

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1317 OF 2010

GRACE MWENDA MUNJURI CLAIMANT

VERSUS

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

RULING

1. On 4th March 2014, the Advocates for the respondent, Kithi & Company Advocates filed a Notice of Preliminary Objection to the claim filed by the claimants dated 26th October 2010 noting that the suit was defective and cannot stand in law and the same should be struck out with costs. Both parties appeared in court on 11th and 19th March to argue these preliminary points.

2. For the respondent Mutua Advocate submitted that the claimant has sued the Trustees of the respondent however suits against a society like the respondent cannot be initiated as the claimant has as the same must be filed against the officers of such a society who only have the capacity to be sued in their proper names. The respondent relied on the case of *James Gitonga versus Trustees of Agricultural Society, Cause no. 1322 of 2010* where the court struck out the suit as the suit had been initiated against the society without listing the officials. He also relied on the case of *Simu Vendors Association versus Town clerk of City council of Nairobi et al Misc. appl. 427 of 2005* the court held that a suit by or against an incorporated body must be done through the members of the body or one of such body in a representative capacity.

3. That the claimant herein has not disclosed the respondent officials and thus cannot be sued through its name but through its trustees and the same should be struck out with costs to the respondent.

4. Mbaluto Advocate for the claimant submitted that the preliminary objections raised by the respondent do not conform to the law as held in *Mukisa Biscuits Manufacturing Ltd versus West End Distributors Ltd [1969] EA 697*. That the matters presented by the respondent should not affect the substantive issues at hand and based on Article 159 of the Constitution, the court should ignore and proceed to hear the claimant on merit. The respondent admitted in the defence the description of the parties and should be held to their admissions and not allowed to rely on mere technicalities. The respondent is a society incorporated under the perpetual Succession Act, Cap 164 with capacity to sue and be sued. The preliminary objections should be dismissed and the claimant given a hearing date.

5. It is now settled law that a preliminary objection should remain an issue that raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The standing of parties before court especially if a party is wrongly sued is a legal issue that must be determined at the earliest for the court to determine as to extend this to a later time does nothing but unnecessarily increase costs and in most cases confuse the real issues for determination. I therefore find the questions raised by the respondent as an issue of law that should be determined first as this is not a mere technicality that can be cured by the application of Article 159 of the Constitution

6. The law on suits by or against societies is well settled. A society not being a legal person cannot sue or be sued in its name. It has to sue or be sued through its officials and correctly held in *Voi Jua Kali Association –vs- Sange and others (2002) 2 KLR 474*. And the officials have to be named. Titles like Chairman, Secretary and or treasurer cannot be used as those are not legal persons either. In this case,

where there are *Trustees* of the respondent *Society* these *Trustees* are known persons against whom orders may be executed by a party successful in any proceedings but not to the respondent as currently stated. The non-disclosure of the persons behind the respondent is an error not curable any other way other than to strike out the suit. this was the essence in the decision in the case of ***John Githinji Wang'onde versus Raphael Gitau Njau et al, Civil Appeal No. 241 of 1997 [1997 LLR 6700.***

7. I hasten to add, the question of standing before court is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. Standing before court goes to the root of the matter as where a wrong party is brought to court, then that is the injustice not curable by any Constitutional provision looking at the Constitutional preamble to the last Article.

In the circumstances, this Court will allow the preliminary objection raised by the respondent herein and hereby strike out the claim. Each party will bear their own costs.

Delivered at Nairobi and dated this 17^h day of April 2014.

M. Mbaru

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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