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

Civil Suit 923 of 2003

ARISTOCRATS CONCRETE COMPANY LIMITED…….PLAINTIFF

VERSUS

MAVOKO MUNICIPAL COUNCIL……..DEFENDANT

RULING

The plaintiff moved to this court,vide a plaint dated 3rd day of September 2003 and filed on the 4th day of September 2003. The plaintiff has described itself as Aristocrats Concrete Company Limited. Whereas the defendant was described as Mavoko Municipal Council.

It is apparent from the court, record that summons to enter appearance were taken out and served. Appearance seems to have been entered but there is no copy traced on the court file. It seems to have fallen off. There is however a defence dated 25th day of September 2003, which does not bear a date stamp showing when it was filed. But there is a receipt showing that the defence was filed on the 26th day of September 2003. The parties in the defence are described in the same manner as described in the plaint.

There is an interim application which had been filed on the same date as the plaint. It was opposed, but same was canvassed inter partes and gave rise to a ruling delivered by Visram J as he then was (now JA) on the 15th day of January 2004, by which ruling the plaintiff became a beneficiary of an interlocutory injunctive relief.

The defendant has presented to this court, an application dated 29th day of June 2007 and filed the same date which is subject of this ruling. It is brought under order V rule 13 (1) (b) and (d) CPR section 3A of the CPA and all other enabling provisions of the law. Two prayers are sought namely;-

1. *The plaintiff's suit herein be struck out with costs.*

2. *Costs of this application be provided for.*

The grounds in support are set out in the body of the application, supporting affidavit, further affidavit, written skeleton arguments, and case law. Since the application is anchored on the pleadings, it is better to set out the salient features of the same first. Those of the plaint run thus:-

- The defendant is a local authority duly established under the provisions of chapter 265 of the laws of Kenya and is charged interalia with the statutory duty of construction, general control and care of all public streets and roads within Athi River.

- The plaintiff is an owner of a quarry within the municipality.

- Using own funds, the plaintiff constructed a 6.5. Km road to its quarry (plaintiffs).

- The said road is also used by other quarry owners within the vicinity.

- The costs of construction came to Kshs. 65,375,600.00.

- He was advised by the Ministry of lands and settlement to seek compensation from the defendant.

- Pursuant to the said advise, the defendant and the plaintiff entered into a memorandum of agreement on or about the 15th October 2001 for the payment of the expended sum of Kshs. 65,375,600.00 as specified in paragraph 5 of the plaint among others, through payments of toll charges to the tune of Kshs. 11,186,440.65 and Kshs. 2,013,55.32.

- The plaintiff became aggrieved because in January 2003 the defendant in flagrant breach of the said agreement collected toll charges but failed to remit the same necessitating the filing of the suit and the seeking of the relief being specified in the prayers.

The defendants' response to that claim as set out in its defence is as follows:-

- Denied construction of the road and the plaintiff is put to strict proof.

- The defendant had no duty either moral or legal to compensate or refund the plaintiff of the sum allegedly expanded in constructing the said road.

- That although a memorandum of understanding was purportedly signed, between it and the plaintiff, the said agreement is void and does not form a binding contract between the parties for the reason, in a summary form that the same was entered into contrary to the provisions of the local government Act, as no approval of the minister of local government was sought and obtained before the said agreement was entered into, and lastly that the said agreement was signed/attested by individuals contrary to the mandatory requirements of the law that such a document be sealed with the common seal of the defendants council as provided for under section 46 of the 2nd schedule of the LGA

- Further that the said contract ceased to apply and have any effect on the parties when the defendant stopped operating toll booths and thus leaving collections from the road users. As such the plaintiff can only claim money collected through the use of toll booths as specifically provided for under the agreement.

- Denied flagrantly breaching the said agreement.

- With effect from 18th February 2003, the defendant has been levying royalties from quarry users and not toll charges and as such it is not obligated to account for the same to the plaintiff.

- Denied the entire claims as laid against it and sought for its dismissal.

It is therefore against the above set out background summary of the content of the pleadings on record that the defendant/applicant seeks the relief sought in the application. A summary of the major points raised by them are namely:-

1. The suit is incompetent because it has been brought against an unknown entity known as Mavoko Municipal council instead of Municipal council of Mavoko.

-That without a proper status in law, there can be no claim to any accrued right.

-Contend that the defect cannot be cured by an amendment as one cannot amend that which does not exist.

2. The plaintiff is further non suited in that, the suit is based on an illegal contract because the same offends the provisions of section 186 of local government Act which makes a mandatory requirement that in order for any contract to be valid, the same had to receive the sanction of the relevant minister. In the absence of such ministerial sanctioning, any such contract purportedly entered into will be null and void and any suit that seeks to enforce such a void and null contract is an abuse of the due process of the court, fortified by the fact that as per the assertion in the deponement of one Tubman A. Otieno, there are no council minutes on records evidencing the existence of the said alleged part performance by the defendants and if any alleged arrangements exists for such transactions, then the same is alleged against public policy and consequently null and void making the suit a proper candidate for striking out and there is no need to go to trial.

In opposition, the plaintiff put a replying affidavit by one Rita Kangara Mwangi sworn on the 4th day of March 2008, and filed the same date and a further affidavit by one Raghavandra Ranganathan on the 31st day of March 2008 and filed on the 22nd day of may 2008, written skeleton arguments, oral high lights and case law. The major ones are as follows:-

-The defendant accepted, the description given to it in the plaint and did not protest at the earliest opportunity.

-That the defendant is officially described as such as shown by annexture RKM 1 and 2.

-That the suit has been in court, for the last 4 years and parties have litigated as such and in fact drawn issues and have readied the suit for trial. None of the issues raised, raise the issue of a mis noner in the description of the defendant.

-Contend that the defendant uses the description given in the pleadings and the same cannot be denied.

-It is common knowledge that local authorities use their names before municipal council and Visram J as he then was (now JA) recognized the said use when he described the defendant in his ruling herein that the defendant is a local authority established under the local government Act, which ruling has not been upset and as long as it stands the defendant has been properly described.

-They contend that by reason of what has been asserted by them, above, the default if any is minor and the same is curable by an amendment under order 6A rule 5(1) CPR.

-Further an amendment and or correction of the names is permissible under order 6A rule CPR, if the court, is satisfied that the mistake is genuine and it was not meant to mislead.

-The court, has further tools via section 100 and 3A CPA to correct any error such as the ones mentioned herein for ends of justice to be done to the parties, which is the duty of the court, which court, should not fetter itself.

-Issue of lack of ministerial authority to enter into a contract is a triable issue which cannot be disposed off through interlocutory proceedings as surrounding facts have to be interrogated. Witnesses cross examined and evidence tested vigorously.

-There is also another claim which is not based on contract and the same is sustainable.

-The doctrine of estoppel operates in their favour as the defendant is raising the issue 3-4 years later.

In response to that submission counsel for the defendant stressed the following:-

-Estoppel is an equitable remedy one of whose principles is that Equity follows the law, it cannot be

employed to defeat clear provisions of the law.

-They are perfectly entitled to raise the issue of legality which can be raised at any stage of the proceedings as it deals with issues of law.

-Further that estoppel comes in to aid a litigant where there is an alleged irregularity and not illegality.

-Contend that the ruling of Visram J herein did not concede the description of the defendant as herein described as being proper but it simply described the status of a local authority.

-Still maintain that an amendment is not available herein because in an amendment, the court, substitutes something with another. Herein there is nothing to be substituted.

-Still maintains that section 186 of the LGA applies and in the absence of a ministerial approval the contract is null and void and cannot form a basis of any litigation.

On case law, the court, was referred to the case of **GIMU DEVELOPMENT (K) LIMITED VERSUS MAVOKO MUNICIPAL COUNCIL AND LILIAN NDUKU MUSYIMI AND TABIMAN OTIENO** decided by this court, on the 5th day of February 2007. In this case the defendants had raised a preliminary objection to the effect that. "*The suit as drawn and filed is in competent or bad in law as against the 1st defendant as the same was in gross violation of the mandatory provisions of the local government Act cap 265 laws of Kenya and or the general principles of suits against non natural persons…..*" At page 2 of the said ruling this court, drew inspiration from the decisions of my learned brother judge Mwera J in the case of **NAIROBI HCCC NO 851 OF 2002 (UR) NAIROBI CITY COUNCIL VERSUS CRIS EVARARD AS CHAIRMAN AND OTHERS.** It is noted that Mwera J after reviewing the law, on the subject ruled thus:-

"*The name Nairobi City Council exists only in the minds of the general Public where as the Act (LGA) had set out the name of the entity as the city of Nairobi meaning the city council of Nairobi…..There being no party to sue the defendant could not be said that a non entity has a case to maintain against them and without plaintiff the court, had a duty to close its records by striking out the plaint"*

At page 3 of the ruling this court, also drew inspiration from a decision of Lenaola J in Nairobi HCCC NO. 733 of 2003 (UR) **THE GATUA NYAGA DAIRY FARM COMPANY LIMITED AND OTHERS VERSUS MICHAEL KINGU AS CHAIRMAN AND OTHERS** where it is noted that Lenaola J after revisiting the provisions of section 12 (3) of the LGA and after considering the findings of Mwera J in HCCC No. 851/02 had concluded thus:-

"*The words are clear" unambiguous and incapable of any other meaning other than the mandatory one described and on that basis arrived at the conclusion that the second defendant did not exist and no amendment could cure that deffect"*

At page 4 of the said own ruling, line 10 from the top it is observed that: - "*In the alternative counsel (for the respondent) urged the court, to invoke section 100 of the civil procedure Act and order for an amendment*". At line 5 from the bottom on the same page the court went on the observe thus:- " *The court, has had occasion to revisit section 12 (3) of the local government Act. Subsection 3 begins with the words "Every Municipal Council shall bear the name of "The Municipal council of ……The gist of that section is that every municipal council upon elevation to that status acquires a new Christian name namely" The municipal council of ….." Anything described otherwise robes that particular entity its right, of existence. The provision is clear as found by my learned Brother judge in the cases quoted above and there is no reason to depart from their findings. on this basis this court, finds that the first defendant Mavoko Municipal Council which is described in paragraph 2 of the plaint as a local authority registered under the local government Act cap 265 of the laws of Kenya does not fit the description provided for under section 12 (3) of the said Act. This description therefore robes its right of existence in law without a status in law, there can be no right to sue or to be sued. The first objection therefore stands"*

The decision in the **Gatuanyaga Dairy Farm Company limited case** (supra) by Lenaola J, and **Nairobi city council case** (supra) by Mwera J, have already been commented upon in the said own ruling, what is left in the authorities supplied by the applicant is the decision of Ang'awa J in the case of **FIDELITY HOLDINGS LIMITED VERSUS THIKA MUNICIPAL COUNCIL NAIROBI HCCC NO 1000 OF 2003** decided on the 5th day of December 2007. A perusal of the same reveals that at page 2, of the said ruling the learned judge set out the definition of the city council of Nairobi and the provision of section 12(3) of the LGA thus:-

"*The city council of Nairobi means the city council of Nairobi in corporated by Royal Charter dated 20 March 1950 any reference in this Act, or any other written law, to a municipality or as municipal council shall be construed as including reference to the city of Nairobi or the city council of Nairobi as the case may be"*

Section 12 (3) states: "*Every Municipal council shall under the name of "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 be capable in law of suing and being sued and of acquiring holding and alienating land"*. At page 3-6 the learned judge reviewed case law, on the subject namely **NAIROBI CITY COUNCIL VERSUS CHRIS EVANS AND 4 OTHERS NAIROBI HCCC NO. 851/02 BY MWERA J, THE GATUANYAGA DAIRY FARM COMPANY LIMITED AND OTHERS, NAIROBI HCCC NO. 733/03 BY LENAOLA J, GIMU DEVELOPMENT (K) LIMITED VERSUS MAVOKO MUNICIPAL COUNCIL AND OTHERS NAIROBI HCCC NO. 1314/06 NAMBUYE J, HAMPHRAY WAINAINA MBOGO VERSUS THIKA MUNICIPAL COUNCIL AND OTHERS NAIROBI HCCC NO. 129/2003 AGANYANYA J, KARIUKI CIVIL ENGINEERING (K) LIMITED VERSUS BUNGOMA MUNICIPAL COUNCIL BUNGOMA HCCC NO. 120/05 OCHIENG J.** the learned judge observed that in the first 3 cases the misdescription was found to be fatal, where as in the last two the misdescription was found not to be fatal but curable by amendment.

At page 6-7 of the said ruling the learned judge made the following observations and findings:-

"*What makes the local authority to be unique is that statutes provide its description. In this case the local Authority Act cap 265 provides that the said local authority are to be distinctly described and at all times be so sue or sued. The plaintiff/respondent state that not only did the 1st defendant acknowledge the present description in name but also issued title for land in the name of "Thika Municipalpality" This is implying that the title lease deeds issued to the public at large are in effect, illegal, null, and void due to the misdescription of the names.*

I am not bound by the decisions of my fellow judges but these authorities are persuasive. I am non the less persuaded that the correct position is that the description of the local authorities are as described and provided for by statute namely cap 265 local (Authority) government Act, that is the municipality council of Thika"

Lastly the case of **BROADWAYS CONSTRUCTIONS COMPNAY VERSUS KASULE AND OTHERS (19720 EA 76,** where it was held interalia that "*the land Transfer Act makes illegal all taking of possession and all contracts made without the consent of the minister."*

The respondent has countered those authorities with the provisions of section 12 (3) of the LGA already set out herein, section 186 reads in part:-

"186 (1) A local Authority may with the approval of the minister

(a) …….

(b) Enter into an agreement with any person for the establishment and maintenance by such person of any toll bridge or service of ferry boats which such local authority is under paragraph (9) itself authorized to establish and maintain, and for providing to such person such financial assistance in connection there with as the minister may approve.

(2) *Whenever any toll bridge or service of ferry boats is established and maintained by a local authority under this section or by any person under an agreement entered into between such person and a local authority under subsection (1) (b) such local authority may with the approval of the minister, by order prohibit any person (other than a person with whom the local authority has entered into an agreement as a fore said except with the written consent of and subject to such conditions as may be imposed by the local authority, from operating a toll bridge or carrying on a ferry boat service within the area of such local authority or any part thereof and within such hours as may be specified, in such order."*

Halisbury laws of England volume 16 Fourth Edition page 1082 paragraph 1609. (On what conduct will create estoppel) states "*parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up and a fortiori on a some what different principle such a party cannot take advantage of an error to which he himself contributed."*

A ruling delivered herein by Visram J as he then was (now JA) on the 15th day of January 2003 his Lordship observed at page 2 line 9 from the bottom that:-

"*The defendant is a local Authority established under the local government Act (cap 265)"*

Sections 3A, 99 and 100 of the CPA also cited which read:-

" Section *3A- Nothing in this Act shall limit or otherwise affect the inherent power of the court, to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.*

Section 99 Clerical or Arithmetical mistakes in judgement decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court, either of its own motion or on the application of any other parties.

Section 100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

Order 6A rule 3(3) An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court, is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

Rule 5 (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect in any proceedings, the court, may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just"

The case of **CHEMWOLO AND ANOTHER VERSUS KUBENDE 91986) KLR 492** a CA decision where it was held interalia that " *The concern of the court, is to do justice to the parties and the court, would not impose conditions on itself to fetter the discretion.*

In Re Pan African credit and Finance limited (2000) KLR 36 in which Mbaluto J held interalia that "*the inherent powers of the court, can only be invoked for the purpose of doing justice, they cannot be exercised for the purpose of assisting a party who intends to avoid legal liability.*

The case of **HUMPHRAY WAINAINA MBOGO VERSUS THIKA MUNICIPAL COUNCIL AND 4 OTHERS (SUPRA)** decided by Aganyanya J as he then was (now JA) decided on the 7th day of July 2007. At page 2 -4 line 5 from the bottom on page two, the learned judge as he then was (now JA) made the following observations;-

"*Infact this case has been fixed for hearing in the form it is three times, 1st and 2nd November 2004, 19th and 20th September 2006 and 14th and 15th March 2007. It would appear it has never been heard on all those dates. 1st defendant has since been represented by counsel and has never since filing appearance raised any complaint about the form in which the said 1st defendant has been sued.*

It is common knowledge that councils be it city, municipal, urban or county councils are known by the headquarters of the area where they are situated. This is why we talk of Nairobi city council, Machakos Municipal council and Kakamega county council. The use of the title is so notorious, such that even the plot being contested in this case is titled Thika Municipal Block 11/870.

That in this case the name "Thika" comes before Municipal should not be made so much an issue to cause the striking out of pleadings as this court, is being asked to strike out the suit in this case. I do not believe this was the intention of the legislature when enacting section 12 of the local government Act cap 265 laws of Kenya. The inherent power of the court, to struck out pleadings under order 13(1) of the CPR rules is supposed to be applied or exercised in plain and obvious case and in any case sparingly and cautiously. ***REPUBLIC VERSUS PERUVION GUANO COMPANY 36 CH. DIV 89 AT PAGE 495 AND 496 AND MOW VERSUS LAWSON AND ANOTHER (1915) 31 CTR. 418 AT PAGE 419, IN KELLA WAY VERSUS BURY (1982) 66 LTR 599*** *at page 600 and 601 Denman J said of the inherent powers under rules similar to our order VI rule 13 (1) "That is a very strong power and should only be exercised in cases which are clear and beyond all doubt.…… the court, must see that the plaintiff has got no case at all either as disclosed in the statement of claim, or in such affidavits as he may file with as view to amendment. The late Madan JA was even more liberal when he wrote the leading judgement in* ***D.T DOBIE COMPANY (KENYA) LIMITED VERSUS MUCHINA (1982) KLR1.***

After quoting various decisions including those cited herein above he stated in obiter Dictum "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 real life by amendment it should not be struck out.

….. I am in agreement with the view that where pleadings can only be cured by an amendment not amounting to injection of real life, in such pleadings, then there should be no justification at all in striking out such pleadings. In the case subject to the application herein there has been an interchanging of the word Municipal council of Thika, with Thika Municipal council which is not a fatal defect at all. It can easily be corrected by a simply amendment"

The case of **CENTROL BANK OF KENYA AND ANOTHER VERSUS UHURU HIGHWAY DEVELOPMENT LIMITED AND 4 OTHERS (2000) KLR 382 the CA** held inter alia that "*It is not part of the courts', function at an interlocutory stage of litigation to try to solve conflict of evidence on affidavit as to facts on which the claim of either party may vitimately depend nor to decide difficult question of law which call for detailed arguments and mature consideration."*

OUGO AND ANOTHER VERSUS OTIENO (1987) KLR 364 also a CA decision where the CA held interalia that:- "*The general principles is that where there are serious conflict of facts, the trial court, should maintain the status quo until the dispute has been decided in a trial"*

The case of **DT DOBIE AND COMPANY KENYA (LTD), VERSUS MUCHINA (1982) KLR 1** whose relevant portions has already been set out in the Humphrey Wainaina Mbogo case (supra).

On the courts', assessment of the facts herein, and upon applying the principles of law to those facts this court, is of the opinion that a number of questions have arisen for determination by this court namely:-

1. Whether the entire proceedings or apportion of the same is anchored on a contract, and or memorandum of agreement between the disputants herein.

2. Whether Ministerial approval is mandatory for such contracts and if so whether the same was obtained in relation to the contract subject of these proceedings.

3. Whether issues in number 2 above can be disposed off by way of affidavit evidence.

4. Whether the law provides for description of a local authority in any particular manner and if so in which manner.

5. Does the entity forming the defendant one such entity. If so has it been described in accordance with that description? If the answer is the negative, then how has this entity been described?

6. If the entity in number 6 above has not been described as required by law is that mis description fatal or is it, curable and if curable under what provisions of law can this be done.

7. It is on record that parties have been casing since 2003 and infact the matter has been set down for hearing before, in whose favour and on what basis does this state of affairs operate?

8. What are the courts', final orders on this aspect of the case.

In response to the said questions as mentioned herein earlier on, when the court, was setting out the salient features of the pleadings herein, indeed, there is a mention of a memorandum of agreement purportedly between the disputants whereby the plaintiffs were supposed to recover the construction expenses of road to their quarry, but commonly used by others, from toll charges, but the defendants backed out, hence the occassing of the claim herein, for the balance of the construction costs. However in addition to the above there is pleaded in paragraph 10 of the plaint, that the plaintiff also incurred special damages of Kshs. 9,084,053.00, in the form of the value of supply of construction material to the defendant. This being the case, it follows that even if the issue of lack of ministerial approval for the memorandum of agreement were to be upheld, that in itself would not fault the second limb of the claim dealing with the supply of the construction materials, which claim the defendant denied and put the plaintiff to strict proof which is a triable issue.

As regards the effect of the Ministerial approval, section 186 of the LGA relied upon by the defendant has been set out herein. The operative word there is "***may".*** It is electional. This being the case, it will be imperative upon the court, to interrogate the circumstances surrounding the execution of the said contract, and then determine whether these required the ministers' approval or not as the word used is not "***shall".*** It is also observed that the applicable yardstick applicable when determining the circumstances where the ministers' approval is called for and where not called for has not been inbuilt into that section. It therefore would mean that interrogations have to be made to determine when such approval is necessary or not necessary. As asserted by the applicants counsel, and supported by case law relied upon, this is a matter that calls for adduction of evidence and the same cannot be disposed off by way of affidavit evidence. This being the case, the final orders of the court, on this aspect of the case, is that the move to fault the suit on account of the contract forming the basis of the same being un enforceable for ack of ministerial approval has not been upheld and the same is disallowed.

Turning to the issue of description of the defendant, it is clear that section 12 (3) of the LGA has provided a yardstick on the description of entities created under that legislation, namely, that these have to be christened or slimed "***city council of"*** or municipal council of, as the case may be. Applying that description to the defendant entity herein it is clear that the same has not been described in the manner stipulated in the Act. It has been described as Mavoka Municipal council.

As regard the fatality or the non fatality of the said misdescription, the consequences is not inbuilt, in the Act itself, hence the seeking of the assistance from the case law. Each side provided case law in their favour. The applicant/defendant objector provided case law decided by the superior court, stating that the misdescription is fatal. Where as the plaintiff/respondent cited those that state that the defect if any is curable. It is to be noted that all these are decisions of courts, of coordinate jurisdiction, one of which was decided by this very court. Being such decisions, as Ang'awa J, observed in the case of **FIDELITY**

HOLDINGS LIMITED (SUPRA), these are of persuasive nature and not binding on this court. This court, is not even bound by its own decision. It can revisit the issue and arrive at its own conclusions.

The curative provisions cited to the court, are section 3A, 99,100 of the CPA and order 6A rule 3(3) and 5 (1) CPA. Due consideration of these provisions have been made by this court, and applied them to the rival arguments herein, and the court, proceeds to make the following findings on the applicability herein:-

(a) It is now trite law that section 3A of the CPA operates to meet ends of justice to litigants and to prevent abuse of the due process of the law. It is also trite that, it only applies where no legal provisions exists to aid a litigant. Herein, since section 12 (3) of the LGA is in place, section 3A cannot operate to oust the same. It therefore follows that the applicable provisions is section 12(3) of the LGA.

Section 99 CPA, does not apply herein, as it is a slip rule for correction of errors in a judgement, a matter not subject of the rival arguments herein. Whereas section 100 on the other hand applied to the courts', to amend any defects or error in any proceedings in a suit. The centrol command therein is that, jurisdiction exists to correct proceedings and not pleadings and as such this does not assist the plaintiff. Whereas order VIA rule 3(3) donates jurisdiction to correct proceeding denotes a situation where the validity of the suit is not under challenge like herein. Rule 5(1) on the other hand donates jurisdiction to correct any error in any document. In this courts', view, this jurisdiction does not cure any alleged nullity.

As regards the assertion that parties have been proceeding on the papers as presented and therefore the defendant is estopped from raising a complaint at this late how. Due consideration has been made of the applicability of the doctrine of estoppel and proceeds to make findings that:-

(i). Estoppel being an equitable relief, it is trite that it follows the law and as such it cannot be invoked by a party to any proceedings to defeat clear provisions of the law, namely section 12(3) of LGA cap 265 laws of Kenya.

(ii). Indeed, as submitted by the plaintiffs, in as much as estoppel cannot be called into play to the aid of a litigant seeking to defeat the operation of the law, the court, has judicial notice that neither can it be called into play to aid party wringle out of his legal obligations or aid an illegality. Applying that to the rival arguments herein, it is clear that the plaintiff will not be left remediless, as they will just be required to go back to the drawing board seek leave to file a suit out of time, and then represent their claim against a properly described defendant, should the preliminary objection be upheld.

(iii). Issue of nullity of proceedings are issues of law, that this court, has judicial notice of that, such objections can be raised at any stage of the proceedings even on appeal.

(iv). Indeed jurisdiction to amend exists, and that it is now trite that the last thing that a court, of law should do is to deny a litigant of a chance of being heard and fail to save a pleading which can be injected with life through the art of amendment. However, it is also trite that issues of nullity go to the root of the proceedings and where shown to exist, the remedy of amendment is not an appropriate remedy. More so when the decision that ruled that an amendment is feasible, is not a binding decision on this court. In this courts', view, the stand taken by it on the construction of the intend and purport of section 12(3) in the own cited authority is the correct position, until corrected by the CA.

For the reasons given in the assessment, the final orders of this court are as follows:-

1. Objection to the suit on the ground that the contract forming the basis of the litigation is null and void, by reason of the fact that the command in section 186 of the LGA is an election one, by reason of the use of the word "***may*".** The circumstances under which the contract will fail to be upheld for failure to obtain the ministerial approval, and under which such contract will be upheld, the non compliance with ministerial approval not withstanding are not inbuilt in section 186 LGA cap 265. As such this calls for interrogation of circumstances under which either aspect applies, which calls for adduction of evidence and as such these issues cannot be disposed off by way of affidavit.

2. Had this objection been upheld, that alone would not have faulted the entire suit as paragraph 10 anchors a claim for goods supplied to the defendant and could thrive distinctly from that based on the memorandum or agreement.

3. The objection as regards the nullity of the suit because of the misdescription of the defendant has been upheld because:-

(i). The defect goes to the root of the suit.

(ii). Section 12(3) is framed in a mandatory form.

(iii). Section 3A of the CPA does not aid the plaintiff as it is usually called into play where there is no provision to aid a litigant. Therefore it cannot operate to oust the operation of section 12(3) of the LGA.

(iv). Section 99 of the CPA does not apply as it applies to correction of judgement only.

(v). Section 100 CPA also does not apply as it donates jurisdiction to correct proceedings only.

(vi). The amendments donated by order VIA rule 3(3) and 5(1) applies only where issues of nullity do not arise.

(vii). The decision which stated that the error can be cured by amendment is a decision of a coordinate court and therefore not binding on this court.

(viii). This court, has construed section 12(3) of the LGA cap 265 and ruled that in the absence of proper description as stated in the section, the proceedings are a nullity.

(ix). Estoppel cannot be called into play to aid the plaintiff as it follows the law, and as such, it cannot be called into play to defeat the operation of section 12(3) of the LGA cap 265.

(x). Non application of the doctrine of estoppel, herein, will not be aiding the defendant to wringle out of its legal obligation as there is a remedy for the plaintiff whereby they can go back to the drawing table describe the defendant properly, seek leave of court to represent the claim and then proceed according to law.

4. The observations made by Visram J as he then was (now JA) in these proceedings, when granting the injunctive relief does not aid the plaintiff as it did not a rise from arguments on issues of nullity of the proceedings.

5. The suit as well as the proceedings herein are struck out by reason of what has been stated in number 3-4 above, with costs to the defendant both for the application and the entire proceedings.

6. The plaintiff will be at liberty to revisit the drawing board redraft the plaint, describe the defendant properly, seek leave to present the suit out of time, and thereafter proceed according to law.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE