



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC PETITION CASE NO.321 OF 2015**

**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) LTD.....1<sup>ST</sup> PETITIONER**

**SUDHIR KHETIA.....2<sup>ND</sup> PETITIONER**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LAND, HOUSING &**

**URBAN DEVELOPMENT .....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE CHAIRMAN SCHOOL COMMITTEE**

**KAKAMEGA PRIMARY SCHOOL .....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 5<sup>TH</sup> RESPONDENT**

### **RULING**

1. By notice of preliminary objection dated 7<sup>th</sup> June 2016, **Counsel for the Kakamega Primary School**, the 4<sup>th</sup> Respondent, prays for the amended petition, and application be struck out and or dismissed on the following three grounds:

1. That the amended petition and application are defective and improperly instituted against the 4<sup>th</sup> Respondent who is an unincorporated entity without legal personality of its own.
2. That the amended petition and application are defective and improperly instituted against the 4<sup>th</sup> Respondent who has no locus standi to participate in the proceedings.
3. That the amended petition and application are non-starters, an abuse of the due court process as well as of law, defective in substance and improperly presented.

2. That on the 26<sup>th</sup> June 2016 the court was informed that the counsel for the 4<sup>th</sup> Respondent and the Petitioner had filed and exchanged written submissions on the preliminary objection. The 4<sup>th</sup> Respondent's submission dated 16<sup>th</sup> June 2026 were filed on the 17<sup>th</sup> June, 2016 while the Petitioner's, submission dated 22<sup>nd</sup> June 2016 were filed on the 27<sup>th</sup> June 2016. The counsel for 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents indicated that their clients are not participating in the preliminary objection. The counsel for the 1<sup>st</sup> Respondent undertook to ensure that their submissions were filed before the end of 29<sup>th</sup> June 2016 but by the time this ruling is being prepared no such submissions have been filed.

3. The following is the summary of the submissions by the counsel for 4<sup>th</sup> Respondent and Petitioner for and against the preliminary objection.

#### **a) 4<sup>th</sup> Respondent's submissions;**

That Kakamega Primary School, the 4<sup>th</sup> Respondent, is a school governed under **Section 55 of the Basic Education Act 2014**. The as a school the 4<sup>th</sup> 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 counsel referred to the following decided cases.

*i) **Football Kenya Federation –V- Kenya Premier League Limited & 4 others** [2015] eKLR where the Honorable judge reviewed the previous decisions and agreed 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.*

*ii) **simu Vendors Association –V- Town Clerk, City Council of Nairobi & Another** [2005] eKLR where Ibrahim J (as he then was) made a finding that institution of suit against parties without capacity renders the suit null and void and no amendments, joinder or substitution can suffice.*

*iii) **Evans Otiendeh Omolo –V- School Committee Union Primary School and another** [2015]*

*eKLR where this court made a finding that to allow a suit to continue where the Defendants are non-existent is an abuse of the court process.*

**b) The petitioner's counsel submission:**

That the notice to raise a preliminary objection filed by the 4<sup>th</sup> Respondent dated 7<sup>th</sup> June 2016 does not raise any point 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 counsel submitted that even if the ground raised in the preliminary objection is argued it cannot dispose of the suit as the Petitioner's claim is against five (5) Respondents. That even if the court will allow the preliminary objection, the suit against the other Respondents will continue. The counsel further submitted that the facts are not settled and the matter need to go to full hearing for the facts to be determined. That the misdirection in the reference to the 4<sup>th</sup> 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**. The counsel further referred to **Article 50 (1) of the Constitution, Section 1A of the Civil Procedure Act** and asked the court to address the substantive justice without being obstructed by technicalities raised by the 4<sup>th</sup> Respondent through the preliminary objection.

4. The issues for the court's determination are as follows:

- a) Whether the 4<sup>th</sup> Respondent as described is a legal entity with capacity to defend this proceedings.
- b) Is the question of legal capacity of the 4<sup>th</sup> Respondent to defend this suit a question of law or fact.
- c) should the preliminary objection raised by 4<sup>th</sup> Respondent be upheld and if so what are the orders to issue.
- d) who pays the costs of the preliminary objection.

5. The court has considered the grounds on the notice to raise the preliminary objection dated 7<sup>th</sup> June 2016 and filed in court on 8<sup>th</sup> June 2016, the written submissions filed by counsel for 4<sup>th</sup> Respondent and Petitioner and come to the following conclusions:

- a) That both the petition and notice of motion filed herein by the Petitioner describes the 4<sup>th</sup> Respondent as the **"Chairman School Committee Kakamega Primary School"**. That the 4<sup>th</sup> Respondent's counsel notice dated 7<sup>th</sup> June 2016 takes issue with description of the 4<sup>th</sup> Respondent by the Petitioner by submitting that no such entity as described exists in law and therefore the Petition and notice of motion 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**. That the court takes note of the fact that the Petitioner's counsel has not disputed that position and the court is in agreement with the 4<sup>th</sup> Respondent counsel's submission on that score.
- b) That the description of the 4<sup>th</sup> 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 4<sup>th</sup> Respondent under **Order 8 Rule 3(3) of the Civil**

**Procedure Rules**, possibly the court would have considered such a request favorably.

c) 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.

d) That the court concurs with the 4<sup>th</sup> Respondent's counsel's submission that the party described as the 4<sup>th</sup> Respondent do 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 petition and notice of motion filed by the Petitioner against the 4<sup>th</sup> Respondent amounts to abuse of the court's process. That allowing the preliminary objection will only terminate the suit against the 4<sup>th</sup> Respondent.

e) That the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd –V- West End Distributor Ltd** [1969] E.A. 696 did not hold that a Preliminary objection raised by a party to a suit would only be allowed if it disposes of the suit against all the parties only. The understanding of this court to the finding that “..... **if argued as a preliminary point may dispose of the suit**”, refers to the suit between the party or parties raising the preliminary objection and the party or parties opposing it. That in the current scenario the preliminary objection is between the 4<sup>th</sup> Respondent and the Petitioner and the outcome does not affect the petition and notice of motion against the other four Respondents.

f) That the decisions in the cases set out herein below, though not binding on this court, reflects the position this court has held in other matters that a non-existent party without capacity to sue or be sued in its name cannot have a suit instituted and or continued against in its name.

**(i) Football Kenya Federation –V- Kenya Premier League Limited & 4 others** [2015] eKLR.

**(ii) Simu Vendors Association –V- Town Clerk, City Council of Nairobi & Another** [2005] eKLR.

**(iii) Evans Otiendeh Omolo –V- School Committee Union Primary School and Another** [2015] eKLR.

That in the last case the Respondents had moved this court through a notice of motion to have the plaint struck out for reasons of being defective in that the parties described as the Respondents were non-existent as legal persons. That the court considered among others the provision of **Section 55, 56 59 and 62 of the Basic Education Act Order 2 Rule 15 and Order 1 Rule 9 of the Civil Procedure Rules** and came to the following finding;

“That **the four named defendants are non-existent as entities capable of being sued.**” The court further went to find “**that to allow the suit as filed to continue to further hearing would be an abuse of the court's process.**” The court went ahead to strike out the plaint with costs. That unlike that case, in the instant case the preliminary objection is only by one Respondent and does not affect the other four Respondents as already stated above.

g) That flowing from the foregoing the court that find the preliminary objection raised by the 4<sup>th</sup> Respondent against both the Petition and notice of motion has merit and is hereby upheld. The court orders as follows:

a) That the petition and notice of motion filed by the Petitioner as against the 4<sup>th</sup> Respondent is hereby struck out.

b) The petitioner will pay the 4<sup>th</sup> Respondent costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIROMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2016**

**In presence of:**

**Petitioners Absent**

**Respondents Absent**

**Counsel M/S Kidundhu and Mr Ombaye for Petitioners Mr Nyauma for 2<sup>nd</sup> , 3<sup>rd</sup> and 5<sup>th</sup> Respondents.**

**S.M. KIBUNJA**

**ENVIROMENT & LAND – JUDGE**

**11/10/2016**

**11/10/2016**

**S.M. Kibunja J.**

**Oyugi court assistant**

**Parties absent**

**M/S Kidundha and Mr. Ombayo for Petitioner**

**Mr Nyauma for 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondent**

**Court: Ruling dated and delivered in open court in presence of M/S Kidundha and Mr Ombaye for petitioner and Mr. Nyauma for 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents.**

**S.M. KIBUNJA**

**ENVIROMENT & LAND – JUDGE**

**11/10/2016**