



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

Civil Suit 324 of 2006

ERNIE CAMPELL & CO. LTD. PLAINTIFF

VERSUS

THE AUTOMOBILE ASSOCIATION OF KENYADEFENDANT

RULING

The plaintiff has brought this application pursuant to the provisions of Order 6A rules 3 and 5 of the Civil Procedure Rules. Through this application, the plaintiff seeks leave to amend the Plaintiff.

Essentially, it is intended to incorporate the officials of the Automobile Association of Kenya into the suit, as defendants.

The need to do so arose after the "person" named as the defendant had filed its defence, in which it indicated that it would apply to strike out the Plaintiff, on the grounds that it was fatally defective. The alleged defect was attributed to the fact that the defendant was not capable of suing or being sued. In effect, the defendant submits that when such a person was sued, he must be deemed to be non-existent. Therefore, the court was told that it could not give leave to amend a suit in which the parties were non-existent.

Those submissions were made by the defendant at the stage of a preliminary objection which it had advanced, in an endeavour to shut out the plaintiff's application.

In support of the said preliminary objection, the defendant cited some four authorities. I will revert to the said authorities, in due course.

For now, it is to be noted that the plaintiff's view is that whether or not the Plaintiff was a nullity ab initio, the court had the jurisdiction to cure it, through an amendment.

If that contention was meant to be reflective of the general legal position, then I am afraid that I am unable to agree with it. I say so because, to my mind, that which is a nullity cannot be cured. In order for something to become curable, it must have some life in it. Perhaps it could be defective or diseased. In that state, it could then be cured by either giving it medication or by correcting the defect. But if it had no life at all, no amount of medication or correction could give it a cure.

The plaintiff concedes that the defendant, as sued, lacked capacity to be sued. It was for that reason that the plaintiff now wished to amend the Plaintiff.

However, before the plaintiff can know whether or not it can get to the stage at which it was canvassing

the substantive application for leave to amend the plaint, the preliminary objection must be determined. In doing so, I will give consideration to the authorities which both parties herein have placed before me.

In **THE FORT HALL BAKERY SUPPLY CO. –VS- FREDERICK MUIGAI WANGOE [1959] E.A. 474, at page 475**, the Hon. TEMPLETON J. held as follows;

"A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed."

For that reason, the learned judge proceeded to strike out the action.

In the case of **BANQUE INTERNATIONALE DE COMMERCE DE PETROGRAD –VS- GOUKASSOW [1923] 2 K. B. 682**, at page 688, SCRUTTON L. J. held as follows;

"The objection is that the party seeking to maintain the action is, in the eye of our law, no party at all but a mere name only, with no legal existence. Having decided that this contention is correct it follows in my opinion that the action is not maintainable and the appeal must be dismissed. There can be no costs either in this Court or in the Court below, as the objection on which the defendants succeed is that the plaintiffs have no existence and can neither pay nor receive costs."

In the foregoing two cases, the plaintiffs were said to be non-existent. **Fort Hall Bakery Supply Co.**, was non-existent in law because it consisted of more than twenty persons, and it carried on business with the intention of making profits for its members. Because of those facts, S. 338 of the then Companies Ordinance (Cap 288) had been violated, because it laid down the requirement that any companies, associations or partnerships, which had more than twenty members, and which were formed for purposes of carrying on business, be registered as a company. **Fort Hall Bankry Supply Co.** was not so registered.

Meanwhile, in second authority [**Banque Internationale De Commerce De Petrograd –vs- Goukassow**], the Government of Russia had, by reason of a decree, abolished the plaintiff bank, in its country of origin. On that basis, the Court found that the Russian bank had no legal existence any more, and could therefore not maintain the action.

At page 693, ATKIN L. J. said;

"In the case of an artificial person, such as a foreign corporation, our law would look to the law of the country which created the corporation, and finding the corporation dissolved by that law, our Court must also treat the corporation as dissolved."

.....

On principal, the plaintiff is dead, and the action must be dismissed."

As in the two cases analysed above, the plaintiff was non-existent, the said cases can be distinguished from the case before me, wherein the defendant is in existence. Indeed, the defendant has boldly asserted that it is a Society registered under the Societies Act, of the Laws of Kenya.

In **VOI JUA KALI ASSOCIATION –VS- SANGE & OTHERS [2002] 2 KLR 474**, the Hon. ONYANGO-OTIENO J. (as he then was) dealt with a preliminary objection which was founded on the assertion that the suit was a nullity ab-initio, for want of a lawful plaintiff.

The learned judge observed that the plaintiff, which was a society, could only sue or be sued through its officials.

Nonetheless, he proceeded to overrule the preliminary objection.

And in **HOUSING FINANCE COMPANY OF KENYA LTD. -VS- EMBAKASI DEVELOPMENT PROJECT [2004] 2 KLR 548, at page 554**, the Hon. OJWANG Ag. J. (as he then was), said;

"It follows that the notion that an entity lacking legal personality can seek orders of the Court or become the bearer of rights or liability declared by the Court, is totally inconsistent with the character and modus operandi of the Courts in the common law system."

I have not the slightest doubt that that is the correct legal position.

But then again, the defendant has at no time said that it is in an entity that was lacking legal personality.

As I understand it, the defendant is very much alive and well. The fact that it had been sued in its name, rather than through its officials, could not, in my considered opinion render the Plaint a nullity. Accordingly, there is a possibility that the defect in the Plaint could be cured, if the plaintiff's application for leave to amend the Plaint, were to be successful.

For those reasons, the preliminary objection is overruled, and the plaintiff is awarded the costs thereof.

Dated and Delivered at Nairobi, this 9th day of November 2006.

FRED A. OCHIENG

JUDGE