



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 250 OF 2015

BETWEEN

GRACE MWENDA MUNJURI APPELLANT

AND

TRUSTEES OF THE

AGRICULTURAL SOCIETY OF KENYA RESPONDENT

*(Appeal from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nairobi
(Mbaru, J.) delivered on 17th April, 2014*

in

Employment and Labour Relations Court Cause No. 1317 of 2010)

JUDGMENT OF THE COURT

[1] On the 26th October, 2010, Grace Mwenda Munyuri (appellant) filed a memorandum of claim before the Industrial Court (now Employment and Labour Court) in Nairobi against Trustees of the Agricultural Society of Kenya (Respondent). The appellant contended that she was employed on 30th June 2005, as Marketing and Publicity Manager by the respondent. The said employment was pursuant to a contract of employment that spelt out clear terms and conditions of service as well as the obligations of both parties in the course of the employment.

[2] The appellant's specific complaints as per the memorandum of claim were that on or about 5th April 2007, the respondent purportedly sent her on compulsory leave which was not provided for under the contract of employment. Further on or about 8th May, 2007, the respondent suspended her from performing her duties and withheld payment of her salary and other emoluments during the said suspension. Eventually, on 29th October, 2007, the appellant's services were terminated by the respondent by purporting to backdate the termination to take effect from when the appellant was suspended.

[3] Aggrieved by the aforesaid treatment, the appellant filed a claim seeking payment of salaries and other emoluments amounting to Kshs. 1,165,969/= as well as exemplary and aggravated damages for breach of employment contract; breach of the Employment Act; for maliciously withholding her salaries and the

costs of the suit. The respondent filed a memorandum of reply on 1st December, 2010 in which it denied all the allegations of wrong doing in as far as the termination of the contract of employment was concerned.

[4] According to the respondent, the appellant's employment was terminated due to the fact that she breached the code of regulations by using abusive and disrespectful language against other officers, and for doing so, in front of subordinate staff; refusing to comply with lawful orders issued to her by senior officers and by failing to keep official secrets and confidential information which she released to media and their parties without authority of the Council or Chief Executive Officer. The respondent contended the appellants' services were duly terminated in accordance with the contract, the Code of Regulations and the Employment Laws.

[5] In regard to the claim for salary and other emoluments, the respondent denied that the appellant was entitled to the sum claimed in the suit, but it admitted she was entitled to a sum of Kshs. 346,653/=, which was arrived at after deductions of monies owed to the respondent. In the same reply, the respondent contended that the entire claim by the appellant was fatally defective and it gave notice of its intention to raise a preliminary point *in limine* seeking to have the suit dismissed or struck out.

[6] On 4th March 2014, in keeping with the aforesaid notice, the respondent filed a notice of preliminary grounds stating the following:-

1. That the suit offends mandatory provisions of the law and as such is defective and ought to be struck out.
2. That the suit is misconceived, misdirected and misled and therefore orders sought cannot stand in law.
3. That the entire suit is an abuse of the process of the court and ought to be struck out and/or dismissed with costs.

The matter was for hearing on 11th March 2014, when Mbaru J. directed the preliminary objection be heard first; upon hearing it and in a ruling delivered on 17th April 2014, the learned Judge allowed the preliminary objection with the result that the appellant's claim was struck out and each party was ordered to bear their own costs.

[7] That is the order that has provoked the present appeal which is predicated on the following grounds of appeal:

1. The learned Judge misdirected herself and failed to appreciate the import and legal effect of registration of a society under the **Perpetual Succession Act** (Cap 164), as distinct from registration under the **Societies Act** (Cap 108).
2. As a consequence, the learned Judge fell into an error of law and arrive at the erroneous conclusion to the effect that the respondent lacked the legal capacity to sue and to be sued.
3. The learned Judge erred in law by failing to find that parties are bound by their pleadings, including admissions in respect of the parties' description.

The learned Judge erred in law by failing to find that the Preliminary Objection raised by the respondent, did not fit within the description set out in **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd** [1968] EA 697.

5. The learned Judge failed to exercise her discretion properly and in this respect failed to give any effect to Article 159 (2) (d) of the Constitution as read together with **Section 20 (1)** of the **Employment and Labour Relations Court Act, 2011**.

6. The learned Judge, in all circumstances of the matter, failed to do justice as regards the Preliminary Objection that was before her and accordingly erred in law by making the orders that she did.

[8] During the hearing of the appeal, both counsel for the appellant and respondent relied on their respective written submissions and list of authorities to support their respective positions, they also made some oral highlights. Mr. Mbaluto learned counsel for the appellant urged us to find the preliminary objection raised by the respondent did not raise a pure point of law as per the principles set out in the Court of Appeal decision in the case of Mukisa Biscuits Manufacturing Ltd v. West End Distributors Ltd [1969] EA 697 where it was stated as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

[9] Mr. Mbaluto further argued that in the statement of defence or reply to the claim, filed by the respondent, it admitted everything contained in paragraphs 1 and 2 of the claim regarding the description of the parties as accurate; thus the respondent could not therefore turn around and deny the same by filing a preliminary objection. Moreover counsel submitted that the respondent did not produce a certificate of registration to demonstrate that it was registered under the Society’s Act and that its officials were not registered under Cap 164 which gives it perpetual succession when office bearers leave office.

[10] Counsel for the appellant faulted the fact that the respondent waited until the eve of the hearing date, to file a notice of preliminary objection which was vague; the registration of the respondent or its legal status was a contested issue, the appellants’ position was that the respondent is registered under **section 3 (3)** of Cap 164 which is a matter of fact, and it was incumbent upon the respondent to provide evidence to prove that was not the case. Moreover, the respondent having admitted the descriptive part of the claim, counsel submitted that an estoppel by record arose which stopped the respondent from denying matters already admitted as the respondent is not allowed to approbate and reprobate. Counsel for the appellant also urged us to find the learned Judge erred by holding that law suits by or against a society should be through its officials as there is a clear distinction between registration under the Societies Act Cap 108 and under the Trustees (Perpetual succession) Act (Cap 164). Finally, counsel urged us to give due regard to the provisions of **Article 159** of the Constitution that gives emphasise to substantive as opposed to procedural technicalities that deny parties their day in a court of law. Counsel was of the view that justice in the matter will only be achieved through eventual determination of the appellants’ claim on its merits.

[11] On the part of the respondent, Mr. Mutua learned counsel for the respondent opposed the appeal. He pointed out that the respondent had duly indicated on paragraph 13 of the reply to the claim of its intention to raise a preliminary objection on the legality of the appellants’ claim. There was no ambush because when the respondent filed the notice of preliminary objection, the appellant’s counsel sought an adjournment and duly prepared to argue the preliminary objection which was on a point of law and can be raised at any time of the proceedings. As regards the certificate of registration of the respondent under Trustees (Perpetual Succession) Act, counsel submitted that it was the appellant who had a legal burden to produce it; it is a party who alleges the existence of certain facts who bears the burden to produce proof of the certificate. Counsel urged us to uphold the decision of the trial court.

[12] In a brief rejoinder, Mr. Mbaluto pointed out that the issue of registration of the respondent was contentious; the Judge had a duty of resolving the same through trial; by merely striking the claim that did not help matters as the issue was left unresolved.

[13] This is a first appeal albeit the claim by the appellant was struck out before it was determined on merit. The single issue that is discernable for determination in this appeal is whether the learned Judge was justified to strike out the appellant’s claim on the basis of the preliminary objection that the claimant failed to name the registered officials in addition to the respondent. We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was

in issue. Going by the contentious position taken by counsel for the appellant who stood by their claim that the respondent officials were registered under the Trustee (Perpetual Succession) Act; on the other hand the respondent insisted that its officials were registered under the Societies Act; in the circumstances of these two divergent positions that were taken by each side, we are left wondering how the trial Judge was able to determine that the respondent's officials were registered under the Societies Act and not under the Trustee (Perpetual Succession) Act. It would seem in arriving at the conclusion that the respondent was registered under the Societies Act, the Judge relied on an earlier decision of the same court in the case of **James Gitonga vs Trustees of Agriculture Society Cause No 1322 of 2010** which facts were similar to this case and the suit by the claimant against the respondent had been struck out on 9th February 2012. However the Judge must have been oblivious of the fact that the said ruling striking out that claim of **James Gitonga** was set aside on an application for review on 12th March 2014, by Maureen Onyango J., on the grounds that it was not clear whether the respondent was registered under the Societies Act or the Trustees (Perpetual Succession) Act.

[14] It is also correct to state that paragraph 13 of the reply to the claim alleging that a suit which was fatally defective, was not at all that clear. This is what was stated:-

“The respondent gives notice that this claim as canvassed is fatally defective and will raise a preliminary point in limine seeking to have the same dismissed/struck out.”

Even the three grounds contained in the notice of preliminary objection (reproduced here above) when read with this statement of reply; they all did not clearly spell out the actual point of law or the defect that was being canvassed by the respondent in the preliminary objection. Indeed, it only became clear during the arguments in court, that the appellant had not cited the officials of the respondent and that is when counsel for the respondent espoused that the appellant sued the respondent instead of the registered officials who ought to have been sued in their individual capacities under the Societies Act. A party coming to court seeking a remedy or to have a claim by the other side struck out ought to make full disclosure of material facts or the specific law that has been breached. In our view, the legal status of the respondent regarding its officials was an important matter that was in issue before the trial Judge and the respondent was obliged to make a clear disclosure. The learned Judge needed to know the actual legal status of the respondent and its officials which was in issue while dealing with the preliminary objection.

[15] It is unfortunate that even as we determine this appeal it is not clear to us whether the officials of the respondent are registered under the Societies Act or under the Trustees (Perpetual Succession) Act. When the issue was put to counsel for the respondent during the hearing of this appeal, Mr. Mutua told us it was incumbent upon the appellant who alleged registration of the respondent was under Cap 164 to prove so. We find this rather strange because the respondent did not produce any evidence to prove that it was registered as a Society either. If this was a pure point of law, it ought to have been obvious on the face of it that the respondent was nonsuited and could not be sued at all. In the circumstances of this matter, the burden shifted to the respondent to prove that indeed the officials of Agricultural Society of Kenya were registered under the Societies Act and not Cap 164 as alleged by the appellant.

[16] The overreaching imperative in the administration of justice that guides courts, right from the Constitution to statute law as well as the relevant Rules of Procedure that guide various types of litigation in our courts, have shifted and courts tend to disregard matters of technicalities especially where no prejudice is caused to the parties. The courts are nowadays focusing on facilitating a just expeditious, proportionate and affordable resolution of substantive disputes without undue regard to technicalities as set out under

Article 159 (d) of the Constitution. In this case, the appellant's suit was struck out, not because the claim by her lacked merit or was bad in law, but because she did not indicate or cite the officials of the respondent as parties to the suit; this is notwithstanding the fact that it was the respondent who was the central party to the dispute as indeed it was the respondent that had employed the appellant. This denied the appellant an opportunity to be heard on her claim. See **Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission & 2 Others**, CA No. 18 of 2013, Nyeri.

“The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there would be proportionality.”

In this case, this Court emphasized the right to a hearing as one of the cardinal principles that underpins the Rule of law.

[17] We appreciate that the learned Judge in striking the suit was perhaps exercising her discretion to ensure ends of justice and to protect the court process and rules of procedure from being abused. We are nonetheless concerned that in so doing, the Judge failed to point out the specific law or procedure that was breached by the appellant. The appellant’s suit was struck out and the respondent who claimed that it was registered under the Societies Act did not produce the certificate of registration or any evidence to show that its registered officials do not fall under the provisions of Cap 164. As the matters stood, it was the appellant’s word against the respondent, thus rendering credence to the arguments by counsel for appellant that the ruling of the Judge went against the principles set out in the Mukisa Biscuits Case (supra). We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned. See the case of Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, this Court stated as follows:

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.

Such practice of course ought to be discouraged.”

[18] We are of the view that the learned Judge misapprehended the preliminary objection, it did not raise a clear point of law that was not contested. For the aforesaid reasons, we find merit in this appeal which we allow and set aside the ruling of 17th April 2014 by Mbaru, J. We substitute it with an order dismissing the preliminary objection. Consequently we order that the claim by the appellant be heard by another Judge other than Mbaru, J. on priority basis. Costs of this appeal as well as for the preliminary objection shall abide the outcome of the claim.

Dated and delivered at Nairobi this 24th day of March 2017.

E.M. GITHINJI

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR