



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.72B OF 2018

BETWEEN

WOTTA-HAUS LIMITED.....APPELLANT

AND

THE CHAIRMAN, SECRETARY & TREASURER

(suing as the officials and on behalf of House Of Hope).....RESPONDENT

(Being an Appeal from the Ruling and Orderin Kisumu CMCC No. 239 of 2015

by Hon. W.K.Onkunya (SRM) on 18th July, 2018)

JUDGMENT

1. **THE CHAIRMAN, SECRETARY & TREASURER (suing as the officials and on behalf of HOUSE OF HOPE) (Respondent)** filed suit against **WOTTA-HAUS LIMITED (Appellant)** in the lower court seeking a refund of Kshs. 500,000/, costs of the suit and interest.
2. The Appellant denied the Respondent's claim. The case was heard and before the Appellant closed its case, it applied to recall its witness which application was allowed by a ruling dated 25.08.17.
3. Before the recall of the Appellant's witness, the Appellant by a notice of Preliminary Objection dated 14.03.18 and filed on 21.03.18 notified the Respondent that it would seek the dismissal of the suit on the ground that there was no proper plaintiff before the court. The court after considering the submission of both parties dismissed the Preliminary Objection.
4. Aggrieved by the trial court's decision, the Appellant filed this appeal.
5. I have considered the submissions by counsel for both parties. It is not disputed that the proper complainant in this suit ought to be the **House of Hope Kandaria Self Help Group**. Since the said entity is not a legal person with capacity to sue or be sued, it can only sue through its officials who must be named in the pleadings. (See **Francis Karani Elijah & 2 Others v Chairman (KANU) & 2 Others Misc. Civil Case No. 238 of 2002**).
6. The fact that the trial court on 18.05.15 allowed the Respondent to sue through its officials did not exempt the Respondent from complying with the law relating to parties to a suit since a non-existent party cannot sue or be sued. (See **Fort Hall Bakery Supply Co. v Fredrick Muigai Wangoe [1959] E.A 474 page 475**).
7. The foregoing notwithstanding, I find that the trial magistrate rightly considered that substantial justice is better served by not striking out the Respondent's suit for the reason that the anomaly in its pleadings can be cured by an amendment. (See **Josiah Njoroge Njuguna v Ingobor Farm Co. (Registered Trustees) & 3 Others [2018] eKLR**).
8. Consequently, this appeal is disallowed but on condition that the Respondent does within 30 days from today's date file an application to amend its pleadings to bring in the correct party to the suit. In the absence of compliance with this order, this appeal shall stand allowed and the Plaintiff's suit struck out. Costs of this appeal shall be borne by the Respondent.

DATED AND DATED IN KISUMU THIS 12th DAY OF March. 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi

For the Appellant - N/A

For the Respondent - N/A