



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 682 OF 2009

KENYA PROGRAMMES FOR SUSTAINABLE DEVELOPMENT APPLICANT

VERSUS

CFC STANBIC BANK DEFENDANT

RULING

1. The Application before this Court is the Defendant's Notice of Motion dated 22 April 2013 seeking Orders that the entire suit to be struck out with costs. It is brought under the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as **Order 2 Rule 15 (1) (b) (d)** and **Order 51 Rule 1** of the *Civil Procedure Rules, 2010*. The Application is founded on the Grounds that the Plaintiff was de-registered on 28th of December 2010 and therefore, as a result, it does not exist in law or in fact. The Defendant maintains that the suit filed by the Plaintiff is thus incompetent. The Application is opposed.
2. The said Notice of Motion is supported by the Affidavit of **Greg Karungo** dated 22 April 2013. Mr. Karungo details therein that he is an advocate of this Court practising in the firm of Walker Kontos, the advocates on record for the Defendant. As a result, the deponent maintains that he is duly authorised to swear the Affidavit on behalf of the Defendant. He went on to say that by letter dated 2 November 2012, a copy of which was annexed to the said Affidavit, he wrote to the NGO Coordination Board (hereinafter "the Board") which is a statutory body that registers all Non-governmental Organisations in Kenya, such as the Plaintiff. He wrote to enquire as to whether the Plaintiff was duly registered with the Board, whether it was of good standing and requested a copy of the current list of officials thereof. Mr. Karungo detailed that he had received a response from the Board dated 14 March 2013, again a copy of which he annexed to his said Affidavit. That letter detailed that the Plaintiff was deregistered on the 28th day of December, 2010 for non-compliance with the Act. In Mr. Karungo's view the Plaintiff was guilty of material non-disclosure for having failed to disclose to this Court that it had been de-registered almost 3 years ago. For those reasons, he felt that the entire suit to be struck out with costs.
3. The Plaintiff filed a Replying Affidavit sworn by one **James Muhia Njuguna** dated 14 May 2013. The deponent maintained that he was the Chairman of the Plaintiff, conversant with the conduct of the suit and thus competent to swear the said Replying Affidavit. He noted that this suit was filed in September 2009 and that the purported de-registration to which the Defendant had referred in the Supporting Affidavit to the Application was effected in December 2010. He thus maintained that this suit was properly filed. Thereafter, he annexed to his said Affidavit a copy of a letter from the Board dated 10th May 2013 in which it had noted that the Plaintiff had applied for re-registration. That letter acknowledged receipt of the Plaintiff's Original Registration Certificate plus Shs. 36,000/- being penalty payments and the processing fee for a new Certificate. The last two paragraphs of the said letter from the Board read as follows:

“However, note that you will be expected to submit all your outstanding returns for the period ended December, 2005 – 2012 and remit annual returns filing fee of KES. 2000/- per year when collecting your new certificate.”

Looking forward to a continued good working relationship.” (Underlining mine).

4. In his submissions before Court, Mr. Karungo pointed to the de-registration of the Plaintiff as a result of non-compliance with the Act. He maintained that the Plaintiff could not be represented before Court. He referred to the letter from the Board dated 10 May 2013 which did not detail that the Plaintiff had been re-registered. Consequently as before Court, there was no Plaintiff. Mr. Ochieng appearing for the Plaintiff opposed the Application firstly, because it was filed without the instruction of the Defendant client. He noted that the Supporting Affidavit with regard to the Application was sworn by counsel himself and that the Court did not have before it any authority granted to counsel by the Defendant client. Secondly, the letter which the firm of Walker Kontos had written to the Board dated 2 November 2012 revealed no instructions from the firm’s Defendant client. He then referred to the letter from the Board dated 10 May 2013 from which it was obvious that the Board knew that the entity of the Plaintiff existed. Re-registration of the Plaintiff, according to the letter, was not in doubt. In Mr. Ochieng’s view, the Defendant’s Application before Court had been overtaken by events. He concluded that what the Defendant claimed is dead, is alive and well and the registration would be re-instated.
5. In his response to the Plaintiff’s submissions, Mr. Karungo submitted that the firm of Walker Kontos being on record for the Defendant, he was authorised to file any Application or swear any Affidavit on the Defendant’s behalf. In his turn, it queried the position of Mr. Ochieng, not being an advocate, as being before the Court. He pointed out that Mr. Ochieng was not an office bearer of the Plaintiff. He further noted that the letter from the Board dated 10 May 2013 details that reinstatement was pending and he reaffirmed that, as at present, before court, the Plaintiff did not exist.
6. **Order 2 Rule 15 (1)** reads as follows:

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a. **it discloses no reasonable cause of action or defence in law; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

As regards the Defendant’s Application before this Court brought under the above Rule, the relevant words are: “any pleading”. The Pleadings before this Court include the Plaintiff dated 17 August 2009 but not filed until 17 September 2009. As pointed out by Mr. Ochieng, as at those dates, the Plaintiff was registered by the Board. Undoubtedly through some oversight, the requirement to renew registration annually had been overlooked by the Plaintiff’s office bearers. Indeed from the letter dated 10 May 2013 from the Board, it does appear that the Plaintiff’s annual returns for the period ended December 2005 – 2012 had not been filed. However, is such oversight fatal to the Plaintiff’s appearance before this Court?

7. The principles set out in **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** are clear that if the pleading does not disclose any reasonable cause of action or defence or that the pleading is scandalous, frivolous and vexatious, or that such pleading may prejudice, embarrass or delay the fair hearing of the suit or that it is an abuse of the process of the court, then it ought to be dismissed. In the matter, it was held:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of Justice ought not to act in darkness without the full facts of the case before it.” (Underlining mine).

With respect to Mr. Karungo, I believe that this is the case in this matter. I find that the Plaintiff is making appropriate efforts to put its position in order as before this Court by seeking early re-registration from the Board, largely, I fear, as a result of the Defendant’s Application before court amounting to a wake-up call. I do not consider that the lack of registration means that the Plaintiff no longer exists as an entity and without doubt, it is repairable.

8. As a result, I dismiss the Defendant’s Notice of Motion dated 22nd of April 2013 but in all the circumstances, I make no Order as to costs.

DATED and delivered at Nairobi this 13th day of June, 2013.

J. B. HAVELOCK

JUDGE