REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 239 of 2009

BUREAU VERITAS (K) LIMITED …… PLAINTIFF

VERSUS

KENYABUREAU OF STANDARDS ……..…….…..… 1ST DEFENDANT
DR. KIOKO MANGELI ……..…… 2ND DEFENDANT
SAMMY K. MILGO ……..……..… 3RD DEFENDANT
ROSE GACHERU ……..... 4TH DEFENDANT
JOHN M. RUKARIA ……. 5TH DEFENDANT

RULING

1. The Chamber Summons dated 7th December 2009 is brought by the plaintiff. It is expressed to be brought under the provisions of order VI rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules. The plaintiff is seeking for an order that the defendants' amended defence dated 5th October 2009 and filed on 6th October 2009 be struck out with costs to the plaintiff. This application is based on the grounds that the amended defence consists of general denials; it is evasive and raises no triable issues.

2. It was submitted that the defendants have been purporting to act in the capacity of officials of Kenya Accreditation Services (KENAS) which is contrary to the regulations and not founded within The Standard Act. Further grounds stated that the defendants have no statutory authority to usurp the powers and functions of **KENA**S so as to fill in the void of a regulatory vacuum created by the failure of the Minister concerned to constitute a Board of **KENAS.** According to the applicant no Board has been established as per the regulations thus the amended defence is a mere sham merely calculated to prejudice the fair trial of this case.

3. This application is supported by the affidavit of **Andrew Kinyanjui** sworn on 7th December 2009. It is contended that, prior to 8th March 2005, the Minister of Commerce and Industry, published a legal Notice No.90 of 1995 which contained the National Scheme for the Registration of Assessors. A Committee known as Quality Systems Assessments Committee was provided for to register various categories of assessors who were to carry out quality assessment and certification of various products, services and systems in accordance with the **Standards Act Cap 496**.

4. Prior to 8th March 2005, the plaintiff was registered as a Quality Assessment Assessor by the said Committee and carried out its functions as prescribed in the legal notice No. 90 of 1995. In order to regulate the practitioners in the area of certification under the Act, the Minister of Trade and Industry published Legal Notice No.26 of 2005 the Standards (Kenya Accreditation Services Regulation) which came into force on 8th March 2005. Those regulations provide for the immediate establishment of a body known as **KENAS**. The appointment of a board comprising of a Chairman is supposed to be appointed by the Minister and a number of other members representing various

stakeholders for the performance of the functions of **KENAS.** It follows that with the new regulations, the qualities System assessment Committee established under a legal Notice No. 90 of 1995 was abolished with effect from 8th March 2005 and no other entity has been established.

5. It is further contended that since the publication of the new regulations, in March 2005 the Minister has not appointed the board of **KENAS** although it was said he has appointed **Dr. George Sirengo Masavu** as the Chairman of the board. There was no appointment of the Chief Executive Officer and other members of the board. Due to this vacuum it is alleged that the defendants have been usurping the powers and functions of the non existing **Board o**f **KENAS** and have been demanding payment of loyalties and subscriptions in the name of **KENAS.** The defendants have further been faulted for individually and collectively acting as agents of **KENAS** and for purporting to issue accreditation certificates for a fee.

6. The plaintiffs had raised this matter in another suit **HCCC NO. 919 OF 2006** but that suit was dismissed for want of prosecution however that does not bar the plaintiff from filing a fresh suit because the issues were not adjudicated on merit. Counsel referred to the case of; **The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd (unreported) CIVIL APPEAL NO. 333 OF 2001** in which the court of appeal held that a suit which was dismissed for want of prosecution and was not determined on merits, the principle of ***res judicata*** does not apply. The same principle is articulated by an English case of; **Birkitt v James [1977] 2 ALL ER 801, HL**. In which the House of the Lords held that;

> "***If an action was dismissed for want of prosecution before the limitation period had expired, the court would have no power, in the absence of special circumstances, to prevent the plaintiff starting a fresh action within the limitation period, and proceeding with it with all proper diligence***"

Counsel urged the court to find that the defendants' have been acting irregularly by demanding for money. It is not also in dispute that the plaintiff has been in the business of certification. It is the Minister who is supposed to constitute the Board and there is no statutory authority for the defendants to usurp the power of **KENAS** their defence is therefore without basis and should therefore be struck out.

7. This application was opposed by the defendant; reliance was placed on the replying affidavit by **J.B. Kalo** sworn on 8th February 2010 as well as the amended statement of defence filed on 6th October 2009. It is contended that the plaintiff is not engaged in the business of certification and merely stating so in an affidavit cannot confer upon them the powers of certification and standardization. The powers accorded to the 1st defendant are provided for **under Section 4 of the Standards Act Cap. 496** which includes; the promotion of standardization in industry and Commerce and other functions stipulated there under. There is no way the defendant a statutory body can be said to be usurping the powers provided for by the Act. Moreover under section 20 of the Act, the Minister is supposed to make regulations in consultation with the Council for Bureau of Standards for the better carrying out of the provisions and purposes of the Act.

8. Counsel therefore urged the court to dismiss the application to strike the amended defence. He also relied on several authorities which give general guidelines on the elements the court should consider in determining whether or not to strike out pleadings. Striking out pleadings is always sparing done when the pleading being complained about is an abuse of the court process and discloses no triable issue?

The principles to bring to bear are explained by the Court of Appeal in the case of; **DT Dobbie & Co. Ltd. versus Muchina 1982 KLR** as per Madan JA:

> ***"The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."***

9. The plaintiff's main complaint against the defendants is that they are usurping the powers and functions of **KENAS** an entity that has not yet been constituted according to regulations published in March 2005. The defendants are faulted for collecting loyalty fees from the plaintiff. On the other hand the defendants contend seriously that they are the creature of the Standards Act Cap. 496, which establishes them and sets out their functions. Those functions include ***inter alia*** the promotion of the standardization of the specification of the commodities thus the work of standardization is fully vested upon the 1st defendant.

10. Going by the contentious issues raised in this application and the replying affidavit it will not be in the interest of justice to strike the amended defence. The thin line lies between the allegations of usurpation of powers to fill a vacuum where the Minister has not appointed or constituted the board of **KENAS** against the contention that the 1st defendant is a statutory body deriving powers under the Standards Act. Those are triable issues which can only be determined through the court room processes but not by way of affidavits. Indeed the affidavits have not resolved the issues, there are allegations and counter allegations which can only be determined at a full trial.

11. Accordingly the application seeking to strike out the amended defence cannot succeed it is dismissed. Costs of the application will be in the cause.

RULING READ AND SIGNED ON 18TH JUNE 2010 AT NAIROBI.

M.K. KOOME
JUDGE