



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 102 OF 2019

VSO JITOLEE.....APPELLANT

VERSUS

BETTY WAFULA.....RESPONDENT

(Being an appeal from the Ruling delivered on 29th January, 2019 by Hon. Mr. Gesora

(Chief Magistrate) Milimani Commercial Courts in CMCC No. 7283 of 2019)

JUDGMENT

1. The Appellant, VSO Jitolee was sued by the Respondent, Betty Wafula vide a plaint dated 28th September, 2017. The central issue in the case is 27,500 Kenya Commercial Bank Shares (hereinafter KCB Shares) stated to have been purchased by the Respondent in the year 2000 when she was an employee of VSO Kenya, the Appellant's predecessor. It is pleaded that the KCB Shares were held by VSO Kenya in trust for members of staff under Account No. 000xxxx. It is contended that the Appellant failed to deliver to the Respondent the KCB Shares and the accrued dividends thereof.

2. The claim was denied by the Appellant through the Statement of Defence dated 13th December, 2017. It was pleaded that the Appellant as a Non-Government Organization was precluded by the law and by its Charter from conducting any business for profit, trading in any commodities or offering any service for a fee and that if the transactions referred to by the Respondent were carried out, the same were illegal and criminal acts. The Appellant's contention is that the plaint raised no triable issues.

3. The Appellant subsequently filed the Notice of motion dated 28th May, 2015 seeking orders that the suit against it be struck out with costs. The application was premised on the grounds that the Appellant, a duly registered Non-Governmental Organization registered under the Non-Governmental Organizations Act was precluded from conducting any form of business for profit, trading in commodities or offering any services for a fee. That the business the subject matter of this suit was a criminal act perpetuated by the Respondent and others. That the suit herein did not state the nature of the shares allegedly held in trust for the Respondent nor value thereof indicated or demonstrated any documentary proof of the existence of any CDS Account in the name of the Respondent or any existence of a Trust Deed.

4. The application was opposed. It was stated in the replying affidavit that the Respondent's case was grounded on the activities of the Appellant's predecessor, VSO Kenya which agreed to its name being used by its employees to purchase the KCB Shares as a way of investing their bonus benefit in the year 2000. Further, that it's not been demonstrated how such an investment comprised criminal activities.

5. The Respondent's further averment was that the shares were the KCB Shares held in trust for her under held under Shares Certificate No. 000xxxx CDS Account xxxx. It was contended that a trustee relationship arose constructively through the arrangements with the Appellant's predecessor and that thereafter the Respondent continued to receive dividends thereof and subsequently received an acknowledgement of the ownership of the said shares. It was further stated that the Respondent's colleagues received their shares.

6. It was further contended that the suit was not scandalous, frivolous, vexatious and an abuse of the court process but raises a reasonable cause of action with triable issues as follows:

(a) Did VSO Jitolee's predecessor, VSO Kenya, hold KCB shares in trust the Respondent and others?

(b) Did VSO Jitolee succeed its predecessor in relation to shares?

- (c) Did the KCB shares actually exist?
- (d) Could the arrangement for the KCB shares to be held by VSO Jitolee's or its predecessor have been a criminal offence?
- (e) Who perpetuated the criminal offence?
- (f) What was the act constituting the alleged criminal offence?
- (g) What was the motive of the alleged criminal offence?
- (h) Who was the Respondent's conspirator in the alleged offence?
- (i) What was the basis of VSO Jitolee's letter dated 14th August, 2008 stating that the Respondent owned 27,500 of the KCB shares?
- (j) What will happen to the Respondent's shares if she does not get them?
- (k) Who will be the beneficiary of the Respondent's shares if she does not get them?
- (l) What would be the basis of denying the Respondent's her shares when others received theirs?
- (m) Which superior right did those who received the proceeds of their shares have over the Respondent?
- (n) In what capacity did Ben Ngutu sign the letter dated 14th October, 2013 and the Notice dated 9th October, 2013 concerning the sale of Nellie Munala's shares?
- (o) On what basis did Kennedy Akolo implore his colleagues to assist the Respondent sell her shares?

7. Ben Ngutu and Kennedy Akolo who were also Defendants in the trial court filed a similar application. Non-Governmental Organization Co-Ordination Board which was named as an Interested Party did not participate in the application.

8. The two applications were heard simultaneously. The application by the Appellant was dismissed while the other application was allowed. The Appellant was dissatisfied with the said ruling, hence the Appeal herein.

9. The Appellant raised the following grounds of Appeal:

- 1. Failing to appreciate and hold that the Appellant being an NGO governed by the NGO Act, could not approve actions undertaken by its workers or officials outside its mandate as stipulated in the aforesaid law as well as its constitution and that the transaction subject to the suit constituted a criminal act and was therefore ultra vires to the said constitution**
- 2. Failing to hold that the Appellant could not therefore be held accountable for criminal or unauthorized actions of the 2nd and 3rd Defendants who were its employees**
- 3. Failing to note the express admission by the 2nd and 3rd Defendants in their pleadings and submissions that the entire transaction subject matter of the suit was tainted with illegality and fraud ab initio and therefore find that the respondent, 2nd and 3rd defendants were co-conspirators of a secret illegal scheme whose operations were therefore never sanctioned by the appellant nor were they allowed in law and therefore find that they were acting as independent contractors**
- 4. Failing to find that there existed no privity of contract between the Appellant, respondent, 2nd and 3rd Defendants and/or other members of their employees investment group and that therefore hold that the Appellant was wrongly sued**
- 5. Failing to appreciate that as a result of the issues raised above, the Respondent's suit did not raise any reasonable cause of action as against the Appellant and therefore dismiss the suit**
- 6. Failing to appreciate the Respondent's own admission that at the time the illegal investment scheme was hatched and set up, the Appellant did not exist and therefore hold that the Respondent's claim could only be directed at the entity declared to have been the employer of the Respondent at the material time.**
- 7. Failing to appreciate that since the Respondents claim was over alleged shares whose value was sought since 2008-2009, then the Respondent's suit was time barred by reason of the provisions of Section 4(a) of the Limitation of Actions Act.**
- 8. That the decision of the Hon. Magistrate has approved and legitimized an illegal commercial activity undertaken by the Respondent and the 2nd and 3rd Defendants in the suit before the lower court, which holding amounts to a travesty of justice**

10. The Appeal was canvassed by way of written submissions which I have considered.

11. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

12. The Appellant’s submission is that the Respondent’s suit was time barred by virtue of section 4(9) of the Limitations Act. It is stated that the Respondent pleaded that she left the employment of VSO Kenya in the year 2005 and that the last dividends were paid to her in the year 2009. That this being a claim based on contract, six years have lapsed since the last alleged payment of dividends. That the suit was brought after six years after the cause of action accrued and therefore ought to have been dismissed.

13. On the other hand, the Respondent’s contention is that the Respondent’s suit involves shares held in trust and therefore Section 20(1) of the Limitations of Actions Act is the one applicable and not Section 4(a) thereof.

14. Section 20 (1)(b) of the Limitations of Actions Act provides:

(1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

15. Turning back to the plaint herein, it was pleaded in paragraph No. 8 & 12 that the shares were held in trust for the members of staff including the Respondent. Paragraph No. 10 & 13 of the plaint talks about the trusteeship role of the Appellant’s predecessor, VSO Kenya and thereafter the trusteeship role of the Appellant. Finally the Respondent in prayer No.(f) of the plaint seeks damages for breach of the trustee relationship. The trustee position is covered by Section 20 (1) (b) of the Limitation of Actions Act. Consequently, I am not persuaded by the argument by the Appellant that the suit herein is based on contract and is time barred.

16. The Appellant has submitted that the activities referred to in the suit were outside it’s legal mandate and were criminal acts outside the scope of the Respondent’s employment. Both Counsels for the Appellant and for the Respondent through their rival submissions filed herein took the court through the evidence in the documents filed herein on the issue of employment, the acquisition of the shares and payment of dividends. In this court’s view, these are matters to be established by way of evidence during the trial as opposed to the court conducting a mini trial through the analyses of documents which are yet to be produced as exhibits.

17. It was submitted by the Appellant that there was no evidence before the court on privity of contract between the Appellant and the Respondent or other members or the employees investment group. However, as analyzed above, this court’s view is that the Respondent’s pleadings point to a trustee relationship as opposed to a contractual one.

18. The Appellant’s contention is that the Respondent’s suit at the trial court does not disclose any reasonable cause of action.

19. The Court of Appeal in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** with regards to dismissals for not disclosing a reasonable cause of action stated as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

(See also **Mercy Nduta Mwangi t/Mwangi Keng’ara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR** and **Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR**).

20. In the case at hand, this court’s view is that the Respondent’s case raises triable issues which ought to go to trial. Some of these issues

have already been reflected in the Respondent's replying affidavit as summarized hereinabove.

21. With the foregoing, this court finds no merits in the Appeal and the same is dismissed with costs.

Dated, signed and delivered at Nairobi this 30th day of Sept., 2021

B. THURANIRA JADEN

JUDGE