



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 28 OF 2018**

**DANIEL NYAGA MVUNGU.....APPELLANT**

**VERSUS**

**ACK DIOCESE OF MBEERE.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. The appellant filed suit against the respondent in the Embu Chief Magistrate Court CMCC No. 30 of 2017 for compensation of unpaid dues of Kshs. 232,338/= from the respondent. The trial court dismissed the suit on the ground that the respondent was not a legal entity to be sued and could only be sued in the name of their officials or representatives.

2. The appellant being dissatisfied with the judgement of the Honourable trial magistrate delivered on the 5/06/2018 filed his memorandum of appeal dated 28/06/2018 which was based on grounds that can be summarised as follows: -

*a) The learned trial magistrate erred in law and fact when he dismissed the appellant's suit on grounds that the respondent was not capable of being sued in its own capacity and thus denied the appellant his claim.*

3. The parties filed submissions to dispose of the appeal and later orally highlighted the submissions.

**B. Appellant's Submission**

4. The appellant submitted that during the course of proceedings before the trial magistrate, the respondent had paid the principal sum claimed but did not pay the costs and interest. He submitted that the trial magistrate erred by dismissing the suit on a technicality without ordering the respondents to pay the costs and interest.

5. He further submitted that the finding of the trial magistrate that the respondent could not be sued was a technicality and against the provisions of **Order 1 Rule 9 of the Civil Procedure Rules** that provides that no suit shall be defeated by reason of the misjoinder or non joinder of parties. He also cited the Constitution that provides that justice shall be administered without undue regard to technicalities.

**C. Respondent's Submission**

6. The respondent submitted that the capacity to sue or be sued was not a technicality but a point of law as it went to the very root of a case and as such the trial magistrate was right in dismissing the suit against the respondent. He relied on the cases of **Kakamega HCCC No. 299 of 2013, African Orthodox Church of Kenya v Rev. Charles O. Omoruko & Another** and that of **Nairobi HCCC No. 762 of 2007 Eritrea Orthodox Church v Wariwax Generation Limited** where the courts held that where a party is registered under the Societies Act, it had no capacity to sue or be sued in its own name.

7. The respondent further submitted that the judgement of the trial magistrate was regular and proper and that the appellants had not satisfied the conditions for setting aside a judgement.

**D. Analysis & Determination**

8. I have perused the pleadings and documents filed by the parties herein. The suit CMCC No. 30 of 2007 was instituted by way of a Plaint dated 22/02/2017 and filed in court the next day. In paragraph 2 of the Plaint, the defendant has been described thus:

*“The defendant is a church registered as such under the Societies Act with its headquarters at Siakago within Embu County*

*within the Republic of Kenya...*

9. The dispute between the parties relates to unpaid salary arrears and other unpaid benefits all totalling to Kenya Shillings 211,338/=. In his submissions, the appellant admits that after the suit was filed the respondent paid the total claim but did not pay any interest or costs. It is the respondent's case that they have no legal capacity to sue or be sued in any court in their own names and such proceedings cannot be maintained and as such the trial magistrate did not err in dismissing the suit. It is argued that the respondent can only sue or be sued through Trustees, if one exists or in the names of their officials in a representative capacity.

10. In the case of *Onyancha, J.* in **ERITREA ORTHODOX CHURCH v WARIWAX GENERATION LTD. [2007] eKLR** it was held that the plaintiff in that suit was a religious unincorporated organization registered under the Societies Act and that the institution of proceedings by the persons who form the society without complying with rules governing representative suits rendered the suit null and void.

11. In **John Ottenyo Amwayi & two others v Rev. George Abura & two others – Civil Appeal No. 6339/1990** Bosire, J. (as he then was) held as follows: -

***“The Societies Act does not contain Provisions with regard to the presentation and prosecution of suits by or against the unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names.”***

12. I have perused the **Societies Act Cap 108** and the provisions therein do not give a society registered thereunder capacity to sue or be sued in its own name. If the law has been amended, the appellant did not bring to the court's attention.

13. The respondent in the suit is a religious organization registered under the Societies Act. That being the case, respondent has no capacity to sue or be sued in the manner the appellant purported to do.

14. I have considered the submissions of the parties on the issue of capacity to sue. The respondent refers to lack of capacity to sue as a technicality. It is my considered view that this is a technicality curable under **Article 159 of the Constitution**, but a requirement of law that must be given the attention it deserves. The appellant cannot plead ignorance of the law in this regard.

15. It is my finding that this appeal lacks merit and it is hereby dismissed.

16. There will be no order as to costs.

17. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF JULY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Muthoni for Appellant**

**Ms. Murithi for Wairimu for Respondent**