



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 14 OF 2010

BETWEEN

MEIR MIZRAH..... 1ST APPELLANT

STANLEY KINYANJUI..... 2ND APPELLANT

(Suing for and on behalf of the Outdoor Advertising Association of Kenya)

AND

NAIROBI CITY COUNCIL..... 1ST RESPONDENT

ADOPT A LIGHT..... 2ND RESPONDENT

ALLIANCE MEDIA KENYA LIMITED..... 3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Emukule, J.) dated 2nd December 2005

in

HCCC. No. 131 of 2003)

JUDGMENT OF THE COURT

In this appeal, *the appellants, Meir Mizrah and Stanley Kinyanjui* challenge the ruling and order of the High Court at Nairobi (*Emukule, J.*) dated 2nd December 2005 by which he struck out their suit as frivolous, vexatious, and calculated to prejudice, embarrass and delay the fair trial of the action or otherwise as an abuse of the process of the court. The learned judge took that drastic action after he was persuaded that the *Outdoor Advertising Association of Kenya (the Association)*, a society on whose behalf the appellants had filed the suit, was non-existent in law under the provisions of the *Societies Act, cap. 108 Laws of Kenya*.

The short and relevant background to the appeal is as follows. On 13th March 2003, the appellants, in their respective capacities as treasurer and secretary of the Association, filed a suit against *Nairobi City Council*, the predecessor of *Nairobi County (1st respondent)*, *Adopt-a-Light Limited (2nd respondent)* and *Alliance Media Kenya Limited (3rd respondent)* for alleged breach of contract. They pleaded that the Association had entered into an agreement or understanding with the 1st respondent by which the latter recognised it as the only regulator of outdoor advertising in the City of Nairobi. Pursuant to the agreement and upon payment of advertisement fees and charges, members of the Association constructed and erected advertising billboards in the City.

They further averred that in breach of the agreement, on 28th March 2002, the 1st respondent entered into an agreement with the 2nd respondent purporting to grant it indefinite, sole and exclusive right or monopoly to advertise on streetlight poles in the City. In further breach of the agreement, they averred, on 3rd June 2002, the 1st respondent entered into another agreement with the 3rd respondent granting it indefinite, sole and exclusive right or monopoly to replace damaged area demarcation signs in the City and to install new ones.

Consequently the appellants prayed for declarations that the said agreements were contrary to public policy, in contravention of the *Restrictive Trade Practices, Monopolies and Price Control Act* and the *Local Government Act* (repealed) and therefore null and void. They also sought permanent injunctions to restrain the implementation of the agreements between the 1st respondent and the 2nd and 3rd respondents, as well as general damages for loss of business and costs of the suit.

By a rather prolix application dated 22nd September 2004 taken out principally under the former **Order IX Rule 13** of the **Civil Procedure Rules**, the 2nd respondent applied to strike out the appellants' suit as frivolous, vexatious, and calculated to prejudice, embarrass and delay the fair trial of the action or otherwise as an abuse of the process of the court. The primary ground upon which the application was based was that the appellants had no capacity to sue on behalf of the Association because it was not a society within the meaning of **section 2** of the Societies Act, since it had less than ten members as required by the said Act. In the 2nd respondent's view, the Association on whose behalf the appellants' purported to sue was non-existent in law.

The appellants opposed the application by an equally prolix replying affidavit running into 26 pages, excluding annexures, sworn on 7th October 2004 by the 2nd appellant. As far as is relevant to this appeal, the appellants contended that the Association was a duly registered society and its certificate of registration, which was annexed to the replying affidavit, was *prima facie* evidence of its registration and existence in law. They further contended that contrary to the 2nd respondent's averments, the Association had more than ten members and that the Societies Act deemed the natural persons who were members of incorporated bodies that constituted the members of the Association to be individual members of the Association. The appellants also maintained that the fact that the Registrar of Societies had not de-gazetted the Association as a society was sufficient confirmation that it was still a legal and duly registered entity under the Societies Act.

Emukule J. agreed with the 2nd respondent's position that the Association was non-existent in law and struck out the suit. He relied on the decision in **Russian and English Bank v. Barring Brothers Co. Ltd. [1932] All ER 122** to the effect that a non-existent person cannot sue. It is that ruling which precipitated this appeal founded on four grounds of appeal, at the heart of which lies only one issue, namely whether the learned judge erred in his interpretation of section 2(2) of the Societies Act.

Urging the appeal, **Ms. Gichoya**, learned counsel for the appellants submitted that the evidence before the learned judge showed that the Association had seven members who were limited liability companies. She contended that under section 2(2) of the Societies Act, the shareholders of those seven companies were also individually members of the Association, contrary to the conclusion of the learned judge. She also argued that the principle in **Salomon v. Salomon [1897] AC 22**, under which the company is a separate legal entity from the shareholders and which the learned judge relied upon, had no application to the Societies Act.

Relying on **DT Dobie & Company (Kenya) Ltd v. Muchina [1982] KLR 1** the appellants submitted that striking out a suit is a drastic action, which ought not to have been resorted to in the circumstances of this appeal, because there was before the court a certificate of registration of the Association confirming that it was lawfully in existence. They added that it was a contradiction in terms for the learned judge to hold that the Association was legally non-existent and still award costs against a non-existent body, contrary to the holding in **Fort Hall Bakery Supply Co Ltd v. Frederick Muigai Wangoe [1959] EA 474**.

The 2nd respondent, represented by **Ms. Mugo**, learned counsel, opposed the appeal, submitting that under section 2 of the Societies Act, a duly registered society had to have ten or more members and that by the appellants' own pleadings, the Association had only seven members at the time it filed the suit. In the circumstances, it was contended, the learned judge was right in holding that the Association did not exist in law and therefore could not sustain the suit.

The judgments of this Court in **Suryakant Bhanwanji Raja Shah v. Aperit Investments S.A. & Another [2002] eKLR** and **Deposit Protection Fund Board v. Rosaline Njeri Macharia & Another [2016] eKLR** as well as that of the High Court in **Sietco (K) Ltd v. Fortune Commodities Ltd & Another, HCCC No. 1264 of 2002** were cited in support of the submission that a deregistered, dissolved or wound-up entity cannot sue or be sued.

As regards the certificate of registration the 2nd respondent submitted that it was of no consequence once it was confirmed that the Association had less than the prescribed minimum of ten members. It added that unlike under **section 12(2)** of the **Non-Governmental Organizations Co-ordination Act**, the Societies Act has no provision recognizing the certificate of registration as conclusive evidence of compliance with the requirements of the Societies Act.

Lastly we heard the 3rd respondent who was represented by **Ms. Mumbi**, learned counsel. This respondent also opposed the appeal, terming it academic and untenable because the two agreements, which the appellants were challenging, had long expired. Entertaining the appeal, it was submitted, would be acting in vain, which the Court should not do.

On the substance of the appeal, the 3rd respondent submitted that under the constitution of the Association, its members were companies rather than natural persons and it had only seven such members rather than the minimum ten required by section 2 of the Societies Act. Relying on **IEBC & Another v. Stephen Mutina Muli & 3 Others [2013] eKLR**, this respondent submitted that the appellants were bound by their pleadings that the Association had only seven members. We were urged to find that the learned judge did not err in his interpretation of section 2(2) of the Societies Act and that the phrase "any body of persons" in the provision means bodies that qualify to be societies and excludes companies registered under the Companies Act.

Lastly the 3rd respondent submitted that the issue of costs had not been raised in the grounds of appeal and that at any rate, as stated by the High Court in **Housing Finance Company of Kenya Ltd v. Embakasi Youth Development Project [2004] eKLR**, a party who files a suit sets in motion events that occasion costs which he cannot evade paying.

As we have already adverted, this appeal turns on the interpretation of section 2 of the Societies Act. The Act was enacted and came into force on 16th February 1968 for the express purpose of making provision for the registration and control of societies. Section 2, a rather long provision, provides as follows:

2 (1) "society" includes any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not, except in paragraphs (i) and (ii) of section 11 (2) (f) of this Act, include—

(a) a company as defined by the Companies Act, or a company registered as a foreign company under Part X of that Act;

(b) any corporation incorporated by or under any other written law;

(c) a registered trade union within the meaning of the Trade Unions Act, including a branch of a trade union registered under that Act, a probationary trade union within the meaning of that Act and a trade union or a branch of a trade union whose application for registration has been made and not determined;

(d) a company, firm, association or partnership consisting of not more than twenty persons, formed and maintained with a view to carrying on business for profit;

(e) a co-operative society registered as such under any written law;

(f) a school registered under the Education Act, advisory council, Board of Governors, District Education Board, school committee or similar organization established under and in accordance with the provisions of any written law relating to education;

(g) a building society as defined by the Building Societies Act;

(h) a bank licensed under the Banking Act;

(i) any international organization of which Kenya is a member, or any branch, section or organ of any such organization;

(j) any combination or association which the Minister may, by order, declare not to be a society for the purposes of this Act;

...

(2) For the avoidance of doubt, it is declared that, for the purposes of this Act, where any body of persons, whether incorporated or unincorporated, is a member of an association, all members of that body are members of that association.

The above provision does not really define what a society is; rather, it gives examples of bodies that are societies, with the critical element of a society being ten or more persons or members. Notwithstanding the examples given of societies, the provision goes further and lists a number of bodies that are not societies for the purposes of the Act. Thus, although a society is defined to include any club, company, partnership or other association, the definition of a society does not extend to, among others, a company as defined in the Companies Act or any corporation incorporated under any other law except for the limited purposes of **section 11 (2) (f) (i) and (ii)** of the Act, which relate to the power of the Registrar of Societies to refuse to register a society on account of its name, and are not relevant in this appeal. In other words, save for the limited purposes set out in the Act, a company or a corporation is not a society under the Act.

To constitute a lawful society, the body in question must be registered under the Societies Act. The **Schedule** to the Act lists matters that must be provided for in the constitution and rules of every society before it is registered. Among them is the “**persons**” to whom membership of the society is open. Under **rule 2** of the **Societies Rules**, an application for registration or exemption from registration of a society is to be made in **Form A**. The form requires among others, disclosure of the class or classes of “**persons**” to whom membership of the society is open and the current number of members. Lastly, upon registration as a society, **rule 16 (f)** of the same rules require the Registrar of Societies to enter into the register of societies the class or classes of **persons** to whom membership of the society is restricted and the number of members of the society.

The Societies Act does not define the term “**person**”, but **section 3** of the **Interpretation and General Provisions Act** defines “**person**” to include a company, association or body of persons, corporate or unincorporate. To the extent that the Societies Act does not define the word “**person**” differently and there is nothing in the subject or context to suggest a different definition of the word “person” was intended, the definition in the Interpretation and General Provisions Act must be applied to the end that a society may have as its members natural or juristic persons.

In compliance with the requirements of the Societies Act, the Association indicated in its constitution and rules dated 1st November 1999 that its membership was open to **companies or organizations** duly accepted in accordance with its rules and regulations. It was on that basis that the Registrar of Societies registered the Association and issued it with a certificate of registration on 14th November 2000. Clearly, the Association could not have been registered as a society if the Societies Act restricted members of a society to natural persons only.

In its plaint filed on 13th March 2003, the Association pleaded that it was registered under the Societies Act and listed its members as:

i) Spellman & Walker;

ii) Monier 2000 Ltd;

iii) Magnate Ventures;

iv) Adsite Company Ltd

v) Eagle Outdoor;

vi) *City Clock*; and

vii) *Gadman Marketing*

That is what prompted the 2nd respondent to contend that the Association was an unlawful society because it did not have a minimum of ten members as required by section 2 of the Societies Act. But the question is whether really that is the correct legal position, in view of what we have stated above.

First and foremost, section 2(2) of the Societies Act provides in the clearest of terms that “*for the avoidance of doubt*” and *for the purposes of this Act*”, where any body of persons, corporate or unincorporate is a member of an association, all members of that corporate or unincorporate body are members of the association. We have no doubt in our minds that under section 2 (2), members of all the seven bodies that comprised the Association as a society were individually also members of the Association. That is the clear import of the provision, which must be given its plain meaning without straining, embellishing or doing violence to its words. In *Sony Holdings Ltd v. Registrar of Trademarks & Another* [2015] eKLR, this Court quoted with approval the following words from *Tindal, CJ* in the *Sussex Peerage Case* [1844] 11 CI & Fin 85 on statutory interpretation.

“...the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case best declare the intention of the lawgiver.”

Secondly and with all due respect, the learned judge erred by importing the principle of separate legal personality of a company as explained in *Salmon v. Salmon* to defeat the express and unambiguous provisions of section 2(2) of the Societies Act. The Act is very clear that save in very specific and restricted contexts, a company registered under the Companies Act is not a society for the purposes of the Act. In addition to that, whilst the principle is *Salmon v. Salmon* is not in dispute, the drafters of the Societies Act made it very clear that for the *purposes of the Societies Act*, a member of a company, which is itself, a member of a society is separately and distinctly a member of the same society. The words “*for the avoidance of doubt*” and *for the purposes of this Act*” which the learned judge ignored, were intended to mean that irrespective of the principle in *Salmon v. Salmon* or any other principle, when it comes to the Societies Act and a company is a member of a society, the company itself and its members are to be treated as separate and distinct members of that society. Section 2(2) is therefore intended to apply only for the purposes of the Societies Act and not for the purposes of the Companies Act or any other Act, as the learned judge erroneously held.

Thirdly, the Societies Act has very comprehensive provisions on how a society becomes an unlawful society. By *section 4(1)* of the Act, an unlawful society is one, which has not been registered or exempted from registration. To the extent that the Association in this appeal had a certificate of registration issued by the Registrar of Societies, whose authenticity was not questioned, that was *prima facie* evidence that it was registered and therefore a lawful society. Where it is alleged after registration that a society is operating in violation of the law, for example by ceasing to exist as a society within the meaning of the Act, the Registrar has immense powers under *section 12* of the Act to cancel or suspend the registration of the society. Such action is taken after the registrar has served upon the society a notice of the alleged violation and afforded it an opportunity to be heard on the alleged violations. If a society’s registration is ultimately suspended or cancelled, it has a right of appeal under *section 15 (1) (b)*, first to the Minister and thereafter under *section 15(2)* to the High Court, if it is still aggrieved.

We advert to all this, to show that the law has provided a very specific and comprehensive mechanism for determining whether or not a society is an unlawful society. In our view it was not proper to sidestep that prescribed mechanism and declare the Association an unlawful society under the summary provisions of the former Order IX rule 13 of the Civil Procedure Rules and on very disputed and contested facts at that. The effect of the impugned ruling was not only to strike out the appellants’ suit, but also to declare the Association unlawful without following the prescribed mechanism for that purposes. It has consistently been held by courts in this jurisdiction that where a specific mechanism is provided to address a complaint, it must be followed. (See *Mutanga Tea & Coffee Company Ltd v. Shikara Ltd & Another* [2015] eKLR) and *Isaac Aluoch Polo Aluochier v. Attorney General* [2018] eKLR.

On whether the learned judge properly exercised his discretion in striking out the suit, *Madan JA*, (as he then was), cautioned in *D.T. Dobie Company (K) Ltd v. Muchina & Another* [1980] eKLR, against striking out pleadings with alacrity, unless in the clearest of cases. In words that still deserve quoting, he stated:

“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A

court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.” (Emphasis added).

In view of the clear provisions of section 2(2) of the Societies Act, we are satisfied that there was no basis upon which the learned judge could have concluded that the appellant’s suit was frivolous, vexatious, and calculated to prejudice, embarrass and delay the fair trial of the action or otherwise as an abuse of the process of the court.

While we agree with the statement of the law as espoused in *Suryakant Bhanwanji Raja Shah v. Aperit Investments S.A. & Another* (supra) and *Deposit Protection Fund Board v. Rosaline Njeri Macharia & Another* (supra) that a non-existent party cannot sustain a suit, that principle, as we have demonstrated above, had no application in the circumstances of this appeal. In the same vein we do not think there

is any substance in the 3rd respondent's contention that this appeal is academic. While it is true that the agreements upon which the suit was founded have long expired, a substantial issue of law on the interpretation of section 2(2) of the Societies Act, which we have determined, has been live.

It should also be remembered that the appellants were condemned to pay costs on the basis of an interpretation of section 2(2) which we are persuaded is erroneous.

For all the foregoing reasons, we allow this appeal; set aside the ruling and order of the High Court dated 2nd December 2005; and substitute therefore an order dismissing the 2nd respondent's application dated 22nd September 2004 with costs. The appellants shall have costs of this appeal. It is so ordered.

Dated and delivered at Nairobi this 23rd day of November, 2018

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR