



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 243 of 2011

THE REGISTERED TRUSTEES OF

PENTECOSTAL EVANGELISTIC FELLOWSHIP

OF AFRICA PLAINTIFF

=VERSUS=

VOI MUNICIPAL COUNCIL DEFENDANT

RULING

Before court is the Preliminary Objection dated 19th March 2012 brought by the Respondent in which it raises the following point of law:

“The suit herein has been brought against a legally non-existent entity and in total contravention of Section 28(3) of the Local Government Act (Cap 265) Laws of Kenya”

The Respondents allege that for that reason the entire suit amounts to an abuse of the due process of the court and should be struck out. **MS. JADI** Advocate acted for the Respondent while **MR. KIBE** represented the Applicant. By consent the application was to be disposed of by way of written submissions and both parties duly filed their submissions in court.

In their submissions the Respondents argue that this suit having been brought against the ‘**VOI MUNICIPAL COUNCIL**’ as opposed to the ‘**MUNICIPAL COUNCIL OF VOI**’, has been filed as against a non-existent entity and this cannot stand. The Respondent cites Section 28(3) of the Local Government Act to buttress their case.

In reply the Applicants in opposing this Preliminary Objection submit that Section 28(3) refers only to Town Councils and this does not apply to the Respondent being a Municipal Council. They argue that the relevant statute is 12(1) of the Local Government Act. In determining this matter it is important to cite the relevant legislation. Section 28(3) of the Local Government Act Cap 265 provides as follows:

“(3) Every county or town council shall, under the name of “the County Council of” or “the Town Council of” as the case may be, be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued, and acquiring, holding and alienating land”

On the other hand Section 12(3) of the same Act provides:

“every municipal council shall, under the name “The Municipal Council of” be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time), and shall by such name be capable in law of suing and being sued, and of acquiring, holding and alienating land”

Voi is a municipality and therefore at the outset it is clear that the application section is 12(3) and not Section 28(3) upon which the Respondents relied. Be that as it may, I do note that the pleadings refer to ‘**VOI MUNICIPAL COUNCIL**’ as opposed to ‘**THE MUNICIPAL COUNCIL OF VOI**’. The question this court needs to answer is whether this misdescription is a fundamental error that renders the entire suit fatal or whether it is a mere technicality that can be amended without prejudice to the Defendant. Firstly I do note that despite referring to the Respondent as a non-existent entity the Defendants did file a defence to the suit on 26th March 2012. This is clear evidence that they were duly served with the suit papers even despite this mis-description. The Town Clerk **BAKARI SAID PHILE** in his Replying Affidavit sworn on 26th March 2012 states:

“I am the Town Clerk to the ‘Municipal Council of Voi’ and not ‘Voi Municipal Council as pleaded in this suit hence I swear this affidavit under such protest ...”

The Town Clerk proceeds in this Affidavit to respond to the issues raised in the application making it abundantly clear that the Municipal Council of Voi is fully aware of the Plaintiff’s allegations as set out in the plaint. The mis-description aside the Respondent had no doubt whatsoever that the Plaintiff intended to refer to it and that is why it responded accordingly. The error would only be deemed fatal if it caused confusion as to who was being referred to or if the Respondent was in no way aware that it was the Respondent being referred to. As demonstrated this was not the case here.

Courts of law have repeatedly pronounced that they would be reluctant to dismiss any suit at the preliminary stage without hearing the matter on its merits. I take judicial notice of the fact that Municipal Councils are often referred to in one format or the other thus to refer to the Respondent as Voi Municipal Council cannot be deemed fatally defective to the suit. The two terms Voi Municipal Council and Municipal Council of Voi refer to one and the same entity only that the latter is the statutory correct manner of reference. I also take into account the ‘**overriding objective principal**’ as well as Article 159(2) (c) of the Constitution of Kenya as a basis to find that this mis-description is a mere technicality which does not affect the validity of the suit. I therefore dismiss this Preliminary Objection.

Although the Plaintiff has not made any application to amend the name of the Defendants, it is clear that the intention was to sue the Municipal council of Voi. There is therefore need to have this amendment affected in order to cure the mis-description. Order 8 r5 of the Civil Procedure Rules 2010 allows a court to direct amendment to any document for the purpose of correcting any error or defect in the proceedings.

Therefore invoking the courts powers under O8 r5 and Section 3A as read with Section 1A and 1B of the Civil Procedure Act I hereby order the Plaintiff to file and serve an amended plaint substituting the Defendant as named with the correct name of the Defendant within seven (7) days of today’s date. Costs in the cause.

Dated and Delivered in Mombasa this 8th day of November 2012.

**M. ODERO
JUDGE**

In the presence of:

Mr. Aziz holding brief for Mr. Ahmed for Applicant

Mr. Mutisya for Respondent