandum of appeal incorporating the further grounds of appeal as sought. The numbering of such grounds will be for the applicant to decide on.

Whilst Mr. Ngatia insists on costs in any event, I would order that the costs of this application be costs in the appeal.

I can see the urgency (for all parties to appeals) and I would venture to suggest that the counsel do seek directions from Hon. The Chief Justice for an urgent early hearing of all appeals, arising out of orders made on 7th July, 1995 by the learned judge in the superior court. I was told by Counsel that three appeals are filed.

Dated and delivered at Nairobi this 12th day of October, 1995.

A.B. SHAH

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JUDGE OF APPEAL