



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 65 OF 2010

BETWEEN

**THE CHAIRMAN, KENYA VETERINARY ASSOCIATION CENTRAL
REGION.....APPELLANT**

AND

DR. RENSON MAINA

KIMINDI.....RESPONDENT

***(Appeal against Judgment and Orders of the High Court of Kenya at Nyeri
(Makhandia, J.) dated 25th January, 2010***

in

HCCA No. 89 of 2006)

JUDGMENT OF THE COURT

1. On the 13th May 2005, Benson Maina Kimindi (respondent), filed what would pass for a small claim suit before the Resident Magistrate's Court at Othaya. His claim was against the Chairman, Kenya Veterinary Association Central Region Branch (appellant), seeking for a sum of Kshs. 122,400/-, being the sum the respondent was supposed to be paid as daily allowance and upkeep for 51 days whilst he participated in a livestock vaccination campaign covering Nyeri, Kerugoya and Murang'a Districts between various dates in April to November 2002.

2. The respondent contended that he participated in the campaign at the invitation or co-option by the appellant. He further contended that it was agreed by the executive committee of the appellant that members who participated in the vaccination campaign were supposed to be paid a daily allowance of Kshs. 1,500/= and an upkeep of Kshs. 900/=, making a total of Kshs. 2,400/= per day. The respondent took part in the vaccination for 23 days in Nyeri, 8 days in Kirinyaga and 20 days in Murang'a making a total of 51 days but despite demand, and even notice to sue, he was not paid.

3. The appellant denied liability in its written statement of defence. It contended that the respondent was not a registered veterinary surgeon as per the provisions of the **Veterinary Surgeons, Act Cap 366**. It accused the respondent of misrepresenting himself as a duly registered practitioner when he was co-

opted in the office as an executive committee member of the Kenya Veterinary Association, Central Region Branch, when he was not. The appellant admitted that the campaign took place and that the payment was supposed to be made to the bonafide registered members. However the appellant contended in its defence that the agreement was null and void for reasons that the respondent was not a registered practitioner, therefore, he was not entitled to any payment.

4. The respondent gave evidence in support of his claim and Dr. Daniel Kimaru Karugu, gave evidence on behalf of the appellant. The learned trial magistrate who heard and saw the witnesses testify entered judgment in favour of the respondent in the sum of Kshs. 122,400/= in respect of the claim for daily allowances for 51 days. She dismissed and rightly so the claim for Kshs. 25,800/= for special damages which was not proved.

5. Being aggrieved, the appellant appealed before the High Court. In a fairly detailed judgment, the learned Judge, Makhandia, J. (as he then was), re-visited the entire evidence before the trial court. He reminded himself of the principles that guided the first appeal as set out in the case of **Selle v Associated Motor Boat Company Limited [1968] E A 123**. After analyzing the evidence, he concurred with the trial magistrate. Regarding the additional issues that were raised in the appeal, touching on the competency of the suit, to the effect that the appellant, a registered society had no capacity of being sued; this is what the learned Judge posited in part of his Judgment on the aforesaid issue:

“From the foregoing, it is quite clear that the appellant's defence was categorical on what it thought was defective within the suit. It had nothing to do with capacity to sue or be sued. Ordinarily, a party is bound by his own pleadings and submissions before Court. In the case of Opendo v Ann [1983] K L R, the Court of Appeal observed;”

“The Court of Appeal cannot consider or deal with issues that were not canvassed pleaded and or raised at the lower court. For a matter to be a ground of appeal, it has to have been sufficiently raised and succinctly made an issue at the trial.....”

Also, in **Kenya Commercial Bank v Oisebe (1982) K L R 296**, it was held:

“It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal.....”

This is a situation obtaining here! In any event in his own defence, the appellant without any reservation has accepted its description by the respondent. Finally, what prejudice did the appellant suffer from such misdescription if at all? I cannot think of any....”

6. The appellant's appeal was dismissed, but the appellant is non relenting, he has now filed this 2nd appeal based on the following 4 grounds of appeal to wit:-

- 1. That the learned Judge erred in law in disregarding that the appellant lacked the capacity to be used.***
- 2. That the learned Judge erred in law in failing to make a decision as to whether the appellant had the capacity to be sued or not.***
- 3. That the learned Judge erred in law and misinterpreted the provisions of Section 15 of Cap 366 of the Law of Kenya.***
- 4. That the learned Judge erred in law is failing to fairly and properly analyses the evidence adduced before the lower court before making his judgment.***

7. Mr. Abubakar, learned counsel for the appellant in his address to us reiterated that the suit was against a party who lacked capacity to be sued. The suit was against the chairman of a society, he argued

that the respondent should have indicated the exact name of the chairman. Secondly, both courts below failed to consider the evidence of the fraudulent claim; the fact that the respondent breached the **Kenya Veterinary Board Code of Conduct**; the appellant could not pay the claim which was against the statutory provisions of **Section 15** of the Veterinary Act; the respondent offered services when he was not registered to offer such services. In this regard, counsel cited several authorities albeit persuasive, where the High court struck out pleadings or proceedings prepared by an advocate who did not have a practicing certificate. Similarly Counsel urged us to strike the claim which was based on an illegal contract.

8. This appeal was opposed by Mr. Karweru, learned counsel for the respondent. He submitted that the issue of the appellant's capacity was never raised before the trial court. He drew our attention to the statement of defence in which the appellant admitted the contents of paragraphs 1 and 2 of the plaint that dwelt with the description of the parties. Moreover, he maintained that the appellant was not prejudiced at all. The chairman of the society who was sued effectively defended himself and the society and he should be estopped from denying he had capacity to plead and defend the suit.

9. As regards matters of **Section 15** of the **Veterinary Act**, counsel argued that the operative words are “*charge or pay for drugs*”. The history of the matter clearly shows that the respondent was co-opted into the executive committee of the appellant and they undertook an exercise of vaccination of animals where no fees were charged by the participants. The money claimed was not in respect of professional services rendered but allowances payable to the participants for upkeep and daily allowances. The respondent was co-opted and promised payment; he gave evidence and proved that he incurred expenses for travelling, sleeping and eating. Counsel urged us to dismiss the appeal.

10. This being a second appeal, only issues of law fall for consideration. **Section 72(1)** of the **Civil Procedure Act, Cap 21 Laws of Kenya** provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court. A careful reading of the Section shows that such appeals are, as a general rule, confined to issues of law only. The grounds of appeal set out in the appellant's Memorandum of Appeal as we see them raise three issues of law; the capacity of the appellant to be sued; the interpretation of the provisions of **Section 15** of **Cap 366** of the **Laws of Kenya** and whether the learned Judge failed in his duty to analyze the evidence adduced before the lower court.

11. The issue of the appellant lacking capacity to be sued was raised for the first time before the High Court and this is what the learned Judge had to say about it:

“The issue being raised in this ground of appeal was never on issue before the trial court. In other words, the issue of who had been sued and in what capacity was never an issue for determination by the trial court. Much as the appellant raised the issue with regard to the competence of the suit in its defence, it was entirely on other grounds. Those grounds were that the plaint was undated. However, it is clear that this ground was untenable as the plaint in court file and as indeed the trial court found was dated. The other ground was that the verifying affidavit sworn on 9th May, 2005 contravened the mandatory provisions of the oaths and Statutory Declarations Act. The appellant did not pursue this ground during the hearing nor is it apparent how the said verifying affidavit is defective. The other ground was that the particulars of special damages had not been set out. On this, the learned magistrate agreed with the appellant and disallowed the claim. The final ground was with regard to Section 15 of the Veterinary Surgeon Act, which I have already dealt with elsewhere in this Judgment.”

12. From the above analysis and observations made by the learned trial Judge, he systematically addressed all the issues that were raised in the appeal before the High Court and went on to cite the case of ***Openda v Ann* (1983) K L R** to respond to the issue of capacity of the appellant to be sued. This Court held on page 296:

“The Court of Appeal cannot consider or deal with issues that were not canvassed,

pleaded and or raised at the Lower Court. For a matter to be a ground of appeal, it has to have been sufficiently raised and succinctly made an issue at the trial.....”

From our own reading of the proceedings before the trial court and also the pleadings especially the defence, we are in agreement with the learned trial Judge, the issue of capacity was raised for the first time in the High Court and perhaps only as an afterthought. The appellant filed a defence admitting the contents of paragraphs 1 and 2 of the plaint. These are the descriptive parts of the plaint, for example paragraph 2 of the plaint stated as follows:

“The defendant is the Chairman of the Central Region Branch of the Kenya Veterinary Association, which is duly registered under Societies Act and has its registered office at District Headquarters, Ministry of Agriculture and Livestock Development, along Muhoya Road, Nyeri Town within the said Republic of Kenya. Its address for service for the purpose of this suit shall be P. O. Box 270, Nyeri.”

13. From the above description, the appellant did not protest their description, the chairman filed a defence. During the hearing the Chairman also adduced evidence and just like the two courts below, we do not see any prejudice that the appellant suffered simply because the name of the chairman was not indicated on the pleadings. We are also alive to the fact that we are determining this appeal when the courts have shifted from worshipping at the altar of technicalities and are focusing on substantive justice. The question the courts continuously have to answer is whether an oversight to include the names of the chairman such as in this case caused any miscarriage of justice or prejudice. In this case, the chairman of the appellant, filed pleadings and called evidence in defence and was well represented by counsel, thus failure to describe him by his name did not cause any prejudice whereas striking out the suit would have resulted in injustice.

14. The second issue of law is regarding the application of the provisions of **Section 15** of the **Veterinary Surgeon Act**, which provides inter alia:

“No person shall be entitled to recover in any Court any charges for professional aid, advice or visit or for the value of any medicine or appliance supplied unless he was at the time when such aid, advice or visit was given such medicine or appliance was supplied duly registered under the Act.”

We find the learned Judge appropriately dealt with this issue when he made the following observations in part of the judgment:

“It is not denied that the respondent was involved in Livestock Vaccination Campaign and that at the time, he was not registered Veterinary Surgeon. However, the respondent's claim was not for professional services that he had rendered during the vaccination exercise, rather, it was for daily allowances i.e. allowances and daily upkeep that was offered by the appellant for those who participated in this exercise. The operative words here are 'charge' and 'value'. The appellant invited the respondent to the exercise and promised to accord him daily allowance and up keep. What the respondent was claiming for was not fees for the exercise. In other words, he was not charging for professional aid, advice or visit or for value of any medicine or appliance supplied..”during the exercise so as to bring into operation the provisions of the aforesaid Act.”

We do not wish to belabor this issue as we entirely agree with the learned Judge.

15. The last issue raised in this appeal was whether the learned Judge failed to analyze the evidence especially regarding falsified records. We are afraid the learned Judge dutifully set out the entire case, which he reviewed including the aforesaid issue which he dismissed as the appellant did not demonstrate any loss that was occasioned and the fact that he did not file a counter claim. We also hasten to add that it was the learned trial magistrate, who had the opportunity of hearing the witnesses as they testified and she

was not satisfied the allegations of professional misconduct by the respondent were proved. This is what the learned trial magistrate had to say in part of her Judgment:-

“The defence further raises an issue that during the said campaigns some of the records required to be filled in by the plaintiff were (sic) wrong entries. It is worthy to note that this issue was referred to Kenya Veterinary Board. As the plaintiff's counsel rightly points out in his submissions, there is no evidence that the plaintiff was ever found guilty of any misconduct by Kenya Veterinary Board”.

We find no justifiable reason(s) to disagree with the concurrent findings by the two courts below. This appeal lacks merit and we have no hesitation to order it dismissed with costs to the respondent.

Dated and Delivered at Nyeri this 20th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR