



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**CIVIL APPEAL155 OF2002**

**MARY WANJIRU MATHA.....APPELLANT**

*Versus*

**THE CHAIRLADY,**

**TREASURER KENERA WOMEN WATER PROJECT.....RESPONDENTS**

**(Being appeal from the judgment delivered on 3<sup>rd</sup> September, 2002 by the Senior Resident Magistrate in RMCC NO. 102 of 2001 at Embu)**

**JUDGMENT**

The Plaintiff/Respondent brought an action in the lower court in their capacity as Chairlady, Secretary and Treasurer of Kenera Water Project. The action was against the Respondent who up to December 2000 was the group's treasurer. The Plaintiff's claim in the lower court was for the recovery to Ksh.35,303/= which the Plaintiff claim that the Defendant had received as the treasurer within the period of July to October 2000. That claim in the lower court was defended. The learned magistrate by his judgment of 3<sup>rd</sup> Sept. 2002 awarded judgment as prayed to the Plaintiff.

The Appellant has filed this appeal. The Appellant by ground No. 1 states that there was no Plaintiff in the lower court. As can be seen from the title the Respondents are described by the office they hold. The Appellant argues that that was fatal to the action. The test is whether the Appellant knew or was aware of who was suing her. In the case of **J. B. KOHLI & OTHERS V Bachulal popatlal [1964] E.A. 219** the Court of Appeal held as follows:

*“In my view the question is not whom the plaintiff intended to sue but whether a reasonable man reading all the documents in the proceedings before the resident magistrate and having regard to all the circumstances would entertain no doubt that “Haji Essa Adma & Sons” were the defendants intended to be sued by the plaintiff. If he would have no doubt as to the person to be sued it would be a case of misnomer.”*

Clearly the defendant knew who the plaintiff was and to fail to insert the names of office holder was not fatal to the action.

In respect of ground 2 the Appellant argued that the case was brought against her to advance hostility against her. In re examining the evidence before the lower court I find that there was no evidence to show hostility to the Appellant. Indeed what was before court was hard evidence in the form of an audited report which was presented by the auditor who explained that the Plaintiff suffered a loss during the tenure of the Appellant. Evidence was also given by the accounts clerk who indicated the procedure followed when money was received and when expenditure was undertaken. It was the evidence of defence witness no. 2 which gave some intimation of hostility to the Appellant. It is however worthy to note that during cross- examination of the plaintiffs and its witnesses there was no suggestion of hostility. I find that this ground fails because there was no evidence of hostility.

On ground three the Appellant argued that the magistrate erred in law in not holding that the verifying

affidavit was faulty and ought to have rejected. I have examined that verifying affidavit the one attached to the Memorandum of Appeal is a copy. It is not clear whether some words were not photocopies in paragraph 2 of that affidavit. Looking at that paragraph it is however clear that the plaintiff was verifying the correctness of the plaint. I do therefore find that this ground also fails.

Ground 4 to ground 7 deal with the evidence before the lower court. I have had the opportunity to re-examine that evidence. P.W.1 was very clear in his evidence on how he carried out an audit report which revealed that an amount of Ksh.35,303/= was missing. P.W.2 and 3 gave evidence on procedures of the plaintiff in relations to receiving and spending of money. The Defendant on her part produced another audited report which she claimed was carried out by P.W.1. P.W.1 denied preparing that report. That being the case the learned magistrate was entitled to disregard that report. In addition the learned magistrate found that that audited report had certain pages missing. I agree with the finding of the learned magistrate that D.W. 2 was of no assistance to the appellant. This witness did not know procedures in relation to the usage of money or in relation of running of the plaintiff. In the end I find that the finding of the magistrate was supported by the evidence before him. The finding of this court is that this appeal fails and the same is dismissed with costs to the Respondent.

**MARY KASANGO**

JUDGE

*Dated and delivered at Nyeri this 7<sup>th</sup> day of November 2007.*

**By: M. S. A. MAKHANDIA**

JUDGE