



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE 8 OF 2006

JANE MBITHE
MUTUKU.....PLAINTIFF

V E R S U S

1. THE CHAIRMAN, B.O.G., KYETHIVO SECONDARY SCHOOL

2. THE PRINCIPAL (MRS AGNES A MASIKA), KYETHIVO SECONDARY SCHOOL.....DEFENDANTS

R U L I N G

1. The Plaintiff herein sued the chair of the Board of Governors and its secretary (who was principal) of Kyethivo Secondary School in respect of a loan of money which the Plaintiff pleaded she advanced to the Defendants. The Plaintiff's case is that the money advanced was never paid, and she claims the same plus costs and interest.
2. The Defendants entered appearance and filed defence. They denied borrowing money from the Plaintiff as pleaded. The 2nd Defendant however admitted signing a loan agreement with the Plaintiff on behalf of her school but averred that she did so under duress, and that therefore the said agreement could not bind the school. She pleaded particulars of duress. There are other averments in the statement of defence.
3. On 18th May 2006 the Plaintiff applied for an order to strike out the Defendants' defence and entry of judgment in her favour. Before the application was prosecuted the Defendants lodged notice of preliminary objection to the suit upon the main grounds that they were non-suited. That preliminary objection was partly heard on 25th June 2008.
4. Before conclusion of arguments upon the preliminary objection the Plaintiff applied by **chamber summons dated 18th July 2008** for leave to amend her plaint under **Order VIA, rules 3, 5 and 8** of the then **Civil Procedure Rules** (the **Rules**). The amendment sought was "to change the names and/or particulars of the Defendant to bring (the) right party to the suit". The application is supported by the Plaintiff's affidavit to which a draft amended plaint is annexed. It is clear from the intended amendment that it is proposed to substitute the Board of Governors of Kyethivo Secondary School in place of the two defendants.
5. The 2nd Defendant has opposed the application by **grounds of opposition dated 20th May 2010** (I cannot see on the record any papers filed by the 1st Defendant in opposition to the application). The grounds of opposition are -

(i) That the application is bad in law, an afterthought and *mala fides* in that it is meant to defeat the Defendants' preliminary objection to the suit.

(ii) That the proposed amendment will prejudice the Defendants on account of the part-heard preliminary objection.

(iii) That the draft amended plaint does not disclose a reasonable cause of action.

6. I have considered the submissions of the learned counsels appearing.

7. A suit cannot be defeated merely because the wrong party has been sued. See Order 1, rule 9 of the Rules.

8. In the present application the Plaintiff is merely seeking to bring the right defendant before the court so that the matters in controversy can be properly adjudicated. I cannot see what prejudice the Defendants may suffer by being removed from the suit and substitution in their place of the correct defendant. They will no doubt be entitled to their costs for defending the suit so far.

9. Bearing in mind the overriding objective of the **Civil Procedure Act, Cap 21** (the Act) and the Rules as set out in **sections 1A** and **1B** of the Act, I will grant the application. The Plaintiff shall file and serve an amended plaint within fourteen (14) days of delivery of this ruling. The Defendants shall have costs of the application. It is ordered.

10. The delay in preparation of this ruling is deeply regretted. It was caused by my ill-health the last few years. But I thank God that I am much better now.

DATED AT NAIROBI THIS 6TH DAY OF AUGUST 2012

H.P.G. WAWERU
JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA

.....
JUDGE