REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Suit 96 of 2010

RUTH WANJIRU NJOROGE

***(suing on behalf of MUGUGA HIGH SCHOOL)*……..……1ST PLAINTIFF**

MUGUGA HIGH SCHOOL COMPANY LIMITED……..2ND PLAINTIFF

VERSUS

HONOURABLE ATTORNEY GENERAL…….……..1ST DEFENDANT

THE DISTRICT LAND REGISTRAR NAROK……...……..……..2ND DEFENDANT

JEMIMAH NJERI NJOROGE……..…….……..3RD DEFENDANT

KISHANTO OLE SUUJI…….…..……4TH DEFENDANT

RULING

In her Notice of Motion dated 30th May 2011 and filed on 3rd June 2011, the 3rd Defendant *(the Applicant)* sought two orders; **firstly** that the suit herein be dismissed on the ground that it is scandalous, frivolous and vexatious, and **secondly** that the costs of the Motion *(the Application)* be borne by the 1st Plaintiff.

The Motion was based upon the grounds on the face thereof and the Supporting Affidavit of

Charles Mbugua Njuguna of Njuguna Partners Advocates for the 3rd Defendant *(the Applicant).*

In opposition to the Motion the firm of Gitau J.H. Mwara & Co. Advocates 1st Plaintiff filed a Notice of Preliminary Objection on the grounds that -

(i) the Application is on the face of the record defective, incurably and fatally defective because it does not show who is the Applicant or Respondents,

(ii) the Affidavit in support is sworn by an Advocate, Charles Mbugua Njuguna who had no capacity to swear an affidavit in place and on behalf of the 3rd Defendant, without stating whether he was authorized by the 3rd Defendant to swear the Supporting Affidavit, and does not state whether the facts averred were in his knowledge before the suit was filed,

(iv) the said Supporting Affidavit was witnessed by William Githara which is unprofessional, unprocedural and unethical.

(v) the Motion was overtaken by events as the suit in the name of the 2nd Plaintiff had been withdrawn and discontinued by a Notice of Withdrawal and Discontinuance of suit for the 2nd plaintiff filed on 24th June 2011.

(vi) the suit by the 1st Plaintiff against the 4th Defendant is still subsisting hence the Application by the 3rd Defendant to dismiss the whole suit has no merit and be dismissed with costs.

The four parties were each well represented when this matter was urged before me on 22nd February 2012. The Application by Mr. Nyambane, holding brief for Mr. Gitau, learned counsel for the Applicant to adjourn the matter was declined. Mr. Njuguna counsel for the 1st and 2nd plaintiff sought outright dismissal of the Motion for non-prosecution. Mr. Kimatta who held brief for Mr. Kayo for 4th Defendant, argued against dismissal of the suit on technicalities and urged the court to let the case be heard on its merits.

There is basically one ground for seeking the dismissal of the suit. It was Mr. Njuguna\'s learned counsel for the Applicant case, that once a limited liability company is dissolved, whether by a process of liquidation or striking off by the Registrar of Companies under the Companies Act *(Cap. 486, Laws of Kenya)*, it cannot sue nor can it be sued. Counsel argued that once the suit by the 2nd plaintiff collapses, so does the suit by the 1st plaintiff because the suit by the 1st plaintiff is dependent upon the existence of the 2nd plaintiff.

Having considered the totality of the arguments in this application including my decision in **SIETCO (K) LTD VS. FORTUNE COMMODITIES LTD & ANOTHER [2005] eKLR** that a non existent legal entity cannot sue nor be sued, I set out in the following paragraphs my opinion on the issues -

(1) whether the application is incurably and fatally defective because it fails to state who the Applicant or Defendant (is in the Application),

(2) whether there is a law and practice prohibiting an Advocate from swearing an affidavit in place of his client,

(3) whether it is unprofessional unprocedural and unethical for a partner in a firm to witness an affidavit of his colleague, in the firm?

(4) whether the application has been overtaken by events by virtue of the Notice of

Withdrawal and Discontinuances of suit for the 2nd plaintiff,

(5) whether the suit by the 1st plaintiff against the 4th defendant is still subsisting,

(6) whether the application to dismiss the entire suit has merit,

(7) who should bear the costs of the application.

I do not agree that the application is necessarily incurably and totally defective merely because of failure to indicate who is the Applicant or defendant. Whereas it is good practice and proper drafting of pleadings to indicate who the Applicant/Respondent is, it is usually pretty clear and discernible from the pleadings themselves or particular applicant who the applicant or respondent is, and no prejudice can be said to be caused to any party. To hold that failure to so indicate parties would be both mechanistic and would make the rules, the masters rather than maidens of justice. I find no merit on this ground.

The law restricting Advocates from making an affidavit in place of their clients is found in Section 134 of the Advocates Act, *(Cap. 80, Laws of Kenya)* which provisions confer privilege and protection to Advocates in respect of his dealings with a client. Where therefore an Advocate makes an Affidavit in place of his client, he throws away that privilege and protection and brings herself/himself into the arena of the suit as a potential witness. There are however exceptions. The privilege does not extend to -

(a) any communication made in furtherance of any illegal purpose,

(b) any fact observed by an Advocate in the course of his employment showing at any time that a crime or fraud has been committed since the commencement of his employment as such Advocates.

Whereas that is the law, there are occasions such as the present one, where the matters deponed to by an Advocate are both legal and factual in nature such the existence of a Gazette Notice giving notice to show cause why a name of a company should not be struck out, and subsequent Gazette Notice striking off a company from the Registrar of Companies, where the loss of privilege and protection under Section 134 of the Evidence Act may not be lost, it is an undesirable practice, and counsel should be well advised to keep their privilege and protection under the law. I would not however hold that there is a law prohibiting making affidavits by counsel in place of their clients - the litigants. Failure to observe this practice is not fatal unless first challenged and upheld.

Again, the internal witnessing of Affidavit by partners is a practice to protect counsel within the firm from potential summons to testify in controversial cases; and it could prove embarrassing to the firm. Witnessing of Affidavits is done by persons independent of the deponent. Again that rule of ethics should be borne in mind by all counsel. Failure to do so does not render the Affidavit defective per se.

The Notice of Withdrawal and Discontinuance of the suit against the 2nd plaintiff did not affect the Notice of Motion for striking out the suit. It did not affect the Motion for striking out the suit because the Notice of Withdrawal and Discontinuance were filed subsequent to, and in respect to the Motion. In other words, the Motion for striking out evoked in the mind of counsel for the plaintiffs that the 2nd plaintiff did not exist and could therefore maintain an action.

It is indeed trite to students of the law of associations, and in particular company law, that once a group of two or more persons *(it is now suggested, even one person can incorporate himself into a limited liability),* are incorporated and are issued with a Certificate of Incorporation or as appropriate certificate of registration, such companies or associations become separate legal or juristic persons from their erstwhile sponsors. That is the effect of Section 18 of the Companies Act *(Cap. 486, Laws of Kenya).*

The argument by counsel for the 3rd Defendant is that once the company was struck off the

Register of Companies by Gazette Notice Number 850 of 6th February 2008, it ceased to exist that is to say to carry on any business by its corporate name. Suing is part of the capacity of an incorporated company. Once the veil of incorporation was removed by dissolution it could not sue.

The Plaint herein is dated 16th April 2010, and was filed on the same day. The company which is the 2nd plaintiff having been struck out of the Register of Companies on 6th February 2008, two years prior to the filing of the suit, it had no capacity to do so. The suit by the 2nd plaintiff was therefore incompetent and ought to be struck out.

Mr. Njuguna argued that the suit should stand struck out as a whole because the 1st plaintiff\'s claim is itself dependent upon the suit by the 2nd plaintiff. This is not apparent from the pleadings, in particular the plaint, paragraph 1 - where the 1st plaintiff is described as *"a member and shareholder of Muguga High School"*. I am not sure what is meant by a member and shareholder of Muguga High School. I have looked at the Certificate of Incorporation of Muguga High School issued on 12th March 1998. It refers to *"Muguga High School Company Ltd"* and not Muguga High School Company Ltd *"trading as Muguga High School"*. This clearly shows that the two bodies, Muguga High School, and Muguga High School Company Ltd - are two separate entities. The latter is a creation of the Companies Act the former, the creation of the Business Names Registration Act *(Cap. 499, Laws of Kenya)*. It is thus possible that the 1st plaintiff is indeed a member and shareholder of Muguga High School a business name. For that reason, her suit is not dependent upon the existence or otherwise of the 2nd plaintiff.

For that reason only I would not strike out the 1st plaintiff\'s suit against the Defendants. I would direct counsel for the plaintiff, if found necessary, to amend the plaint to reflect the status of *"Muguga High School"* in law as discussed.

I would therefore strike out the suit by the 2nd plaintiff with costs to the 3rd Defendant.

In summary, I find and hold -

(1) The application is not incurably and fatally defective by failure to indicate who is an Applicant or Defendant,

(2) Advocates lose their privilege and protection under Section 134 of the Evidence Act by making affidavits on behalf of their clients,

(3) Affidavits drawn by one Advocates firm should be commissioned by an independent person,

(4) In this case the Notice of Withdrawal and Continuance of suit did not affect the Motion for striking out the suit against the 2nd plaintiff,

(5) the suit by the 1st plaintiff against the 4th Defendant still subsists,

(6) the application to dismiss the entire suit lacked merit,

(7) the costs herein shall be borne by the first plaintiff.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 8th day of June, 2012

M. J. ANYARA EMUKULE
JUDGE