



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E400 OF 2021

JAMES KALA NGOLYA.....CLAIMANT

VERSUS

REGISTERED TRUSTEES OF NAIROBI CLUB.....RESPONDENT

RULING

1. This ruling responds to a Preliminary Objection raised by the Respondent in a notice dated 27th July 2021. The Objection is premised on the following grounds:

- a) There is no entity set up under the Trustees (Perpetual Succession) Act , Cap. 164, Laws of Kenya, known as the Registered Trustees of Nairobi Club;
- b) There is no Respondent in law against whom the orders sought can be directed.

2. The Objection was urged by way of written submissions. Both parties referred to the well-known decision in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] E.A 696* where a Preliminary Objection was defined in the following terms:

“....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.....”

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.”

3. The substance of the Respondent’s Objection is that there is no entity known as *Registered Trustees of Nairobi Club* and that in fact there is no body corporate capable of being sued.

4. This straightaway begs the question, who then was the Claimant’s employer, the corollary question being, by which capacity did Nairobi Club enter into an employment relationship with the Claimant?

5. In the submissions filed on behalf of the Claimant, reference was made to the decision in *Grace Mwendwa Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR* where the Court of Appeal expressed itself thus:

“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 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 non suited 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”.

6. This position was restated by the Court of Appeal in *Trustees of the Agricultural Society of Kenya v James Gitonga [2017] eKLR* as follows:

“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.”

7. While arguing that the named Respondent does not exist, there was no disclosure as to the actual institutional form of the Claimant’s employer. From the evidence on record, there was an employment contract between the Claimant and Nairobi Club and the rights and obligations accruing therefrom cannot vanish just because the Respondent may have been misnamed.

8. An employee cannot lose a claim against an employer simply because the employer has not been properly described. In ***Kenya Hotels and Allied Workers Union v Diani Sea Resort t/a Carslake Nominee Limited [2015] eKLR Rika J*** stated the following:

“Employees cannot be closed out from pursuing their Claims on the ground that they have given the Court the wrong description, of the business and legal structures which constitute their Employers. Employees hardly know what these capacities are, and what the Employers’ business and legal structures are.....Employees would be hampered in correcting employment wrongs, if they are expected to sift through these multiple layers before filing their claims.”

9. What is more, upon being sued, the Respondent filed an unconditional Memorandum of Appearance. It is now well settled that a party entering appearance unconditionally has submitted to the jurisdiction of the court where the suit has been filed.

10. In ***Kanti & Co Ltd v South British Insurance Co Ltd [1981] KLR, 6*** the Court of Appeal stated:

“...the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court, and it could not thereafter abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of the court releasing it from the admission and acceptance of the jurisdiction. Once a defendant submits to the jurisdiction of the court, the plaintiff acquires a vested interest which the defendant cannot deprive him of at his whim by entering conditional appearance or an appearance under protest. As long as the unconditional appearance stood, as it stands even today, the court was seized of jurisdiction to try the suit.”

11. In ***Billy Graham Owuor v Daudi Sabin Bahira & another [2012] eKLR Mwongo J*** held that:

“The object of a Memorandum of Appearance is to signify to a complainant and to the court before which the suit is filed, that such a suit or dispute has been acknowledged by the Defendant as filed. It is an acknowledgement that a dispute initiated by a Plaintiff has been taken notice of and noted by the Defendant; and that the Defendant will take such steps to file a response or an answer as are necessary. If the Memorandum of Appearance is unconditional as it was in this case, such appearance has been deemed by the Court of Appeal to mean that the party filing appearance submits to the jurisdiction of the Court.”

12. Pursuant to the foregoing findings and conclusions, I find and hold that the Respondent’s Preliminary Objection is misconceived and proceed to overrule it with costs to the Claimant.

13. It is so ordered.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JANUARY 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Muli for the Claimant

Miss Kwamboka for the Respondent