



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**CIVIL APPEAL NO. 1084 OF 2004**

*(From the original judgment of Mr. G.P. Ngare, Resident Magistrate, in Murang'a PMCC No. 541 of 2003)*

**KENYA FARMNUT MULTIPURPOSE**

**CO-OPERATIVE SOCIETY LTD.....APPELLANT**

**VERSUS**

**JOSEPH NDUHIU GITURI.....RESPONDENT**

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

Kenya Farmnut Multipurpose Cooperative Society Ltd, the appellant herein is aggrieved by a judgment delivered by the Resident Magistrate G.P. Ngare on the 18<sup>th</sup> November, 2004 in Murang'a PMCC No.541 of 2003. The suit was initiated by Joseph Nduhiu Gituri (hereinafter referred to as the respondent). In his plaint dated 15<sup>th</sup> September, 2003, the respondent sued his former employer Kenya Farmnut Cooperative society Ltd (hereinafter referred to as the defendant), for payment of unpaid salary arrears, plus accrued legal terminal benefits. The defendant filed a defence in which it admitted having employed the respondent, but denied owing him any salary arrears or terminal dues. The defendant contended that the respondent absconded and or deserted his employment and was therefore not entitled to any payments.

During the hearing of the suit, the respondent testified and also called 2 witnesses. He explained that he was employed by the defendant as an agriculturalist in January, 1997 and that he worked up to September, 2000 when he left the company. The respondent testified that the defendant was experiencing financial difficulties and did not pay his salary between April, 2000 and September, 2000. He denied the allegation that he absconded his employment maintaining that he was released by the defendant's deputy general manager Francis Wanyoike. The respondent produced his letter of appointment and a copy of the letter which he wrote to the general manager of the defendant demanding his salary arrears for the 6 months.

Francis Muiruri Wanyoike the former general manager of the defendant testified in support of the respondent's case. He confirmed that by the time the respondent left the defendant's employment in September, 2000, the respondent had not been paid any salary for six months, as the defendant was experiencing liquidity problems. He testified that employees of the defendant were released because of the financial situation. Under cross-examination, he maintained that the defendant Kenya Farmnut Cooperative Society and Kenya Farmnut Multipurpose Cooperative Society Ltd (The appellant) are one and the same.

Julius Maina Wachira, a labour inspector with the Ministry of Labour, also testified on behalf of the

respondent. He calculated the respondent's terminal dues in accordance with the General Wages Order of Cap 229 as 15 days salary for each completed year of service.

The defendant called one witness Lucy Ndiu who testified that she was a personnel officer with Kenya Farmnut Multipurpose Cooperative Society. She testified that the letter of appointment produced by the respondent was signed on behalf of the general manager Kenya Farmnut Multipurpose Cooperative Society Ltd. According to their records the respondent worked until September, 2000 when he absconded duty. As a result the respondent was summarily dismissed. She maintained that the respondent was therefore not entitled to any salary arrears.

In their submissions the respondent's advocates maintained that the defendant was properly described in the plaint as also reflected in the defendant's letter of employment produced as an exhibit. It was further submitted that it was not disputed that the respondent was an employee of the defendant. Counsel for the defendant on the other hand submitted that there was no entity in law known as Kenya Farmnut Cooperative Society Ltd and that the proper name of the defendant is Kenya Farmnut Multipurpose Cooperative Society Ltd. It was further submitted that the respondent had not discharged the burden of proof and the respondent having absconded from duty Section 17A of the employment Act provided for summary dismissal. It was contended that the respondent having purported to work for six months with no pay, his claim was not maintainable as he did not mitigate his damages. It was submitted that Regulations of Wages and Conditions of Employment Act Cap 229 was not applicable to the contract of employment between the respondent and the defendant.

In his judgment, the trial magistrate found that the defendant was properly described in the plaint, and that the respondent was employed by the defendant. He found that the respondent had proved his case on a balance of probabilities and entered judgment in favour of the respondent for the sum of Kshs.187,000, plus costs and interest.

In its memorandum of appeal filed under protest, the appellant raised ten grounds. Ms. Kamende who appeared for the appellant submitted that the trial magistrate misdirected himself in holding that the defendant was properly described, contending that a letterhead cannot legally effect a change of name of a legal entity nor can it change the legal character of an entity. She maintained that there was no legal entity in law known as Kenya Farmnut Cooperative Society. In this regard, she relied on the case of **Nairobi City Council vs Chris Everard & Others HCCC. (Milimani) No. 851 of 2002**. Counsel for the appellant therefore submitted that there was misjoinder of the appellant.

It was further submitted that the plaintiff's contract of employment having been entered in writing, and evidence having been tendered to show that the employment was terminated in writing through summary dismissal, the trial magistrate was wrong in relying on oral evidence. The case of **CPC Industrial Products (Kenya Ltd) vs Omweri Angima Civil Appeal No. 197 of 1992** was relied upon for the proposition that the respondent failed to mitigate his loss.

For the respondent, it was submitted that the defendant was described as Kenya Farmnut Cooperative Society Ltd, and that the appeal having been brought in the name of Kenya Farmnut Multipurpose Cooperative Society, was incompetent and should fail. It was further submitted that there was no evidence adduced to show that the defendant does not exist in law. It was contended that the defendant did not enter appearance or file a defence under protest, but specifically admitted having employed the respondent. It was maintained that the letter of employment produced by the respondent identified his employer. It was maintained that there was no evidence to show that the respondent had absconded from his employment. The court was urged to find that the trial magistrate's finding that the two societies were one and the same entity was supported by evidence. In support of his submission, Counsel for the respondent cited the case of **Wrigglesworth Exporters Ltd vs Victor W. Barasa HCCA.(Mombasa) No. 117 of 2004**.

The rejoinder of counsel for the appellant was to urge the court to find the case of Wrigglesworth Exporters Ltd (Supra) distinguishable as it was a case involving a takeover.

It is evident from the pleadings that in its defence filed on the 12<sup>th</sup> of January, 2004, the defendant did not at all raise the issue of its legal existence or corporate name. Although there was a general denial of the descriptive part of the plaint, that was not sufficient. It was necessary for the defendant first and foremost, to file its proceedings under protest and secondly, to specifically deny that there was no legal entity in existence as per the defendant described in the suit. The defence in fact, impliedly admits the employment of the respondent but contends that he absconded from employment. In his evidence the respondent produced his letter of employment which was clearly headed Kenya Farmnut Cooperative Society but signed for Kenya Farmnut M.C.S Ltd. Since the defendant admits being the respondent's employer, and having issued the letter of employment, it is evident that the defendant described itself to the respondent both as Kenya Farmnut cooperative Society and Kenya Farmnut M.C.S Ltd (presumably Kenya Farmnut Multipurpose Cooperative Society). The defendant cannot therefore be allowed to misdescribe itself and rely on that misdescription to avoid responsibility.

Moreover, although it was submitted by the defendant's counsel in the lower court that the defendant as described in the plaint, did not exist in law, no evidence was adduced before the trial magistrate to substantiate that allegation. The defendant's own witness, Lucy Ndi, though claiming to be an employee of the appellant testified on behalf of the defendant. She confirmed that the respondent was employed by the defendant. This was consistent with the evidence of Francis Muiruri Wanyoike the defendant's former deputy General Manager. It is evident that the appellant defended the claim in the lower court in the name of the defendant.

The issue of the defendant's legal existence was not therefore a contentious issue raised either in the pleadings or during trial. Nor was there any misjoinder of the appellant. I find that there was sufficient evidence to justify the finding that the defendant was properly described. I am not impressed by the appellant's belated attempts to distinguish itself from the defendant by bringing this appeal as an entity separate from the defendant. For in the light of the evidence that was adduced before the lower court, this court must ignore any purported distinction between the two and treat them as one. Indeed the appeal is nothing more than attempt to advance the defendant's interest.

With regard to the respondent's claim for unpaid salary for the months of April to September, 2000, it is not disputed that the respondent was in the defendant's employment during that period. The respondent has maintained that he was not paid any salary for this period. Although the defendant denied this claim, no evidence was actually adduced to confirm that it actually paid the respondent. The defendant's witness did not come to court with any documents but simply relied on the respondent's alleged summary dismissal. Even assuming that the respondent was summarily dismissed such dismissal would not affect the respondent's entitlement with regard to the salary earned for days worked. I am satisfied that this claim was proved.

With regard to the claim for terminal dues the defendant's former general manager, made a sweeping statement that he talked to the directors and they released employees of the company to go home. The witness did not specify whether the respondent was one of the employees who was verbally released. Moreover, the respondent was a senior officer having been employed as a factory manager. It is not conceivable that he would have been sent away orally like a casual labourer. In the absence of any evidence of termination of employment I am inclined to believe that the respondent opted out of the defendant's employment because of the defendant's inability to pay him. This is consistent with the defendant's contention that the respondent left his employment on his own. Although the defendant termed the move "absconding", given that the defendant had already breached his part of the contract by failing to pay the respondent, the respondent's move was not absconding or breach of contract but simply a move to mitigate his losses by freeing himself from the defendant to look for alternative employment. I come to the conclusion that this was not a case of redundancy or termination of employment such that any terminal dues would arise. The labour officer was wrong in assessing the terminal dues as if the respondent's case was one of redundancy or unlawful termination of employment. I would therefore allow the appeal to the extent of disallowing the sum of Kshs.37,500 awarded to the respondent in respect of terminal benefits. To this extent only does the appeal succeed.

I confirm the judgment in favour of the respondent in the sum of Kshs.150,000/= together with costs in

the lower court and interest thereon, as well as costs of this appeal.

Those shall be the orders of this court.

**Dated and delivered this 20<sup>th</sup> day of May, 2008**

**H. M. OKWENGU**

**JUDGE**