



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 259 OF 2009

EDESA L. MUNIALO.....APPELLANT

VERSUS

THE BOARD OF MANAGEMENT,

KENYA AGRICULTURAL RESEARCH INSTITUTE.....RESPONDENT

(Being an appeal from the judgment and decree of the Honourable Mr. M.K. Kiema, Resident Magistrate, delivered on 17th June, 2008 in Civil Suit No. 5503 at the Chief Magistrates' Court, Milimani Commercial Court, Nairobi)

JUDGMENT

1. This is an appeal arising from a suit which was filed in the chief magistrate's court at Nairobi by the appellant. He had sued the respondent seeking a refund of KShs. 60,000/- being an overcharge for rent together with costs and interest thereon.

Brief facts are that the appellant was an employee of Kenya Agricultural Research Institute ("KARI"). Sometime in the year 2001, KARI's centre Director informed all KARI staff that KARI's Board of Management ("the board") resolved to start charging rent for all staff houses.

2. An assessment was done by the Ministry of Roads and Public Works and the value of category 'F' houses was found to be KShs.2000/=. The appellant was an occupant of the said category of houses. Subsequent to the assessment, deductions of KShs. 2000/= from every staff who occupied category 'F' houses was effected.

The appellant's claim is that an excess of KShs. 1500/- was deducted from him monthly until the time he retired from employment. That the total of the deductions to the time of retirement was KShs. 60,000/-. His complaints towards the over deduction was in vain. He in the lower court suit claimed from the respondent the said amount together with costs of the suit and interests thereon.

3. The respondent filed a defence but brought no evidence in court. In its statement of defence, the respondent denied being privy to the tenancy or employment agreement with the appellant. It essentially maintained that it had been wrongly sued for the reason that KARI is a separate entity distinct from its board of management.

4. The trial magistrate dismissed the appellant's case on the basis of that misdescription.

5. Being aggrieved by that judgment, the appellant has lodged this appeal raising the following grounds:

- i. **The learned magistrate erred in law in dismissing the suit for want of proper description of the defendant notwithstanding that no prejudice or injustice was occasioned by misdescription of the defendant.**
- ii. **The learned magistrate erred in law and in fact in failing to appreciate that Kenya Agricultural Research Institute was in truth and substance the defendant in the proceedings in respect of whose unlawful actions the plaintiff had instituted the suit in the subordinate court.**
- iii. **The learned magistrate erred in failing to have regard and give effect to the provisions of section 15 and 16 of the Science and Technology Act relating to the functions of the board of management on behalf of the defendant.**
- iv. **The learned magistrate erred in law in failing to determine the dispute before him on substantial justice without undue regard to technicalities.**

6. Learned Counsels appearing recorded a consent order to have the appeal disposed of by written submissions. It is the Appellant's submission that the respondent in an organ of KARI which undertakes the functions spelt out in **section 16 of the Science and Technology Act, Cap 250 Laws of Kenya (Repealed)** ("the Act"). It is further submitted that suing the respondent and not KARI was a bona fide and excusable mistake on the part of the appellant who was unrepresented at the time. The appellant argued that the misdescription occasions no prejudice since the respondent is an organ of KARI.

The appellant's major outcry is that the trial court dismissed the suit on a technicality even after acknowledging that the appellant's case was clear and undisputed. It was submitted that substantive justice should not be defeated on the basis of technicalities.

The appellant relied on the cases of **Trust Bank Ltd v. Amalo Company Limited Civil Appeal No. 215 of 2000, Esmail v. Kenya Duty Free Complex [1992] LLL 5574 (HCK)** and **Bhuda Builders and Erectors v. Ima Agencies Ltd [2014] eKLR**. The authorities by the appellant resonate the principles which guide courts in administration of substantive justice. That disputes should be heard on merit and that much attention should not be given to technicalities in this particular case, misdescription.

7. The Respondent on the other hand maintained that the board and KARI are separate legal entities. It was argued that the appellant ought to have applied to join the proper party at the point where the respondent denied being the appellant's employer. The respondent relied on the cases of **Mohamed Adan Molly v. Linksoft (K) Ltd & Another (2013) e KLR** and **Joseph Maina Kiragu v. Maina Mutungi (2009) e KLR** to support its line of argument.

8. I have carefully considered and evaluated the evidence which was adduced before the trial magistrate. I have also considered the grounds raised in the memorandum of appeal and the submissions made by the parties. It is not disputed that the appellant's monies were deducted in excess by KARI.

The issue left for to this court for determination is whether or not the trial court rightly disregarded substantive justice in favour of a technicality.

KARI's organisational structure is such that KARI operates under the Board of Management. **Section 13** of the Act however states in mandatory terms that KARI shall be a body corporate that shall have power to sue and be sued. The board cannot therefore be sued in place of KARI for being an organ of KARI.

9. The appellant admits that KARI was the proper and real defendant in the suit but has justified that suing the respondent was a bona fide and excusable mistake on the part of the appellant who was unrepresented at the filing and prosecution of the case. I have taken the liberty to peruse the trial court's proceedings. In deed the appellant was unrepresented and may not have had the knowledge of court procedures such as amendment of pleadings.

10. The trial court in its judgment acknowledged that the appellant's case was clear and undisputed but

went ahead to dismiss it on the basis of a technicality which could have been cured by an amendment. In my view and with all respect, the trial court should have assessed the merit of the case vis á vis the technicality and with a view to conscientiously determine the best course, employed the provisions of **order 1 rule 9 and 10 of the Civil Procedure Rules, Cap 21 Laws of Kenya**. The aforesaid order gives court the discretion to assess the circumstances of the case and where satisfied, maintain a suit in cases of misjoinder or non-joinder of parties.

11. Rules of procedure are handmaids of justice and should basically facilitate rather than defeat justice. It is also a well-established principle that the object of courts is to decide the rights of parties and not to punish them for mistakes they made in the conduct of their cases. Courts exist for purposes of deciding matters in controversy and not to discipline. More so in instances where the error or mistake was not intended to overreach.

12. Article 159(2) (d) of the Constitution of Kenya which imposes on the courts an obligation to refrain from being bogged down by technicalities at the expense of substantive justice synchronises this principle.

This principle was also asserted in the case of **Rawal v. Mombasa Hardware (1968) E.A. 392**. In view of the foregoing, I am satisfied that misdescription does not go to the root of the cause.

13. In the end, the appeal is allowed with costs. Consequently, the order dismissing the suit which was issued on 17.6.2008 is set aside. The case is restored and is directed to be heard de novo before another magistrate of competent jurisdiction other than Hon. M.K. Kiema.

Dated, Signed and delivered in open court this 10th day of October 2014.

J.K.SERGON

JUDGE

In the presence of:

Miss Karani for the Appellant

Mrs. Njuguna h/b Litunya for the Respondent