REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 149 OF 2009

WANYIRI KIHORO & OTHERS.....….....APPELLANTS

VERSUS

THE HON. ATTORNEY GENERAL & ANOTHER.....RESPONDENTS

(An appeal from the Ruling of Hon. S. Muketi, C.M. delivered on 6th December 2009, in Nyeri C.M.C.C. No. 404 of 2008)

JUDGMENT

This appeal raises one fundamental issue, namely, whether a pleading that does not describe a local authority in the manner stipulated under the provisions of Section **12(3)** of the Local Government Act[1], (Repealed) is fatally defective. The said section provided as follows:-

> *(3) "Every municipal council shall, under the name of "The Municipal Council of .....", be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time), and shall by such name be capable in law of suing and being sued, and of acquiring, holding and alienating land."(Emphasis added).*

The said Act was repealed by the Urban areas and Cities Act.[2] Section **59** of the Urban areas and Cities Act[3] provides as follows:-

> ***59. Pending actions and proceedings***
>
> *"Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law".*

Section **59** cited above is clear and requires no explanation. The appellants plaint in the lower court had named the second Respondent as **Nyeri Municipal Council**. Counsel for the Respondent in the lower court successfully raised a preliminary objection maintaining that such an entity **did not exist and the only entity in existence was Municipal Council of Nyeri**. The Respondents counsel maintained the said argument in this appeal and urged this court to up hold the decision of the lower court. Counsel for the appellant was of a different opinion and urged the court to overrule the decision of the lower court and reinstate the suit for hearing in the lower court.

The issue that falls for determination is whether or not the learned Magistrate was correct in upholding the Respondents' preliminary objection. In other words, was the aforesaid mis-description fatal. Failure to comply with the provisions of Section **12 (3)** of the repealed Local Government Act[4] reproduced above has received different interpretations by a section of the High Court of Kenya. The said decisions were rendered by courts of coordinate jurisdiction and are therefore not binding on this court but may be persuasive. I was not able to find Court of Appeal decisions on the issue nor did both counsels in this case bring any to my attention, even after I allowed them **seven days** to submit authorities after hearing this application. In fact I now render this judgment without the benefit of any authorities cited by both

advocates.

Some of the High Court decisions rendered on the point before me are **(a)** *Gimu Development (K) Limited vs Mavoko Municipal Council and Lilian Nduku Musyimi and Tabiman Otieno**[5]* where the defendants had raised a preliminary objection to the effect that. "*The suit as drawn and filed was in competent or bad in law as the same was in gross violation of the mandatory provisions of the local government Act**[6]** and or the general principles of suits against non natural persons…..*" In determining the aforesaid objection, the court drew inspiration from the decision Mwera J (as he then was) in the case of *Nairobi City Council vs Cris Evarard and Others**[7]* where the learned judge after reviewing the law ruled thus:-

> "*The name Nairobi City Council exists only in the minds of the general Public where as the Act**[8]** had set out the name of the entity as the City of Nairobi meaning the city council of Nairobi…..There being no party to sue the defendant could not be said that a non entity has a case to maintain against them and without plaintiff the court, had a duty to close its records by striking out the plaint*"

Lenaola J in *Gatua Nyaga Dairy Farm Company Limited and Others vs Michael Kingu and Others**[9]* after revisiting the provisions of Section **12 (3)** of the Local Government Act[10] concluded that the words are clear, unambiguous and incapable of any other meaning other than the mandatory one described and on that basis arrived at the conclusion that the defendant in question in the said suit did not exist and no amendment could cure that defect.

In the said case, Lenaola J proceeded to state as follows:-

> *"The court, has had occasion to revisit section 12 (3) of the local government Act. Subsection 3 begins with the words "Every Municipal Council shall bear the name of "The Municipal council of ……The gist of that section is that every municipal council upon elevation to that status acquires a new Christian name namely" The municipal council of ….." Anything described otherwise robes that particular entity its right, of existence. The provision is clear as found by my learned Brother judge in the cases quoted above and there is no reason to depart from their findings. on this basis this court, finds that the first defendant Mavoko Municipal Council which is described in paragraph 2 of the plaint as a local authority registered under the local government Act cap 265 of the laws of Kenya does not fit the description provided for under section 12 (3) of the said Act. This description therefore robes its right of existence in law without a status in law, there can be no right to sue or to be sued. The first objection therefore stands"*

As pointed out above, there are contradicting decisions of the High Court on the same issue. In the above cited cases of **(a)** *Nairobi city council vs Chris Evans and 4 others*[11] by Mwera J, **(b)** *The Gatuanyaga Dairy Farm Company Limited and others**[12]**, by Lenaola J,* ***(c)*** *Gimu Development (K) Limited vs Mavoko Municipal Council and Others*[13]by Nambuye J, **(d)** *Aristocrats Concrete Company Limited vs Mavoko Municipal council*[14] by Nambuye J delivered on 18.9.2009, **the mis-description in all the foregoing cases was found to be fatal**, but in the following five cases, namely, *Hamphray Wainaina Mbogo vs Thika Municipal Council and Others*[15] by Aganyanya J, (as he then was) and *Kariuki Civil Engineering (K) Limited vs Bungoma Municipal Council*[16] by Ochieng J, *Nzomo Wambua vs Wote Town Council**[17]* by Lenaola J**,** *James Mwangangi & 64 Others vs Wote Town Council**[18]**by Wendo J and* as late as 2014, Gikonyo J in *Fubeco China Fushun vs Naiposha Company Limited & 11 others**[19]* **the mis-description was found not to be fatal but curable by amendment.**

Thus, these are two contradicting positions taken by courts of coordinate jurisdiction. A decision of a court of co-ordinate jurisdiction is not binding.[20] While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. In the case of *R.* v. *Nor. Elec. Co.*,[21] McRuer C.J.H.C. stated:-

> "*.....The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an*

ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…". (Emphasis added).

In my opinion, I think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was "*given without consideration of a statute or some authority that ought to have been followed*." I do not think *"strong reason to the contrary"* is to be construed according to the flexibility of the mind of the particular judge.

Talking about consideration of a statute and authority or authorities that ought to have been followed, perhaps at this juncture it is important to recall with approval the words of Madan, JA, (as he then was) in *DT Dobie Co Ltd vs. Muchina**[22]* where he stated that:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so week as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."(Emphasis added)

The above passage has been quoted and relied upon in numerous decisions of both the High Court and the Court of appeal in this country to the extent that in my view it has acquired the force of law.

Even though the High court decisions discussed above are not binding on me but merely persuasive, there is authority also for the proposition that where two decisions cannot be reconciled, *the more recent and the more consistent with general principles ought to prevail*. This was the holding in *Campbell* v. *Campbell*[23] *decided as early as 1880 which settled the law on this point.* [emphasis added].

Talking of recent decisions, discussing a similar issue as late as 2014, Gikonyo J in *Fubeco China Fushun vs Naiposha Company Limited & 11 others**[24]* citing previous decisions held as follows:-

"I hold and find that this is not a case of non-existent or faceless entity that would invariably be incapable of suing or being sued. It is a case of pure mis-description of a party and is governed by the same law on mis-description of parties in a contract. I find support of that position in the words of ***Lenaola J*** *in the case of Nzomo Wambua vs Wote Town Council**[25]** while citing the case of James Mwangangi & 64 Others vs Wote Town Council**[26]** where it was held that:-*

"Clearly, the advocates as did their client knew who was being sued and understood the mis-description in the name of the defendant but that fact does not change the cause of action against it nor the substratum of the suit as well as the questions in dispute. I therefore agree with Wendoh J, in James Mwangagi (supra) where the learned judge stated as follows:-

"the Defendant/Respondent is not properly described but mere mis-descriptions of a party cannot render a suit incompetent. ..... the court has wide discretion under Order 1 Rule 10 of Civil Procedure Rules to allow an amendment of the parties on its own or upon application" "

I take the view that that the prior decisions discussed above whereby similar preliminary objections as in this case were up held were given without consideration of a statute, namely the provisions of *Order **1** Rule **10** of Civil Procedure Rules which gives the court discretion to allow an amendment of pleadings on its own or upon application* and also the said decisions did not take into account relevant binding authorities such as the decision by Madan JA cited above.

Order **8** Rule **(5) (1)** of the Civil Procedure Rules provides that:-

"For the purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on

the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

Other relevant provisions of the law include Section **3A** of the Civil Procedure Act[27] which provides that *'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'*

I also find it necessary to recall the words of the court in *Dickson Karaba Vs. John Ngata Kariuki & Another**[28]*** whereby the court stated as follows:-

"…striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court…"

I also find it necessary to recall the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General**[29]***

".....and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in causes were the action is an abuse of legal procedure… To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad". (Emphasis added)

I stand guided by the words of Madan JA cited above and the above decisions all of which are in agreement that *our judicial system would never permit a plaintiff to be "driven from the judgment seat without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.* I am persuaded that the decisions by Gikonyo J, Ochieng J and Anganyanya J (as he then was) which are more persuasive and in my view considered the relevant principles of law and authorities and which I find to be more consistent with the general principle which ought to prevail, that is "*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so week as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

Also relevant is the case of *Richard Nchapai Leiyangu vs IEBC & 2 others**[30]*** where it was held as follows:-

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

In my view, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[31] The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal* [32]"*has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it."* **Lord Cairns** in *Roger Vs Comptoir D' Escompts De Paris* stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the

matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justiciae*, to have any determination which affects him set aside. Discussing the nature and objects of the inherent powers of the court, *Sir Dinshah Mulla* in *The Code of Civil Procedure*[33]observes that:-

> *"the Code of Civil procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act* ***ex debito justiciae*** *for doing real and substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act* ***ex debito justiciae****, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice....."*

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[34] Discretion must be exercised in accordance with sound and reasonable judicial principles.

The King's Bench in Rookey's Case[35] stated as follows:-

> *"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

In my view, the court has wide discretion under Order **1** Rule **10** of Civil Procedure Rules to allow an amendment of pleadings on its own or upon application and consequently, striking out pleadings is a draconian step and as was held in *Agip Kenya Ltd vs Highlands Tyres Ltd****[36]***the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given.

If we carefully examine all the authorities on the power of the court to amend pleadings, the statement of law declared by the Privy Council in *Ma Shwe Mya v. Maung Mo Hnaung*[37] that has been consistently accepted by the courts as correct statement of law. The Privy Council observed:-

> *"All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."*

Its trite law that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties.

In the leading English case of *Cropper v. Smith**[38]*, the object underlying amendment of pleadings has been laid down by Browen, L.J. in the following words:

> *"It is a well established principle that the object of the courts is to decide the rights of the parties and not punish them for mistakes they make in the conduct in their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."*

In *Amulakchand Mewaram & Others v. Babulal Kanalal Taliwala,**[39]* the Bombay High Court had an occasion to decide a case involving mis-description of a party. In that case, the Court observed:-

> *"... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought in the name of a non-existent person or whether it is merely a mis-description of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs."*

In my opinion, when we apply the principles laid down by the above judgments, the conclusion becomes irresistible that the view taken by the lower Court in the impugned ruling cannot be said to be justified in law. Guided by the numerous authorities cited above, I find that the mis-description of the second Respondent in the lower court was a defect that could be cured by way of an amendment, hence, the same was not fatal. In fact at page 28 of the record, counsel for the appellant in the lower is recorded informing the court that it had unfettered discretion to allow an amendment, but the court in its ruling did not address the issue of jurisdiction or judicial power to allow an amendment.

Writing on judicial power, Chief Justice John Marshall wrote the following on the subject:-

> *"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.**[40]***

I echo the words of John Marshall cited above and reiterate that it cannot have been the will of the legislature in enacting Section **12 (3)** of the Local Government Act[41] (Repealed) to drive out a litigant from the seat of justice and erode or take away "*the right to a hearing which has always been a well-protected right in our constitution and is also the cornerstone of the rule of law."* Guided by the numerous authorities cited herein and the well protected constitutional right to a hearing which is the cornerstone of the rule of law, I hereby allow the appellants appeal and make the following orders:-

1. **That** *the ruling/orders of the learned magistrate made on 9th December 2009 striking out the appellants case against the second Respondent in RMCC No 404 of 2008 be and is hereby set aside.*
2. ***That*** *the appellants suit against the second Respondent in the said suit be and is hereby reinstated.*
3. ***That*** *RMCC No 404 of 2008, Hon. Wanyiri Kihoro & Others vs The Hon. Attorney General & Another be and is hereby remitted back to the Chief Magistrates Court, Nyeri for hearing and final determination.*

4. ***Each*** *party to bear its/his own costs for this appeal.*

Orders accordingly.

Signed, Delivered and Dated at Nyeri this 19th day of July 2016

John M. Mativo

Judge

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[1] Cap 265, Laws of Kenya, Repealed

[2]Chapter 275, Laws of Kenya

[3]Ibid

[4] Supra

[5] Nairobi HCCC NO. 1314/06

[6] Supra

[7] Nairobi HCCC NO 851 of 2002 (UR)

[8] Local Government Act

[9] Nairobi HCCC NO. 733 of 2003 (UR)

[10] Supra

[11] Supra

[12] Supra

[13] Nairobi HCCC NO. 1314/06

[14] {2009} eKLR

[15] Nairobi HCCC NO. 129/2003

[16] Bungoma HCCC NO. 120/05

[17] {2008} eKLR

[18] HCC 113/ 2004

[19] [2014] eKLR

[20] R. v. Nor. Elec. Co., [1955] O.R. 431; R. v. Groves (1977), 17 O.R. (2d) 65.

[21] Ibid

[22] [1982] KLR 1 at page 9:

[23]{1880}, 5 App. Cas. 787 at p. 798

[24] [2014] eKLR

[25] {2008} eKLR

[26] HCC 113/ 2004

[27] Cap 21, Laws of Kenya

[28] {2010} e KLR

[29] {1911} KB 418

[30] Ibid

[31] See Mamraj vs Sabri Devi, AIR 1999 P & H 96

[32] air {1962} AC 527

[33] 18th Edition Reprint 2012

[34] See Sir Dinshah F. Mulla, Supra, at page 1381.

[35] [77 ER 209; (1597) 5 Co.Rep.99]

[36]{2001} KLR 630

[37] (1933) 35 Bom. L.R. 569

[38] (1884) 29 Ch D 700 7 (1878) 10 Ch. D 393

[39] 12 (1933) 35 Bom. L.R. 569

[40]Osborn V. Bank of the United States, 22 U. S. 738 {1824}.

Supra[41]