



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION NO. 3 OF 2017

IN THE MATTER OF ARTICLE 22 (1) & (2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24 AND 25 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 40, 47, 50, 60 (1) (B), 232 AND 249 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

YAKO SUPERMARKET (K) LIMITED ::::::::::::::: 1ST PETITIONER

SUDHIR KHETIA ::::::::::::::: 2ND PETITIONER

AND

NATIONAL LAND COMMISSION ::::::::::::::: 1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF LAND, HOUSING &

URBAN DEVELOPMENT ::::::::::::::: 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ::::::::::::::: 3RD RESPONDENT

THE CHAIRPERSON, BOARD MANAGEMENT

KAKAMEGA PRIMARY SCHOOL ::::::::::::::: 4TH RESPONDENT

THE HON. ATTORNEY GENERAL ::::::::::::::: 5TH RESPONDENT

RULING

The 4th respondent raised a Preliminary Objection on points of law for the following reasons; that the amended petition and applications herein are bad at law, an abuse of the due and court process for contravention of Article 22 of the Constitution of Kenya, 2010 as well as section 55 of the Basic Education Act, 2014 and ought to be struck out and or dismissed with costs to the 4th respondent. That the purported amended petition and applications therein are bad at law for being non-starters on account of premise on a previously struck out petition, improperly presented and defective in substance and ought to be struck out and or dismissed altogether with costs to the 4th respondent. That the purported amended petition and applications herein are bad at law for being incompetent, non-starters on account of premise on an unverified petition, consequently an empty shell and ought to be struck out and or dismissed altogether with costs to the 4th respondent. That the purported amended petition and applications herein are bad at law for being instituted and or filed without demonstrable requisite sanction of the 1st petitioner's Board of Directors, and Regulations and ought to be struck out and or dismissed altogether with costs to the 4th respondent.

The petitioners' at the hearing of the 4th respondent's notice of preliminary objection dated the 23rd day of November, 2017, opposed the same on the following grounds; that the petition upon which the preliminary objection is predicated was filed and served on the 4th respondent in March, 2017. That accordingly the 4th respondent has been aware of this suit for nearly 9 months. That counsel for the 4th respondent was in court when the honourable court issued directions regarding the pending applications in the matter, resting with the directions that the same be heard on the 23rd of November, 2017. That the 4th respondent however filed the notice of preliminary objection on the morning of the hearing of the petitioners' applications raising issues that have been in the 4th respondent's knowledge and possession for nearly 9 months. That admittedly the preliminary objection is but a back-door application to protract the matter herein. That more fundamentally, the preliminary objection as formulated is bare, bereft of sufficient material and couched in a way that it is impossible for the petitioners to prepare and be ready to counter it. That in the circumstances the preliminary objection is an abuse of the process of the court and the 4th respondent's conduct disentitles it from any relief from this court.

The 4th respondent's counsel submitted that Kakamega Primary School, the 4th respondent, is a school governed under Section 55 of the Basic Education Act 2014. The as a school the 4th Respondent is an unincorporated entity without capacity to be sued in its name. That the school is managed by a Board of Management in the name of whom the suit should have been preferred. The 4th respondent further submitted that a petition cannot be amended using Order 8 Rule 3(3) and 5(1) Order 1 Rule 9 of the Civil Procedure Rules. The petition is not governed by these rules. The original petition was struck out and the petitioners ought to have filed a fresh petition as there was nothing to amend. The 4th respondent cannot therefore be added without being involved. It cannot be a genuine mistake to correct an identity. The 4th respondent's counsel referred to the following decided cases;

- 1. East Africa Portland Cement Limited v. Capital Markets Authority & 4 Others (2014) eKLR**, where the court held that in the absence of a board resolution sanctioning the commencement of the action by the company the company is not before the court at all.
- 2. Football Kenya Federation v. Kenya Premier League Limited & 4 others [2015] eKLR** it was held that, an unincorporated society or entity being an entity without legal personality, cannot sue or be sued in its own name but that of its official or trustees.
- 3. Simu Vendors Association v. Town Clerk, City Council of Nairobi & Another [2005] eKLR**

it was held that, institution of suit against parties without capacity renders the suit null and void and no amendments, joinder or substitution can suffice.

4. Evans Otiendeh Omolo v. School Committee Union Primary School and another [2015] eKLR the court made a finding that to allow a suit to continue where the Defendants are non-existent is an abuse of the court process.

5. Yako Supermarket (K) Ltd & Another v. National Land Commission & 4 Others (2014) eKLR. The court held that the description of the 4th respondent in both the Petition and notice of motion do not refer to the name of any person capable of being a member or official of the Board of Management of Kakamega Primary School.

The petitioners' submitted that the misdirection in the reference to the 4th respondent can be cured at any stage before judgment. The learned counsel referred to Order 8 Rule 3(3) and 5(1) Order 1 Rule 9 of the Civil Procedure Rules. They admitted it was a genuine mistake and applied orally to amend the same. That paragraph 7 of their amended petition on the description of the 4th respondent is very clear and amending it will not prejudice the 4th respondent. That in the case of **Yako Supermarket (K) Ltd & Another v. National Land Commission & 4 Others (2014) eKLR**, Kibunja J struck out the petition against the 4th respondent only and hence the 4th respondent could now be brought in through an amendment of the original petition. That in the replying affidavit Mr. Sandeep is authorised to swear the affidavit by a resolution of the board. The Civil Procedure Rules further state that it is only a plaint which should have a verifying affidavit and not a petition.

This court has carefully considered the grounds on the notice to raise the preliminary objection dated 23rd November 2017 and filed in court on the same date and the submissions by counsel for 4th respondent and petitioners. The court finds that the notice to raise a preliminary objection filed by the 4th Respondent and dated 23rd day of November, 2017 does raise points of law as is accepted in the principles set out in **Mukisa Biscuits Manufacturing co. Ltd –V- West End Distributors Ltd** (1969) E.A. 696. That for a ground in a preliminary objection to amount to a point of law, it should be one that if argued would dispose of the suit on the assumption that all the facts pleaded by the other side are correct. The grounds raised in the preliminary objection could dispose of the suit as against five (5) respondents and the court will proceed and determine the same.

The issues for determination are as follows:

1. Whether the 4th respondent as described is a legal entity with capacity to defend this proceedings.
2. Is the suit properly before this court in the event there is no board resolution sanctioning the same and would it affect all the respondents.
3. Should the preliminary objection raised by 4th respondent be upheld and what are the orders to issue.
4. Who should pay the costs of the preliminary objection.

The amended petition and applications filed herein by the petitioner describe the 4th respondent as the "The Chairman, Board Management Kakamega Primary School". The 4th respondent's counsel submitted that no such entity as described exists in law and therefore the amended petition and the applications should be struck out and or dismissed with costs. That a primary school like Kakamega Primary School is managed under a Board of Management as provided for under Section 55 of the Basic Education Act 2014. The petitioner's counsel has not disputed that position and concedes to this objection but claims it was a genuine mistake and now wishes to amend the amended petition orally to reflect the correct title and/or description. The court is in agreement with the 4th respondent's counsel's

submission and is persuaded by the above mentioned relevant authorities. In the case of **Yako Supermarket (K) Ltd & Another v. National Land Commission & 4 Others (2014) eKLR**, Kibunja J stated as follows;

“That the description of the 4th Respondent in both the Petition and notice of motion do not refer to the name of any person capable of being a member or official of the Board of management of Kakamega Primary School. The use of the word or descriptive term “Chairman School Committee Kakamega Primary school” does not disclose the identity of the person who holds the position of Chairman for purposes of service of court processes and participation in the court proceedings. That had the petitioner moved the court before the presentation of the preliminary objection to correct the name of the 4th Respondent under Order 8 Rule 3(3) of the Civil Procedure Rules, possibly the court would have considered such a request favorably.

That the issue of the existence or otherwise of a party to a suit cannot be said to be an issue of technicality. That the issue is important and should be decided at the earliest opportunity to ensure judicial time and resource, in addition to parties time and resources are not wasted as no orders either positive or negative can be made for or against a non-existent party. That the existence or otherwise of a party to a suit in court is a matter of law and is in order for such a question to be raised through a preliminary objection, at the earliest opportunity”.

I agree with the 4th respondent’s counsel’s submission that the party described as the 4th respondent does not refer to the Board of Management of Kakamega Primary School in terms of Section 55 of the Basic Education act 2014 and the party so described does not legally exist. That to continue with the amended petition and applications against the 4th Respondent amounts to abuse of the court’s process. This cannot casually be amended by an oral application. However, just like before in this matter allowing the preliminary objection at this stage will only terminate the suit against the 4th respondent. In this case the preliminary objection is on identity and it is between the 4th respondent and the petitioner and the outcome does not affect the petition and applications against the other four respondents.

The 4th respondent submitted that there was no board resolution to sanction the institution of this suit and that the resolution produced was not from the board but from one Director to another. There was also no verifying affidavit to the amended petition and only one affidavit was sworn in support of the amended petition and the application. On the issue of the absence of a board resolution he relied in the case of **East Africa Portland Cement Limited v. Capital Markets Authority & 4 Others (2014) eKLR**, where the court held that in the absence of a board resolution sanctioning the commencement of the action by the company, the company is not before the court at all, I am in agreement with this judgement. However, the court has perused the court file and in the affidavit in support of the application and the amended petition sworn by Sandeep R. Khetia dated 22nd of February 2017 and filed in court on the 27th February 2017, in paragraph 2 he states that he has authority to swear the affidavit on behalf of the 2nd petitioner and has annexed the authorization document marked “SRK” on pages 3 – 5 of the petition. I have perused the annexure so mentioned and find that the same is a board resolution dated 21st October 2015 and it states inter alia as follows;

“IT WAS RESOLVED that the Company files a Constitutional Petition against the National Lands Commission, the Cabinet Secretary Ministry of Lands and Urban Development, the Chief Land Registrar and the Hon Attorney General to challenge the National Land Commission’s decision to revoke the company’s title over Kakamega Town Block II/252 & 292”.

It is signed by the chairman of the company and certified as the true extract from the minutes of the meeting of the Board of Directors of the Company. I find that indeed there was a resolution to sue the other respondents except the 4th respondent. The Company is properly before the court as regards the other respondents save for the 4th Respondent.

Just like the previous case, in the instant case the preliminary objection is by one respondent and does not affect the other four respondents. Be that as it may, the court finds that the preliminary objection raised by

the 4th respondent against both the amended petition and the applications has merit and is hereby upheld. The court orders that the amended petition and applications filed by the petitioner as against the 4th respondent be hereby struck out. The petitioner will pay the 4th respondent costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF JANUARY 2018.

N.A. MATHEKA

JUDGE