



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

Civil Appeal 503 of 2002

KIRURUMWE FARMERS CO-OPERATIVE SOCIETY LIMITED.....APPELLANT

VERSUS..

JOSIAH NYAGA & 11 OTHERS.....RESPONDENTS

(Being an Appeal against the Judgment of the Co-operative Tribunal Case No. 1 of 2001 dated 14th August, 2002)

JUDGMENT

This is an Appeal from The decision of the Co-operative Tribunal (hereinafter “the Tribunal”). On 22nd September, 2000, the 12 Respondents (Claimants in the Tribunal case) filed a Statement of Claim seeking Judgment of KShs.478,645/71 against the Appellant Co-operative Society.

The Tribunal, comprising Mrs. Roseline Wendoh, Chairman, (as she then was) and Mr. C.G. Mbogo, Deputy Chairman, heard the testimonies of the Claimants (Respondent), and the five witnesses called on behalf of the Appellants, and concluded that the Respondents had established their respective claims (except the 10th Respondent, Acpon Njeru Njaga, who had proved a claim of Shs.10,652/13 as opposed to the sum of Shs.18,136/96 pleaded in the Statement of Claim), and accordingly entered Judgment for the Respondents.

Aggrieved by that Judgment the Appellant has preferred this Appeal based on the following 10 grounds of Appeal:

- 1. *The Tribunal erred in holding that the Respondents were entitled to a sum in the Judgment which was not pleaded and specifically proved.***
- 2. *The Tribunal erred in law and fact in not appreciating that the Respondent’s suit was bad in law and did not reveal any cause of action.***
- 3. *The Tribunal erred in law and in fact in not appreciating the evidence tendered before them by the Respondents was doctored, tailored and contradictory.***
- 4. *The Tribunal erred in law and in fact in not appreciating the evidence tendered on behalf of the Appellants.***
- 5. *The Tribunal erred in law and in fact in not holding that the Respondents had colluded amongst***

themselves.

6. The Tribunal erred in law and in fact in not appreciating that the 4th, 6th, 8th and 10th as employees of the Appellant colluded and falsified the Appellant's records in their own favour and that of the rest of the Respondents in collusion with the rest of the Respondents illegally.

7. The Judgment of the Tribunal has occasioned a failure of Justice and/or resulted in a gross miscarriage (sic) of justice as the compensation awarded is excessive and not supported by any documentary proof or record.

8. The Tribunal erred in law and fact as the Appellant had proved fraud, falsification of the Appellant's record by the Respondents.

9. The Judgment by the Tribunal is based on mistake and error on the part of the said Tribunal not understanding the law and facts.

10. The Tribunal erred in law and fact in awarding compensation for loss which was not pleaded and/or proved at the hearing.

At the hearing of this Appeal, Mr. Kahuthu, Counsel representing the Appellant, submitted that the Verifying Affidavit in support of the Statement of Claim having been sworn only by the First Respondent, the claims of the **other** Respondents were invalid and ought to be struck out; that the Court fees not having been paid in full at the time of the filing of the Claim, the Tribunal had no jurisdiction to entertain the Claim, which ought to have been struck out; that although the amounts claimed by the Respondents were pleaded, none of the claims were specifically proved; that the claims by the Respondents were fraudulent, and made in collusion with the Appellant's former employees; and finally that the Tribunal's Award having been signed only by one of the three members, was invalid.

Mr. Kinyanjui, Counsel for the Respondents, submitted that the issue of the validity of the Statement of Claim for failure to file additional Verifying Affidavits was not raised at the hearing before the Tribunal, and it was now too late to do so; that the filing fees were indeed paid in full following the under-assessment made by the Registrar initially; that the particulars of fraud relied upon by the Appellants were not pleaded in its defence in accordance with the requirements of O.6 R8 of the Civil Procedure Rules; that, in any event, no fraud or collusion was proved as against the Respondents; and that all the claims of the Respondents were specifically proved by production of receipts.

Having read submissions, and perused the rather voluminous record filed before this Court, I would uphold Mr. Kinyanjui's argument both on the issues of the Verifying Affidavits, and late payment of Court fees. First, with regard to the Verifying Affidavits, it is too late in the day to argue here on Appeal that the suit should be struck out for failure to swear an appropriate affidavit. That was a point reserved for the Tribunal to decide. It should have been raised there, not here. This is because the Tribunal, or the Court before whom the claim is made, has the discretion to either strike out the suit for failure to file the Verifying Affidavit or to order the filing of a correct Verifying Affidavit. That discretion belongs to the Lower Court, and that argument ought to have been raised before the Lower Court. Under O.7 R.3 the Court has the **discretion** to order the striking out of any plaint which is not accompanied by a verifying affidavit. That discretion clearly belongs to the Court before whom the plaint is filed, and ought to have been raised before **that** Court.

With regard to the payment of fees for the filing of the Statement of Claim, as Counsel for the Respondents has pointed out, there was initially an under assessment of fees payable. Eventually, the Respondents paid in full. That certainly is not a ground to strike out the Claim.

Now, with regard to the other grounds of Appeal, and the arguments preferred before this Court, I must note at the outset that the Appeal is based substantially on issues of "**facts**" and not law.

However, this being a first appeal, it is my duty to assess and re evaluate the evidence before the Lower

Court, bearing in mind that this Court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the Tribunal are based properly on the evidence before it and that it has not acted on wrong principles in reaching its conclusion. Now, having warned myself of that, let me examine the relevant evidence before the Tribunal.

In paragraph 3 of the Statement of Claim, the Respondents claimed that they were members of the Appellant Co-operative Society; that they delivered coffee to the Appellant at Embu on diverse dates in 1998 and 1999, and for which they were seeking payment. Now, in their evidence before the Tribunal, they produced their respective Pass Books bearing the Appellant's stamp and number to prove their membership. They then produced the receipts issued upon delivery of coffee to the Appellant. The Tribunal accepted, and found this evidence credible.

The Appellant called five witnesses in an attempt to persuade the Tribunal that the claims were invalid. However, the Tribunal found that

“none of the defence witnesses had adduced evidence as to how the 12 claimants obtained membership fraudulently.”

The Tribunal found that the membership was valid, and that the Appellant's own witness (DW2 Boniface Mbili) had actually visited the Respondents farms and confirmed that they indeed grew coffee for delivery to the Appellant. The Tribunal found no evidence of fraud on the part of the Respondents. This Court must note that it was the Tribunal (and not this Court) that had the benefit of observing the witnesses, their demeanour, and testing their credibility. Having reviewed, and re evaluated the record of evidence before the Tribunal, I am unable to fault its conclusion, which is based on a sound analyses of the evidence before it. The evidence given by the Respondents was credible for the Tribunal to find their respective claims proved.

Finally, the fact that the Tribunal's Award was signed by one member, instead of both, does not render the Award a nullity.

Accordingly, I am satisfied that there is no merit to this Appeal, and dismiss the same with costs to the Respondents.

Dated and delivered at Nairobi this 18th day of May, 2007.

ALNASHIR VISRAM

JUDGE