JOHN CHISATA v THE ATTORNEY-GENERAL (1990 - 1992) Z.R. 154 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND LAWRENCE, JJ.S.
24TH MARCH, 1992 AND 9TH SEPTEMBER, 1992.
(S.C.Z. JUDGMENT NO. 3 OF 1992)

Flynote

Civil procedure - Pleading - Power of Court to strike out - When available - Procedures to be followed in the event of unwarranted action.

Headnote

The appellant claimed damages against the State for unlawful detention, first by the police and later on presidential order. Article 29(8) of the Constitution did not permit claims based on presidential orders and the Court ordered that the pleadings be amended 15 to omit such a claim. Counsel for the appellant wrote to the Court refusing to obey the order and threatening to appeal to the Supreme Court. The judge dismissed the action on the grounds that the pleadings disclosed no reasonable cause of action.

Held:
Courts rarely on their own motion order amendments of pleadings, and amendments should not usually be ordered unless they 20 come within order 8 of the High Court Rules - intended to eliminate all statements which may tend to prejudice, embarrass or delay the fair trial of the suit or to determine the real question in controversy between the parties. An order for amendment should not be made without calling counsel to comment on the proposed order. Where this is not done the proper cause is to 25 issue summons or file a notice of motion requesting the Court to review its orders.

For the appellant: G. Kunda of George Kunda and Co.
For the respondent: R.O. Okafor, Ag.Ass. Principal State Advocate.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

When this appeal came before us we ordered that the case be sent back to another judge of the High Court on the pleadings as they stood. We indicated that we would give our reasons later and we now give those reasons.This is an appeal from an order of a High Court judge dismissing an action on the grounds that the pleadings disclosed no reasonable cause of action.

We will refer to the appellant as the plaintiff and to the respondent as the defendant as they were in the Court below.The facts of this case are that the plaintiff claimed damages against the State for his unlawful detention. The statement of claim indicated that his claim for such damages was in respect of his detention by the police between 15th September, 1978 and 3rd October, 1978, and his further detention under a presidential detention order from 4th October, 1978, until 25th March, 1981.

On an application for an adjournment before a judge in Chambers the judge granted the

adjournment and ordered that the pleadings be

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amended to omit claims which were not sustainable under the provisions of art. 29(8) of the Constitution then in force.The plaintiff's advocates wrote to the judge informing him that the pleading would not be amended as ordered because another judge had entertained a suit whose pleadings had been couched in a similar manner and that the plaintiff in that case had been awarded damages.

It was intimated in the letter that, if the judge disagreed, the advocates intended to appeal to the Supreme Court.The learned judge then made the order dismissing the action which is the subject of this appeal.

Mr *Kunda*, on behalf of the appellant, argued that the order to amend the pleadings was superfluous because the provisions of art. 29(8) had already been referred to in the defence and reply. He also pointed out that the note to order 20/5-8/3 in the Supreme Court Practice (The White Book) 1988 indicates that the Court very rarely exercises its power to amend pleadings of its own motion, that it plays not an active but a passive role in relation to the raising of the issues for its consideration and determination and that it is not the duty of the Court to force upon the parties amendments for which they do not ask.

Mr *Kunda* further argued that it was wrong to hold that the pleadings did not disclose a cause of action because the claim was for damages for police detention as well as for the detention under the presidential prder to which art. 29(8) specifically refers. He further pointed out that the order to dismiss the action was made without calling on the advocates for either party to argue the matter.

Mr *Okafor* for the State indicated that the writ claimed damages in respect of the presidential detention, but he conceded that the statement of claim referred to both police and presidential detention. He also conceded that counsel had no opportunity to argue the matter before the order for dismissal was made.

We agree with Mr *Kunda* that courts rarely on their own motion order amendments of pleadings, and that amendments should not usually be so ordered unless they come within the terms of order 8 of our own High Court Rules, that is to say, to eliminate all statements which may tend to prejudice, embarrass or delay the fair trial of the suit or to determine the real question in controversy between the parties, but, as we understand it, the learned judge in this instance was saying that, in default of amendment, he would order the striking out of part of the claim, that is the claim in respect of the presidential detention, because constitutionally it disclosed no cause of action. The learned judge's order for amendment read as follows:

> ''During the period of the adjournment I order that the pleadings be amended to reflect that the provisions of art.29(8) have been considered. As it is even claims which are not sustainable by that article are included in the pleadings.''

As Mr *Kunda* has pointed out, the first part of the order was superfluous because the article was pleaded in the defence and issue was joined in the reply.As to the second part of the order which was a comment that even claims which were not sustainable by reason of art. 29(8) were included,

the notes to order 18 Rule 19 of the Supreme Court Practice (The White Book) indicate that the discretion to strike out should only be exercised in the clearest cases. The best course in nearly every case is to allow the whole matter to come to trial and to leave it to the trial judge to decide what claims are sustainable. In this type of case, although there appears to be a general prohibition against claims arising out of presidential detention orders, claims will still lie if it is shown that a detention was improperly enforced, for example that the claimant was detained in an unauthorised place. So far as this particular case is concerned no such allegation is apparent from the pleadings; but, even so, the matter was properly dealt with in the pleadings as they stood; the defendant did not see it fit to apply to have part of the claim struck out, and there was no need for the Court to intervene by making the order for amendment as it did.

We agreed also with Mr *Kunda* that the order for amendment should not have been made without calling upon counsel to comment on the proposed order. This follows the general rule in such matters; but, in this particular case, had counsel been called upon they could have drawn attention to the fact that art.29(8) had been pleaded in the defence and issue had been joined thereon in the reply.

Be that as it may, what followed must be the subject of comment by this Court. The appellant's advocates, who disagreed with the order for amendment, saw fit to write a letter to the judge saying that they did not intend to comply with his order.

This was a most improper action. The proper course to be taken in such circumstances is by way of summons or notice of motion requesting the Court to review its order on the grounds that counsel had not had the opportunity to argue the matter and had a meaningful argument to put forward. Alternatively the matter could have been raised at the trial. As it was, the writing of such a letter was impertinent in the extreme and the learned judge reacted to it accordingly. In the event the order to dismiss the whole action, again without calling upon counsel to argue the matter, was irregular and should not have been made because, apart from the amendment ordered, there were still claims unaffected by art.29(8).

We cannot stress too strongly what we have said in the past, that such cases should, wherever possible, and where there is no prejudice to either party by some irregularity, be allowed to come to trial so that the issue may properly be resolved. Interlocutory orders which prevent this should be avoided. For these reasons this appeal was allowed with costs to the appellant.

Appeal allowed.
