

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 41 of 2010

**(Appeal arising from the judgment of [MR. P.N. ARERI, R.M] in the Chief Magistrate's Court
Kakamega in Civil Case No. 427 of 2006)**

ELPHAS NAFUTSU APPELLANT

V E R S U S

MUMIAS SUGAR CO. LTD. RESPONDENT

JUDGMENT

This is an appeal from P.N. ARERI, R.M. in Kakamega CMCC NO. 427 of 2006. The three grounds of appeal are that the learned magistrate erred by *suo moto* plucking an issue out of nowhere and making it the only basis of dismissing the appellant's suit, that the appellant's suit was erroneously dismissed due to miss-description of a party and that the trial court erred by failing to make a finding on damages.

Parties agreed to file written submissions. The appellant contends that he is **ELIPHAS NAFUTSU** but the documents produced described him as **ELIPHAS NAFUBU**. That was a mere miss-description and could not have caused the dismissal of the suit and it an honest and genuine mistake that was made by all the parties to suit and the same could have been rectified. On its part the respondent maintains that the appellant did not prove that he was in the employment of the defendant and the case was not proved as required. The respondent further contends that the appeal was filed out of time as judgment was delivered on 9th April 2010 and the appeal ought to have been filed on 16th March 2010.

From the evidence on record the appellant was PW1. He testified that he is called **ELPHAS NAFUTSU** and on 18th of December 2004 he was working at the defendant's premises as a casual labourer when he had an accident. He was issued with a sick sheet and was treated. The accident occurred as the place he was working was slippery and he fell down. **PW2 DR. CHARLES ANDAYI** examined the appellant on the 20th of May 2006 and produced a medical report. The defence did not call any evidence. The trial court held that the plaint dated 20th June 2006 and the verifying affidavit described the appellant as ELPHAS NAFUTSU. The medical report by PW2 dated 2nd June 2006, the sick sheet dated 18th December 2004, the receipt for the medical report for KShs.3,500/= and the letter of employment dated 9th December 2004 that were all produced in court gave the name of ELPHAS NAFUBU. The court held that since there was no evidence to show that ELPHAS NAFUBU and ELPHAS NAFUTSU were the same person then the case was proved on a balance of probabilities.

From the evidence on record, it is clear that the description of the appellant was not an issue for determination by the trial court. Although the defence denied that it had employed the appellant, no evidence was adduced to show that the person they had employed by the name ELPHAS NAFUBU was not the appellant. The trial court misdirected itself by dismissing the appellant's suit merely because there was a misdescription of the appellant's name. There was no evidence that the appellant was trying to impose himself as the one who was injured in the accident. The defence did not raise issues as to the name of the appellant. It is the court in its judgment that brought in the issue of the appellant's name. Indeed the proceedings before the trial court show that the case was heard by one magistrate, MR. S. O. TEMU, R.M. and MR. ARERI, only heard the appellant's recalled to produce the sick sheet and went ahead to write the judgment. I do find that the description of the appellant's name in the documents produced as ELPHAS NAFUBU and not ELPHAS NAFUTSU was a matter which could have been

rectified by the trial court and should not have been used to have the appellant's suit dismissed with costs.

In the end I do find that the appeal is merited. The judgment of the trial court is hereby set aside. I do wish to evaluate the evidence on record and find out on liability as well as make a finding on quantum. I do order that the matter be heard afresh by the trial court. There shall be no orders as to costs.

Delivered, dated and signed at Kakamega this 14th day of November 2012

SAID J. CHITEMBWE
J U D G E