



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO. 93 OF 2012

MSABAHA INVESTMENTS LIMITED.....PLAINTIFF

=VERSUS=

1. ODON KALMAN MARIA CUPPEN

2. PATRICIA RACHEL MELANI CUPPEN.....DEFENDANTS

R U L I N G

1. The Application before me is dated 21st December 2012 and has been brought pursuant to the provisions of Section 3 of the Environment and Land Court Act NO. 19 of 2011.
2. In the Application, the Plaintiff is seeking for the following reliefs;
 - a. **THAT the Hon. Court be pleased to order that the Plaintiff/Applicant has filed all pending annual returns up to the year 2012.**
 - b. **The Hon. Court be pleased to order that the Plaintiff/Applicant's pleadings filed in court on 20th June 2012 prior to filing annual returns, be deemed as duly filed and served upon the Defendants/Respondents after complying with the requirements of filing annual returns.**
 - c. **Costs be in the cause.**
3. The Application is based on the grounds that the Applicant filed the suit in court in haste and consequently committed a mistake by filing the suit whereof the Applicant had omitted to file returns for 13 years; that the irregularity and or mistake committed by the counsel has been rectified and that the Respondent shall not be prejudiced at all.
4. The Application is also supported by the Plaintiff's manager who deponed that the Plaintiff has now fully paid all the dues for a period of 13 years. The Plaintiff's annual returns for 13 years have been annexed on the Supporting Affidavit.
5. The Defendants filed their Grounds of Opposition on 6th March 2013 and stated that the suit is incurably defective and that it cannot be cured by the current Application; that the Application is an attempt to cure a suit that is brought by a non-suited individual and that the Defendant's Preliminary Objection should be heard first.
6. The current Application was filed by the Plaintiff after it was served by the Defendants with the Notice of Preliminary Objection dated 25th June 2012.
7. The Preliminary Objection is premised on the grounds that the suit is brought without legal authority and by a non-suited person.
8. The issue of the Plaint being incurably defective was also raised in the Defence as follows:

(i) The Deponent of the the Verifying Affidavit is non-suited and the said Affidavit is clearly false and he has perjured himself contrary to the Oaths and Statutory Declaration Act;

(ii) There is no authority to anyone or the Deponent of the Verifying Affidavit to file the suit:

(iii) The purported Plaintiff, the company is non-existent by operation of the law having failed to file annual returns since 1999;

(iv) There is no evidence that Mr. Rigii Kibugi Wainaina, the only witness stated in the statement is a manager/agent/servant of the Plaintiff's as stated in his statement.

9. The current Application seems to address the Preliminary Objection in terms of (iii) above alone. The Plaintiff will still have to deal with the other objections that have been raised in the defence.
10. I have gone through the Companies Act and I have not come across a provision which states that a company which has not filed annual returns is non-suited. According to section 125 (3) of the Companies Act, if a company fails to comply with the requirement of filing the annual returns, the company and every officer of the company who is in default shall be liable to a default fine.
11. The failure to pay annual returns by the Plaintiff as at the time of filing the suit cannot be said to be fatal to the suit, especially in a situation where the company thereafter files the annual returns.
12. It is now established that irregularities as to form which do not cause prejudice to the other side are not sufficient to invalidate proceedings before the court. The court should not treat any incorrect act or omission to comply with a particular Rule as a nullity, with the consequences that everything founded thereon is itself a nullity, unless the omission is of a fundamental nature. Matters of procedure, in my view, are not normally of a fundamental nature.
13. The general body of case law indicates that where there are defects, this does not by itself compromise the main cause, as the courts are guided by the object of substantive justice, and that the courts are always interested to know what prejudice the objector has suffered where such defects are alleged. The Court of Appeal had this to say in the case of **Mwangi Vs. Mwangi (1999) 2 EA 234:**

“Rules of procedure are said to be good servants but bad masters. This is not to say that they can be flouted with impunity. All rules have their specific purpose(s) but a rule of procedure should not drive a litigant out of judgment seat if other rules allow such a litigant to come back to court. Our rules of procedure have had their origin in England and the tendency in England is to move away from form to substance. When the litigant himself shows that he is doing his best the court ought to exercise its discretion which is wide enough, subject only to the requirements of justice and any consequences which would result contrary to those interests should be treated with considerable reservation.”

14. The Defendants have not shown the prejudice they shall suffer with the filing of the annual returns by the Plaintiff after filing the suit. The filing or non-filing of annual returns by the Plaintiff is not an issue in the current proceedings.
15. For the above reasons, I find and hold that the non-filing of the annual returns by the Plaintiff at the time of filing this suit is an irregularity which is not fatal to the suit. I therefore allow the Application dated 21st December 2012 as drawn.

Dated and Delivered in Malindi this **29th** day of **August** 2013

O. A. Angote

Judge