



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

Civil Case 1291 of 2003

HUMPREY WAINAINA MBOGOPLAINTIFF

VERSUS

THIKA MUNICIPAL COUNCIL & 4 OTHERS.....DEFENDANTS

RULING

The application dated and filed in Court on 13th February 2007 seeks an order of this Court to strike out the plaintiff's suit as against the 1st defendant; plus costs thereof.

The grounds upon which the application is based are set out on the body thereof, namely that the suit as drawn and filed against the 1st defendant is incompetent and is bad in law as the same is in gross violation of the mandatory provisions of the Local Government Act, Chapter 265 Laws of Kenya

r the general principles of suits against non-natural persons.

That in view of the above contravention of the law, no suit lies and/or is not tenable against the 1st defendant as pleaded and that in view of the above two (2) contentions the suit is frivolous, and/or is without any substance in the circumstances of the case or that it is otherwise an abuse of the process of the Court.

The application was under the provisions of *Order VI Rule 13(1) (b) and (d)* of the Civil Procedure Rules. This application for some strange reason was not supported by any affidavit. May be it was because it was solely based on a point of law.

The respondent through counsel filed grounds of opposition to oppose this application.

Counsel for the parties appeared before the Court on 11th July 2007 to either urge or oppose the application.

Counsel for the defendant/applicant relied on the grounds on the face of the application and said since the Council had been sued in the name not authorized by Section 12 of the Local Government Act, Chapter 265 Laws of Kenya then no suit lies and/or that the suit against the 1st defendant was not tenable.

Mr. Ngugi for the plaintiff stated that since in the defence filed on 17th February 2004 and amended on

5th November 2004 the 1st defendant admitted the descriptions of the 1st defendant in paragraph 2 thereof it was estopped from turning round to deny that admission in this subsequent application to strike out. He prayed for the dismissal of the application with costs.

Mr. Eriedi from the Attorney General's Chambers associated himself with submissions of counsel for the plaintiff and poses a question; whom counsel for the 1st defendant represents in these proceedings if he says that the defendant is non-existent!

According to this counsel it is the 1st defendant's counsel who brought the 2nd defendant into this case by way of counter-claim and that the Municipal Council of Thika is commonly referred to as Thika Municipal Council.

Counsel prayed that this application be dismissed with costs.

A part from the 1st defendant admitting the descriptions of the 1st defendant in the defence and counter-claim filed in Court on 17th February 2007 and 5th November 2007, the suit has been in this Court since 9th December 2003 and parties have taken all necessary steps, including agreeing on issues, to prepare the case for hearing without ever raising a finger against the description of the 1st defendant.

There has been an application to enjoin the Chief Land Registrar to this proceeding which was granted on 5th November 2004.

In fact 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 such titles is so notorious such that even the plot being contested in this case is titled ***Thika Municipality Block 11/870***.

That in this case the name "***Thika***" comes before "***Municipal***" should not be made so big 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 strike out pleadings ***under Order 13(1)*** of the Civil Procedure Rules is supposed to be applied or exercised in plain and obvious cases and in any case sparingly and cautiously: ***Republic v. Peruvian Guano Company 36 Ch. Div. 489*** at pages 495 and 496 and ***Moore v. Lawson & Another (1915) 31 LTR. 418*** at page 419.

In ***Kellaway v. Bury (1982) 66 LTR 599*** at pages 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 a view to amendment".

The late ***Madan JA*** was even more liberal when he wrote the leading Judgment in ***D.T. Dobie Company***

(Kenya) Limited v. Muchina [1982] KLR 1.

After quoting various decisions including those cited herein above he stated in an *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 a suit can be injected with real life by amendment it should not be struck out”.

I am aware an Obiter comment is not part of the Court decision but I am in agreement with the view that where pleadings can easily 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 simple amendment.

I dismiss this application with costs.

Delivered, dated and signed at Nairobi this 17th day of July 2007.

D. K. S. AGANYANYA

JUDGE