



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.4 OF 2015**

*(Appeal from the judgment and decree of Hon. J. M. Njoroge (CM) dated and delivered on 16<sup>th</sup> January 2015, in the original Kisii CMCC No.471 of 2013)*

**MADHU MOHAN t/a GUSII HIGHLIGHTS HIGH SCHOOL..... APPELLANT**

**VERSUS**

**ELIZA KWAMBOKA NYAMACHE..... RESPONDENT**

**JUDGMENT**

1. On 17<sup>th</sup> December, 2013 the Respondent herein filed a suit in the lower court against the Appellant seeking the payment of Ksh.119,400/= together with interest and costs of the case. She claimed that on 5<sup>th</sup> of January, 2008 she supplied the Appellant with 83 bags of maize valued at Ksh.149,400/= out of which the Appellant paid to her Ksh.30,000/= thereby leaving an outstanding balance of Ksh.119,400/= which the Appellant had failed/refused to pay her thus necessitating the filing of the suit.
2. In his defence, filed on 24<sup>th</sup> January 2014, the Defendant denied trading as Gusii Highlights High School (hereinafter in the judgment, referred to as the institution) and averred that he was an employee of the said institution but had ceased to be an employee thereat and hence no suit could lie against him.
3. The Appellant however, went further to admit that the institution was indeed supplied with 83 bags of maize by the Respondent out of which it had paid Ksh.30,000/=, but could not pay for 68 bags of maize as the same were found to have been contaminated and were eventually destroyed by Public Health Officers.
4. The lower court, upon hearing the evidence of both parties, on 16<sup>th</sup> January, 2015 made a finding in favour of the Respondent for the payment of the amount of Ksh.119,400/= that she had claimed together with costs and interests. It is this finding by the lower court that has precipitated this instant appeal.
5. The Appellant in his Memorandum of Appeal has set out the following grounds of appeal:
  1. The Learned Trial Magistrate erred in law and in fact in finding and holding that the Respondent herein had proved her case and/or claim against the Appellant on a balance of Probabilities, notwithstanding the apparent and uncontradicted evidence that the Appellant herein was neither the owner nor the Proprietor of **Gusii Highlights High School**, to whom the subject maize were (sic)

delivered to.

2. In finding and entering Judgment against the Appellant herein, the Learned Trial Magistrate misconceived and/or Misapprehended and thereby misapplied the Doctrine of Law that where the Principal is Disclosed, no suit can be originated and/or maintained against an Agent, whatsoever and/or howsoever.
  3. The Learned Trial Magistrate erred in law in entering Judgment in favour of the Respondent even though the maize, the subject of the Proceedings before the subordinate Court, were found to have been contaminated and therefore incapable of Human consumption. Consequently, the Judgment and/or Decision of the Learned Trial Magistrate is contrary to Public Policy and/or Interests.
  4. In finding and/or arriving at a Decision to grant judgment in favour of the Respondent, the Learned Trial Magistrate ignored, disregarded and/or otherwise failed to take into account the uncontroverted evidence of DW2, the Public Health Officer, who confirmed the contamination and resultant Destruction of the maize the subject of the suit proceedings.
  5. In awarding judgment in favour of the Respondent on account of contaminated maize, the Learned Trial Magistrate appears to have rewarded and/or endorsed an illegality. Consequently, the Judgment of the Trial Magistrate is Null & Void.
  6. In any event, the Learned Trial Magistrate erred in law in entering Judgment for and/or in favour of the Respondent in the sum of Kshs.119,400/= only, notwithstanding the fact that the amount claimed had not been proved and/or ascertained, on a Balance of Probabilities. Consequently, the Learned Trial Magistrate misconceived and/or misapprehended the purport and Tenor of the provisions of **Sections 107 & 108 of the Law of Evidence Act, Chapter 80 Laws of Kenya.**
  7. The Learned Trial Magistrate failed to cumulatively and/or exhaustively evaluate the entire Evidence on record and in particular the evidence by the Appellant and thereby the Learned Trial Magistrate reached and/or arrived at an Erroneous conclusion, contrary to the weight of evidence on record.
  8. The Learned Trial Magistrate erred in law in ignoring, disregarding and/or failing to consider the Appellant's Submissions on record. Consequently, the judgment by Learned Trial Magistrate has occasioned a miscarriage of justice.
  9. The judgment of the Learned Trial Magistrate is contrary to the provisions of **Order 21 Rule 4 of the Civil Procedure Rules, 2010.**
6. When the appeal came up for hearing on 12<sup>th</sup> October, 2015 the Appellant was represented by Mr. Oguttu Advocate while the Respondent acted in person. Each party gave their oral submission for and against the appeal respectively.

#### **Appellant's Submissions:**

7. Mr. Oguttu advocate for the Appellant submitted that even though the appellant concedes having received maize supply from the respondent, the appellant had not been properly in-pleaded in the suit since Gusii Highlights School was not a body corporate but a trade name and as such it was the proprietor who ought to have been sued and not the appellant who claimed that he was merely an employee of the institution. Mr. Oguttu argued that even though the issue of the status of the appellant, as an employee and not the proprietor of the institution was brought to the attention of the court, both in the appellant's pleadings and in evidence, the court did not make a determination over it thereby holding the appellant liable for an institution that did not belong to him.
8. **Secondly**, Mr. Oguttu submitted that 68 bags out of the maize that was delivered by the Respondent to the appellant were subsequently found to be contaminated and therefore unfit for human consumption. The said maize was, according to the appellant, destroyed by public health officials and as such, the respondent could not be seen to ask for payments for the same.
9. **Thirdly**, Mr. Oguttu contended that the respondent's claim for special damages was neither pleaded nor specifically proved as is required by the law. In this regard the appellant's counsel stated that respondent's claim for the sum of Ksh.119,400/= in respect for 68 bags of maize did not specify or particularize the cost of a bag of maize and therefore the magistrate disregarded the provisions of **Section 107 and 108 of the Evidence Act** in proceeding to render judgment without

due regard to the law obtaining to special damages.

10. **Lastly**, Mr. Ogutu submitted that the learned magistrate contravened the provisions of **Order 21 Rule 4 of the Civil Procedure** Rules by failing to consider the pleadings and the evidence tendered on behalf of the appellant. Mr. Ogutu argued that the judgment and decree of the lower court was replete with faults and errors that ought to be vitiated by allowing the appeal with costs to the appellant.

**Respondent's Submissions:**

11. The Respondent submitted that this was an old case dating back to the year 2008 when she was charged with a related criminal case. She narrated the circumstances under which she supplied the maize to the appellant whom she knew as the owner of the institution (school) and who even made part payment of the amount due to her. The respondent stated that she had been granted judgment by the lower court and she was thus entitled to receive the fruits of her judgment.
12. As an Appellate Court of first instance, I am under an obligation to re-evaluate the entire evidence tendered before the lower court with a view to arriving at my own independent assessment and conclusion on the same while keeping in mind that I had neither seen nor heard the witnesses – see **Selle & Aoter vs Associated Motor Boat Co. Ltd & others [1968] EA 123.**

**Respondent's Evidence (before the Lower Court)**

13. The Respondent testified before the lower court and did not call any witness to support her case. She also produced documentary evidence, as follows;

1. **Delivery note dated 5<sup>th</sup> January 2008**
2. **Proceedings and Judgment of Criminal Case No.895 of 2008**
3. **Demand Notice dated 11<sup>th</sup> December 2012 from Bosire Gichana & Co. Advocates.**
4. **Reply Letter dated 18<sup>th</sup> December 2012 from Oguttu Mboya & Co. Advocates**
5. **Letter from the office of the District Commissioner, Central Kisii to the Principal, Riondong'a Secondary School.**

14. The Respondent's testimony was that on 5<sup>th</sup> January 2008, she supplied the Appellant with 83 bags of maize valued at Ksh.149,400/= out of which the appellant paid her Ksh.30,000/= thereby leaving a balance of Ksh.119,400/= which she now claimed by filing the suit. The respondent produced the delivery note in support of her case. She added that when she later on went to collect her dues, the appellant refused to pay her and instead caused her arrest by the police after which criminal charges for creating a disturbance were preferred against her in Kisii CMCR Case No.395 of 2003 the proceedings of which were also tendered as exhibits before the court.

**Appellant's Evidence (before the Lower Court)**

15. The Respondent's testimony was that he was an employee of the institution from 1990 to the end of 2012 as the principal and that while he was in the employment, the respondent had supplied the institution with maize out of which she had been paid Ksh.30,000/= but that the 2<sup>nd</sup> batch of maize which was 68 bags was contaminated and therefore, the institution declined to pay for it. He stated that the contaminated maize was confiscated and destroyed by the public health officers after the plaintiff declined to take them back.
16. The appellants' sole witness, Kenneth Orenge Basweti, was the public health officer who stated that on 6<sup>th</sup> February 2008 he received complainants from the defendant regarding suspected contaminated maize meals which contamination he confirmed after inspecting the food stuffs. He seized the contaminated maize and destroyed it. He produced a report to that effect as Exhibit D3.

### **Analysis:**

17. I have carefully perused the evidence tendered before the lower with great attention. I have considered it fully with a view to re-evaluating it afresh side by side with the grounds of appeal and submissions made by the parties.
18. From the analysis of the said grounds of appeal and the submissions made before this court, I note that the following pertinent issues arise and require this court's determination:
1. Whether the appellant was properly sued by the respondent in this case,
  2. Whether the respondent's claim for special damages was proved to the required standards,
  3. Whether the maize that had been supplied to the appellant was contaminated and by extension, whether the respondent was entitled to be paid for the supplied maize,
  4. Whether the trial court contravened the provisions of **Order 21 Rule 4 of the Civil procedure Rules.**

### **Special damages:**

19. On the aspect of whether or not the respondent specifically proved her claim for the sum of Ksh.119,400/=, I find that it was not disputed that the respondent supplied 83 bags of maize valued at Ksh.149,400/= to the appellant out of which the appellant paid her Ksh.30,000/= thereby leaving a balance of Ksh.119,400/=. The respondent furnished the court with a delivery note as an exhibit in court which gave the specific details of the supply. In any event, the appellant conceded that the 83 bags of Maize was indeed supplied to him by the respondent the only dispute or point of departure being that 68 bags out of the 83 bags of maize were contaminated and thus unsuitable for human consumption. I find and hold that the delivery note, coupled with the appellant's own admission of having received the maize supplied, was sufficient specific proof of the respondent's case.

### **Maize contamination:**

20. From the evidence on the record of the lower court the 83 bags of maize were supplied to the appellant in January 2008. The appellant claimed that sometime in February 2008, the students of his institution complained of stomach upset after consuming food made from the said maize which led the appellant to engage the services of the Public Health Officers who declared the maize unfit for human consumption, seized the maize and later destroyed it.
21. The appellant claimed that he notified the respondent who acknowledged the contamination and asked her to take back the contaminated bags of maize to no avail.
22. The appellant did not however show any document of proof of the student's health problems after consuming the maize or any notice or letter he sent to the respondent informing her of the issue of the contaminated maize or her alleged acknowledgement of the contamination.
23. It was not clear what transpired between the appellant and the respondent from the time the maize was delivered in January up to May 2008 when the respondent went to the appellant's institution to claim the balance of the payment's due to her.
24. I find that the letter by the Public Health Officer materially contradicts the testimony of another health officer who testified in the related criminal case that only 20 bags of maize were contaminated while the letter states that 68 bags were contaminated. Moreover the maize was allegedly inspected in the respondent's absence long after the supply was done in January 2008 and it was thus first of all not established that it was the same maize that the respondent supplied that was contaminated or if the respondent was the only sole supplier of maize to the appellant's institution.

25. I find that the allegation, by the appellant that the maize supplied by the respondent was contaminated was not proved, was a red herring and was an afterthought created to avoid paying the respondent when she turned up at the school 5 months later to claim her dues. Besides, it was not proved whether the maize was contaminated as at the time it was supplied to the school or if it got contaminated while at the school.

**Order 21 Rule 4 of the Civil Procedure Rules:**

26. states as follows:

***“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”***

I find that magistrate duly complied with the said provisions by considering and analyzing the evidence presented before him.

**Non Suited**

27. From the very outset in his defence filed before the lower court on 24<sup>th</sup> January 2014 the Appellant (*then the Defendant*) stated as follows:

“2. The Defendant admits the contents of paragraphs 1 and 2 of the Plaintiff, in so far as same are merely descriptive of the Parties. However, the Defendant denies the fact that he trades as Gusii Highlights High School and shall aver that same was an employee at the said Institution by virtue of being the principal thereon. Nevertheless, the Defendant’s address of service for purposes of this suit only shall be care of M/S Oguttu-Mboya & Company Advocates, Magsons Plaza, 1<sup>st</sup> Floor, Hospital Road, Opposite Kenya Commercial Bank Ltd, Post Office Box Number 330 KISII.

3. **IN FURTHER ANSWER** to the contents of paragraph 2 of the Plaintiff, the Defendant avers that same has since ceased to be an employee of the Institution and hence no suit can lie and/or be laid against the Defendant herein, (sic) on account of goods allegedly supplied to the Institution, whatsoever and/or howsoever. In the premises, the instant suit is misconceived.

28. During his testimony before the court, the Defendant categorically denied being the proprietor of the institution in question which he confirmed belonged to one **Ramesh Dingra**. The Appellant stated that he was an employee of the institution as a principal from 1990 to 2012 when he left employment and as such, he was not properly sued in the case.

29. In light of the Appellant’s revelations, pleadings and testimony, the Respondent was under a duty to rebut the Appellant’s contention that he was not properly sued by availing to court the requisite documents of proof of ownership of the institution or any other evidence of registration to controvert the defence’s allegation.

30. I concur with the submissions of Mr. Oguttu that the ownership of the institution was the fulcrum or the foundation of the case before the lower court. The Respondent did not rebut the defence’s claim and instead, chose to continue with the case to its logical conclusion as if she had sued the right party. The Respondent was under those circumstances under an obligation to demonstrate to the court first and foremost, that the institution was registered as a business name and secondly, that the Appellant was the proprietor of the said business.

31. **Section 2(1) of the Business Names Act Cap.499** provides as follows:

***“Business name means the name and style under which any business is carried on whether in partnership or otherwise.”***

32. **Order 30 Rule 9** of the **Civil Procedure Rules** states:

***“9. Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.”***

33. The Respondent did not do her proper homework and establish the real proprietor of the school even though at the time the defence was filed she was represented by an advocate who ought to have given her the requisite advice and guidance.

34. In the premises, I think that the trial court misdirected itself in failing to consider this critical aspect of the case. As much as this position may look unfair at this point in the appeal when the Respondent already has a decree/judgment in her favour, the law is clear on who can and cannot be sued and the Respondent ought to have discharged her duty under an adversarial system where the winner takes it all and he who alleges must prove.

35. Faced with a similar situation as in this instant appeal, Ochieng J, in the case of **Francis Njakwe Githiari & Another –vs- Hon. Daniel Toroitich Arap Moi t/a Moi Educational Centre** stated as follows:

***“...the court recognizes that the Plaintiffs will be obliged to satisfy the trial court not only that a school could be registered as a business, but that Hon. Daniel T. Arap Moi did register the Moi Educational Centre as such. At the moment in the face of the certificate of registration for Moi Educational Centre, it appears that Mr. Moi has been sued in the wrong capacity.”***

36. In the same vein, I find that the Appellant herein was not proved to have been the proprietor of the institution and consequently was not properly sued. On this ground alone, the entire appeal succeeds despite the fact that the other remaining grounds of appeal were not proved as shown herein above.

37. In the end, I allow the Appellant’s appeal herein and set aside the lower court’s judgment dated 16<sup>th</sup> January 2015.

38. Taking into account the circumstances of this case and the contractual relationship that existed between the Appellant and the Respondent, lack of proof of ownership of the institution notwithstanding, I order that each party shall bear his/her own costs of the appeal and the lower court case.

39. It is so ordered.

**Dated, signed and delivered in open court this 11<sup>th</sup> day of November, 2015**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

M/S Nyambati for M/S Oguttu for the Appellant

Respondent: In person

Mr. ogega: court clerk