REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 3338 OF 1979

MBUGUA.....PLAINTIFF

VERSUS

FESTO H OLANG & ANOTHER.....DEFENDANT

RULING

December 28, 1979, **Hancox J** delivered the following Ruling.

The application by the defendant and former defendant by way of Chamber Summons now having been resolved, whereby the second defendant successfully applied to be struck out as a party to the suit, and the *exparte* temporary injunction was continued as against the first defendant until the result of the trial, Mr Le Pelley has sought an order for costs on behalf of the successful defendant against the plaintiff , and, as regards the first part of his application, that the costs should be reserved, or treated as costs in the cause. He said that it was for Mr Sampson, representing the plaintiff, to show cause why the 2nd defendant, as a successful party, should be deprived of his costs, which it is well settled (see the proviso to s. 27 (1) of the Civil Procedure Act and, for example, Biron J in the Tanzania case of *Janmohamed v Twentsche Overseas Trading Co* of [1967]EA at p 290, where it is said the onus is on the party seeking to deprive the successful party of his costs) should follow the event unless good reason (sometimes called good cause) exists to the contrary.

Mr Sampson dealt in his submission with two separate sets of costs. First those of the *ex parte* injunction, which the plaintiff secured on 15th October and subsequently succeeded in continuing until the final determination of the issues as against the first defendant; secondly those of the action which has now been dismissed as against the Synod, formerly the second defendant.

So far as the first part of Mr Sampson's argument is concerned, as regards the first set of costs, with respect I do not think his client can, as yet, be said to have "succeeded", as it is put, against the first defendant. The whole point of a temporary injunction is to keep matters *in statu quo* until the main issue in the case can be properly heard; *Preslord v Luck* (1884) 27 Chd at p 505 per Cotton, L J and *Mohamed v Haidara* [1972] EA 166.

The status quo is that the plaintiff is Vicar of a parish within the Church and, as I have held, shall not be deprived of that position without proper charges being formulated and his being given an opportunity of being heard, and at least until the case is decided. Nothing has been said or done finally to determine

the plaintiff's position; just that he shall not be removed until the issues can fairly be tried. It is for this among other reasons that the undertaking as to damages is always given. I therefore decline, at this stage, to give costs to the plaintiff as against the remaining defendant. Of course the application for the injunction and his resistance to its being discharged will, if the plaintiff is ultimately successful, all be matters which will fall to be taken into account when costs are dealt with at that stage. But while recognizing that the plaintiff very probably was thoroughly alarmed at receiving the letter of 12th October, and reacted, as Mr Sampson says, pointedly and at once, I cannot do so now.

I therefore turn to what has been called the second set of costs and I start from this premise, as it was put by James, LJ in *Dicks v Yates* (1881) Ch. D at p 85:-

"....." (on the issue of costs)" ..... there is an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there."

The earlier English decisions, from most of which the line of authority on this question is drawn, are partially clouded by whether the case was one which was left to the discretion of the judge alone, or was decided by a judge and jury. *Ritter v Godfrey* [1920] 2 KB 47 was, however, decided without a jury and Lord Sterndale MR at p 53 described the line between the two types of action as "very fine". I therefore propose to deal with the authorities as though what is there said represents the law whether the particular case happened to be decided with the assistance of a jury or without it. In the later, and well known, speech by Lord Cave LC in *Donald Campbell v Pollak* [1927] AC at pp 811/2, the remarks of Atkin, LJ in *Ritter Godfrey,* to the effect that the judge must give a successful defendant his costs, save in three specified instances, were held to have gone too far, for the reason that if that were so, it would effectively deprive the judge of his absolute and unfettered discretion (save to exercise it judicially) to award costs or not to award them. The trial judge, MacCardie J, had deprived the successful defendant doctor of his costs because of misconduct in the shape of a letter he had written to the plaintiff which was calculated to exacerbate rather than assuage his feelings on a matter of (to them) the utmost sensitivity. The judgment of Lord Sterndale MR (which was approved in *Donald Campbell v Pollak* (supra)) after stating that considerations sufficient to justify a refusal of costs to a plaintiff are not necessarily sufficient in the case of a defendant, for the former initiates the litigation while the latter is brought into it against his will continued:-

"Speaking generally, I think it may be said that, in order to justify an order refusing a defendant his costs, he must be shown to have been guilty of conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought. This is so stated by Vaughan Williams LJ in *Bostock v Ramsey Urban Council (1)*, and it generally may be tested by the question stated in the judgment of the two other members of the Court, A L Smith LJ and Romer LJ in the same case, i.e., was the defendant's conduct such as to encourage the plaintiff to believe that he had a good cause of action"

I do not say that this is the only test, but I think it is the one properly applied to this case."

I can find nothing in the speech of Lord Cave in the later case which militates against that statement of the law, (indeed he said that a successful defendant in a non-jury case has, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff) and for my part I consider it right to adopt that test here. Indeed, as I understand him, Mr Simpson does not seek to argue that the second defendant should not get its costs but he says, that they should be recovered, not from the plaintiff, but from the first defendant, either as a *Bullock* order

(*Bullock v London General Omnibus Co* [1907] 1 KB 264) by adding them to the costs recovered (if they are eventually recovered) by the plaintiff against the unsuccessful (if he turns out to be unsuccessful) defendant, or as a *Sanderson* order (*Sanderson v Blyth Theatre Co* [1903] 2 KB 533), which avoids circuity by ordering the unsuccessful defendant to pay them direct to the successful one. But here again I am met by the same consideration which operated when deciding on the first set of costs, namely, can it be said at this stage that the first defendant has been “unsuccessful"” If he is unsuccessful, that is, if the plaintiff establishes his case, what are the underlying principles of a *Sanderson* order" In *Sanderson’s* case the Court of Appeal upheld the trial judge’s order that the unsuccessful defendant who had denied the architects the successful defendant’s authority to request the supply of materials or the performance of the work by the plaintiff, should pay the architect’s costs. This form of order was used, quite recently, in *Dobi & Co v United India Insurance Co* [1964] EA 16 by Sir Udo Udoma CJ, in which the respective defendants adopted mutually conflicting defences, partly basing his decision on the fact, as he found, that it was unreasonable for the first defendants to have denied the authority of the second defendant, their agent, and partly because the first defendant, in so doing, had induced the plaintiff to join the second defendant as a party to the suit, thus putting the plaintiffs in doubt as to whom to sue within the terms of Order I Rule 7. He held that the claims for relief against the two defendants were in the alternative which, Mr Le Pelley submits, is not the position here.

One of the reasons behind the application of a *Sanderson* order appears to be the insolvency of the unsuccessful defendant, as instanced by the case of *Mayer v Harte* [1960] 2 All ER 840, in which *Sanderson’s* case was followed, and the paragraph from the *White Book* cited to me by Mr Sampson approved (with the correction of “defendant” for “plaintiff” in the phrase relating to insolvency) by Willmer LJ at p 847. In that case the plaintiff’s house was contiguous to that of the first defendant. He instructed a builder (the second defendant) to repair his roof, and he in turn employed the third defendant (who was insolvent) to do it. The work was badly done and the plaintiff’s roof leaked as a result. The first and second defendants were held not liable and awarded costs. The third defendant was held liable in costs. After tracing the history of the jurisdiction to award costs as between defendants (formerly the practice in the Court of Chancery was that costs could not be awarded between parties on the same side of the record whether as plaintiffs and defendants) Harman LJ said:-

“Turning back to the present case, the learned judge could only decide to make a *Bullock* (19) order, whether in one form or the other, on the footing that the plaintiff was justified in bringing both the first and second defendants before the court even though she had not succeeded against them. It must also mean that he had decided that it was just the third defendant ought to bear, whether directly or indirectly, the costs of his codefendants. There is no appeal on either of these two points. If all the parties were solvent, it would not much matter in which form the order was couched,; the eventual result would be the same and in such a case the advantage of making the *Sanderson* (20) form of order is confined to avoiding circuity, as Romer, LJ says; but directly it turns out that the third defendant is an insolvent person the *Bullock* (19) form of order will work a great injustice to the plaintiff, who not only recovers nothing from the third defendant but has to pay the costs of the first and second defendants and is thus very far out of pocket though she had a good cause of action. This, it seems to me, is why both the Master of the Rolls and Stirling, LJ, pointed out that the insolvency of the defendant to be made liable is the strongest reason for making the order in the *Sanderson* (20) form. No doubt this will in itself produce some injustice to the first and second defendants, who are successful litigants and will have to bear their own costs, but they were each of them at least indirectly responsible for the wrong done to the plaintiff and should therefore suffer rather than she.”

If, then, it should transpire that the plaintiff in this case is successful as against the first defendant he will have to establish, whether a *Bullock* order or a *Sanderson* order is sought, that the first defendant was guilty of some misconduct which led the plaintiff to join the Synod. In the *Bullock* case itself the Court

ordered that the plaintiff, who was a passenger in the first defendant's omnibus and also was injured by a collision between it and the second defendant's cart, should include in her costs recoverable from the omnibus company the costs she had to pay to the successful defendant. The common sense underlying that order was clear because the judge, when he made it, had before him evidence that owing to the attitude taken up by the omnibus company it was reasonable for the plaintiff to join the other defendant.

Conversly in *Salisbury v Woodland* [1969] 3 All ER at p 881 Harman, LJ refused such an order saying:-

"This does not seem to me to be a *Bullock* case. There is no dilemma here "(as to whom to sue)" such as there is in that class of case ....."

Mr Sampson asked me to say, basing his submission on an extract from my Ruling at pages 5 and 6, that it was reasonable for the plaintiff, confronted with an emergency as he was, to sue both the Archbishop and the Synod. Mr Le Pelley, on the other hand, urged on me that once the emergency was ended (by the granting of the injunction) the plaintiff did nothing to disabuse the court of the claims against the second defendant; indeed he pressed the case well after the emergency was over, and well knowing the contents of the Constitution of the Church.

All I can say is that these matters will have to be resolved by the learned trial judge after the case has been decided. I cannot possibly, at this juncture, say who is going to be a successful or an unsuccessful party; indeed who will be recovering what with which and from whom.

Accordingly, as to the first set of costs, I order that they be reserved until the end of the trial. As to the second, I do not think it would be right for me to keep the second defendant out of its costs on the ground that, when the case is decided, it would be more just to the plaintiff (if successful) at that stage to give a *Sanderson* (direct) order, or a *Bullock* order, properly so called. I have no ground for depriving the second defendant of its costs at this stage. Indeed it has been held (*Kierson v Thompson* [1913] 1 KB at p 589 per Cozens-Hardy MR) that it is not a judicial exercise of the discretion to order a party who has been successful and against whom no misconduct is alleged, to pay costs.

I therefore give costs to the second defendant as prayed. This effectively means that a *Sanderson* order cannot later be had, though, having considered the authorities cited to me, and the related ones, and indicated the basic principles of law involved, I say no more about the question of a *Bullock* Order.

December 28, 1979

HANCOX J