



- 1) Civil Practice and procedure
- 2) Preliminary Objection on the locus of the defendant
“Whether the defendant is a legal entity capable of suing and being sued in its own name?”
- 3) Advocate for plaintiff/respondent argues that by admission, the defendant is a legal entity to be sued
- 4) Advocate for the defendant/applicant – the defendant is not a legal entity to sue and be sued.
- 5) Held: Original Defendant no capacity to sue
The amendments substituting current defendant time barred.
- 6) Case law:- Nil
Court Reuben Shilobi Ashikaga v Hoffman Livigh & Another
Hccc 5180//99, Ringera, J.
Statute Law order 29 r30 CPR.
- 7) Advocates
P.L. Otieno Oyoo advocate for the plaintiff
M. Karimi advocate for the defendant

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.607 OF 1999**

MAURICE OOKO OTIENO PLAINTIFF

VERSUS

MATER MISERICORDIAE HOSPITAL DEFENDANTS

RULING

ON A PRELIMINARY OBJECTION

The defendant raise a preliminary objection which is also issue No.1 in the agreed statement of issues, namely:-

*“Whether the defendant is a legal entity
capable of suing and being sued in its own
name?”*

A) BACKGROUND OF THE SUIT

Maurice Ooko Otieno, a male adult was on the material day of the 24th day of November 1997 at the

Mater Misericordiae Hospital. Whilst there in the said premises he sustained a fall that caused him injuries so serious that it is alleged that he is now a quadraplegia ie the loss of use of both his upper and lower limbs.

On the 23.3.99 by a plaint dated 23.3.99 he sued the said hospital in TORT stating that they were indeed negligent thus causing his injury.

The hospital entered appearance and filed defence through their advocates. They all along maintained in their defence as follows:-

“Mater Misericordiae Hospital is not a legal entity capable of suing or being sued .”

This defence was filed on 30.4.99.

I see no reply to the defence on the file. The question of status of the defendant was made an issue as outlined above.

The plaintiff advocate took hearing dates of this suit on the 11.4.03 for the case to be heard on 24 and 25 July 2000. The suit was taken out of the call over list.

On the 8.3.03, two years later the plaintiff advocate took date for the 1st and 2nd October 2002.

On the 1st of October 2002 the parties appeared before Ransely (CA) (as he then was). Mr. Otieno for the plaintiff sought an adjournment on the grounds that his client had been living in Siaya and he had no idea why he was not in court for the hearing of the case. The application for adjournment was granted.

On the 14.3.03 – six months later, the advocate for the plaintiff took dates for the hearing of his application Chamber Summons dated the 24.6.02 but was in fact filed on the 13.3.03. The said application prayed for leave to the plaintiff to “amend his plaint in terms of the draft plaint”

This application was given the date of 9.5.2003.

The parties appeared before Matheka, Principal Deputy Registrar. The defendant objected to the application on the ground that by an amendment it could not cure the error made.

The said application through an amendment sought to substitute the defendant's name.

“Mater Misericordiae Hospital” with the new defendants

by the name “the Arch Diocese of Nairobi Kenya Registered

Trustees of the Mater Misericordiae Hospital.”

The Principal Deputy Registrar held that amendments should be freely allowed and in her brief ruling relied on the case law of Eastern Bakery v Castelino CA 30/1958 that held the general principle on the amendment of pleading should be freely allowed. The amendment to the plaint that, in effect, substituted a new defendant was allowed.

The defendant filed an application Chamber Summons dated 6.5.2003, seeking for suit to be struck out. This application came before Hayanga J who stood it over generally. I believe due to there being no appearance by the plaintiff/respondents advocate. They also filed an amended defence stating that the new defendant:-

The Arch -Diocese of Nairobi Kenya

is not the registered trustee of the

Mater Misericordiae Hospital .

The plaintiff filed no replying affidavit on grounds of opposition to this application. He instead fixed the matter for hearing on the 28.10.03 for the case to be heard on the 11th and 12th of February 2004.

When the suit came before me for hearing, the advocate for the plaintiff announced that the plaintiff was not before the court. He admitted that this was the second time that his client failed to appear to court.

I directed the parties to address this court on their 1st issue. The defendant took this up as a preliminary objection and in the meantime withdrew her application dated the 6.5.03.

The advocate for the defendant argument was the same. That the defendant is not a legal entity to sue and be sued. The advocate for the defendant argued that there has been admission in the past that the current defendant is a legal entity.

The question thus arises.

“Is the defendant a legal entity or not capable of suing and being sued?”

The effect of the plaintiff suing Mater Masericodiae Hospital (original defendant) is quite clear.

The law requires that a suit be brought against a legal entity. This is an individual, a Limited Liability Company, the Attorney General – on behalf of government department, certain parastals and or co-operations.

Mater Misericodiae Hospital has not been described as a limited liability company.

It therefore has no legal capacity to be sued.

The plaintiff required to find out what the status of the said hospital is.

If it is a business name or a firm then order 29 CPR requires to be complied with. If it deals with trustees, Executors and administrators then order 30 CPR required to be looked into.

Be as it may, M/s Mater Misericodiae Hospital not being sued the suit against it cannot stand.

The new defendants herein described as the:-

“Arch-Diocese of Nairobi Kenya the registered

Trustee of the Mater Misericodiae Hospital.”

were allowed to be substituted to the plaint by an amendment that was duly granted by the Principal Deputy Registrar. The cause of action arose on the 24.11.97. The joining to this suit by way of substitution of a new defendant on the 16th May 2003 effects the Limitation of action against the new defendants.

In the unreported ruling of the case:-

Reuben Shiholi Ashikaga

V

Hofman Livigh & Another

Nbi Hccc 5180/89, Ringera,J.

The plaintiff applied to amend his plaint to join a new defendant to the suit. The application was granted. It was held by the trial judge that the effect to joining a new defendant was in itself bringing a suit against a defendant which was time barred.

In this current case, there could be an argument that a new defendant was not being joined but that its name was being amended. If that may be the argument the amended name in fact is still not a legal entity as required by law.

If the defendant is a new defendant being joined they are therefore so irregularly joined being time barred. The original defendants would remain but have no status to sue or be sued.

The advocate for the plaintiff claimed that the current name of the defendant was by admission. He referred to the withdrawn application which he says admitted the present name. The defendants have all along denied that they are registered trustee.

In law trustees may not have a capacity to sue and be sued unless otherwise registered.

If I look at the unincorporated bodies who require special situation to be sued, I would give a few example. This is that of a firm which has partners. In such a situatio

A members club which is neither a partnership nor a legal entity and this cannot sue or be sued yet the trustees in the club may be sued or be sued in respect of the club properties. Any action to the property are considered to represent the members beneficially interested. This includes an action in TORT. Any person being interested may be authorized by the court to defend. The defendants have informed the plaintiff that the defendants are not a legal entity. They are not a registered trustee of Mater Misericodia Hospital and they can therefore not sue or be sued.

I would hold that the substitution of the defendant to the current one was time barred by statute. That the original defendant has no capacity to sue or be sued. The present defendant also has no capacity to sue or be sued.

I would uphold the Preliminary Objection and hereby strike out this suit with costs to the defendants.

Dated this 12th day of February 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Otieno-Oyoo & Co. Advocate for the plaintiff

Hamilton,Harrison & Mathews advocates for the defendant