REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 727 OF 1999

SPENCON KENYA LIMITED…….PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF KERICHO…….DEFENDANT

R U L I N G

The Chamber Summons herein, dated 12/10/04, under Order 6 Rules 13 (1) (a) and 16 of the Civil Procedure Rules, seeks the following orders:

1. **That the Plaint, dated 1/6/1999, and filed in court on 10/6/99, be struck out with costs.**

2. **The suit be dismissed and/or struck out with costs.**

3. **The costs of this application be awarded to the applicant.**

The application is on the grounds that:

(a) The plaint discloses no reasonable cause of action against the applicant because:

(i) The Defendant named and sued in the plaint does not exist in law;

(ii) The Municipal Council of Kericho is not the Defendant named and sued in the plaint;

(iii) The Defendant named and sued in the plaint is not the same entity as the Municipal Council of Kericho.

(iv) The suit having been instituted against a non-existent entity is incompetent and a nullity **ab initio** and ought to be dismissed with costs.

(v) Upon the striking out of the Plaint, the Plaintiff's suit has no foundation to stand on and the suit should be dismissed and/or struck out with costs.

Later on, on 12/11/04, the Plaintiff sought to amend his plaint, by way of a Chamber Summons, in light of the Defendant's application herein earlier, dated 12/10/04. The Defendant filed its grounds of opposition, dated 19/11/04, and filed the same date, in which it raised the following points:

That the application (dated 12/11/04) is incompetent and misconceived in law because:

(a) The suit having been filed against a non-existent entity is a nullity **ab initio** and is beyond redemption by way of amendment.

(b) The Plaintiff cannot invoke the amendment procedure in the circumstances of this case

(c) In any event no substitution is permissible in law because the original Defendant sued has never existed in law and fact.

(d) The applicant is guilty of inordinate delay.

(e) The application is mischievous and an abuse of the court process.

(f) The proposed defendant will suffer irreparably if the application is allowed.

At this juncture, it is important to point out that the application to amend the Plaint was filed and served upon the Defendant/Applicant well before 16/11/04 when counsel for the Defendant made his submissions and hence before the hearing of the application to strike out the plaint, commenced.

In opposition the Plaintiff/Respondent avers, **inter alia**, that:

(a) The application is misconceived, bad in law, and brought in bad faith.

(b) The applicant has **failed to disclose material facts** and information to support the application.

(c) The application is a deliberate attempt to delay the hearing of the suit because:

i. The **plaint was filed on 1/6/1999 against Kericho Municipal Council** – the Defendant - and gives the particulars of the Defendant as a body corporate established under Section 12 (3) of the Local Government Act, Cap. 265, Laws of Kenya;

ii. The Defendant **accepted** service of the summons and the said plaint by **affixing its rubber stamp** in the name of **KERICHO MUNICIPAL COUNCIL, without any protest** and **unconditionally;**

iii. The Defendant filed its Memlorandum of Appearance on 28/6/99 describing itself as MUNICIPAL COUNCIL OF KERICHO.

iv. On 12/7/99 the Defendant **filed its defence describing itself as KERICHO MUNICIPAL COUNCIL,** and the defence admits the descriptive statements of paragraphs 1 and 2 of the plaint which describe the Defendant as KERICHO MUNICIPAL COUNCIL.

v. On 27/8/99 the Defendant filed an **amended defence** describing the Defendant **as KERICHO MUNICIPAL COUNCIL,** and on 29/9/99 the Plaintiff filed an amended Reply to the amended Defence showing the Defendant as KERICHO MUNICIPAL COUNCIL.

vi. On 16/5/2000, by a Chamber Summons, the Defendant sought further amendment of its defence and in that application the Defendant admits the description of the Defendant – **KERICHO MUNICIPAL COUNCIL.**

vii. On 14/11/00 when the matter came up for hearing the Defendant intimated commitment to explore possibility of amicable settlement – This was before Hewett J. (now deceased). Same was repeated by the Defendant on 25/2/03 when it filed a Notice of Preliminary Objection, which was vacated because of intimation again of intention to settle the matter amicably. That Notice of Preliminary Objection has never been prosecuted to date.

viii. Further hearing dates were vacated between March 2004 and September 2004, again owing to the negotiations towards settlement out of court.

ix. On 27/9/04, Maobe & Kiplagat Advocates came on Record as Advocates for the Defendant describing themselves as counsels for the Defendant. These Advocates filed a Notice of Preliminary Objection dated 27/9/04 describing themselves as advocates for MUNICIPAL COUNCIL OF KERICHO.

d. The application lacks merit, and is intended to prejudice, embarrass and delay the fair trial of the suit; it is a sham as being spurious and is **mala fide** instigated by the Defendant to defeat the ends of justice.

e. The conduct of the Defendant in amending its pleadings and compelling the Plaintiff subsequently to amend its pleadings, entering into negotiations of settlement for almost 4 years, then raising Preliminary points of Law to strike out the suit is scandalous, frivolous, vexatious and abuse of the court process and should be dismissed with costs.

Having closely perused the massive pleadings; authorities cited and relied upon by Learned counsel for both sides; and considering the submissions by the two counsels, I have reached the following findings and conclusions.

The gist of the dispute, as per the Chamber Summons herein, is the validity/legality of the Plaint herein, and subsequently, the viability of the suit by the Plaintiff/Respondent.

It is the Defendant/applicant's case that the plaint is against a Defendant who is not only unknown in law, but which has never existed in law. This is on the basis that the Defendant, as per the plaint, is described as KERICHO MUNICIPAL COUNCIL, while under the Local Government act, Cap. 265, Laws of Kenya, the legally recognized corporate body is the MUNICIPAL COUNCIL OF KERICHO. The Defendant contends that by virtue of the foregoing, the plaint is null and void and should be struck out, and flowing from that, the suit should be struck out with costs to the Defendant and against the Plaintiff.

The Plaintif/Respondent's case is best summarized by the background to the case, arising from which it is the Plaintiff's contention that the application is misconceived; bad in law, and is brought in bad faith, and is an attempt to delay the hearing of the suit. This is based on a number of reasons, key amongst which are the following:

(a) The Agreement arising from whose alleged breach sparked the suit herein is dated 6/2/1995, and between the Plaintiff SPENCON KENYA LIMITED and KERICHO MUNICIPAL COUNCIL. The Agreement is signed by all the legally authorized officers on behalf of the Kericho Municipal Council, including the Town Clerk, Kericho Municipal Council, and relevant Permanent Secretaries, i.e. Ministry of Local Government (the Accounting Officer) and the Ministry of Finance.

(b) The Plaint was filed on 10/6/1999 against the KERICHO MUNICIPAL COUNCIL (the Defendant) who accepted the summons and the Plaint by affixing its rubber stamp on 17/6/1999 in the name of KERICHO MUNICIPAL COUNCIL. The Plaint and the summons were accepted without any protest and unconditionally.

(c) The Defendant filed its Memorandum of appearance on 1/7/1999 describing itself as MUNICIPAL COUNCIL OF KERICHO.

(d) On 16/7/1999 the Defendant filed its defence, describing itself as KERICHO MUNICIPAL COUNCIL.

(e) Makhecha & Co. Advocates came on record for the Defendant, vide Notice of Change of Advocates, on 5/4/00, describing the Defendant as KERICHO MUNICIPAL COUNCIL.

(f) On 13/6/00 the Defendant filed and served, a Further Amended Defence describing itself

as MUNICIPAL COUNCIL OF KERICHO, and the Plaintiff filed and served a Further Amended Reply to the Further Amended Defence which confirmed that the **Contract Agreement** between the Plaintiff and the Defendant was **executed and sealed by the Rubber Stamp** in the name of KERICHO MUNICIPAL COUNCIL.

The use of the names KERICHO MUNICIPAL COUNCIL and MUNICIPAL COUNCIL OF KERICHO by the Defendant all through the proceedings and the attempted negotiations clearly shows that the distinction now being drawn, in the current application, between the two names does not arise. Indeed the substitution of one name with the other shows that to the Defendant there is no difference between the two names.

I may observe that if that is the way the Defendant took the two names, how can any third party be blamed for doing the same!

The records also show that the Defendant received and consumed the Plaintiff's services and resources under the same name that the Contract Agreement was signed and executed, that is KERICHO MUNICIPAL COUNCIL.

And that was not all. The Defendant, under the above name, had paid for 23 certificates for the work done by the Plaintiff. The dispute about the validity of the name of the council did not arise until the 24th and **final certificate** for K.Shs.64,962,619/05 dated 24/6/1998. This was out of a total contract sum of K.Shs.223,289,400/- the balance of which had been paid under earlier certificates.

Some of the openly embarrassing questions that arise from the Defendant's contentions are as follows:

The current counsels for the Defendant, **Maobe and Kiplagat Advocates,** took over the case, by Notice of Change of Advocates, dated 5/4/00, from Makhecha & Co. Advocates. What needs no overstressing is that only the Advocates changed, not anything else, as the previous firm had dealt with all the earlier pleadings. The embarrassing question is whether the new firm has/had the capacity to change the pleadings of the Defendant at that stage. They took over from another law firm for the Defendant – KERICHO MUNICIPAL COUNCIL – which had put in its defence in that name, and transacted several amendments to their defence, in the name of the Defendant. If the new firm holds that the Defendant, their client, does not exist in law, and has never existed, the obvious question is "**whom do they represent?"** and on that basis, they have no right of audience before the court as they are strangers in the case. And if that be the case, then the all the papers drawn and filed by that counsel are incompetent, including the application now before me, for they relate to a non-party to the case, and are drawn and filed by a counsel representing a non-existent party.

Surely, such inevitable conclusion, if the Defendant's Counsel's submissions are followed, are absurd and lead to injustice. And this brings me to the next embarrassing scenario.

To avoid injustice, where the signed a Contract is in the name now alleged to be invalid, but also received and consumed the Plaintiff's services and resources under the same name, it is only proper and just that the Defendant, through a formal trial, on merit, be put to task to show why it should not pay for services already delivered and consumed by it rather than to dismiss such a claim on technical and unjust technicalities.

Without going into unnecessary detail in an interlocutory application such as the one before me, the consequences of granting this application, and striking out both the Plaint and this suit, are far reaching. For instance, if as contended, the Defendant does not exist, and never existed in law, then who signed the Contract Agreement? Who received and consumed the services and resources of the Plaintiff in pursuance of the Agreement Contract? Who paid for the Certificates preceding the one in controversy herein? Were such payments null and void and shouldn't the persons who paid be required to refund the money so "illegally paid to the Plaintiff"? And did the Plaintiff deliver its services to a ghost corporate body?

This court should not, and cannot, sanction injustice on technicalities that make little sense and achieve nothing but split hairs.

In the cause of these pleadings and submissions by both learned counsel for both sides, I was referred to numerous previous decisions of this court – the High Court of Kenya. Whereas I have read each and everyone of them, I wish to specifically refer to just two or so of those decisions.

In NAIROBI CITY COUNCIL VS. CHRIS EVARD & OTHERS, HCCC NO. 851 OF 2002, Mwera J, noted that the Local Authority Act (Cap. 265) had determined the issue of the correct name to be used while suing the City Council of Nairobi. He stated:

"**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."**

The situation that Mwera J, was dealing with was rather different from the facts before me. Here, it is not what the general populace calls the Municipal Council of Kericho. It is what that council has represented itself as. The Defendant has described itself as the KERICHO MUNICIPAL COUNCIL, and at other times as the MUNICIPAL COUNCIL OF KERICHO. It is in the name of KERICHO MUNICIPAL COUNCIL that the Agreement Contract herein was signed and executed by the Defendant. It is in that same name that the Defendant filed its defence.

For emphasis, in the case before me, it is not what the Plaintiff represented the Defendant, but how the Defendant represented itself to the Plaintiff. It signed and executed the Agreement Contract in the name it was sued by, by the Plaintiff – KERICHO MUNICIPAL COUNCIL.

The question is whether the Defendant should enter into a Contract, receive the benefits thereof under that name only to turn round when it comes to paying and claim that it has been sued under the wrong name! That is the name the Defendant gave to the Plaintiff and signed the Contract under.

The second case I wish to refer to is PAUL GATHOGO RICHU VS. NAIROBI CITY COUNCIL, Milimani HCCC No. 527 of 1998, where faced with similar problem as now before me, Azangalala J, said in part:

"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 the Preliminary Objection has not been well taken……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."

I totally associate myself with the above sentiments and only add that "**to hold otherwise would lead to absurd results and unmitigated injustice.**

In ADOPT A LIGHT LTD. VS. NAIROBI CITY COUNCIL, HCCC No. 637 of 2006, Ochieng J, said, in part:

"**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."**

In my considered view, whether the law talks of the Municipal Council of Kericho or the Kericho Municipal Council, the conduct of the officers running such body, for they are the same officers, no

dispute on that, knew and know. that the suit herein is targeted at one and the same body/corporation. In reality, the two names – Kericho Municipal Council and the Municipal Council of Kericho refer to one and the same body corporate. How else would two different bodies have the same Post Office Box and Address? In my humble view the farce is sheer waste of valuable judicial time and scarce public resources expended in these legal proceedings.

Accordingly, and for the above reasons, the application herein is dismissed with costs against the Defendant/Applicant and in favour of the Respondent/Plaintiff.

Before concluding. it is the Defendant's contention that the Defendants cannot be substituted, vide the Plaintiff's application. This, it was submitted, is because the Defendant sued never existed in law.

I need not dwell on such submission in light of my ruling herein above on the mythical ideas held by the Defendant. Suffice it to state as follows:

Under Order 1 rule 10(2) and Order 6A rule 5(1) of the Civil Procedure Rules, this court has the power, on its own motion, and even without the need for an application by any party to order the addition of any person in any suit, at any stage, whose presence before the court is necessary for the effectual and complete adjudication of the issues involved in the suit.

Accordingly, I order that the MUNICIPAL COUNCIL OF KERICHO, a necessary corporate body in this suit, be enjoined as a Defendant in this suit.

All in all, and for avoidance of any doubts, the application herein is dismissed with costs to the Plaintiff/Respondent and against the Defendant/Applicant. The suit to proceed for hearing on merit.

DATED and delivered in Nairobi, this 14th Day of June, 2007.

O.K. MUTUNGI

JUDGE