



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1322 OF 2010

JAMES GITONGA.....CLAIMANT

VERSUS

TRUSTEES OF THE AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

RULING

The Claimant herein filed a dispute against the Respondent by a Memorandum of Claim dated 26th October, 2010 and filed in court on the same day. The Respondent filed its Memorandum of Reply on 14th June, 2011.

The case was heard by **Justice P.K. Kosgei** (as he then was) and he delivered the award on 9th February, 2012 in the award he struck out the claim with costs. The material part of the award at pages 5 thereof is as follows:-

“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 submissions that his 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.”*

Being dissatisfied with the award the Claimant filed an application for review of the award. The grounds upon which he seeks review as stated in the application are as follows:-

1. *By failing to take into account and appreciate that the Respondent was registered under the Trustees (Perpetual Succession) Act Cap. 164 Law of Kenya, which was fact of registration was not in dispute, the learned Judge made an error of law apparent on the face of the record.*
2. *The learned made a consequential error of law apparent on the face of the record by holding that the Respondent was not a registered entity known in law.*
3. *The learned Judge made a further consequential error of law by holding that the Respondent was not a corporate body, contrary to the express provisions of Section 3(3) of the Trustees (Perpetual Succession) Act by virtue of which the Respondent is made a body corporate, with the power to sue and be sued in the corporate name.*

He seeks the following orders

1. *The application for review be allowed as a consequence whereof, the Order made by the learned Judge on 9th February, 2012 be set aside.*
2. *This Honourable Court be pleased to deliver an Award on the merits of the case on the basis of the proceedings conducted herein on 12th September 2011.*
3. *As an alternative to 2, above this honourable court be pleased to direct that the matter heard de novo.*

The Respondent filed a Notice of Preliminary Objection to the Application for Review on 12th April, 2013 on the following grounds:-

1. *The application as canvassed before the court contravenes mandatory provisions of the Law and therefore the same cannot be ventilated before this honourable court and ought to be struck out.*
2. *The application contravenes the provisions of Order 32 of the Industrial Court (Procedure) Rules 2010.*
3. *The Claimant case for review does not disclose a party capable of being sued and there is no error apparent on the face of the court's decision.*
4. *The application does not cure the fatality that occasioned the striking out of the suit and is not a matter for review as such the orders sought are not available to the Applicant/Claimant.*
5. *The application is incurably defective, void ab initio, untenable and an abuse of the court process.*

When the matter came up for hearing it was agreed that the grounds of Preliminary Objection be treated as the Respondents Grounds of opposition to the Review Application. The parties thereafter filed written submissions which were highlighted in court on 26th September, 2013.

Mr. Mbaluto for the Claimant submitted that the learned Judge made an error of the law apparent on the face of the record by making a finding contrary to admissions by both parties in the pleadings. He further submitted that the Judge made an error by finding that the Respondent is registered under the Societies Act as opposed to the Trustees (Perpetual Succession) Act. From that error there was a consequential error to the effect that the Respondent is therefore not a registered entity. As a consequence the Respondent could not be sued in its corporate name. For that reason the Judge struck out the claim. Mr. Mbaluto referred to paragraph 2 of the claim where the capacity of the Respondent was pleaded which plea was admitted by the Respondent in the Memorandum of Reply. That there was no dispute as this was an admitted fact. Mr. Mbaluto submitted that the legal effect of registration under the **Trustees (Perpetual Succession) Act** is provided for at **Section 3(3)**, that the trustees become a corporate body capable of being sued in the corporate name. He relied on the case of **Orero vs Seko [1984] KLR 238** in which the court ruled that where there is an error apparent on the face of the record a review shall issue.

Mr. Mbaluto also relied on the case of **Gitahi and Another vs Maboko Distributors Limited and Another** in which the court held that parties are irrevocably bound by their pleadings. He urged the court to allow the application and either proceed to prepare judgment on the substantive case or order de novo hearing as the case had been fully heard.

Mr. Mutua for the Respondent submitted that the Respondent as sued lacks capacity to be sued. He submitted that the trustees should have been sued in their individual names. He further submitted that although the Respondent admitted the descriptive paragraphs of the claim, admission cannot clothe legal capacity where none exists. That in the present case there is no error on the face of the record. He referred to the definition of error on the face of the record from Muller on the **Indian Code of Civil Procedure 13th Edition page 1672** which states that *“a mere error of law is not a ground for review. It must be further an error on the face of the record. The difference between an error simpliciter and an error apparent on the face of the record is a thin line. It can be said that an error is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to disabuse.”*

Mr. Mutua submitted that the present error is subject to evidence. He referred to the decision of **Rawal, Judge** (as she then was) in the case of **In RE Estate of Justus Ezekiel Mbogo (deceased) [2008] eKLR**. He submitted that the argument being advanced by the claimant is an issue of appeal and not review.

Mr. Mutua further argued that the review application is defective as the order being sought to be reviewed is not attached. He referred to the following cases all of which ruled that failure to annex the orders on decree sought to be reviewed makes the application for review invalid.

1. **Benard Githii vs Kihoto Farmers Limited Nairobi HCCC No.32 of 1971 (UR).**
2. **Dr. Perez Malende Olindo and another vs Diamond Trust Bank of Kenya Ltd. Nairobi Hccc No. 1230 of 1999.**
3. **Trust Bank Limited vs Geoffrey M. Asanyo Nairobi Hccc No.118 of 1998, and**
4. **Agricultural Syndicate Limited vs Pavement Bank Limited Hccc No.5861 of 2001.**

He urged the court to strike out the application for review.

I must point out that this has been a difficult application for me to deal with. On the one hand, it is an application for review of a decision that was made by a judge who is no longer sitting. The Industrial Court (Procedure) Rules provide that an application for review should be made to the Judge who made the decision for which review is sought. Since **Justice Kosgei** is no longer sitting, it now falls upon me to make the decision.

Secondly, the Claimant alleges that the Respondent is registered under the **Trustees (Perpetual Succession) Act** while the Respondent's position 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 record but 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, that is, whether there are any other sufficient reasons to review the award.

I find that there is no proof on record whether the Respondent is registered under the **Societies Act** or the **Trustees (Perpetual Succession) Act**. I find this to be a reasonable ground upon which I can set aside the award. I therefore order as follows:-

1. The award dated 9th February 2012 is hereby set aside.
2. The case shall be heard *de novo*.

Orders accordingly.

Read in open court this 12th day of March, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Read in the presence of

Munene holding brief for Applicant

No appearance for Respondent