



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: OUKO (P), MUSINGA & J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO. 120 OF 2017**

**BETWEEN**

**FINMAX COMMUNITY BASED GROUP.....1<sup>ST</sup> APPELLANT**

**CHAIRMAN.....2<sup>ND</sup> APPELLANT**

**TREASURER.....3<sup>RD</sup> APPELLANT**

**SECRETARY.....4<sup>TH</sup> APPELLANT**

**AND**

**KERICHO TECHNICAL INSTITUTE.....RESPONDENT**

***(Being an appeal against the entire Judgment of the High Court of Kenya at Kericho (J.K. Sergon, J.) delivered on 24<sup>th</sup> March, 2015 and Amended on 22<sup>nd</sup> April, 2015***

***in***

***H.C.C.C. No. 20 of 2013)***

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**JUDGMENT OF THE COURT**

The High Court (Sergon, J.) awarded to the respondent Kshs. 11,261,901.28 being payment of the outstanding tuition fees due to the respondent from the appellants for educational services rendered to the former’s sponsored students, compounded interest at 12% from the date of filing the plaint and the costs of the suit. The appellants’ counterclaim was dismissed for lack of proof.

This was the effect of the judgment of 24<sup>th</sup> March, 2015, which was later amended on 22<sup>nd</sup> of April, 2015. In reaching this decision, the Court was satisfied that there was an initial gentleman’s agreement between the respondent and the 1<sup>st</sup> appellant which was subsequently reduced into writing by an agreement dated 3<sup>rd</sup> January, 2012 and by which the 1<sup>st</sup> appellant agreed to pay 90% of the fees for some students undertaking various courses and training in the respondent’s institution. The difference of 10% was to be paid by the students themselves.

According to the respondent, they enrolled and trained the students in accordance with the agreement; and that the 1<sup>st</sup> appellant paid some money amounting to Kshs. 650,000 towards their fees but, without any justification, stopped. The respondent alleged that at the time the payment was stopped, it was owed Kshs. 11,261,901.28 by the appellants for which it brought a suit to recover.

The 1<sup>st</sup> appellant denied owing the respondent any money in fees or at all and insisted that it was the respondent that was in breach of the agreement for which it ought to refund the monies already paid to it; that the respondent either failed totally to offer the courses it had promised, or they were substandard.

Parties presented evidence before the learned Judge, which on consideration he found to raise only three questions for his determination.

On the first question, he found that there was a valid and enforceable contract between the parties.

Secondly, that the contract was breached by the appellants when they failed to settle the tuition fees for the students they had sponsored; that there was no proof that the training was non-existent or below standard; and that the appellants did not present any proof by way of letters that they complained to the respondent about the quality of the training. As a result, the Judge found no foundation for the appellants' demand for the refund of money paid to the respondent.

On the question whether the 1<sup>st</sup> appellant could be sued in its name, being a community based organization, an unincorporated body, the Judge looked at the conduct of the parties and came to the conclusion that the respondent dealt with the officials of the 1<sup>st</sup> appellant, the Chairman, Treasurer and Secretary, who were parties to the suit; and that because officials of such organizations keep changing, there was no harm using the offices rather than the actual names of the office bearers at the time the action was instituted.

With that, the Judge gave judgment for the respondent and ordered, as we have pointed out, that the appellants pay Kshs. 11,261,901.28 to the respondent, among other reliefs.

The appellants now brings this appeal contending that the Judge erred in awarding Kshs. 11,261,901.28, in special damages without proof; that the Judge erred in determining that there was a binding agreement between the parties without any evidence to support the conclusion; that in finding that there was a breach of contract by the appellants, the learned Judge erred as he did not identify the nature of the breach; and that it was incorrect to state, as the Judge did, that the appellants had failed to prove the counterclaim even though they had presented sufficient evidence to show that the respondent had failed to provide quality training for the appellants' sponsored students.

Arguing the first ground before us, the appellant stated that it is trite that special damages must, not only be specifically pleaded, but they must also be strictly proved to the required standard.

According to the appellant, there was no basis for the award of Kshs. 11,261,901.28 because there were no reports presented by those who made them to authenticate the figures relied on.

On the contract, the appellants submitted that the allegation that the parties initially entered into an oral contract, which was later reduced into writing was not factually correct as there was no evidence to support it. There was, for instance, no details of the number of students to be trained, fees or the period of their study.

Regarding the finding of breach, it was submitted that, though the Judge found breach by the appellants, he did not identify the nature of the breach as indeed, the respondent itself failed to outline any particulars of breach in the plaint; that on the other hand, the appellants presented proof that there was breach by the respondent, for which the former was entitled to a refund of Kshs. 650,000 in fees paid as prayed in the counterclaim.

Finally, the learned Judge is said to have erred in holding that it was regular for the respondent to institute a suit against and in the name of an unregistered society, the 1<sup>st</sup> appellant.

For their part, the respondent submitted that the claim for special damages in the sum of Kshs. 11,261,901.28 was proved by evidence to the standard required in law; that the respondent also demonstrated the existence of an agreement between the two sides of the bargain; that there was proof too of breach of contract by the appellants; that the counterclaim was properly rejected for want of proof; and that the appellants were properly sued, first as an institution and in addition, its officials, the chairman, treasurer and secretary.

We start by outlining our jurisdiction in a first appeal. That jurisdiction is to re-evaluate the evidence so as to arrive at our own independent conclusion, but having regard to the fact that we did not see or hear the witnesses, as did the trial court. This was confirmed in the case of **Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited** [2016] eKLR and the oft-cited **Selle & Another vs. Associated Motor Boat Company Ltd & Others** (1968) EA 123.

The next equally important principle is that the respondent, having sued the appellants for breach of contract, the burden of proving the existence and breach of the contract was upon it, which would be discharged upon presentation of evidence to prove its claim on a balance of probabilities.

In respect of the burden of proof, **sections 107,108 and 109** of the Evidence Act provide that;

**“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.**

**(2) .....**

**108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**109. The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person”.**

Did the respondent discharge the burden of proving its claim to the standard expected?

We have seen on record a Memorandum of Understanding (MoU) whose terms constituted the contract binding the parties. The terms included sponsorship by the appellants of 33 employees of Finlays Flowers for training in various courses at the respondent's institution.

It undertook to pay 90% of the fees while the sponsored students would pay 10%. The appellants did not categorically deny the existence of the agreement in its defence and counterclaim.

Similarly, some of the appellants' witnesses too confirmed that their training was pursuant to this agreement. For these reasons, there is therefore no merit in the appellants' denial of the existence of an agreement between them and the respondent.

The question that must, of necessity follow, is whether the appellants breached the agreement. The main complaint was that, although the respondent had performed its part of the bargain by providing training to students sponsored by the appellants, the latter had failed to pay their fees as agreed. It was contended that at the time the action was instituted the appellants owed to the respondent Kshs. 11,261,901.28 in unpaid fees.

In paragraph 7 of the plaint the respondent pleaded Kshs. 7,106,520 as the amount owing from the appellants plus interest in the sum of Kshs. 5,516,033, less Kshs. 450,000 that the appellants had allegedly paid. The respondent quantified its loss as Kshs. 11,261,901.28. That loss amounted to a claim in special damages.

It is now firmly established that special damages must both be pleaded and proved, before they can be awarded by the court. In **Hahn vs. Singh**, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 the Court (Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – as he then was, emphasised that:

**“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves”.**

The rationale for requiring a party to plead and prove special damages was given by the Court in **Jackson Mwabili vs. Peterson Mateli** [2020] eKLR, as follows;

**“...the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing.”** (Emphasis supplied)

No doubt, as we have shown the respondent specifically pleaded that it was owed Kshs. 11,261,901.28.

Unfortunately, apart from that statement in the plaint and in the demand letter, the respondent did not call evidence to buttress the claim. The closest the respondent came to proving the claim was a recorded and oral statement by the respondent's Managing Director, Samwel Kiprono Sang, that the amount claimed was outstanding payment.

Then followed a consent by the parties in which they agreed and the court adopted, that documentary evidence contained in the respondent's Exhibits 1 to 11 be produced without their proof.

As part of that consent the parties were also emphatic that the accounts report would not be produced alongside the other documents but, instead they were to be “Marked for Identification” (MFI. 10).

We understand this to mean that the respondent was to call a witness to prove the accounts report before they could be admitted in evidence. Up to the point the judgment was pronounced, the accounts report had not been produced.

As way back in 1953, in the case of **Des Raj Sharma vs. Reginam** (1953) 19 EACA 310, it was recognized that the only distinction between “exhibit” and an article or a document “marked for identification” is that an “exhibit” is evidence which has been formally proved and admitted in evidence, while an exhibit “marked for identification” (MFI) is not part of the evidence before the court and cannot, therefore, be used as proof of any fact.

Until a document “marked for identification” is formally produced, it is of very little, if any, evidential value. See **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others** [2015] eKLR.

The report in question which we suspect was the genesis of the amount claimed by the respondent was not produced and appears not to be part of this record.

We come to the conclusion on this question that the respondent did not present any proof of how the figure of Kshs. 11,261,901.28. was arrived at. The learned Judge clearly erred in failing to analyze the evidence in respect of proof of the figure claimed.

Having found that the respondent did not discharge its burden of proof, we need not consider the next and final ground; the capacity of the appellants to be sued. But for the development of the law, we shall consider it nonetheless.

The appellants were sued as Finmax Community Based Group, the Chairman, Treasurer and Secretary. It was readily admitted that the 1<sup>st</sup> appellant was registered, as the name shows, as a community-based Group under the Ministry of Gender, Children and Social Development. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were its officials.

The question posed to the Judge was whether, in those circumstances the respondent could institute an action against appellants. In his answer, the Judge found that the 1<sup>st</sup> appellant could only be sued through its officials. But since the 1<sup>st</sup> appellant's Chairman, Secretary and Treasurer were joined in the suit, the Judge was of the view that that was sufficient; and that to insist on the particulars of the officials would be to place technicality above substance.

He also justified the joinder on the ground that, since in such community organizations high turnover of officials is expected, it is wise to sue the office and not the specific officials, who may have vacated those offices at the time an action is instituted.

The 1<sup>st</sup> appellant is an unincorporated association and therefore in law is not a legal personality with the capacity to sue or to be sued. For a long time, courts have held that such bodies could not sue or be sued.

However, with the advent of the 2010 Constitution, this position appears to have changed. **Article 260** which is the Interpretation section of the Constitution defines **"a person"** to include;

**"... a company, association or other body of persons whether incorporated or unincorporated"**. (Own emphasis).

As regards institution of court actions, **Article 50**, dealing with issues of fair hearing gives;

**"(1) Every person .... the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"**.

It would seem, from the foregoing, that an association like the 1<sup>st</sup> appellant is "a person" who may institute proceedings and also be sued.

However, the question today is not whether unincorporated entities may commence action or how actions against them may be commenced, but rather, the manner of commencing proceedings. It is equally also settled that they cannot maintain an action or actions brought against them in their names.

Proceedings on their behalf or against them can only be through the registered officials, whose particulars, names and capacity must clearly be indicated in the suit.

See **Grace Mwenda Munjuri vs. Trustee of the Agricultural Society of Kenya** [2014] eKLR.

In this appeal, the 1<sup>st</sup> appellant, being an unincorporated organization, had no capacity to be sued in its own name. The respondent could only institute the suit as against named officials.

Titles like Chairman, secretary or treasurer cannot be used as those are not legal persons against whom orders may be executed by the successful party in the proceedings.

For the reasons we have given, this appeal succeeds. We accordingly allow it by setting aside the judgment and order of the High Court made on 24<sup>th</sup> March, 2015 and amended on 22<sup>nd</sup> April, 2015 and substitute it with an order dismissing the respondent's suit.

As a result of what we have said regarding the appellants, we order that each party to bear its own costs both in this appeal and in the court below.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of February, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**