IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ONYANGO OTIENO, GATEMBU , KANTAI JJ. A)

CIVIL APPEAL NO. 84 OF 2006

BETWEEN

NORTH KISII CENTRAL FARMERS LIMITED.....APPELLANT

AND

JEREMIAH MAYAKA OMBUI .....1st RESPONDENT

PATRICK ONDIEKI ONCHOKE ….....2nd RESPONDENT

LEONARD NYABANDO ….....3rd RESPONDENT

PRISCILLAH SIGARA OMARIBA ….....4th RESPONDENT

ASKAH TUNANGI.....5th RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Eldoret (Lady Justice Jeanne Gacheche, J) dated 22nd February, 2006

in

H. C. C. C. 176 OF 2000

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JUDGMENT OF THE COURT

By a plaint filed at the High Court of Kenya, Eldoret, on 20th July, 2000 the appellant **North Kisii Central Farmers Limited** ("the plaintiff") sued the respondents, amongst others ("the defendants"), in a claim where the three prayers set out were for a permanent injunction restraining the defendants from running the affairs of the plaintiff, general damages and costs. It was alleged in the plaint that the defendants had set themselves out as officials or directors of the plaintiff and were collecting money from shareholders of the plaintiff without authority thus hampering company operations; that the defendants had never been elected as officials of the plaintiff; that the defendants had ignored the various demands for them to desist from the said activities and that the defendants said activities were fraudulent and the

plaintiff was in the event entitled to compensation.

A statement of defence was duly presented on behalf of the defendants where the plaintiff's claims were totally denied; the defendants took as a defence that the prayers in the plaint could not be granted because according to the defence the subject matter was land and each shareholder of the land repaid a loan sum to Settlement Fund Trustees and the plaint should therefore be struck out.

There was no counter-claim and that was the status of pleadings at the closure of the same.

The matter was heard by Jeanne Gacheche, J, who in a judgement delivered on 22nd February, 2006 dismissed the claim. The learned judge rendered herself thus in the material part of the judgement:

" One may as well enquire what I am driving at.

This matter which revolves around land, involves over two thousand members. It cannot be gainsaid that each must have had very high hopes of settlement when he set out to contribute for a share in the company. Not all were lucky. The company has lost this case, but it owes a duty, especially that of accounting to its shareholders. I have already touched on the 1992 award of K.Shs. 441,350/= which was meant to compensate all the shareholders who were not allocated with land.

Though I find that there is no proof that the company paid the sum of K.Shs. 2,000,000/= to Dale, it has however been able to prove, on a balance of probability, that it paid SFT the sum of K. Shs. 300,000/=, which was the initial deposit.

In my very humble opinion, it is important that justice be done, and that this matter be settled in the most amicable manner. It is obvious that those who are currently settled on the land would not have enjoyed the benefit were it not for the benevolence of the other members who were not so lucky. Those who are settled cannot have their cake and eat it, for that would not be fair or just.

In the interest of justice, I do order the defendants and all the members who are currently settled on the subject land, to pay back the sum of K.Shs. 300,000/=, (the initial deposit to SFT). The sum which must be paid within the next six months, shall accrue interest at court rates from 5/11/1979 (when the payment was made to SFT), till payment in full. The five defendants shall oversee the collection of the said sum whose payment will be apportioned on a pro rata basis depending on acreage of each allotee.

I do also order the company to account to all its members for the aforementioned sum K.Shs 2,000,000/=, which it did not pay to Dale. Each party shall be at liberty to apply. Those shall be the orders of this Court."

What resulted from the judgement was the Decree which ordered that the plaintiff's suit be dismissed with costs; the defendants and members settled on the subject land were to pay a sum of Kshs. 300,000/= with interest; the five (5) defendants were to oversee the collection of the said sum whose payment was to be apportioned on a pro rata basis depending on acreage of each allotee; the plaintiff company was to account to all its members for a sum of Kshs. 2,000,000/= and each party was at liberty to apply.

The plaintiff was unhappy with the said judgement and filed this appeal premised on five (5) grounds of appeal which can be summarized as:- that the learned judge erred in law and fact by delivering a judgement on issues not pleaded; that the learned judge erred in law and fact by placing a higher burden of proof on the appellant than the law requires; that the learned judge erred in law and fact by putting too much weight on the evidence adduced by the defence; that the learned judge did not appreciate the legal provisions governing the appellant and finally that the learned judge erred by dismissing the plaintiffs case against the weight of evidence.

This is a first appeal and we are duty bound to reconsider the whole matter and re-evaluate the same and

come to our own conclusions always remembering that we have not tried the case or had the benefit of hearing the witnesses. This principle has been recognized and applied by this court in many decisions that have come forth such as **Kenya Revenue Authority v Spectre International Limited (Kisumu) Civil Appeal No. 235 of 2010 (ur)** and **Mwanasokoni v Kenya Bus Service Limited (Mombasa) Civil Appeal No. 35 of 1985** (ur). Sir Kenneth O'Connor, speaking for the predecessor of this Court in **Peters v Sunday Post Limited [1985] EA 424** had this to say on the position of a first appellate court:

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses …. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion ..."

We recognize this principle and having done so we note that the case for the plaintiff and that of the defendants are well summarized in the judgement appealed from and since the appeal did not turn on those facts at all it is not necessary to set them out in this judgement.

When the appeal came for hearing before us on 26th February, 2014 the appellant was represented by learned counsel Mr. E. O. Miyienda while the respondents appeared in person. Mr. Miyienda submitted that the judgement was wrong because it was based on issues which were not pleaded in the plaint. He referred us to the prayers in the plaint where a permanent injunction not to deal with company affairs was sought against the defendants while the judgement, according to counsel, dealt with other issues. Counsel further referred to the order in the judgement for the defendants to refund a sum of Kshs. 300,000/= which was not prayed for and similarly the order for the appellant to account for Kshs. 2,000,000/= to its members which order was not pleaded in the plaint. Counsel further submitted that the learned judge erred in failing to make orders against the respondents who had remained in office from 1981 without consent of members of the company.

On the other grounds of appeal relating to allegations that the learned judge placed a higher standard of proof on the appellant than the law required learned counsel submitted that the plaintiff's case that the defendants were in office illegally had been proved but the learned judge made findings unsupported by the pleadings. It was therefore urged that we allow the appeal.

Mr. Jeremiah Mayaka Ombui, the 1st respondent, addressed us on his own behalf and as representative of the other respondents upon their election. He referred to his membership of the appellant company since 1978, allocation of land by the appellant company and his occupation of the same. He and others including the other respondents were removed from their alloted land by Settlement Fund Trustees but the issue was later settled through intervention by the central government. He confirmed that no election of office bearers for the appellant had taken place but he nevertheless supported the judgement in the event opposing the appeal.

It would appear that although the parties before the trial court were represented by counsel no issues were drawn at all for determination of the court.

As we have shown at the start of this judgement the three prayers in the plaint were for a permanent injunction restraining the defendants from running the affairs of the plaintiff company; a prayer for general damages and a prayer for costs.

In the judgement appealed from the learned judge dismissed the plaintiff's suit. It ordered the defendants and all its members then settled on the suit land to pay back a sum of Kshs. 300,000/= with interest within six months. The five defendants to the suit were to oversee the collection of the said sum whose payment was to be apportioned on a pro rata basis depending on acreage of each allotee. The plaintiff company was to account to all its members for a sum of Kshs. 2,000,000/= and each party was at liberty to apply for the said orders.

The form and contents of a judgement is provided for at Order 21 Civil Procedure Rules as follows:

"(4) Judgement in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for such decision."

The complaint running through the submissions by the learned counsel for the appellant in this appeal was that the learned judge wrote and delivered a judgement on issues that were not pleaded in the plaint and which were therefore not be before the learned judge for determination.

Order 4 Rule 6 Civil Procedure Rules states that every plaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative and it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court deems just.

One of the issues for determination on appeal in the case of **Abdul Shakoor Sheikh v Abdul Najeid Sheikh Civil Appeal No. 161 of 1991 (ur)** was the complaint that the trial judge dealt with an issue which was not properly before him as it had not been pleaded in the plaint. It was also contended in that appeal that in making this part of the order dependent on a non-existent appeal the judge grossly erred in that he granted a relief which had not been sought. This court differently constituted agreed and held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim as pleadings play a very pivotal role in litigation. The court cited a quote from the authors **Bullen and Leake (12th edition)** page 3 under the rubric Nature of Pleadings:-

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which the parties can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

It was held in the case of **Galaxy Paints Co. Limited v Falcon Guards Limited [2000] 2EA 385** that the issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for determination. It was further held that unless pleadings were amended parties were confined to their pleadings. This position had been taken in the earlier case of **Gandy v Caspair [1956] EACA 139** where it was held that unless pleadings were amended parties must be confined to those pleadings. It was further held that to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.

In a judgement delivered recently by this Court on 14th February, 2014 in **Romanus Joseph Ongombe & others v Cardinal Raphael Ochieng Otieno & others (Kisumu) Civil Appeal No. 20 of 2011 (ur)** it was held that a judgement whose basis was on issues not founded on the pleadings was a nullity. This Court proceeded in that case to remit the matter to the High Court for retrial.

The position flowing from all the previous judgements we have considered herein is that a judgement must be based on issues arising from the pleadings and the trial judge is not at liberty, as the trial judge in the case leading to this appeal did, to depart from the pleadings or the case before the court to write and deliver a judgement on issues that are not before the court. The difference would of course be where the parties introduce an unpleaded issue in the course of the trial and leave that issue for the court to decide. The court would in that event be entitled to make a necessary finding - See **Odd Jobs Mubia [1970]EA 476** where it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for a decision.

The appellants complaint in this appeal is basically that the learned judge delivered a judgement on issues that were not pleaded and which were not before the court. We agree. The learned judge adopted a path of doing what she perceived to be "justice" to the parties but in the event she erred by departing from the general rule that issues for determination in a suit generally flowed from the pleadings and the learned judge could only pronounce judgment on the issues arising from the pleadings. In the

event this appeal succeeds with the result that we set aside the judgement of Gacheche, J, delivered on 22nd February, 2006 in its entirety. We award costs of the appeal and of the court below to the appellant.

Dated and Delivered at Kisumu this 23rd day of May, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR