

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Civil Appeal 65 of 2003

P.C.E.A. KIRICHU CHURCH.....APPELLANT

Versus

JOSEPH KIMUNYA MACHARIA (Suing on behalf.....RESPONDENT

Of KIM Electrical/Electronic Services)

RULING

The appeal in this matter had come for hearing before me on 18th May, 2005 when Mr. Karweru, Counsel for the Respondent raised a preliminary objection, having given notice to Mr. Muthoni, Counsel for the Appellant, on the grounds: ***“That the appeal, having been filed by a self-confessed non-legal entry is incompetent and should be dismissed forthwith.”***

If I understand the two counsel well, the Respondent sued the Appellant in the lower court – claiming general damages for breach of contract. The Appellant filed a defence saying that it was incapable of suing or being sued as described in the Plaintiff and that in the circumstances there was no proper defendant in the suit as the Appellant was a stranger.

The Appellant was subsequently overruled by the court on that issue both in a preliminary objection and in the judgment in the main suit. Having been aggrieved by the judgment in the suit as a whole, the Appellant filed this appeal.

But interestingly, to-day Mr. Karweru through his predecessor, who all along was saying the Appellant was the right defendant and as a result succeeded in persuading the learned trial magistrate to agree with him that the Appellant was the right Defendant, has made about turn and is to-day telling this Appellate Court that the Appellant is not the right Appellant and should not be allowed to appeal in this matter. In other words, Mr. Karweru is telling the court that the Appellant in this suit is not the Defendant Mr. Karweru’s predecessor persuaded the trial court to agree was the right Defendant in this suit. Mr. Karweru has failed, like his predecessor failed last time, to persuade M. Muthoni agree with him. Before the trial court Mr. Muthoni may have been wrong and therefore the trial magistrate did not agree with him. In this court, I am sure Mr. Muthoni is right in saying that the Defendant who was before the trial magistrate is to-day the Appellant before me and I agree with him. Having been aggrieved by the trial court’s judgment dated 26th May, 2003 that Defendant is entitled to be in this court as the Appellant in this appeal.

Accordingly Mr. Karweru’s preliminary objection is hereby dismissed with costs to the Appellant.

Parties will take another hearing date for the appeal at the Registry.

Dated this 10th day of June, 2005.

J. M. KHAMONI

JUDGE

Present:

Mr. Karweru for the Respondent

Appellant's Mr. Ephantus Karoki – In Person