REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 89 of 2006

THE CHAIRMAN,KENYA VETERINARY ASSOCIATION, CENTRAL REGION….APPELLANT

Versus

DR. BENSON MAINA KIMINDI…….....…….……RESPONDENT

(From original judgment of the Resident Magistrate's Court at Othaya in RMCC. No.22 of 2005 by MUTUKU M.W – RM)

J U D G M E N T

By a plaint dated 13th May, 2005, **Dr. Benson Maina Kimindi** hereinafter referred to as *"the respondent"* sued the Chairman, Kenya Veterinary Association, Central Region, hereinafter referred to as *"the appellant"* in the Resident Magistrate's Court at Othaya claiming a sum of Kshs.122,400/= being the amount due and owing from the appellant to him on account of daily allowance and upkeep for the 51 days he had worked for the appellant. The respondent also claimed Ksh.25,800/= as special damages as well as costs of the suit on the same account.

The appellant denied the respondent's claim aforesaid. By a statement of defence dated 2nd June, 2005 the appellant averred that the respondent was not a registered veterinary surgeon as per the provisions of the Veterinary Surgeons Act. Accordingly he illegally and unlawfully operated a private veterinary practice in Othaya. Though a member of the executive committee of the appellant he had misrepresented himself as a duly registered veterinary surgeon. The agreement that the respondent sought to enforce by the suit was thus null and void by virtue of the mispresentation alluded to above. The respondent too unlawfully doctored vaccination certificates and their manifests. Finally, the appellant averred that the suit was incompetent and bad in law in that the plaint was undated, the verifying affidavit accompanying the plaint contravened the mandatory provisions of the Oaths and Statutory Declaration Act, particulars of special damages had not been set out and that the plaint violated section 15 of the Veterinary Surgeons Act.

The evidence which was led before the trial court in support of and in opposition to the claim by both the respondent and appellant can be summarized briefly as follows; The respondent is a graduate in Veterinary Medicine from the University of Nairobi and operates a private veterinary practice in Othaya town. He was co-opted to Kenya Veterinary Association on 4th April, 2004 as an executive member of the Central Branch. In 1999, the appellant started a pilot project for the vaccination of animals. The respondent participated in the programme in Nyeri, Murang'a and Kirinyaga Districts. He was not paid any money by the appellant for the exercise. Instead the respondent used his own funds for sustenance. When however he demanded allowances for the exercise that he was entitled to from the appellant, the same were not settled allegedly because according to the appellant he had doctored some manifests, and that he was not a registered veterinary doctor in any event. The dispute was referred to Kenya Veterinary Board. However no disciplinary action was taken against the respondent in consequence thereof.

The appellant on their part did not deny that the respondent took part in the vaccination exercise for 51 days and that he was entitled to Ksh.1,500/= allowance and 900/= upkeep per day. Their contention was however that it could not pay the respondent because he doctored some manifest specifically those in respect of certain farmers namely Mukiri Muthinji, Paul mwangi and Moses Mukira. The respondent too did not possess a practicing certificate. It was out of this realization that the appellant wrote to Kenya Veterinary Board to arbitrate on the issue. According to the appellant, the respondent was in breach of Kenya Veterinary Surgeons Act and since he was not registered as a Veterinary Doctor cannot practice, charge fees or sue for such fees.

The learned magistrate having considered the respondent's as well as appellant's case, the evidence led and the submissions thereof found in favour of the respondent holding thus;

> "The issue for determination is if the plaintiff is entitled to the allowance or upkeep. It is admitted by the plaintiff that he was then not registered as a veterinary by the time of vaccination. Further S.15 Cap 366 states that one cannot sue for any 'charge' or 'value' for services or appliances/medicines rendered. What is clear is that it is not registered vets who took part in the exercise. The plaintiff demonstrated that there were other four (4) doctors, then not registered who took part in the vaccination. What is also clear is that the plaintiff was not charging for any services so rendered, neither did he demand for any value of drugs. It is clear that he was entitled to 'allowance' and 'upkeep' which expenses he incurred during the exercise. He has been able to demonstrate to the court that he drew money from his account to sustain himself during the various visits. KVA is a welfare society, and co-opted the plaintiff. The plaintiff cannot be said then to have been charging for his services and the Kshs.2,400/= per day was clearly of self sustenance.
>
> I find that the plaintiff is entitled to Kshs.2,400/= daily allowances for 51 days, totaling (sic) 122,400/=. The special damage of Kshs.25,800/= though not particularized as required under order VII ruled 2(1) has not been proved, and I will not grant the same. The plaint, contrary to defence counsel is signed and dated 13th May, 2005.
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> The plaintiff is further awarded costs and interest on (a) and (c) as prayed for."

Aggrieved by that judgment and decree, the appellant through **messrs Magee** wa **Magee advocates** lodged the instant appeal setting out 10 grounds to wit:

> "1. That the learned magistrate erred in law and fact by making judgment against the weight of evidence.
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> 2. That the learned magistrate erred in law and fact in disregarding the provisions of *section 15* of cap 366 thereby arriving at an erroneous finding.
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> 3. That the learned magistrate erred in law and fact in disregarding the documentary exhibits produced by the appellant thereby ignoring crucial and material evidence.
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> 4. That the learned magistrate erred in law and fact in disregarding the evidence adduced by the appellant's witness thereby making erroneous finding(s).
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> 5. That the learned magistrate erred in law and fact in disregarding the provisions of the law of contract act.
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> 6. That the learned magistrate erred in law and fact in failing to find that the respondent did not prove his case on a balance of probabilities.
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> 7. That the learned magistrate erred in law and fact in failing to find that the plaint before court and the entire suit was fatally defective.
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> 8. That the learned magistrate erred in law and fact in failing to find that the respondent herein did not have a cause of action against the appellant by virtue of the fact that he was, at the material time, not gazetted as a veterinary surgeon.
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> 9. That the learned magistrate erred in law and fact in failing to consider the averments made by the appellant's witness (and supported by documentary exhibits) of the respondent's

malpractice and fraudulent acts.

10. That the learned magistrate erred in law and fact in failing to properly analyse the evidence adduced before her before making her finding(s) and/or judgment."

When the appeal came up for directions on 31st July, 2009, Mr. Magee and Mr. Mwangi learned counsels for the appellant and respondent respectively agreed to canvass the same by way of written submissions. Subsequent thereto they filed and exchanged their respective written submissions together with relevant authorities which I have carefully read and considered.

This being a first appeal, I am obliged to re-evaluate the evidence myself and come to my own independent conclusion or conclusions on the evidence without of course overlooking the findings and conclusions of the trial court. I am at the same time to bear in mind that unlike the trial court, I neither saw nor heard the witnesses testify. It is by seeing and hearing witnesses testify that it is possible to reasonably assess their credibility as witnesses. The parties are entitled to expect and to receive my view on the issues raised in this appeal. See Selle V Associated Motor Boat Co. Ltd (1968) E.A. 123.

It is common ground that the respondent was involved in a livestock vaccination campaign and or exercise between 8th October, 2002 and 20th November, 2002 at the invitation and or instigation of the appellant. It is also common ground that the respondent at the time was not registered as a veterinary surgeon pursuant to the provisions of the Veterinary Surgeons Act. It is also common ground that the respondent was entitled to Ksh.2,400/= on account of allowance and upkeep. It is common ground also that the respondent was not paid this amount. Finally it is also common ground that during the vaccination exercise, some of the records required to be filled in by the respondent were falsified.

However, the respondent's claim as captured in the plaint was for daily allowance and upkeep for 51 days he had worked at the invitation of appellant. The appellant while conceding that the respondent was entitled to such payment nonetheless refused to pay on account of the fact that the respondent was in breach of the provisions of section 15 of the Veterinary Surgeons Act which provides interlia:-

"No person shall be entitled to recover in any court any charge for professional aid, advice or visit or for the value of any medicine or appliance supplied unless he was at the time when such aid, advise or visit was given such medi**cine or** appliance was supplied duly registered under this act."

It is not denied that the respondent was involved in livestock vaccination campaign and that at the time, he was not a registered veterinary surgeon. However the respondent's claim was not for professional services that he had rendered during the vaccination exercise rather it was for daily allowance i.e allowances and daily upkeep that was offered by the appellant for those who participated in the exercise. The operative words here are *'charge'* and *'value'*. The appellant invited the respondent to the exercise and promised to accord him a daily allowance and upkeep. What the respondent was claiming was not fees for the exercise. In other words he was not "charging for professional aid, advice or visit or for value of any medicine or appliance supplied…" during the exercise so as to bring into operation the provisions of the aforesaid Act. As correctly submitted by Mr. Karweru, learned counsel for the respondent, the respondent was duly invited into an exercise by the appellant and he used his own resources to carry out the exercise on the promise that he would be paid his allowance and daily upkeep costs. In essence, he had not volunteered a service for which he was charging. Thus there was nothing illegal with what the respondent did. What would have been illegal is for the respondent to have charged a fee or get consideration for medicine and or appliances offered. The respondent did nothing of the sort. All that the respondent was asking is to be paid the agreed dues in terms of allowances and upkeep and not fees for services rendered. Accordingly and in my judgment section 15 of the Veterinary Surgeons Act is not available to the appellant.

In its submissions, the appellant has raised the issue that the plaint before court and the entire suit was fatally defective in that the respondent intended to make a claim against a duly registered society. That being the case the proper manner of instituting the suit would have been to give the proper name of the chairman and indicate that he/she was sued in that capacity. Failure to do so rendered the plaint and the entire suit incompetent. In support of this submission, counsel for the appellant referred this court to the following authorities:

(i) NBI HCCC No.2824 of 1997 (O.S.)
Jane Nyambura Joshua VS Apostolic Faith Church (UR)

(ii) NBI HCCC No.2098 of 1985
Hinga & Anor. V PCEA Thro' Rev. Dr. Njoya (UR)

It should be noted that these authorities are all High Court decisions which are not binding on me. They are merely of persuasive authority only. In any event those authorities are clearly distinguishable. For instance, in the first authority, the respondent had sought and had been given leave to amend the plaint so as to properly describe the defendants. However she failed to amend the O.S as ordered. That is not the situation obtaining here. With regard to the 2nd authority, the learned judge was of the view that the preliminary objection raised to the effect that the suit was incompetent because in bringing a court action against a church, the plaintiffs should have filed a representative suit in accordance with order 1 rule 8 of the civil procedure rules was procedural point which was curable. That is not the situation obtaining here as well.

The issue being raised in this ground of appeal was never an issue before the trial court. In other words the issue of who had been sued and in what capacity was never an issue for determination by the trial court. Much as the appellant raised the issue with regard to the competence of the suit in its defence it was entirely on other grounds. Those grounds were that the plaint before court was undated. However it is clear that this ground was untenable as the plaint in court file and as indeed the trial court found was dated. The other ground was that the verifying affidavit sworn on 9th May, 2005 contravened the mandatory provisions of the oaths and Statutory Declarations Act. The appellant did not pursue this ground during the hearing nor is it apparent how the said verifying affidavit is defective. The other ground was that the particulars of special damages had not been set out. On this, the learned magistrate agreed with the appellant and disallowed the claim. The final ground was with regard to section 15 of the Veterinary Surgeons Act which I have already dealt with elsewhere in this judgment.

From the foregoing it is quite clear that the appellant's defence was categorical on what it thought was defective with the suit. It had nothing to do with the capacity to sue or be sued. Ordinarily a party is bound by his own pleadings and submissions before court. In the case of Openda V Ann (1983) KLR 166, the court of appeal observed; "The court of appeal cannot consider or deal with issues that were not canvassed pleaded and or raised at the lower court. For a matter to be a ground of appeal it has to have been sufficiently raised and succinctly made an issue at a trial…." Also in Kenya Commercial Bank Ltd V Oisebe (1982) KLR 296 it was held:- "It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal…." This is a situation obtaining here! In any event in his own defence, the appellant without any reservation had accepted its description by the respondent. Finally what prejudice did the appellant suffer from such misdescription if at all. I cannot think of any.

The last ground of appeal urged by the appellant was that the learned magistrate erred in law and fact in making judgment against the weight of evidence. In support of this ground the appellant argued that the learned magistrate ought to have made a finding that the respondent had committed an act of misconduct in falsifying the records. To my mind this was peripheral issue and in any event, the appellant had not lodged any counterclaim against the respondent for the loss if at all occasioned to it by the respondent's alleged misconduct. The respondent was not on trial in this suit for the alleged misconduct. The trial court could not therefore have arrogated itself the disciplinary powers vested in the Kenya veterinary board. In any event there was evidence that the appellant had referred the respondent to the said board on the issue and no disciplinary action had been taken against him.

The upshot of all the foregoing is that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE