



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 83 OF 2020

ST. JOHN MISHOMORONI ACADEMY.....APPELLANT

VERSUS

YAKUB SHABAN.....RESPONDENT

(Being an Appeal from the Judgment of Hon. G. Kiage (Senior Resident Magistrate)

in CMCC No. 473 of 2018 Mombasa delivered on 28th May, 2020)

JUDGMENT

1. The Appellant was the Plaintiff in **CMCC No. 473 of 2018** having filed a Plaintiff on the 14th March, 2018 where it described itself as a duly registered private Nursery and Primary School under the Ministry of Education, Science and Technology, situated at Mishomoroni/Junda on Plot L.R No. 777/II/M. N.
2. The Appellant's main contention was against the Respondent on claims of trespass. The particulars of the case were that on or about 1st October, 2017, the Respondent illegally and without any justifiable cause trespassed into the Appellant's school and demolished a perimeter wall and lavatories that were under construction. This action had occasioned wastage, loss and caused a hygiene crisis as the pupils at the school did not have adequate lavatory facilities for their daily usage.
3. In its Plaintiff dated the 14th March, 2018, it was the Appellant's prayer that it be awarded by the trial court *a permanent injunction restraining the Respondent, his agents, servants, employees and/or agents from trespassing and or interfering with the school herein; general damages for trespass and compensation for destroyed and wasted building materials together with costs of the suit.*
4. In response to the Plaintiff, the Respondent filed a Defence and Counter Claim dated the 5th March, 2018 and stated that he was the administrator of the estate of his father, Shaban Kassim Kibiero (deceased) who had purchased Plot No. MN/II/777 from Saleh Said Sherman and the same was yet to be transferred into the name of the Respondent's father before his demise.
5. The respondent stated that he and all other beneficiaries of Shaban Kassim Kibiero (deceased) were the actual beneficial owners of the suit property.
6. In the same breath, the Respondent raised a Counter Claim and averred that the Appellant was a mere licensee who was granted permission to construct only one room on the suit property but upon the demise of his father, and in breach of the licence agreement he, erected illegal extensions to the one room. Further, that attempts to stop the construction were not fruitful and attempts to report the matter to the police have been met with violence.
7. In his Defence and Counter Claim the Respondent has sought that the Appellant's suit *be dismissed with costs; judgment be entered on the counter claim for vacant possession of the suit property by the Plaintiff; general damages for trespass and compensation and costs of the suit.*
8. The Appellant called one (1) witness while the Respondent called three (3) witnesses.
9. PW1 was Raphael Ojiambo Obure who described himself as businessman and the proprietor of St. John Mshomoroni Academy. He stated that the school has both pre-school and primary school goes up to standard 8.
10. He testified that the Respondent was known to him as the daughter of the late owner of the land where he has constructed the school and

has been to the school.

11. It was PW1's testimony that the school was established in the year 1990. He stated that when he started to build the school, and before he did so, he spoke to one Mzee Salim who gave him the consent to proceed. He added that he has been in the school premises for years without any disturbance and that the said school is recognized by the Ministry of Education.

12. PW1 stated that he filed statements dated the 6th December, 2017 and 6th December, 2018 respectively, upon which he relied and also referred the trial court to the list of documents dated the 14th March 2018. He stated that his prayer was for the Respondent to be restrained from interfering with the operations of the school and pay costs for the suit.

13. The Respondent testified as DW1 and he told the court that his statement dated 5th April, 2018 and List of documents dated 11th April, 2018 be adopted as his evidence in chief by the court.

14. He testified that he made a report to the police and county offices when the Appellant violated their terms of agreement. He stated that he was the administrator appointed by the court in the estate of his late father and there was no agreement between him and the Appellant.

15. It was DW1's testimony that his late father gave a small portion of the land to the proprietor of the Appellant to use to teach children as he had stated that the children would be taught for free.

16. DW1 prayed that the Appellant's suit be dismissed and judgment entered as per the Counter Claim.

17. DW2 was Kanyevu Mwanza, a resident at Mshomoroni. She stated that she had lived in the area for the last seventy (70) years. She further stated that the original proprietor of St. John was a woman who had asked for a small portion of land to run a nursery school.

18. She testified that the owner of the land passed away and the owner of the school tried to extend the school by building beyond the land as was granted by the deceased. She added that the proprietor of the school did not purchase the land, he has only been allowed to use a small portion for the nursery school.

19. DW3 was Keruwa Mwamrero, a resident of Mshomoroni and community leader (Mama Mtaa) at her area of residence. She stated that she was aware of the dispute between the Appellant and the Respondent. That a report was made against the proprietor of the Appellant to her and she advised that the Respondent reports the matter to the chief or police.

20. Lastly, DW3 told the court that she was born in the area and the defendant's claim was truthful and justified.

21. After hearing the parties, the trial court delivered its **Judgment on 14th May, 2020** and struck out the Appellant's suit and awarded the Respondent's Counter Claim in terms of the judgment entered for vacant possession of the suit property. Further, costs of the suit and counter claim were awarded to the Respondent.

22. Being aggrieved by the decision of trial court issued on **14th May, 2020**, the Appellant has raised the following grounds of Appeal: -

1. THAT the Honourable Magistrate grossly erred in law and in fact by unfairly and in a draconian manner striking out the Plaintiff's suit *suo moto* without due regard to the provisions of Article 159(2)d of the Constitution of Kenya 2010 and notwithstanding that no legal objection had been raised by the Defendant;

2. THAT the Honourable Magistrate grossly erred in law and in fact by failing to consider or properly consider the evidence adduce by the Plaintiff in support of his claim and otherwise misdirected himself as to the import of the said evidence which failure resulted in a total miscarriage of justice;

3. THAT the Honourable Magistrate in any event grossly erred in law and in fact by allowing the Defendant's Counterclaim notwithstanding his own findings that the Plaintiff's suit was fatally defective due to the Plaintiff's lack of legal capacity to institute and/or sustain the proceedings while at the same time allowing the Defendant's Counterclaim against the same Plaintiff which action has no logical rationale whatsoever;

4. THAT the Honourable Magistrate grossly erred in law and in fact by misdirecting himself as to the veracity of the evidence adduced by the Plaintiff and otherwise finding that the Defendant had established his Counterclaim;

5. THAT the Honourable Magistrate grossly erred in law and in fact by allowing the Defendant's counterclaim notwithstanding the provisions of Section 7 of the Limitation of Actions Act Cap 22

23. The Appellant prayed that the Appeal be allowed, the judgment by Hon. G. Kiage (SRM) delivered **14th May, 2020** set aside and the same be substituted with an order allowing the Plaintiff's claim with costs. The Appellant also prays that the Defendant's Counterclaim be dismissed with costs and it be awarded the costs of the appeal together with those of the lower court.

24. Directions were then given on **2nd December, 2020** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **13th January, 2021** while the Respondent filed theirs on the **23rd February, 2021**. The parties relied on their written submissions in their entirety.

The Appellant's submissions

25. In its submissions, the Appellant has canvassed its appeal by discussing each ground and the court has noted that the ground no. 5 has been abandoned. On ground one (1) of appeal, the Appellant has submitted that the trial court grossly erred in striking out its case as the defect by a party can be cured by a simple amendment so as to enable the determination of the matter on its merits and ensure that justice was done without undue regard to procedural technicalities as provided under **Article 159(2) (d) of the Constitution of Kenya**.

26. The Appellant has referred the court to **Order 1 Rule 10 of the Civil Procedure Rules** that clearly allows a court to substitute the correct parties to the suit on its own motion and reliance has been placed on the case of **Kipsiwo Community Self Help Group v Attorney General And 6 Others [2013] eKLR**.

27. According to the Appellant, the trial court misdirected itself as to the veracity of the evidence adduced by the Respondent which was contradictory and thus no case was established.

28. On ground No. three (3), the Appellant has submitted that the trial court erred in considering the Respondent's counter claim in a suit who's the Plaintiff's Plaint had been struck out for lack of legal capacity. The Appellant has claimed that the trial court did not understand the import of most of the cases it referred to, and the examples being the case of **St. Mary School, Nairobi Vs Josephat Gitonga Kabugi [2004] eKLR** and **Kipsiwo Community Self Help Group v Attorney General And 6 Others (supra)** on the interpretation of legal capacity to sue and be sued.

29. Further, the Appellant has submitted that the circumstances in the case of **Beatrice Mumbi Wamahu V Mobil Oil Kenya Ltd [2011] eKLR** were not applicable in the suit herein as it dealt with a withdrawal of the Plaintiff's suit as opposed to the Appellant's suit that had been struck out and thus the trial court erred in relying on the same. The Appellant has stated that a counterclaim is treated a separate suit only in the event where the Plaintiff's suit is withdrawn and not struck out.

30. In conclusion, the Appellant has urged this court to consider its submissions and that if grounds 1, 2 & 4 cannot be awarded, the court be pleased to set aside the counterclaim Judgment in favor of the Respondent.

31. On costs, they have submitted that each party bears its own costs of the trial proceedings as guided under the provisions of **Section 27 of the Civil Procedure Act**.

The Respondent's submissions

32. The Respondent submitted that **Section 10 of the Education Act** provides that the Board of Management is the right body to be sue or be sued on matters affecting a public school.

33. That further, **under Section 9 of the Education Act and the Education (School Committees) Regulation**, a school committee of a primary school is mandated with the authority to manage a school and thus the trial court was right to conclude that the Appellant lacked the legal capacity to appear before it.

34. The Appellant did not provide evidence to demonstrate the right over the suit land and in the instant case, **Section 107 of the Evidence Act** requires that who alleges must prove. The Respondent submits that

35. According to the Respondent, the trial court was right to admit the counter claim as it raised triable issues which related to the suit land and that the Appellant did not produce any convincing evidence that the land was leased to the school. On the relevance of a counter claim, the Respondent has relied on **Order 7 Rule 3 of the Civil Procedure Rules**.

36. The Respondent has urged that the Appellant's Appeal be dismissed with costs to the Respondent.

Analysis and determination

37. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that it neither saw the witness nor heard the evidence when the parties were testifying to see their demeanour. **(See the Court of Appeal case of Gitobu Imanyara & 2 others v Attorney General [2016] e KLR**).

38. I have carefully considered the pleadings and submissions filed herein and find the issues for determination are as follows: -

i) Whether the Appellant lacks the legal capacity to sue in its own name

ii) Whether the trial court erred in allowing the Counter Claim notwithstanding the Plaintiff's suit being struck out

Whether the Appellant lacks the legal capacity to sue in its own name.

39. By all accounts, the Appellant herein described itself as a private Nursey and Primary school and filed a suit on the **14th March, 2018** in its own name. In the determination of the suit, the trial court raised an issue with

regard the legal personality of the Appellant to entitle it institute and sustain a suit in its own name.

40. The trial court referred parties to the case of **St. Mary's School, Nairobi Vs Josephat Gitonga Kabugi (supra) and Kipsiwo Community Self Help Group v Attorney General And 6 Others (supra)** to state that the Appellant lacked the legal capacity to appear before it.

41. In its submissions for the appeal, the Appellant acknowledges that they indeed lack capacity to appear before the trial court. However, its contention is that the trial court ought to have raised the issue on its own motion at the earliest opportunity and the defect might have been cured by an amendment.

42. It is the Appellant's averment that **Order 1 Rule 10 of the Civil Procedure Rules** allows for a court to *suo moto* make an order to substitute the correct parties to the suit. To the Appellant, the issue on capacity could have been cured under **Article 159 (2) (d) of the Constitution of Kenya** so as to give effect to **Section 1A and 1B of the Civil Procedure Act**.

43. The trial court found that the Appellant has no **Locus Standi** or capacity to institute a suit and due to the lack of the said capacity, the suit was found to be incompetent and was struck out. In the case of **Law Society of Kenya Vs Commissioner of Lands & Others Nakuru High Court Civil case No. 464 of 2000**, the Court held that: -

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and others Vs City Council of Nairobi (1982) KAR 229, the Court also held that: -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

44. It is therefore evident that Locus Standi is the right to appear and be heard in Court or other proceedings. Literally, it means a place of standing. Therefore, if a party is found to have no **locus standi**, it means they cannot be heard whether or not they have a case worth listening to.

45. In its documents before court the Appellant was registered as a private school under the **Basic Education Act No. 14 of 2013** with the Ministry of education in December, 2013. The said registration did not confer it with a legal existence. Registration of a school is only meant for regulation of the schools but does not confer legal existence. **Justice Bosire** (as he then was) in the case of **Free Pentecostal Fellowship in Kenya Vs Kenya Commercial bank (HCCC No. 5116 of 1992 (OS))** stated as follows: -

“...In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which then meant it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its own name...”

46. Equally in this matter, the Plaintiff, **St. John Mishomoroni Academy** is not a corporate body, but a private school registered under the Ministry of Education and it lacks capacity to institute proceedings in its own name as it is not a registered body.

47. On whether the issue on legal capacity can be cured by **Article 159 (2) (d) of the Constitution of Kenya**, the Court in **Phares Omondi Okech & 3 others (Suing for and on behalf of Kasgam Community – Wadhari Clan) v Victory Construction Co. Ltd & Kisumu Water & another [2015] eKLR** held that: -

“...That the issue of capacity to sue cannot be a matter of procedure as counsel for the plaintiffs submitted to be cured through Article 159 of the constitution by the consideration of substantive justice. The lack of capacity cannot be cured by Article 159 of the constitution that emphasizes on substantive justice or by applying the oxygen principle under Section 1A, 1B and 3A of the Civil Procedure Act...”

48. In this case the Appellant has placed the burden on the trial court that it ought to have ordered for substitution to reflect the proper parties *suo moto*. Just like this court, I believe the trial court was not privy to how the school was constituted itself and thus it is very presumptive of the Appellant to believe that the court would have done the same on its behalf. Further, the Appellant is not a proper party who is recognized under the law as having the legal persona to sue and be sued.

Whether the trial court erred in allowing the Counter Claim notwithstanding the Plaintiff's suit being struck out.

49. The Appellant raised issue with trial court's decision to determine and eventually allow the Respondent's Counter Claim dated the **5th April, 2018** after its suit was struck out for lack of legal capacity to appear before the court.

50. It is trite law that a Counter Claim is a case on its own right and completely different from the Appellant's case which either fails or succeeds on its own merits. Among the prayers sought in the counter-claim, the trial court allowed the prayer seeking an order for vacant possession. I must reiterate that equity serves no wrong without a remedy.

51. In my view, the prayer for vacant possession is more of a claim in *rem* as opposed to a claim in *personum*. This means that the court can issue that prayer against a property notwithstanding whether or not the owner defended the claim. Consequently and having read through the trial courts Judgment, I see no reason why this court should disturb the finding on whether vacant possession ought to be granted.

Disposition

52. In view of the above, the Appellant's Appeal is hereby dismissed with cost

to the Respondent.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE