



IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 637 of 2006

ADOPT A LIGHT LIMITED PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL DEFENDANT

RULING

The plaintiff has brought an application by way of a Chamber Summons dated 21st November 2006. Through that application, the plaintiff seeks an order to compel the defendant to return all the advertising media which the defendant had taken down from the permitted streets. The plaintiff also sought an injunction to restrain the defendant from removing advertising media, including bill boards and advertising frames which the plaintiff has erected or will erect or install within the streets of Nairobi.

The defendant's first reaction to the application was to raise a preliminary objection, which is in the following terms;

- "1. There is no entity in law set up under the Local Government Act described as the Nairobi City Council.**
- 2. There is no defendant in law against whom the orders sought can be directed."**

This ruling is in relation to that preliminary objection.

When canvassing the objection, the defendant submitted that there was no valid suit before the court, which could give to this court a basis for undertaking any adjudication.

In that regard, my attention was drawn to the decision by the Hon. Mwera J. in **NAIROBI CITY COUNCIL -VS- CHRIS EVARDARD & OTHERS, HCCC NO. 851 OF 2002.**

In his considered view, the learned judge found himself **"unable to agree that Nairobi City Council, the plaintiff herein, is the same or ought to be treated the same as the City Council of Nairobi."**

After noting that the Local Government Act (Cap 265) cited the City Council of Nairobi, he went on to hold as follows;

"The law did not name that corporate body in vain. No matter what other names the general populace gives the City of Nairobi or the City Council of Nairobi, it remains what the Act called it, and mandated that it shall sue and be sued."

Consequently, the court found that there was no party to sue the defendants, and therefore proceeded to

strike out the Plaintiff.

The defendant emphasized that the pillar of the corporate entity was its name. Therefore, as far as the defendant was concerned such a body corporate could not sue or be sued in a different name, regardless of the norms, nicknames or abbreviations which are ordinarily used either by members of the public, or by any other persons.

But in the same breath, the defendant acknowledged the fact that this court has a discretion to allow for the amendment of misnomers or mis-descriptions, upon proper applications to the court.

Another authority cited by the defendant was that of **FOXSTONE ENTERPRISES –VS- NAIROBI CITY COUNCIL, MILIMANI HCCC NO. 686 OF 2002**. In that case, the Hon, Ibrahim J. expressed his concurrence with the decision which the Hon. Mwera J. arrived at in the case of **NAIROBI CITY COUNCIL –VS- CHRIS EVARAD, HCCC NO. 851/2002**. He then went on to state that;

"If the pleadings were left as they are then the defendant is non-suited; there is no Defendant within the Local Government Act or Companies Act i.e. Companies Registry, incorporated and known as 'Nairobi City Council'."

For those reasons, the defendant invited the court to dismiss the whole suit.

In answer to the preliminary objection, the plaintiff first demonstrated the fact that the defendant had represented itself to the members of the public as Nairobi City Council, on some occasions, whilst on other occasions they presented themselves as City Council of Nairobi.

In one of the instances, in which it is said to have represented itself as Nairobi City Council is the contract in issue herein. That contract is dated 28th March 2002.

Two other examples were cited at paragraph 22 of the Plaintiff, whereat the defendant was cited as the Nairobi City Council in two cases; being

(a) OUTDOOR ADVERTISING ASSOCIATION OF KENYA –VS- NAIROBI CITY COUNCIL, ADOPT A LIGHT & ALLIANCE MEDIA LIMITED, HCCC, NO. 131 OF 2003

(b) OUTDOOR ADVERTISING ASSOCIATION OF KENYA – VS- NAIROBI CITY COUNCIL & 2 OTHERS, MISCELLANEOUS APPLICATION NO. 335 OF 2005.

To my mind, those two cases are reflective of instances in which other persons had cited the defendant as Nairobi City Council. I say so because, ordinarily, a defendant does not decide for the plaintiff the name in which the plaintiff is to sue him. Therefore, inasmuch as in those two examples, the Nairobi City Council was a defendant, it cannot be said that they had represented themselves as such.

Secondly, just because no objection may have been taken, I do not think that that alone would be a bar to the defendant raising the issue, in these proceedings.

Other examples by the plaintiff, in which the defendant represented itself as Nairobi City Council were;

- (a) Pre-set writing notepaper, which the defendant utilised in correspondence.
- (b) The Official Nairobi Telephone Directory.
- (c) Legal Notices in the Kenya Gazette.

In the light of those examples, the defendant submitted that telephone directories are an inappropriate example. It was explained that in websites and electronic directories, the names which are used by the publishers are those which would assist the users of such directories. The designers and publishers of

such directories are said to prefer to key-in the most unique name of any subscriber.

To that end, I believe that it is a matter of common notoriety that in directories, in most instances the name which is highlighted is the "surname", if the subscriber is a natural person. Therefore, it may well follow that the sequence of names published in directories and websites may not necessarily be the literal one.

That notwithstanding, it was noteworthy that the defendant made no comments at all, on its use of the name Nairobi City Council on its notepaper, as well as in the Legal Notices in the "Kenya Gazette".

I would imagine that if the said legal notices were to be voided many actions undertaken by the defendant, as well as appointments to the said local authority would become nullities; to the detriment of the said council.

The plaintiff submitted that as the defendant had not only signed the contract in issue, in the name of Nairobi City Council, all the parties to the case knew exactly who was being referred to. Therefore, the plaintiff was of the view that if the preliminary objection were to be upheld, that would cause injustice.

In that respect, the plaintiff placed reliance upon **PARMAR –VS- KEBEIRO [1981] K L R at page 341** for the proposition that if an interpretation had been acted upon for long, that should not be disturbed unless there was an injustice.

The plaintiff also relied on the following decision by the Hon. Azangalala J. in **PAUL GATHONGO RICHU –VS- NAIROBI CITY COUNCIL, MILIMANI HCCC, NO. 527 OF 1998;**

"It is clear therefore, that the defendant variously described itself as Nairobi City Council and the City Council of Nairobi. It would also appear that the defendant has dealt with the plaintiff variously as Nairobi City Council and the City Council of Nairobi, and I believe that that is the reason the description of the defendant as either Nairobi City Council or the City Council of Nairobi has been admitted by the defendant in its pleadings.

It is for the above reasons that I feel the Preliminary Objector has not been well taken. In my view, it would offend against our sense of justice and fair play for a party to escape liability for a civil wrong or a civil claim merely because the same party has variously described itself differently. To hold otherwise would lead to absurd results."

Such absurd results would result in this case if it were to be proved that the persons who signed the agreement in issue were those who were duly authorised, by law, to execute contracts on behalf of the City of Nairobi, but they had signed the contract on behalf of the Nairobi City Council. If, as it is alleged, the benefits deriving from the said agreement accrued to the City of Nairobi, yet they were to escape the obligations arising from the very same contract, that would be a grave injustice. A court of law would be loathe to countenance such an injustice, in the name of a strict adherence to the letter of the law.

Another practical way of looking at the same issue would be to ask the City Council of Nairobi, who say that they were not the same as the Nairobi City Council, to let the plaintiff prosecute the suit and the application against the named defendant. I do not think that if the Nairobi City Council is not the same legal entity as the City Council of Nairobi, the latter should feel obliged to contest the claims directed at another "person". To my mind, the decision by the Nairobi City Council to take an active interest in these proceedings is a clear indication that they know the real person against whom the proceedings were instituted. All pointers are to the fact that the two names Nairobi City Council and the City Council of Nairobi refer to one and the same body corporate, as already held by the Hon. Azangalala J. in the case of **PAUL GATHONGO RICHU –VS- NAIROBI CITY COUNCIL.**

Be that as it may, it cannot be denied that pursuant to the provisions of Section 2 of the Local Government Act (Cap 265), the proper name of "the City of Nairobi" is the "City Council of Nairobi", as incorporated by the Royal Charter dated 20th March 1950.

The defendant did concede the fact that a misnomer or a mis-description could be amended, provided there was an appropriate application in that regard.

In this case, the plaintiff made an oral application for leave to amend the Plaintiff, if the court were to conclude that there was need to correct the defendant's name.

The defendant felt that there was no appropriate application for leave to amend.

In the case of **NAIROBI CITY COUNCIL –VS- CHRIS EVARARD & OTHERS**, the Hon. Mwera J. struck out the Plaintiff, after observing that the plaintiff therein was not keen to consider or to apply to amend the Plaintiff.

In **FOXSTONE ENTERPRISES –VS- NAIROBI CITY COUNCIL**, the plaintiff made an oral application for amendment pursuant to Order 6A rule 8 of the Civil Procedure Rules, and the Hon. Ibrahim J. allowed the amendment.

In this case, the plaintiff has invoked Order 1 rule 22 of the Civil Procedure Rules, in making its application. Pursuant to the provisions of Order 1 rule 10 (1);

"Where a suit has been instituted in the name of wrong persons as plaintiff" the court may order any other person to be substituted or added, upon such terms as the court thinks fit.

Sub-rule (2) of Order 1 rule 1 allows the court at any stage of the proceedings, to order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and the name of the person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court was necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.

By virtue of Order 1 rule 22, an application under rule 10 of that order may be made orally. Therefore, the plaintiff was within its rights to have made the application orally.

And, as I am sure, has already been evident from what I have already stated earlier herein, the presence of the City Council of Nairobi would be necessary in this case, so as to enable the court to effectually and completely adjudicate on the questions involved in this suit. Therefore, I am satisfied that the plaintiff has made out a case to warrant the substitution of the Nairobi City Council with the City Council of Nairobi.

Accordingly, it is directed that the forthwith the defendant shall be substituted with the City Council of Nairobi.

The costs of the Preliminary Objection as well as for the oral application are awarded to the defendant.

FRED A. OCHIENG

JUDGE

Dated and Delivered at Nairobi by Justice Hon. Lady M. Kasango, this 24th day of January 2007.

M. KASANGO

JUDGE