



Editorial Summary

1. *Civil Appeal*

2. *Subject of Subordinate Court case*

COMMERCIAL LAW

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- 2.1 *Contract.*

- 2.2 *Appellant given contract to drill borehole.*

- 2.3 *Contract frustrated and unable to fully complete.*

- 2.4 *Respondent/original defendant wishes to not only terminate contract but have a new person take over.*

- 2.5 *Appellant files suit on the 3rd February 2010.*

- 2.6 *Appellant files application dated 2nd February 2010 seeking orders of injunction to restrain respondent from taking over site and completing the work with another contractor.*

2.7 *Application heard interparte and ruling delivered
on 15th October 2010*

2.8 *Preliminary objection to be raised. Notice dismissed,
prior to hearing of application 2nd February 2010 for
non-attendance on 17th February 2010.*

2.9 *Ruling held:*

that

i) *Application for injunction dismissed on grounds*

a) *No irreparable loss would occasion.*

b) *The applicant can be compensated for*

damages for breach of contract.

c) *The work of the respondent is for public*

importance.

ii) *Further orders made to dismiss the entire suit.*

2.10 *The applicant/original plaintiff files appeal on 11th November
2010.*

3. *Appeal 11th November 2010*

The memo of appeal stated the Hon. Magistrate erred in law and fact:

3.1 *... in striking out appellant's suit on basis of a
Preliminary Objection (that had been dismissed
prior to 17th February 2010)*

- 3.2 ... in holding that the respondent was not properly sued ... when there was no denial [to this effect in the pleadings and affidavit.]
- 3.3 ... in dismissing the [Preliminary] Objection [when the] only issue for determination was the injunction [that was dismissed] (the main suit should not have been dismissed.)
- 3.4 ... Proceedings on a Preliminary objection that was ... ambiguous.
- 3.5 ... in failing to appreciate the respondent equally to blame ... and failed to accord the appellant an opportunity to complete work.
- 3.6 ... in failing to appreciate the appellant's tools were at the site And failed to determine [the] fate of the tools ... after striking out ... suit.
- 3.7 Prayed appeal be allowed, decision set aside of 15th October 2010 and application of 2nd February 2010 reinstated and allowed with costs.

4. Submissions by Appellant

- 4.1 Main issue was on the entity and legality of the existence of respondent.

suit.

5.4 *The respondents are a corporate body and correctly sued.*

5.5 *In law, there are two types of society unincorporate.*

5.6 *Trustee – corporate*

5.7 *Case law referred deal with societies and NOT corporate bodies such as the respondents.*

c) *Findings*

Main suit be reinstated for hearing.

6. *Case Law:*

Preliminary Objection:

a) *Kobo Safaris Ltd – Vs – About Africa Ltd & 2 Others*

Mombasa HCCC 681/95

Waki J

b) *Agricultural Society of Kenya*

– Vs –

Meru Golf Course Ltd & 2 Others

Nbi HCC 1637/07

Angawa J

On Societies by respondent:

c) *Simu Vendors Association*

Vs

The Town Clerk, City Council of Nairobi & Minister of Local Government

Misc. Application 427/05

Ibrahim J (6th June 2005)

d) **Geoffrey Ndirangu & 5 Others**

Vs

The Chairman of Mariakani Jua Kali Association & 2 others

HCC 33/04

Maraga J (30th November 2005)

e) **Jane Nyambura Joshua**

Vs

Apostolic Faith Church

HCC 2824/97 O.S.

Nyamu J

f) **Ngorika Farmers Co-op Society Ltd**

Vs

John Kiarie & 2 Others

Nakuru HCC 336/04

Musinga J (6th February 2006)

g) **Abdinoor Dima Jillo issuing as the secretary and on behalf of**

Dames Association

Vs

County Council of Isiolo & 4 Others

HCCC 764/07

Ang'awa J

h) **James Gitonga**

Vs

Trustees of the Agricultural Society of Kenya

Industrial court Cause No. 1322/10

Kosgei J, Mlupi, Gaito (Members)

7. *Advocates* :

- i) *E Chacha instructed by M/s Chacha Mwita & Co Advocates for appellant/original plaintiff*
- ii) *G Kithi instructed by Madzayo Mrima & Co Advocates for respondent/original defendant*

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL 486 OF 2010

ARTESIAN (K) LTD APPELLANT/ORIGINAL PLAINTIFF

**VERSUS
REGISTERED TRUSTEES, AGRICULTURAL**

SOCIETY OF KENYA RESPONDENT/ORIGINAL DEFENDANT

(Being an appeal from the Ruling of Hon. A. Ndungu Senior Principal Magistrate in Civil Case No. 497 of 2010 dated 15th October 2010 at Milimani Commercial Courts)

J U D G M E N T

I. **INTRODUCTION**

1. There are two issues that arise in this appeal. The first being the issue of an injunction application that was dismissed by the subordinate court and the second being the issue of the legal entity of the respondent, whereby the whole suit was dismissed at the interlocutory stage by the Hon. Magistrate.

II **BACKGROUND**

2. M/s Artesian (K) Ltd the original plaintiff/appellant (herein referred to as the appellant) entered into a contract with M/s Agricultural Society of Kenya (herein referred to as the respondents), to drill a bore hole at the respondent's land in Nairobi. The appellant alleged that the contract was frustrated when

he was unable to obtain a pump to fully make the borehole work.

3. The respondent denied the appellant access to their land. The appellant filed suit (3rd February 2010) then proceeded to file an application dated 2nd February 2010 seeking orders of injunction to restrain the respondent from giving the work to another contractor.

4. A Preliminary Objection notice was filed (which the appellant alleges was vague) that was to be heard on 17th February 2010. The respondents who raised the Preliminary Objection were absent. The application was dismissed for non attendance.

5. The application for injunction was then heard interparte, a ruling was reserved for 15th October 2010.

6. The arguments transpired from the respondent that the borehole was to have been 300 metres down. When inspected by an independent consultant it was found to be only 131 metres deep. There was no water as alleged. The only solution was to dig another borehole five metres away.

7. The Hon. Trial Magistrate also heard the issue on the legal entity of the respondent. That the names of the trustees had to be disclosed in filing suit.

8. In the ruling of 15th October 2010, the Hon. Magistrate dismissed the application on injunction stating that the Agricultural Society of Kenya was rendering important service to the nation. It was of public importance, that no orders of injunction would be issued. The

Hon. Magistrate further dismissed the entire suit due to the legal entity of the respondent not being in existence.

9. Being aggrieved by these orders, the appellant filed an appeal to this High Court.

III APPEAL

10. The memorandum of appeal stated that the Hon. Magistrate erred in law and fact:

10.1 ... in striking out appellant's suit on basis of a Preliminary Objection (that had been dismissed prior to 17th February 2010)

10.2 ... in holding that the respondent was not properly sued ... when there was no denial [to this effect in the pleadings and affidavit.]

10.3 ... in dismissing the [Preliminary} Objection [when the] only issue for determination was the injunction [that was dismissed] (the main suit should not have been dismissed.)

10.4 ... Proceedings on a Preliminary objection that was ... ambiguous.

10.5 ... in failing to appreciate the respondent equally to blame ... and failed to accord the appellant an opportunity to complete work.

10.6 ... in failing to appreciate the appellant's tools were at the site and failed to determine [the] fate of the tools ... after striking out ... suit.

10.7 prayed appeal be allowed, decision set aside of 15th October 2010 and application of 2nd February 2010 reinstated and allowed with costs.

11. The appellant prayed that the appeal be allowed, the decision be set aside of 15th October 2010 and the application of 2nd February 2010 be reinstated and or allowed with costs.

IV SUBMISSIONS

i) By the Appellant

12. The appellant's main issue was on the legal entity of the existence of the respondent. He argued that the respondent was correctly sued.

13. The Hon. Magistrate erred in entertaining a Preliminary Objection within the application yet the same had not been pleaded to in their pleadings. Relying on the case law of **Kobo Safaris Ltd – Vs – About Africa Ltd & 2 Others** Mombasa HCCC 681/95 Waki J

In which the court outlined the requirements set out in the Mukisa Biscuit Case had not been met. That a pure point of law if raised, it is argued on the assumption that all facts are pleaded by the other side are correct. That court also held that the intended objection had not been pleaded in any of the response to the application.

14. It was on the basis that the respondents, at the interlocutory stage questioning it being sued that the Hon. Trial Magistrate strike out the appellant's suit.

15. The Hon. Magistrate erred, as a case filed the Registered Trustee of the **Agricultural Society of Kenya – Vs – Meru Golf Course Ltd**, had been so filed (HCC 1637/07) and not questioned by this court.

16. Further argued the appellants, the respondents then are trustees having perpetual succession under the Trustees (Perpetual Succession) Act Cap 164 Laws of Kenya. The respondent has never been a registered society under the Society Act Cap 108 Laws of Kenya. The respondent's advocate erred in submitting that they were a society.

17. The objection should never have been considered as it had originally been dismissed for non-attendance on the 17th February 2012.

ii) By the Respondent

18. The respondent in reply stated that they did raise the issue in the lower court that the suit lacked merit. The suit was filed against an entity that was unknown.

19. It was their submission that the respondent being a society could not be sued in its name but only through the names of its registered trustees. Further, argued the advocate, it was not enough to sue **“the registered trustee of the Agricultural Society of Kenya”** and wherein the registered trustee are known. Therefore their names ought to be set aside in the suit and application and failure to set out their names rendered the entire proceedings a nullity. There is indeed no party to sue. The suit would hang in the air making the same incurable.

20. The respondent proceeded to rely on several authorities on the point:-

20.1 The case law of

Simu Vendors Association

Vs

The Town Clerk, City Council of Nairobi

Ibrahim J
Where the Hon. Judge held

“it is trite law and fact that a society registered under the Societies Act is an unincorporated body and does not have the capacity to sue or be sued in its own name in legal proceedings.”

20.2 **Jane Nyambura Joshua**

Vs

Apostolic Faith Church

Misc Application 427/05
Nyamu J

Relying on Halsbury’s Laws of England 3rd Edition, Vol 18, Para 239, the Hon. Judge found that

“a trustee of a registered society or branch or offices authorized by the rules ... may sue and be sued in their proper names without other description than the title of their offices.”

The Hon. Judge stated that the originating summons filed lacked the legal capacity and was struck out.

20.3 The case of

James Gitonga

Vs

Trustees of the Agricultural Society of Kenya

Industrial court Cause No. 1322/10
Kosgei J, Mlupi, Gaito (Members)

Where it held ***that “the Agricultural Society of Kenya is a society registered under the Societies Act Cap 108 Laws of Kenya”***. They must be sued in their proper names. The suit was struck out. The court had stated that the claimant should have ***“initiated proceedings against the current registered trustees of the Agricultural Society of Kenya in their individual names.”***

20.4 **Abdinoor Dima Jillo suing as the secretary and on behalf of Dames Association**

Vs

County Council of Isiolo & 4 Others

HCCC 764/07
Ang’awa J

Whereas the applicant sued in his name the constitution of the society did not recognize the post of a secretary. The correct post was of a chairman, vice chairperson, treasurer and gender promoter (who would act as secretary in all the committees.

21. The respondent stated on the Preliminary Objection, it may be raised at anytime during the proceedings.

22. The issue of the society being a body corporate is a new matter. The Act Trustees (Perpetual

Succession) Act Cap 164 Laws of Kenya applicability was questioned due to the description of Registered Trustee, Agricultural Society of Kenya.

23. The respondent asked the appeal lacks merit and be dismissed.

24. Elsewhere in a judgment of this court, I had laid down the history of how the Agricultural Society of Kenya came into being.

25. The correct position is that under the Trustees (Perpetual Succession) Act Cap 164 Laws of Kenya, it permits the registration of trustees as a body corporate. This act provides:

“For the incorporation of certain trustees for the purpose of perpetual succession to property and for purposes connected therewith.”

26. Anybody or association of persons ***“established for any religious, educational, literary, scientific, social, athletic, or charitable purpose or who have constituted themselves for any such purpose, may apply to the minister for a certificate of incorporation of trustees as a corporate body.”***

27. Once the Minister approves on terms, (the minister here is the Minister of Lands), the trustee becomes a body corporate by the name described on a certificate issued. The body corporate shall have perpetual succession, a common seal and power to sue and be sued in the corporate name.

28. The Agricultural Society of Kenya chose the name to be on the certificate as **“Agricultural Society of Kenya”**. This of course can be understood, of the confusion that arises, between a society so described and a corporate entity.

29. Before a suit is filed, or before a cause is brought to court, due diligence by the advocate is advisable to be done by the advocate concerned. This means that a search as to the legal entity of the person to be sued and or the person suing.

30. The advocate for the respondent took this court through several authorities outlined above. All these authorities are dealing with unincorporated body that falls under the Societies Act Cap 108 Laws of Kenya. The position in law, as to societies and as stated in the various judgments relied on by the respondent are carried apart from the authority of

James Gitonga

Vs

Trustees of the Agricultural Society of Kenya

Industrial court Cause No. 1322/10
Kosgei J, Mlupi, Gaito (Members)

Which described the Agricultural Society of Kenya as a society under the Societies Act Cap 108 Laws of Kenya. This position taken by that court, for purposes of striking out the suit, may have been done inadvertently.

31. It is of this court’s opinion that the respondents are sued as a body corporate. They are correctly sued. The appeal dismissing the suit at an interlocutory stage is hereby allowed. The Hon. Magistrate should have not used the word dismissed but “striking out”, to strike out. Dismissing means that no further suit on the matter may be filed, whilst striking out means that a further suit may be brought subject to the limitation of time.

32. On the issue of the interlocutory application, should an injunction issue against the respondent as

prayed? I find the Hon. Magistrate gave a reasoned reasons for declining to grant orders of injunction.

33. The contract had time lines. The said time to complete the borehole was running out. There was the agricultural show nearing to be held. The report obtained by the respondent showed it was impossible to complete the borehole and the only solution was to dig a new one.

34. I would not interfere with the decision of the Hon. Trial Magistrate on the issue of the injunction. The appeal to reinstate and issue an injunction is rejected and dismissed.

VI CONCLUSION

i) Injunction

35. On the issue of the injunction, application 2nd February 2010, the decision of the Hon. Magistrate to decline to issue orders of injunction is upheld.

ii) Legal Entity

36. On the issue of the legal entity of the respondent, the respondent is a corporate body under the Trustees (Perpetual Succession) Act Cap 164 Laws of Kenya. They are sued in their name.

37. The Hon. Magistrate erred in dismissing the suit at the interlocutory stage.

38. The dismissal orders of the Hon. Magistrate issued on 15th October 2010 be and is hereby set aside. The suit is reinstated to full hearing.

iii) Costs

39. There will be costs of this appeal to the appellant to be paid by the respondent.

40. There will be costs of the subordinate court case, on the application to be paid by the appellant original plaintiff to the respondent original defendant.

DATED THIS 28TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

- i) *E Chacha instructed by M/s Chacha Mwita & Co Advocates for
appellant/original plaintiff*
- ii) *G Kithi instructed by Madzayo Mrima & Co Advocates for
respondent/original defendant*

