



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 53 OF 2015

WILLIAM OMAKADA.....PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS

MUKUYUNI PRIMARY SCHOOL..... DEFENDANT

R U L I N G

1. The plaintiff filed this suit against the defendant on 14/4/2015. He contemporaneously filed an application seeking injunctive orders against the defendant. The defendant filed a replying affidavit to the application by the plaintiff. Before the application could be set down for hearing, a preliminary objection was taken on behalf of the defendant on the following grounds:-

(i) That the instant suit offends the provisions of the Basic Education act.

(ii) That the entire suit and the application dated 10/4/2015 is bad in law and incompetent.

2. Mr. Nyamu for the defendant argued that primary schools are not run by Board of Governors but by Board of Management and that since the plaintiff sued the Board of Governors of Mukuyuni Primary School, the suit is incompetent and cannot be maintained. He further argued that no enforceable order can result from the said suit. He therefore submitted that the entire suit should be struck out with costs.

3. Mr. Bundi for the plaintiff opposed the preliminary objection arguing that non joinder or misjoinder of a party in a suit cannot render a suit incompetent and that in any case, this is something which can be cured by amendment. He further argued that misdescription of a party cannot lead to striking out of the suit.

4. Mr. Nyamu in supporting of his argument cited *Kisumu Civil Appeal No. 256 of 1997* between *Mwori Self Help Group and Nzoia Sugar Company Limited*. He also relied on *Nairobi HCCC No. 607 of 1999 Maurice Ooko Otieno -vs Meter Misericcordiae Hospital* and *Kitale ELC No. 66 of 2013 George Kamau Kimani & 5 Others -vs- County Government of Trans-Nzoia*.

5. Under the Education Act Cap 211 Laws of Kenya (now repealed), management of Primary Schools were run by a Board of Governors. This was provided under Section 6 of the Repealed Act. When the Basic Education Act of 2013 came into force on 25/1/2013, it repealed the Education Act and by virtue of Section 55 of the new Act, the management of Primary Schools was to be run by Board of Management.

6. This suit was filed on 14/4/2015 two years after repeal of the Education Act which provided for management of Primary Schools by Board of Governors. The plaintiff herein brought the suit against the Board of Governors of Mukuyuni Primary School. The question which then arises is whether a suit can be defeated by mere misdescription of parties or joinder or non joinder of parties. In the present case the issue is not joinder or misjoinder of a party. The issue as I understand it is that the defendant is contending that it is the Board of Management which should have been sued and not the Board of Governors. The issue here is not capacity of being sued. The plaintiff brought the suit against the Board of Governors who have since been replaced by Board of Management. This cannot defeat a suit. This is something which can be cured by an amendment. The courts should dispense substantive justice as opposed to technical justice. The authorities relied by Mr. Nyamu are all not relevant. The Court of Appeal decision was dealing with a self help group which had no capacity to sue or be sued in its own name. In the case of Maurice Otieno Ooko and Mater Misericordiae Hospital, the issue there was lack of capacity. An amendment had been allowed to cure the anomaly but the judge held that the new amendment had been caught up by limitation. In the case at the Environment and Land Court at Kitale between **George Kamau Kimani & Others -vs- County Government of Trans-Nzoia**, the issue in that one was amendment of pleadings without leave of court.

7. For the reasons given hereinabove, I find that the preliminary objection lacks merit. The same is dismissed with costs to the plaintiff.

It is so ordered.

Dated, signed and delivered at Kitale on this **28th** day of **July, 2015**.

E. OBAGA

JUDGE

28/7/2015

In the presence of M/s Arunga for Mr. Nyamu for Defendant and M/s Bett for Mr. Bundi for Plaintiff

Court Assistant – Winnie.

E. OBAGA

JUDGE

28/07/2015