

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 178 OF 2018

JACKLINE MWAKHA OKANYA.....APPLICANT

VERSUS

COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

CLERK KAKAMEGA COUNTY ASSEMBLY.....2ND RESPONDENT

RULING

1. Curiously, the proceedings herein are said to be in the form of a miscellaneous application commenced by way of plaint. The plaintiff is a nominated Member of the Kakamega County Assembly and has sued the County Assembly Service Board and the Clerk to the Kakamega County Assembly. A plaint originates a civil suit, never an application, for applications are commenced by way of either a summons in chambers, a motion or an originating summons.

2. Be that as it may, what I am called upon to determine is a Notice of Preliminary Objection dated 20th December 2018 following the consent that the parties entered into before me on 24th December 2018. The objection is raised to the interlocutory Motion dated 10th December 2018, on grounds -

(a) That the Motion is against a non-existent party known as the County Assembly Board;

(b) That the Motion sought substantive orders against persons who are not named in the Motion as parties, that is to say Kakamega County Assembly Board, the Leaders of Majority and Minority in the Kakamega County Assembly and other members of the Board;

(c) That the orders sought are final;

(d) That the application is founded on non-existent or repealed or amended provisions of the law; and

(e) That there were no legal entities known as County Assembly Service Board, Leader of Majority Party, Leader of Minority Party and civilian members of the Board.

3. I note from the record before me that the Notice of Preliminary Objection was lodged in court contemporaneously with an affidavit in reply to the Motion, sworn on 20th December 2018 by Laban Maloba Atemba. I have scrupulously perused through the said affidavit. The points raised in the Notice of Preliminary Objection are also raised in the said affidavit.

4. A preliminary objection is raised on a point of law, and it is to be disposed of by looking only at the pleadings on record without more. It is not to be supported by any other document, such as an affidavit. The mere filing of an affidavit simultaneously with a notice of preliminary objection is enough proof that the issues raised therein do not warrant summary disposal, for if the Motion qualified for summary disposal then the respondents would not have seen it fit to file an affidavit to respond to it, for a Notice of Preliminary Objection would have sufficed.

5. In the circumstances, I hereby dismiss the Notice of Preliminary Objection dated 20th December 2018, and direct that the Motion dated 10th December 2018 be disposed of on its merits.

DATED, SIGNED and DELIVERED at KAKAMEGA this 10th DAY OF April , 2019

W MUSYOKA

JUDGE