



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC. APPLI. 427 OF 2005

IN THE MATTER OF AN APPLICATION BY SIMU VENDORS ASSOCIATION

FOR PREROGATIVE ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

CAP 265 LAWS OF KENYA

SIMU VENDORS ASSOCIATION.....APPLICANT

VERSUS

THE TOWN CLERK CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

THE MINISTER OF LOCAL GOVERNMENT.....2ND RESPONDENT

RULING

On 7th April, 2005, the Applicant, Simu Vendors Association filed an application for Orders to commit the 1st Respondent and the Director of Inspectorate Mr. John Maneno to jail for contempt and disobedience of the Orders of this court granted on 31st March 2005 against the Respondents.

At the hearing of the said application the 1st Respondent through his Counsel Mr. Omotii raised a Preliminary Objection in the following terms:-

1. That the Applicant is not an entity known in law that can institute legal proceedings of the present nature.
2. That in the same vein the Applicant in law is not entitled to procure any court orders including the orders allegedly disobeyed.

The Applicant submitted that the Applicant is registered as a Society under the Societies Act, Chapter 108, Laws of Kenya and that as such it is not a Corporate entity that has capacity to sue in its own name. That as a result the proceedings herein are a nullity and should be struck out, ex debito justitiae.

Secondly, the 1st Respondent argued that the proceedings herein is in violation of Order 1 Rule 8 of the Civil Procedure Rules since the deponent of the Verifying Affidavit in support of the Ex parte Chamber Summons states that the suit was filed by the officials of the Applicant on behalf of its members after

holding a special meeting empowering them to do so and yet no leave has been obtained from the court before institution of these proceedings.

The Applicant asserts that on the said two grounds, the application and proceedings were defective and the same are incurable. In reply, Mr. Kimeria for the Applicant submitted that the members of the Society had given their authority to their officials to institute these proceedings in a special General Meeting held on 16.3.05 at Mang Hotel. He said that a registered society is capable of bringing suit on behalf of its members. The Applicants added that the Respondents knew the Applicants and that any defect in the proceedings can be rectified by amendment. That no suit should be defeated by reason of a mis-joinder or non-joinder of parties and that the court may in every suit deal with the matter in controversy so far as regard the rights and interests of the parties before it.

I have considered the submissions of the Counsel and the authorities referred to. With regard to the first preliminary objection, it is trite law and fact that a society registered under the Societies Act is an unincorporated body and does not have the capacity to sue or be sued in its own name in legal proceedings. I was referred to the decision of Justice Bosire (as he then was) in **H.C.C.C. No. 5116 OF 1992 (O.S.) – FREE PENTECOSTAL FELLOWSHIP IN KENYA –V- KENYA COMMERCIAL BANK**, in which he decided as follows:-

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules. In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name.”

I wholly agree with the said decision. The Applicant being a society and unincorporated lacked the capacity to institute these proceedings. It is not a legal person or corporate body.

I have been invited by the Applicant to invoke the provisions of Order 1 Rule 10 of the Civil Procedure Rules which gives the court the power and discretion even at its own instance to strike out the name of a party who has been improperly joined in a suit or add that of any person who should have been joined etc.

With respect, I do not think strictly that the provisions of the Civil Procedure Rules apply to Judicial Review Proceedings and I cannot invoke the provisions in Order 1 as proposed. Even if this court exercising its inherent jurisdiction under the Constitution, Law Reform Act and Order 53 of the Civil Procedure Rules, were inclined to be sympathetic with the Applicant and substitute the officials as the Plaintiffs, the Law would not permit it as this is not a simple case of misjoinder or non-joinder of parties. This is a case where the Applicant could not in law bring any proceedings in its name. The institution of the proceedings was null and void, ab initio. The proceedings are a nullity. As a result, no amendment and/or joinder or substitution of parties can cure the defect, it is fatal. There can be no joinder or amendment in respect of a suit which in law never existed. Neither is substitution possible.

This is a case where I would have exercised the court’s discretion to correct any defect, Irregularity or error. However, the defect here is not a misnomer, misdescription, misjoinder, or non-joinder. In this case there is no party to replace or substitute, the purported applicant was never there in the first place and what has taken place to date are nullities.

I hereby sustain the first preliminary point of law. What I have said affects the second point of law and no purpose will be served to substantively deal with it. As a result, and with a heavy heart, I hereby strike out the Notice of Motion dated 19th April, 2005 and set aside the orders of leave and stay granted on 31st March, 2005. I hereby discharge the Orders of stay. In exercise of the court’s discretion there shall be no order as to costs.

Dated and delivered at Nairobi on this 6th day of June 2005.

MOHAMMED K. IBRAHIM

JUDGE

6.6.2005

Coram - Ibrahim, J.

Court clerk - Buoro

Mr. Kimeria for the Applicant

Mr. Omotii for the Respondents

No Appearance for the Attorney General

Ruling read in their presence.

MOHAMMED K. IBRAHIM

JUDGE