



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 338 OF 2007

WATER SERVICES TRUST FUND. PLAINTIFF

VERSUS

WATER AND SANITATION FOR POVERTY PRODUCTION. . DEFENDANT

RULING

This suit was filed by the plaintiff on 13th April, 2007 by a plaint dated 11th April, 2007. The plaintiff simultaneously filed an application by Chamber Summons dated the same date under a certificate of urgency seeking several interim and temporary orders. No such orders have so far been issued.

On 4th May, 2007 however, the Defendant filed a replying affidavit in answer to the application dated 13th April, 2007. It is a lengthy replying affidavit covering over 270 pages.

On the same day he filed what for convenience, I may call a Notice of Preliminary Objection on Point of Law. It raises five points which it is necessary to tabulate below: -

- 1) That the whole of the plaintiff's suit including Chamber Summons application, is incompetent, incurably defective and liable to be struck out in limine.
- 2) That the suit by a Trust Fund such as the Plaintiff herein may only be instituted in the name of the registered trustees thereof and not the Trust Fund.
- 3) That the application before the court is omnibus application requiring court to exercise its discretion on different bases and is therefore incapable of being properly canvassed in court as drawn.
- 4) That, there is no evidence of fraud availed against the defendant herein as required by law.
- 5) That the remedy of a mandatory injunction order is never given save in very exceptional circumstances which have not been demonstrated herein.

The Notice of Preliminary objection on points of law came before me for canvassing by the parties on 16th October, 2007 when both parties agreed to canvass by Written Submissions. On 17th December,

2007 Miss Kamende for defendant and Mr. Kathambi for the Plaintiff appeared before me and indicated that they were not adding anything to what they had submitted in writing.

I carefully perused and considered the written arguments from both the Defendant who had filed the Preliminary Objections in points of law and the plaintiff who responded. It is important to observe that the Defendant decided to pursue only one point of objection, being ground number 2. This is despite the fact that the defendant at no time during the court mentions, indicated their intention to abandon the other grounds of objection. The result was that the plaintiff went ahead to waste its time to respond to all five points of preliminary objection earlier herein tabulated.

Despite the defendants' abandonment of the other four grounds, the court felt obligated to and indeed examined them carefully and found them to be no preliminary objections on points of law. They were openly disputable points of law and facts and were in the court's view and finding intended to waste courts time, most probably for the purpose of standing on the way of the possible early hearing of this application. Indeed, had the Notice of Objection not been filed and had it not been accommodated for a hearing, the main application could probably have been accommodated and probably heard.

Turning now to the ground 2 which was the only one argued by the defendant, Miss Kamende for the defendant had the following points to state: - That plaintiff, - Water Services Trust Fund, had no legal capacity to sue or be sued except through its appointed trustees as such trustees. That the plaintiff was not a body corporate under the law, not even under section 83 of the Water Act, 2002 under which the Fund was established.

Miss Kamende also referred to the Trustees (Perpetual Succession) Act, Cap 164 which at section 3 provides the method of incorporating Trustee bodies. She however, avoided accepting or denying whether the plaintiff was incorporated under the said Act, thus leaving that issue in clear dispute in view of the position taken by the plaintiff that it was a body corporate under the Water Act.

The above is the background in the court's view, under which the Preliminary points of objection were taken.

I have carefully considered the preliminary point of law taken up by the defendant. In the courts view, the issue as to whether the plaintiff – the Water Services Trust Fund – is a body corporate with legal capacity to sue and be sued is clearly a disputed issue of fact. Clearly once the defendant raises that issue, the plaintiff may need to adduce evidence in rebuttal if it so wishes. The mere allegation by the defendant that the plaintiff Trust Fund is not a body corporate proves little. So does the fact that the plaintiff's averment that it is a body corporate. Any fact asserted will wait to be proved or disproved during the inter partes hearing of the application or suit.

Having come to the above conclusion, it now becomes necessary to enquire as to whether a point of fact such as the one raised above by the defendant which is clearly in dispute and needs to be proved, can be raised as a Preliminary Objection.

As stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd** (1969) E.A. 696, at page 701, by Sir Charles Newbold: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the opposite side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

In this case, whether the plaintiff fund is a body corporate or not is an issue of fact which can be prove or disprove. No evidence was placed before the court to proved or disproved the fact. It therefore awaits a full hearing of the application or suit. The above inconclusive fact cannot therefore be the basis for dismissal of the application or of the main suit before the court. This is so despite the fact that the issue raised might be an issue of jurisdiction.

For the above reasons this court holds that this preliminary objection, like the others before it, did not amount to a preliminary objections in a point of law. They were all raised in my view, with the probable purpose of deflecting the expected early hearing and disposal of the application dated the 11th April 2007. Raising of them in the court's view, and finding, falls into what Sir Newbold termed the: -

“... Improper raising of points by way of Preliminary Objection (which) does nothing but unnecessarily increase costs and, on occasions, confuse the issue...”

As he further declared: -

“This improper practice should stop”.

In my view, such practice can only stop if it is discouraged by the court through imposition of costs.

The result therefore is that the defendant's **“Preliminary Objections”** are hereby dismissed. Costs should go to the plaintiff and should be taxed on the higher scale for half day.

Orders accordingly.

Dated and delivered at Nairobi this 4 March, 2008.

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D A ONYANCHA

JUDGE