



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 675 OF 2009

MICHAEL GITAU WAWERU.....PLAINTIFF/RESPONDENT

-VERSUS-

PAMELA SAVAGE.....1ST DEFENDANT

ESMOND BRADLEY MARTIN.....2ND DEFENDANT

PAUL WELD DIXON.....3RD DEFENDANT

MIKE MILLS.....4TH DEFENDANT

IAN LANE.....5TH DEFENDANT

THE KAREN LANGATA DISTRICT ASSOCIATION.....6TH DEFENDANT/APPLICANT

RULING

1. The 6th defendant has brought the Notice of Motion dated 4th July, 2017 supported by the grounds set out on its face and seeking the following orders:

- a. THAT the plaintiff's/respondent's suit and/or plaint dated 14th December, 2009 be struck out.**
- b. THAT in the alternative and without prejudice to the foregoing, the name of the 6th defendant/applicant be struck out from the suit.**
- c. THAT the costs of the application and the entire suit be in favour of the 6th defendant/applicant.**
- d. THAT this Honourable Court be pleased to award any other or further orders as it may deem fit in the circumstances.**

2. The plaintiff/respondent filed a replying affidavit he swore to oppose the motion. However the other defendants did not participate in the application.

3. Mr. *Onyango* learned advocate appearing for the respondent argued that a similar application had previously been lodged by the applicant and the other defendants, which application was dismissed by the Honourable Mr. Justice Waweru.

4. It is also Mr. *Onyango's* submission that the issue of striking out the applicant ought to have been raised earlier on and evidence adduced to show that it is an unincorporated body, arguing that the certificate of registration of the applicant will assist in dispelling any doubts that may arise.

5. In response, Mr. *Omollo* learned advocate for the applicant contended that this suit is being challenged on the basis of capacity to sue the

applicant.

6. I have carefully considered the grounds laid out on the body of the Motion plus the facts deponed in the supporting affidavit. I have also considered the facts deponed in the replying affidavit filed in response thereto as well as the oral arguments and the authorities relied upon.

7. The history of the matter is that the 1st to 5th defendants herein filed Nairobi HCCC No. 2250 OF 1998 against the respondent and the City Council of Nairobi seeking for permanent injunctive and declaratory orders with regard to the commercial development on LR NO. 7413/5.

8. The suit was challenged by way of separate statements of defence filed by the respondent and the Nairobi City Council. An interlocutory injunction was granted to the aforementioned defendants pending the hearing and determination of the suit. The said suit proceeded for hearing and in the end, the trial court dismissed the same with costs being awarded to the respondent and Nairobi City Council.

9. Subsequently, the respondent instituted the present suit seeking for general and special damages for damage, injury and loss of business as a result of the injunction in place.

10. In the application, before this court, it is apparent that there are two (2) substantive orders being sought. The first order relates to the striking out of the respondent's suit. I have gone through the record and it is apparent that the defendants had previously filed a Chamber Summons seeking to have the respondent's suit struck out.

11. The said application was heard together with a similar Chamber Summons filed by the respondent seeking to have the defence struck out. Upon hearing the parties, Justice Waweru dismissed both applications vide the ruling delivered on 3rd August, 2011.

12. It is apparent from the foregoing that the issue of striking out the suit was raised and aptly considered by the above judge and there is nothing to indicate that the same has been appealed against. I agree with the respondent's argument that the issue is now *res judicata* and the applicant cannot be heard to urge this court to try it a second time. Consequently, order (a) of the Motion cannot be granted.

13. The second substantive order sought concerns itself with whether there is justification to have the applicant's name struck out from the suit.

14. A close perusal will reveal that the applicant was not a party in HCCC No. 2250 of 1998 which triggered the present suit. It is equally clear that the 4th and 5th defendants herein sued in the aforesaid HCCC No. 2250 of 1998 in their capacities as officials of the applicant whereas the 1st, 2nd and 3rd defendants are indicated as having at all material times been members of the Association.

15. In that case, it is for this court to deliberate on whether an Association can sue or be sued. In so doing, I make reference to the Certificate of Exemption attached to the respondent's list and bundle of documents on page 18. The same indicates that the applicant was exempted from registration under **Section 10** of the **Societies Act, Cap. 108 ("the Act")** as at 23rd March, 1971.

16. The Act does not illustrate whether exempted Associations or societies can file suits or be sued in their own names. In the premises, courts have on various occasions interpreted this to mean that the Act did not intend to have suits brought under the respective names of exempted societies.

17. I am therefore satisfied that the applicant was improperly enjoined in this suit by virtue of its lack of capacity to sue or be sued in its own name. It is apparent that the remaining defendants are either members or officials of the applicant which is to say that the applicant's interests should ideally be safeguarded.

18. In the premises, I will allow orders (b) and (c) of the application and hereby order that the 6th defendant's/applicant's name be struck out of the suit. The 6th defendant/applicant shall have the costs of the application and suit.

Dated, Signed and Delivered at Nairobi this 25th day of September, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st to 5th Defendants

..... for the 6th Defendant/Applicant