**AHMED V COMMISSIONER OF CUSTOMS AND EXCISE**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 11 February 2000

**Case Number:** 245/99

**Before:** Omolo, Shah and O’Kubasu JJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Practice and procedure – Default judgment – No grounds of opposition or defence filed – Refusal of leave to enter default judgment – Whether the refusal was based on proper exercise of discretion –*

*Grounds for interfering with trial court’s discretion on appeal.*

*[2] Practice and procedure – Joinder of parties – Amendment of plaint – Amended plaint wrongly headed – Whether the second plaint was irregularly filed – Whether irregularity was curable – Whether joinder of parties allowed as of right or subject to the court’s discretion.*

**EDITOR’S SUMMARY**

Kersam Ltd was a company engaged in general trading, import and export. In July 1997, Ahmed and another engaged Kersam Ltd to clear and forward two consignments from London to Kigali through the

Port of Mombasa. Kersam Ltd was required to execute a transit bond for KShs 40 million in favour of

Commissioner of Customs and Excise, the Respondent herein. Kersam Ltd effected this by depositing the funds, obtained from Ahmed and the other, in a fixed deposit account with ABC Bank. The requisite exportation documents were eventually lodged with the Commissioner of Customs and Excise but he failed to discharge the bond and instead called it up.

In April 1998, Kersam Ltd sued the Commissioner of Customs and Excise and ABC Bank seeking a declaration and an injunction. In January 1999, Ahmed and the other (Kersam Ltd’s principals), were joined with leave as Plaintiffs to the action. Kersam Ltd’s principals filed a second plaint headed “Plaint for Second and Third Plaintiffs”. The Commissioner of Customs and Excise failed to enter an appearance or defence through the Attorney-General though served with summons. Kersam Ltd’s principals applied for leave of court that default judgment be entered against the government under Order IXA, rule 7 of the

Civil Procedure Rules. The government failed to file their grounds of opposition and their defence.

The court declined leave and Kersam Ltd’s principals appealed. It was contended that the failure by the Attorney-General to file a defence and grounds of opposition should have been considered before the trial Judge exercised her discretion.

**Held** – 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 manner 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 injustice. In this case, the learned Commissioner of Assize failed to consider that no grounds of opposition to the application had been filed under Order L or the continued absence of any defence on the record. She therefore based the exercise of her discretion on wrong consideration.

*Per curiam:* (i) The ever increasing tendency to use a decision of a High Court judge in a matter of discretion as a mere conduit-pipe to this Court should be deprecated. The view that a judge’s discretion can be attacked if it is wholly wrongly exercised should be treated with great caution because it comes perilously close to substituting this Court’s discretion for that of the High Court judge; and that is not permissible. (ii) In principle joinder of parties is allowed as of right, subject to the discretionary power of the court. The heading of the amended plaint in this case did not cause prejudice to the Respondents.

Appeal allowed.

**Case referred to in judgment**

*Mbogo and*