



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO 14 OF 2017

AMOS NKAATE TANYAENG.....APPELLANT

VERSUS

MANN WHEAT FARM LTD.....RESPONDENT

(Being an appeal from the judgement and decree on Hon.W. Juma, CM, delivered on 13th 4.2016. in the Chief Magistrate's Court at Narok in Civil Case No. 170 of 2014, Mann Wheat Farm Limited v Amos Nkaate Tanyaeng)

JUDGEMENT.

1. The appellant has appealed against a summary judgement and decree in which he was liable to pay the respondent a sum of shs. 1,375,000/= together with costs.
2. In this court the appellant has raised eleven (11) grounds of appeal in his memorandum of appeal.
3. In ground 1 the appellant has faulted the court both in law and fact in refusing to set aside the summary judgement without taking into account that the lease agreement dated 3rd October 2012 was between the appellant and Mr. Maggar Singh Mallasingh and not Mann Wheat Farm Ltd, the respondent herein. In this regard, Mr. Kamwaro, counsel for the appellant submitted that the appellant was not indebted to the respondent. Furthermore, the appellant submitted that the respondent was not authorized by the board of directors or by the resolution of the company to sue the appellant, since the respondent is a body corporate with a legal personality. In support of his submissions counsel cited ***Kariuki Njoroge & Others v Stephen Mugo Muthori & Others [2004] ECLR***, in which it was held that the issue of authority and capacity to sue goes jurisdiction and that a company can only sue in its name with the sanction of its board of directors or under a resolution in general or special meeting. Counsel also cited ***Affordable Homes Africa Ltd v Ian Henderson & 2 Others [2004] ECLR***, in which the court struck out a suit which had been commenced without a board resolution sanctioning the commencement of the action in court.
4. Mr. Olewe, counsel for the respondent submitted that the issue of corporate entity ought to have been raised in the lower court.
5. I find that the issue of corporate entity which requires corporate persons to sue and be issued in its name is a matter of law and was therefore properly raised in this appeal. I therefore find merit in ground 1 which I hereby uphold.
6. In ground 2 the appellant has faulted the trial court for refusing to set aside the summary judgement since, the appellant was not indebted to Mann Wheat Farm Limited. Counsel for the appellant submitted that his client entered into an agreement with Maggar Singh Mallasingh and not with the respondent. The respondent's counsel has submitted that this issue was not raised at trial. I find as a fact that the appellant did not enter into an agreement with the respondent. I therefore find merit in this ground of appeal and I hereby uphold it.
7. In ground 3 the appellant has faulted the trial court for ignoring the fact that the appellant was not served in person and that the then advocate on record acted without instructions. Counsel for the respondent has posed the question: *"How did the said firm of Advocates know that there was a suit pending, unless instructed by the Appellant."* The firm of advocates referred to is M/S Onduso & Co Advocates. I find that the said firm of advocates were instructed by the appellant and were properly served as counsel on record. I therefore find that service upon M/s Onduso & Co Advocates was proper. In law, it was not necessary to serve the appellant in person, since service upon his advocates on record was sufficient service. I find no merit in this ground and I hereby dismiss it.
8. In a coalesced form, in grounds 6, 8 and 9 the appellant has faulted the trial court for granting an order of summary judgement, since the defence raised trial issues. Counsel for the appellant has submitted that the defence raised trial issues that warranted an inter parties hearing. He submitted that his client entered into an agreement with Maggar Singh Mallasingh and not the respondent, which in law is a separate legal person. In support of his submissions, counsel has cited the case of ***Kenya Trade Combine Ltd v. Shah, Civil Appeal No. 193 of 1999***, which is cited in ***African Merchant Assurance Co. Ltd v John Muriithi Kimanathi [2015] ECLR***, in which the court pronounced itself as follows:

"In a matter of this nature, all the defendant is supposed to show is that a defence on record raises trial issues which ought to go for

trial. We should hasten to add that in this respect a defence which raises trial issues does not mean a defence that must succeed. The defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavit or otherwise, that his defence raises bona fide trial issues. Where bona fide trial issues have been disclosed, the court has no discretion to exercise in regard to the Defendant's right to defend the suit. That is precisely the reason why the Defendant is entitled to unconditional leave to defend."

9. The submission of the appellant is that the defence raises trial issues and therefore he should be allowed to defend the suit. He submitted that the appellant does not owe the respondent any money. Mr. Olewe, on the other hand, submits that the draft defence should not be considered by this court, since it has not been admitted into hearing. I find that the appellant's agreement was with Maggar Singh Mallsingh and not with the respondent. In the circumstances, I find that the appellant's defence raises triable issues. I therefore uphold this ground of appeal.

10. The respondent has submitted that the record of appeal does not have the following documents. A memorandum of appearance dated 29th September 2014, the proceedings of 16th July 2015, which would have showed that the summary judgement was entered in favour of the respondent by consent. As a first appeal court I am required to re-assess the entire evidence, which I cannot do since part of the record of the trial court is missing. This in itself renders the appeal defective.

11. Mr. Kamwaro cited the case of *Patel v E A Cargo [1974] EA 75* in which the court stated that it should be remembered that to deny a litigant a hearing should be a matter of the last resort.

12. I find as persuasive the foregoing authorities cited by the appellant.

13. In the premises, I find that the appeal succeeds with the result that I hereby allow it.

14. As regards costs, I find that the appellant has succeeded in some grounds and has failed in others. In the circumstances, each party has to bear for its own costs.

Judgement signed, dated and delivered in open court at Narok this 6th day of February, 2020 in the presence of Mr. Kilele holding brief for Mr. Kamwaro for the appellant and Mr. Okinyi holding brief for Mr. Olewe for the respondent.

J. M. Bwonwong'a

Judge

6/2/2020