

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 65 OF 2004

ST. MARY SCHOOL, NAIROBI PLAINTIFF

VERSUS

JOSEPHAT GITONGA KABUGI DEFENDANT

RULING

On 5th February, 2004 the Plaintiff filed an application by way of Chamber Summons under Order 38 Rules 5 and 12 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. In the application the Plaintiff sought security for its costs and for attachment before judgment. The application was supported by an affidavit sworn on the same date by FR JOSEPHAT WANYOIKE. The application was made under a Certificate of Urgency and when it went before Njagi J he certified it as urgent and granted interim orders in terms of prayer 2 of the application.

On 11th February, 2004 the defendant entered appearance through M/s Kyalo & Associates who on 13th February, 2004 filed grounds of opposition/grounds of preliminary objection and a replying affidavit sworn by the defendant on the same date. On 17th February, 2004 the Plaintiff filed a further affidavit of the said Fr Josephat Wanyoike against which the defendant filed a responding affidavit that he swore on 23rd February, 2004.

On 25th February, 2004 the defendant delivered a defence set off and counter claim.

When the Plaintiff's application dated 5th February, 2004 came up for hearing inter parties on 25th February, 2004, Counsel for the defendant applied to raise a preliminary objection as per the grounds set out in what he described as Grounds of Opposition/Grounds of Preliminary Objection filed on 13th February, 2004. Counsel for the Plaintiff did not object to arguments on the preliminary objection being made first before hearing the Plaintiff's application aforesaid.

Mr Kyalo learned Counsel for the defendant submitted that the entire suit and the application are incompetent for the reason that the Plaintiff is not a legal entity in Law with capacity to sue or be sued. In Mr Kyalo's view the Plaintiff's counsel has admitted this fact at paragraph 6 of the further affidavit sworn by Fr Josephat Wanyoike on 16th February, 2004 and filed on 17th February, 2004 in which it is deposed that: "The applicant school is sponsored by Archdiocese of Nairobi Kenya Registered Trustees, which owns the land and buildings..."

Counsel for the defendant therefore prayed that the suit is incompetent and should be struck out.

Mr Nyiha Learned Counsel for the Plaintiff opposed the preliminary objection and submitted that the Plaintiff school is an independent institution registered under the Ministry of Education. Mr Nyiha submitted that the Certificate of Registration issued by the Ministry of Education Science and Technology gives the Plaintiff school legal capacity. He argued that, the school is able to employ, operate a banker's account and sponsor a provident fund. It is therefore a legal entity and the preliminary objection should be rejected. In the event that it is found that the Plaintiff school is not a legal entity Mr Nyiha submitted that under Order 1 Rule 10 (1) the irregularity can be cured.

In a brief reply, Mr Kyalo submitted that registration under the Education Act does not make the

Plaintiff school a legal entity and the fact that the school employs sets up a provident fund enters into contracts does not make it a legal entity. In Mr Kyalo's view Order 1 Rule 10 presupposes a mistake and amendment should be on application. He maintained that the suit should be struck out with costs.

The point 1 have to decide is whether or not the Plaintiff school has legal existence. It is described in the plaint at paragraph 1 as "a Private School duly registered under the Education Act Cap 211 of the Laws of Kenya." As far as I am aware the Education Act Cap 211 is not one of the statutes that provide for the creation of legal bodies. The Act describes its object as: "to provide for the regulation and progressive development of education."

Registration under the Education Act is meant for the regulation of the schools by the Ministry of Education in respect of physical facilities professional standards, management methods etc. It is clear therefore that registration of a body under the Education Act does not give the body legal existence at all. It follows therefore that if all that the Plaintiff school has is the Certificate of Registration under the Education Act, in Law it has no legal existence and has therefore no capacity to sue or be sued. Counsel for the Plaintiff school at the end of his submission submitted that the want of capacity to sue is curable under Order 10 Rule (1). It may very well be so. But at this stage there is no application for amendment oral or by Chamber Summons as provided for under Order 10 Rule 22 of the Civil Procedure Rules. Which other person or persons would substitute the Plaintiff school anyway? Is it the Board of Governors if there is one? If there is one who are its officials? Is the Plaintiff run by a management team? If so who are the managers? The further affidavit of Fr Josephat Wanyoike sworn on 16th February, 2004 says at paragraph 6 "The applicant school is sponsored by Archdiocese of Nairobi Kenya Registered Trustees, which owns the land and buildings and its responsibility vis-à-vis the applicant is as far as the Catholic Faith teaching to students is concerned. The Applicant is otherwise an independent institution duly registered under the Ministry of Education Act."

Is the Plaintiff run by an unincorporated members association? If this were the case then Order 1 Rule 8 of the Civil Procedure Rules would apply. In brief therefore, there is no material available for substitution of the Plaintiff school.

In the result, the preliminary objection succeeds and the plaint and the application dated 5th February, 2004 are struck out as the Plaintiff has no legal existence. For the same reason the defendant's set off and counter claim are also struck out. There shall be no order as to costs.

Dated at Nairobi this 19th day of March, 2004.

F. AZANGALALA

JUDGE

19.3.2004