



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 150 OF 2015

BETWEEN

TRUSTEES OF THE AGRICULTURAL SOCIETY OF KENYA..... APPELLANT

AND

JAMES GITONGA.....RESPONDENT

(Appeal from the whole Ruling/Order (Maureen Onyango, J.) delivered on 12th March, 2014

in

Industrial Court Cause No. 1322 of 2010)

JUDGMENT OF THE COURT

[1] James Gitonga (respondent) was employed by Agricultural Society of Kenya (appellant) in 1987. The respondent was suspended from employment on 13th March, 2007 and his services were subsequently terminated on 29th October, 2007. Aggrieved by the said termination, he filed a memorandum of claim seeking payment of salaries and other emoluments amounting to Kshs. 1,001,000/= as well as exemplary and aggravated damage for breach of employment contract for wrongful dismissal.

[2]The appellant filed a memorandum of reply on which it denied all allegations of wrongful dismissal as far as the termination of contract of employment was concerned. The appellant alleged that the respondent breached the code of regulations by misappropriating funds; by being disrespectful and using abusive language against other employees among other infractions. The respondent contended the respondent services were duly terminated in accordance with the contract, the Code of Regulations and the employment law.

[3] The dispute fell for hearing before Kosgei J. (as he then was) and by an award delivered on 9th February, 2012 the respondent's claim was struck out with no order as to costs. In so doing, the Judge held as follows in a pertinent paragraph of the said award:

“We totally agree with the said rendition of the law and concur with the respondent's submissions that the claimant's pleadings are defective as he has not sued his former employers. The claimant should have initiated proceedings against the current registered

trustees of the Agricultural Society of Kenya in their individual names. Their names are in the public domain as they are available at the office of the Registrar of Societies. Consequently, the claimant cannot be heard stating that he does not know them. I do not accept the claimant's submission that this amounts to giving prominence to technicalities at the expense of justice. The matter is not a technicality. It is a fundamental matter as it touches on the respondent's *locus standi*. The respondent sued clearly lacks legal capacity to be sued and this court will be perpetrating an injustice by accepting such faulty or misconceived claims. The claim before the court is incompetent as the respondent herein is not a legal person or a corporate body. This is a matter the court cannot overlook.

In view of our foregoing decision on the first issue, it is unnecessary for us to go into the other issues regarding the merits of the case. I therefore award and order as follows:-

1. That the claimant's claim is hereby struck out.

2. That I make no orders as to costs.”

[4] It would seem the respondent was not satisfied with the aforesaid orders and that prompted him to apply for review of the said order under the provision of Rule 32 of the Industrial Court Rules. The application for review was heard by Maureen Onyango, J. as Kosgei J. had left the Industrial Court. upon hearing the matters that were presented for and against review, the learned Judge found in favour of the respondent and allowed the application for review with the result that the award striking out the respondent's claim was set aside and the claim was ordered to be heard *de novo*.

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

1. THAT the learned Judge erred in law and in fact in allowing the claimants review application dated 15th March 2012.
2. THAT the learned Judge erred in law and in fact in allowing the application on grounds other than the ones urged by the claimant during the hearing thereof.
3. THAT the learned Judge erred in law and in fact by setting aside the judgment of the Hon. Justice P. Kosgei on unknown grounds and on unknown provisions of the law.
4. THAT the learned Judge erred in law and in fact in disregarding the appellant's submissions in opposition to the Claimants Review Application dated 15th March 2012 together with the authorities cited in support thereof.
5. THAT the learned Judge erred in fact and in law in misdirection herself on the law and facts especially in failing to appreciate the fact that suits against societies must be made as against the registered trustees in their respective individual names.
6. THAT the learned Judge erred in law and in act in placing reliance on extraneous evidence and matters in arriving at her decision.
7. THAT a consequence of the foregoing grounds; the learned Judge erred in allowing the applicant's review and ordering that the claim be heard *de novo*.
8. THAT the learned Judge was openly biased in favour of the respondent.
9. THAT the learned Judge failed to properly consider and analyze the law and the authorities cited in opposition to the Review Application in depth.
10. THAT in all the circumstances of the case, the learned Judge failed to do justice to the

appellant.

[6] During the hearing of this appeal, Mr. Mutua learned counsel for the appellant sought to proceed by way of oral submissions having failed to file written submissions as directed during Case Management on the 5th October, 2016. Mr. Mutua submitted that the appellant can only be sued through its registered officials because it is not a body corporate but an entity that is registered under the Societies Act. Although the Judge found the appellant did not submit the registration certificate to prove that it was registered under the Societies Act, counsel submitted it the responsibility of the respondent who alleged the appellant was registered under the Trustees Perpetual Succession Act to so prove.

[7] Further Counsel faulted the learned Judge for reviewing an award when there was no error apparent on the face of the records; that the Judge relied on other reasons which were not argued before the court. Lastly counsel urged us to find there was sufficient material on decided cases that are on record drawn from the practice in England and also locally that show any suit filed against a body that is not incorporated is brought in the names of the registered officials. Counsel for the appellant urged us to allow the appeal.

[8] On the part of the respondent, Mr. Mbaluto, learned counsel for the respondent relied on the written submissions to support the ruling appealed against. Counsel cited paragraph 2 of the Memorandum of Claim where the respondent pleaded specifically that the appellant is sued in his capacity as the registered trustee of the Agricultural Society of Kenya duly registered under the Trustees Perpetual Succession Act. Having made that admission in the reply counsel for the respondent argued that there is an estoppel by record which stopped the appellant from pacrobatng and reprobating or denying matters already admitted. Counsel drew our attention to the contents of the reply, by which the appellant admitted the statement of claim in paragraph 1 and 2.

[9] Moreover the claim by the respondent was for unlawful termination of employment by the appellant which is registered under Cap 164. The appellant having admitted its registration status in their memorandum of reply, they were estopped by their own admission from denying what was admitted, which was a glaring error on the face of the record. According to counsel the Judge was entitled to review the award of the same court where there is a mistake or error apparent on the face of the record or for other sufficient reasons. An error which is on the face of the record and clear and obvious was demonstrated in the said award, when the respondent's claim was merely struck out without any evidence to prove the appellant was registered as a society nothing required an elaborate argument. See the case of **Orero vs. Seko** [1984] KLR 238. It was obvious to the learned Judge that the issue of registration of the appellant either as contended by the respondent to be under the Trustees Perpetual Succession Act, or under the Societies Act as contended by the appellant were not resolved, those were contentious, factual situations with legal ramifications as the former confers corporate personality upon a body which therefore enables a body to sue or be sued in its corporate name. Counsel urged us to dismiss the appeal, uphold the ruling by the learned Judge and refer the matter for hearing and determination on merit.

[10] We have considered the submissions and the record of appeal, although this is a first appeal, we appreciate the claim by the respondent was not determined on its merit, it was struck out on a preliminary point of law. The issue that is discernable for our determination is fairly straight forward that is, whether the learned judge was justified to review the award dismissing the respondent's claim. The principles that guide the Court on whether to review an award or an order of the court are provided for under the Industrial Court Procedural Rules 2010, and **Rule 32** provides a person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling on the following grounds;-

- a) if there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made.**
- b) on account or some mistake or error apparent on the face of the record.**
- c) On account of the award, judgment or ruling being in breach of any written law.**

d)

e) For any other sufficient reasons.

[11] The central issue of whether the appellant was registered under the Societies Act or under the Trustees (Perpetual Succession) Act was not settled with certainty and the learned Judge appreciated that in her ruling when she stated as follows:-

“Secondly, the claimant alleges that the respondent is registered under a Trustees Perpetual Practitioner while the respondent passions is that it is registered under the Societies Act. None of the parties has however submitted to the court the registration certificate of the respondent which confirms either of the two positions. I have carefully perused the records but I have been unable to come across any such certificate of registration. In the circumstances, I am unable to determine which of the two conflicting positions is correct.”

„This being a matter of evidence, I am left to consider the only ground I can fall back on in determining this application is whether there are any other sufficient reasons to review the award.”

The above scenario as described by the learned trial Judge clearly demonstrated the legal status of the appellant was a contentious issue. This Bench while dealing with another similar matter in Civil Appeal No. 250 of 2015, Grace Mwenda Muthuri vs. The Trustees of Agricultural Society of Kenya, we were confronted by the same issue regarding the legal status of the appellant and this is what this Bench stated in a pertinent paragraph of its judgment:

“It is unfortunate 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 unsuited and could not be sued at all. In the circumstances of this matter, the burden shifted to the respondent to prove indeed the officials of Agricultural Society of Kenya were registered under the Society’s Act and not Cap 164 as alleged by the appellant.”

[12] This time round it is the appellant who alleged that they were registered under the Societies Act and yet failed or neglected to produce the requisite registration documents. On the other hand, the respondent relied on the Trustees (Perpetual Succession) Act we particularly refer to the provisions of **Section 33** which states that the Trustees appointed in office become a body corporate with a perpetual succession and a common seal with power to sue and to be sued in their corporate name and subject to the conditions and directions contained in the certificate. A mere statement from the bar that the appellant’s officials were not registered under the aforesaid regime was not sufficient to prove that the appellant was not suited.

[13] In view of the aforesaid we are not persuaded that the learned Judge erred by finding sufficient reasons to review the award. See the case of Gitangi & Another vs. Mavoko Distributors Ltd & ano. ELR 2005 1EA pg. 65 where it was held:

“It is trite law that a trial court of law has to decide a case before it on evidence before it and on the law. Further, the law as we understand it, is that a court of law would determine a case on the issue that flow from the pleadings or from issues framed for the court’s determination by the parties.”

In the upshot we think we have said enough to demonstrate that this appeal has no merit. We order it dismissed with costs to the respondent.

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

E.M. GITHINJI

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JUDGE OF APPEAL

M.K. KOOME

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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

DEPUTY REGISTRAR