



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 592 OF 2011

ELIAS NDEGWA NJAGI.....APPELLANT

VERSUS

MUGAMA FARMERS CO-OPERATIVE UNION LIMITED.....RESPONDENT

JUDGEMENT

1. By a plaint dated 26/5/2009 the appellant sought reliefs that:-

a. Respondent/respondent be directed to release appellant's funds it held in banking section together with interest at 20% from 2002 till final release.

b. Terminal dues including pay in lieu of leave and overtime pay *inter-alia*.

2. The respondent denied the claim together with interest and raised an issue that the court had no jurisdiction to entertain the matter.

3. The respondent raised a preliminary point of law dated 18/11/2010 based on the following points:

i. The claim is time barred and the order granting leave to file claim out of time is defective.

ii. The claim by the appellant is incompetent and defective and the court lacks jurisdiction by virtue of clear provisions of the Co-operative Societies Act.

iii. The claim is inherently ambiguous and unclear rendering it incompetent and not tenable or maintainable in law.

4. The matter was heard on the preliminary objection and the plaint was struck out.

5. Being aggrieved by the aforesaid decision, the appellant lodged instant appeal and set out the following 7 grounds:

a. That the learned trial magistrate erred in law and in fact when he upheld the preliminary objection and proceeded to strike out the entire suit without any sound legal basis.

b. The learned trial magistrate misdirected himself when he failed to appreciate that a sum of money deposited in a blocked account is not and cannot be a claim for employment benefits capable of being adjudicated in an Industrial Court and hence arrived at a bad decision.

c. The learned trial magistrate erred in law and in fact when he failed to appreciate that the sum of money held in the appellant's account with the defence is a civil debt and falls squarely within the jurisdiction of a Civil Court and accordingly arrived at the wrong decision.

d. The learned trial magistrate erred in law and in fact when he failed to appreciate that the nature of the claim before him conferred jurisdiction on a Civil Court hence arrived at the wrong decision.

e. The learned trial magistrate erred in law and in fact when he failed to appreciate or apply the principle of the overriding objective as set out under section 1A of the Civil Procedure Act and hence arrived at the wrong decision.

f. The learned trial magistrate erred in law and in fact when he failed to appreciate that the appellant had sued as a creditor and not as a member of the respondent society and hence arrived at the wrong decision.

g. The learned trial magistrate erred in dismissing the appellant's claim and awarding costs to the respondent.

6. Parties were directed to file submissions to canvass appeal but only appellant filed the same.

APPELLANT'S SUBMISSIONS:

7. The appellant submitted that, the trial magistrate took time to analyze the issues raised in the preliminary objection. He then, correctly rejected all the grounds raised by the respondents. He found for instance that the challenge to the order extending time to file claim out of time cannot be raised as a preliminary objection.

8. On the issue of the matter falling under the Co-operatives Tribunal the learned magistrate found that the appellant/appellant could not be made a member of a Co-operative Society by the unilateral act of his former employer. But that is not all. The correct position is that the appellant is not a member of the respondent's union and has never been. One can only become a member of a society or union by choice. This is about Freedom of Association under Article 36 of the Constitution.

9. The fact that the respondent operates as a bank in some respects is the only reason the appellant's money is kept there not as union or Sacco contribution or shares but clearly as money in a savings account. It would have been necessary to hear the respondent explain by what right they had deposited the money and denied the appellant access to his own money.

10. The trial magistrate having arrived at the correct finding on that issue nevertheless fell into grave error. He introduced a new twist to the matter. Beginning at page 7 of the ruling the last paragraph the court stated:

"i. But even if the suit should not be there, (the Co-operatives Tribunal) the court has found as a fact that the appellant's suit is employment related. It should be filed at the Industrial Court, not here.

ii. The court has no jurisdiction. The preliminary objection therefore succeeds not so much because of the other arguments raised by the defence but because of this last reason. And because of this suit is struck out with costs to the respondent."

11. In the memorandum of appeal the appellant listed a total of 7 grounds but which he condensed and address on five basic fronts:

a. The money deposited in the account is not an employment dispute, nor is it an industrial claim whatsoever. It is a case of a bank blocking a depositor's account, notwithstanding that the depositor is a former employee of the bank.

b. The appellant in his claim had annexed documents showing that Mugama Farmers Co-operatives Union operates a front office banking section. After the appellant's pension funds were released they were deposited in his savings account. The account was then blocked by the respondent for unexplained reasons and as such the appellant was and is still unable to access his own money. That money should be released forthwith. That particular aspect of the claim cannot even be affected by the Statutes of Limitation for the very simple reason that it was held and is still held by the respondent. The wrongful detainer of the appellant's property is an ongoing wrong and thus not time runs against it.

c. The claim for the money in deposit is severable from the claim for terminal dues which may be an industrial claim. If the court had found part of the claim to belong to the Industrial Court all that was needed to direct that the appellant either amends the plaint or abandons the claim. Alternatively, the court could easily have heard the matter then dismissed that or struck out the part of the claim that it felt was outside its jurisdiction.

d. The court did not bear in mind section 159(2)(d) of the Constitution as well as section 1A of the Civil Procedure Act. That is the overriding objective which enjoins courts to do substantive justice. The appellant's main complainant before the court was about his blocked account and his pension therein. The other claims were incidental. The court erred in not giving him a chance to be heard on his complaint merely because it appeared that part of his claim was in an improper court.

e. The respondent has not raised objection on the basis of the matter being under the Industrial Court. Indeed this was a matter raised by the court of its own motion. The parties, particularly the appellant never got an opportunity to respond to those issues, yet it turned out to be his Waterloo as it were. It was incumbent on the court to give the appellant an opportunity to respond to that issue.

12. It is his submission that even if the trial court had found that the claim before it was an employment claim, falling under the Employment Act which it was not, it would still have been improper to strike it out in the way it did.

13. In the celebrated case of *D.T. Dobie Company (Kenya) Ltd vs Muchina [1982] KLR 1* the Court of Appeal laid down the legal position with regard to striking out pleadings as follows:-

"(a) As the power to strike out pleadings is exercised without the court being fully informed as to the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.

(b) The power to strike out should be exercised only after the court has considered all the facts.

(c) The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be

struck out.”

14. Elsewhere in the judgment the Lordships quoted in the case of *Kelleway vs Bury [1892] 66 LT 599* where it was held the power to strike out is a very strong power and should only be exercised in cases which are “**clear and beyond all doubt**”. The court must see that the appellant has got no case at all, either as disclosed in the statement of claim or in such affidavit as he may file with a view to amendments.

15. In his earlier submission he had submitted that the claim for the pension funds held in a blocked account was severable from the employment claim such as it was. He submitted that with the law as stated in D.T. Dobie case this matter could have been corrected by amendment.

16. The High Court in the case of *Parklands Properties Ltd vs Patel eKLR, Madan J* (as he then was) held that rather than strike out a pleading which did not comply with the rules or for any other reason it is better to allow the pleadings to be amended.

17. He have said enough to demonstrate that the claim for the money held in an account belonging to the appellant but which the respondent does not allow the appellant to access is not an employment or consideration claim. It is not even barred by statute as the wrongful detainer is still going on and the appellant has been asserting his right to his money all along.

18. The order to strike out the suit was in error. It was then compounded by an award of costs against an innocent party who retired after donkeys-year and cannot now access his pension due to the unlawful act of the respondent/respondent.

ISSUES, ANALYSIS AND THE DETERMINATION:

19. After going through the pleadings, proceedings and the submissions, I find the issues; ***whether the court the lower had jurisdiction to entertain the matter? If above in affirmative, what was the appropriate order in the circumstances?***

20. The appellant claim was for the release of his funds respondent held in banking section together with interest at 20% from 2002 till final release and Terminal dues including pay in lieu of leave and overtime pay. This was a mixed debt recovery claim and employment claim thus a mixed grill case.

21. The trial court held in striking out the suit; ***“But even if the suit should not be there, (the Co-operatives Tribunal) the court has found as a fact that the appellant’s suit is employment related. It should be filed at the Industrial Court, not here. The court has no jurisdiction. The preliminary objection therefore succeeds not so much because of the other arguments raised by the defence but because of this last reason. And because of this suit is struck out with costs to the respondent.”***

22. The trial court took the view that the matter was employment related and thus ought to have been filed in the industrial court. In the celebrated case of *D.T. Dobie Company (Kenya) Ltd vs Muchina [1982] KLR 1* the Court of Appeal laid down the legal position with regard to striking out pleadings as follows:-

“i. As the power to strike out pleadings is exercised without the court being fully informed as to the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.

ii. The power to strike out should be exercised only after the court has considered all the facts.

iii. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out.”

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25. The High Court in the case of *Parklands Properties Ltd vs Patel eKLR, MADAN J* (as he then was) held that rather than strike out a pleading which did not comply with the rules or for any other reason it is better to allow the pleadings to be amended.

26. The appellant demonstrated that the claim for the money held in an account belonging to the appellant but which the respondent does not allow the appellant to access is not an employment or consideration claim. Thus could have been severable even assuming the court could not hear the employment claim.

27. The jurisdiction of the Employment and Labour Relations court is set out under s.12 of the Act to include; **disputes relating or arising out of employment between an employer and an employee.**

28. The Magistrate’s Act No.26/2015 provides at s.11 (b) that the court may subject to its pecuniary jurisdiction hear and determine claims relating to employment and Labour relations.

29. In the gazette notice dated 22/6/2018 the Chief Justice acting under powers confirmed to him under ss.2a(3) and 4 (b) of the Employment and Labour Relations Court Act 2011 appointed all the Senior Resident Magistrates and above as special magistrates to hear and determine among others-

“Disputes arising from contracts of employment (excluding trade disputes under the Labour Relations Act) where employees gross monthly pay does not exceed Kshs.80000/- as commenced and continued in accordance with the Employment and Labour Relations Court (procedure) Rules, 2016”.

30. The court finds that the fairest course to take in the instant matter is to remit this case back for trial before a chief magistrate court who will entertain both debt and employment claims. The appellant will be at liberty to amend his pleadings.

31. Thus the court makes the following orders;

i. The trial court ruling and order is set aside.

ii. The matter is referred back to the trial court it had been filed for the chief magistrate or any other magistrate with jurisdiction to hear.

iii. No orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE