



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
ELC CASE NO.225 OF 2014

EVANS OTIENDEH OMOLO.....APPLICANT

VERSUS

THE CHAIRMAN – SCHOOL COMMITTEE UNION PRIMARY SCHOOL

**THE SECRETARY – SCHOOL COMMITTEE UNION PRIMARY SCHOOL.....1ST
RESPONDENT**

THE CHAIRMAN – SCHOOL COMMITTEE KIBUYE PRIMARY SCHOOL

**THE SECRETARY – SCHOOL COMMITTEE KIBUYE PRIMARY SCHOOL.....2ND
RESPONDENT**

RULING

1. The Chairman and Secretary, School Committee Union Primary School, hereinafter referred to as the Applicants, filed the Notice of Motion dated 11th March 2015 seeking for the plaint to be struck off for being fatally defective. They also pray for costs. The application is premised on the grounds marked 1 to 4 respectively and the affidavit of Roseline Apondi Gwada, sworn on 11th March 2015, in which she depones to the following among others;

(a) That she is the headmistress and therefore the Chief Executive Officer of Kisumu Union Primary School since 2011.

(b) That she is also the Secretary to the Board of Management of Kisumu Union Primary School, and that the Board is presided over by a Chairman.

(c) That there is no entity known as School Committee Union Primary School and the suit should be struck out by granting their application ex-debito justitiae.

2. The application is opposed by Evans Otiende Omollo, the Respondent, through the grounds of opposition dated 10th April 2015 and filed in court on 14th April 2015.

3. The counsel representing the Applicants and Respondent appeared before the court on 13th May 2015 and agreed to file written submission in respect of the application. The counsel for the Applicants filed the submission dated 24th June 2015 on the 29th June 2015 while counsel for the Respondent filed

theirs dated 12th August 2015 on the 28th September 2015.

4. The main issues for determination are as follows:

- (a) Whether the defendants as described are legal entities that are capable of being sued.
- (b) If the answer in (a) above is in the negative, whether the plaint should be struck out.
- (c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, grounds of opposition, the pleadings, the supporting affidavit and the written submission by both counsel and come to the following findings:

(a) That the proceedings in this suit were commenced by Evans Otiendeh Omolo, the Respondent, through the plaint dated 28th July 2014. The heading of the plaint carries the description of the parties as follows:

" EVANS OTIENDEH OMOLO..... PLAINTIFF

VERSUS

1. THE CHAIRMAN – SCHOOL COMMITTEE UNION PRIMARY SCHOOL

2. THE SECRETARY – SCHOOL COMMITTEE UNION PRIMARY SCHOOL.....1ST RESPONDENTS

3. THE CHAIRMAN – SCHOOL COMMITTEE KIBUYE PRIMARY SCHOOL

4.THE SECRETARY – SCHOOL COMMITTEE KIBUYE PRIMARY SCHOOL.....2ND RESPONDENTS."

At paragraph 2 of the plaint, the Defendants are described as

"adult Kenyan citizens of sound mind residing in Kisumu in the Republic of Kenya and managing the affairs of the two named schools."

The Applicants have through the supporting affidavit deponed that there is no entity known as School Committee Union Primary School. This has not been rebutted or controverted by the Respondents. A suit cannot be sustained against a non-existent person. The Applicants counsel has further submitted that the Basic Education Act 2013 established the School Board of Management which is the entity that replaced the Board of Governors. That there is no entity known as School Committee Union Primary School which could have a Chairman and Secretary capable of being sued. The counsel submitted that the suit is therefore fatally defective, and incurable and should be struck out. The counsel referred the court to the decisions in the following two cases:

- I. Eritrea Onthodox Church -V - Wariwax Generation Limited {2007} eKLR, and,
- II. Kenya Country Bus Association - V - Barclays Bank of Kenya Ltd {2010} eKLR.

In response to that submission, the Respondent's counsel submitted that the fact that the Applicants were sued as School Committee Union Primary School instead of Board of Management, is purely an issue of description of the parties and does not go to the merits of the case. The counsel further submitted that Respondent's suit is not so hopeless that it cannot be salvaged or cured by amendment and prayed for the application to be dismissed with costs. The counsel does not dispute the Applicant's submission that there are no entities known as School Committee, Union Primary School, and by extension, Kibuye Primary

School, Under the Basic Education Act 2013. The counsel has also not disputed that the management entities for schools under the Basic Education Act 2013 are known as Boards of Managements and not school Committee.

(b) That the Basic Education Act 2013 commenced on 25th February 2013 and under Part VIII headed, " Governance an Management of Basic Education and Training" establishes the Board of Management at Section 55 which states:

" 55. (1) There shall be a Board of Management for every public -

- (a) Pre - Primary institutions
- (b) Primary School
- (c)
- (d)
- (e)
- (f)

The composition of the Board of Management is provided for under Section 56 of the said Act and Subsection 4 provides for the election of the chairperson. The functions of the Board of Management are set out under Section 59 of the said Act while Section 62 provides that the head of the basic education institution shall be the Secretary to the Board of Management. This suit was commenced in 2014 when the Basic Education Act was already in force and there is no explanation offered by the Respondent why the proper and legally created entities of Management of the Union and Kibuye Primary schools were not the ones sued. The parties described as Defendants herein do do exist as they are not legal entities under the Basic Education Act capable of being sued or to defend this suit.

(c) That whereas the court is in agreement with the Respondent's counsel's submissions that the courts power to strike out pleadings under Order 2 Rule 15 of the Civil Procedure Rules should be sparingly exercised and only in exceptional cases, a suit cannot be continued against non-existent parties against whom orders of the court cannot be executed.{see Tranced Media Group Limited – V – Independent Electoral & Boundaries Commission (IEBC)) {2015} eKLR.} The Applicants in the application subject matter of the ruling have shown that the entities described as the Defendants do not exist and there cannot be a cause of action against entities that do not exist. As set out in the Trancend Media Group Limited case (supra)at paragraph 23, " a cause of action is " a factual situation the existence of which entitles one person to obtain a remedy against another person." Letang – V – Cooper (1965) Q.B 232". The parties described in the plaint as Defendants do not exist and there is no way the Respondent can obtain a remedy in form of an order against a non existent party. The Respondent's plaint may have set out out a reasonable claim but the claim is directed against a non- existent party. To continue with the case would be a waste of judicial time and therefore an abuse of the courts process. The suit as phased cannot be cured by amendment as it would require introduction of new parties as Defendants.

(d) That the court is aware that under Order 1 Rule 9 of the Civil Procedure Rules, a suit shall not be defeated by reason of the misjoinder or non-joinder of parties as the court is enjoined to deal with the matter in controversy as between the parties before it. In this particular instance, the question is of the existence of the Defendants and from the affidavit evidence availed and submissions by counsel, the Defendants as described do not exist. The Respondent has not taken any steps to withdraw the plaint so as to file another against Defendants that exist legally and with capacity to defend the suit. The Applicants request if allowed will not lock out the Respondent from initiating suit against the proper entities subject of course to the Law of Limitations Act.

5. That having found that the four named defendants are non existent as entities capable of being sued,

the court finds that to allow the suit as filed to continue to further hearing would be an abuse of the court's process. The application dated 11th March 2015 is therefore allowed. The plaint dated 28th July 2014 is struck out with costs.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/11/2015

Dated and delivered this **5th day of November 2015**

in presence of

Applicants/Defendants N/A

Respondent/Plaintiff N/A

Counsel Mr Nyamusuba for Stausi for 1st & 2nd Defendants/ Applicants

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/11/2015

Court: ruling delivered in open court in presence of Mr Mr Nyamusuba for Stausi for 1st and 2nd Defendants/Applicants.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/11/2015