



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.222 OF 1998

JOSEPH OGINGA APPELLANT
VERSUS
ELISHA NYAGOL RESPONDENT.

JUDGMENT

The Respondent in this appeal, ELISHA NYAGOL, filed suit in the court below against the Appellant, JOSEPH OGINGA, seeking the following reliefs in the plaint dated 9/12/96:

- “(a) A declaration that the plaintiff’s suspension from the post of Vice-chairman of LELA A BEACH FISH PROCESSORS is null and void.
- (b) Damages for loss of earnings and business.
- (c) Costs of the suit.
- (d) Any other relief

the Appellant filed defence dated 16/12/96 in which he denied the Respondent’s claim.

After hearing the case the court below entered judgment for the Respondent. It declared that his suspension from the post of vice-chairman of Lela A Beach Fish Processors was null and avoid. It also awarded him damages for loss of earnings in the sum of shs.50, 000/00, plus costs and interest. Against that decree the Appellant has appealed to this court upon the following grounds set out in the memorandum of appeal dated 17/12/98:-

- (i) The learned trial magistrate erred in trying the suit upon a plaint that was defective in substance.
- (ii) The suit was premature and contrary to the constitution of LELA A BEACH FISH PROCESSORS SELF-HELP GROUP.
- (iii) The suit was essentially against the self help group, not against the Appellant as an individual. The trial court therefore erred in law in giving judgment against the Appellant.
- (iv) The decision of the trial court was against the weight of evidence.
- (v) There was no basis upon which the award of shs.50, 000/00 was made.

I have care fully read the record of the lower Court. I have also give due consideration to the submissions of learned counsels appearing. Quite frankly I do not understand the first two grounds of appeal. I see nothing in the record of the lower court to show that the Appellant applied to strike out the plaint and that such application was refused. These two grounds of appeal raise preliminary issues that ought to have been raised and dealt with before the suit was heard either by way of an application to strike out the plaint or by way of a preliminary objection on a point of law. It is now too late in the day to raise them. I find no merit in the first two grounds of appeal.

In her judgment the learned trial magistrate found that although not stated in the plaint the Respondent sued the Appellant on behalf of LELA A BEACH FISH PROCESSORS SELF-HELP GROUP not against him personally. The evidence tendered before the trial court showed clearly that the action complained of by the Respondent was actually the action of the Committee of LELA A BEACH FISH PROCESSORS SELFHELP GROUP, not the personal action of the Appellant. The Respondent was suspended by the said committee, not by the Appellant.

See Exhibits DW1 and DWII. It matters not that the Appellant was the Chairman of the self-help group at the time. The learned trial thought that the Respondent's failure to state in what capacity he sued the Appellant was a minor omission. With respect it was not a minor matter. Rule 4 of Order VII of the Civil Procedure Rules makes it mandatory that where a defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued and how that capacity arises. The Respondent's plaint did not so state. There is therefore merit in the third ground of appeal.

There is also merit in the fourth and fifth grounds of appeal. Evidence shows that the Respondent was suspended as vice-chairman of the self-help group, not as a member. The minutes by which he was so suspended (Exhibit DWII) say in the relevant portion:

"..... The committee therefore resolved that Mr. Nyagol be suspended as Vice-chairman from 25.9.96. However, he will still remain a member, but security-wise, he will delegate his agent or wife to carry out with the processing operations at the site pending the General Meeting's recommendations."

It is reasonable to expect that the Respondent's activities that would have brought him profits were those of fish-processing. His post of vice-chairman surely was, or should have been, non-profit making! He was not suspended from being a member of the self-help group. He could have carried on his profit-making activities, albeit through his wife or some other agent. So, what loss of earnings did he suffer to entitle him to damages of shs.50, 000/00" That award was without basis in fact as there was no evidence of loss.

The upshot of all the above is that I will allow this appeal and set aside the lower court's decree. I will substitute therefore an order dismissing the Respondent's (plaintiff's) suit with costs. The Appellant shall have the costs of this appeal. It is so ordered.

DATED AND SIGNED AT KISII THIS 24TH DAY OF MAY 2000.

H. P. G. WAWERU

JUDGE.

DELIVERED AT KISII THIS 26TH DAY OF MAY 2000.



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