

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 1 OF 2010

(Being an appeal from the Ruling of the Senior Magistrate, Maralal Hon. Alex Ithuku delivered on 9th December, 2009) in Maralal SRMCCC No. 2 of 2008)

BOG MOI GIRLS SECONDARY SCHOOL.....APPELLANT

VERSUS

STEPHEN OKETCH

T/A STAG GENERAL CONTRACTORS & SUPPLIES.....RESPONDENT

JUDGMENT

Stephen Oketch t/a Stag General Contractors and Suppliers sued Moi Girls Secondary School, Samburu for a sum of Ksh 3,181,820/= the bulk of which sum was paid by the School, and by the time the Amended Plaint dated 22.02.2008 was filed a sum of Ksh 479,040/= was outstanding.

To this claim, the School's Board of Governors (B.O.G.), filed a Defence on 12.03.2008, in the form of a "Reply" to the Respondent's claim. I call it a "Reply" because it contained the Appellants' evidence and whole background to the Respondent's claim. This Reply was copied to the Hon. Attorney-General, who instead of amending the "Reply" purported to withdraw it, and filed his "Statement of Defence" on 6th July 2009.

It is that Defence which triggered the Respondent's application dated 30.10.2009 in which the Respondent applied to have the School's Defence struck out, and judgment entered in favour of the Respondent as prayed in the Plaint.

Despite the School's through the Attorney-General, spirited Defence, the School's Statement Defence was struck out in a Ruling delivered on 9th December 2003. It is that Ruling which prompted the appeal herein, the subject of this judgment. In its Memorandum of Appeal dated 7th January 2010, the Appellant raised ten (10) grounds of appeal, but I think only two of those grounds are material -

1. ***whether the learned trial magistrate erred in law in holding that the defence was incurably defective, and incapable of being cured by amendment, and***
2. ***whether the learned trial magistrate erred in law by holding that the Attorney-General had no locus standi to act for the Appellant school.***

I will commence with the latter ground whether the Hon. the Attorney-General had "locus standi" to appear and act for the school's Board of Governors.

It is correct, as the learned trial magistrate argued that a Board of Governors, constituted under the Education Act (*Cap. 212, Laws of Kenya*) is a body corporate. All Board of Governors in schools aided or funded by the Government, fall under the Ministry of Education (*a government entity/department*) whose principal legal adviser under Section 26 of the former Constitution of Kenya, is and was the Hon. Attorney-General. The Attorney-General had therefore the necessary "locus standi" to act on behalf the School's Board of Governors. The learned trial magistrate therefore erred in law and fact in holding that the Attorney-General had no *locus standi*. The Appellant succeeds on that ground.

On the second ground, whether the School's Defence as filed by the Attorney-General was incurably defective, the jurisprudence in Kenya postulates that the courts should as far as possible aim at sustaining rather than striking out pleadings. This jurisprudence is grounded upon both substantive and procedural law. Commencing with substantive law, Section 72 of the Interpretation and General Provisions Act (*Cap. 2, Laws of Kenya*), provides -

“72. Save as is otherwise provided, whenever a form is prescribed by written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument, or which is not calculated to mislead.”

On procedural law, Order VI, rule 12 of the Civil Procedure Rules provides that -