



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 258 OF 2008**

JOHN KARIUKI MAINA MATHUKO ..... PLAINTIFF

VERSUS

THE TOWN CLERK ON BEHALF OF THIKA  
MUNICIPAL COUNCIL.....

..... DEFENDANT

**RULING**

The plaintiff brought this suit against the defendant in respect of a parcel of land situate in Thika Municipal Council. It is his case that he was dispossessed of the said plot which was then given to a school known as Kenyatta Primary School. An alternative plot was promised by the defendant but the defendant did not fulfill that undertaking. Aggrieved by the loss, he brought this suit against the defendant. The defendant denied all the allegations raised by the plaintiff and stated among other things that, the suit is bad in law as framed and that it is statute barred. The defendant added that a preliminary objection would be raised before or during the hearing.

There is now before me an application by way of Notice of Motion seeking an order that this suit be struck out with costs for being frivolous, vexatious and an abuse of the process of this court. The reasons advanced by the defendant are that;

- i. The claim is statute barred.
- ii. A local authority is a legal entity capable of suing and or being sued.
- iii. There is no local authority in law known as Thika Municipal Council.
- iv. The plaint is not accompanied by a verifying affidavit which is mandatory.
- v. The plaint does not comply with order VII of the Civil Procedure Rules.

There is also an affidavit sworn by Johnson Ndwiga Kariuki who at the time of filing the application was the Town Clerk.

The application is opposed and the plaintiff has filed a replying affidavit thereto. Both the learned counsel for the defendant and the plaintiff have filed written submissions which I have noted.

I have noted that the defendant submits that there is no entity known as Thika Municipal Council, but Municipal Council of Thika. In effect, the plaintiff's suit is said to be against a non entity. Some High court decisions have been cited by the defendant which include **HCCC NO. 851 of 2002 – Milimimani Commercial Court Nairobi City Council V Evis Evarard & Others**. In that case Mwera J held that Nairobi City Council is not the same as City Council of Nairobi. That being the case, the plaint was struck

out. In **HCCC No. 869 of 2001 Josephine Wangari Vs Thika Municipal Council and Others**, Sitati J held that there was no entity in law known as Thika Municipal Council and went ahead and struck out the suit against the 1<sup>st</sup> defendant.

The two decisions above can only be of persuasive value but not binding on this court. With profound respect however, I do not agree with the approach by the two learned Judges in respect of the title of the parties therein. I say this because, there was no doubt whatsoever that the defendant knew in what capacity they were being sued and the name alone should not have prejudiced their position. I also believe that the most important thing in any pleading, is for the party sued to know the nature of the case lodged against it. I have asked myself what prejudice has befallen the defendant in this case for the reason that it was described as Thika Municipal Council instead of Municipal Council of Thika. I have found none, neither has any been alleged by this party. That ground cannot be sustained. Some of the points raised by the defendant fall within the purview of a technicality which should not be used to defeat the case of the plaintiff.

I also know that however weak a party's case may be, they should not be denied their day in court without a hearing. Looking at the pleadings before me, I believe that there are serious triable issues which should be adjudicated upon by the court at the trial thereby giving both parties an opportunity to be heard. There is the issue of whether or not plaintiff was dispossessed of his plot. There is also the issue of whether or not he was promised an alternative plot which was never to be, and there is also the issue of whether or not he has suffered loss as a result of the actions of the defendant.

To uphold the application at this stage would be driving the plaintiff out of the seat of judgment without a hearing. This should not be allowed. Accordingly the defendant's application is hereby dismissed with costs to the plaintiff.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of June, 2011***

**A. MBOGHOLI MSAGHA  
JUDGE**