



Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Eastleigh High School (Cause 354 of 2015) [2023] KEELRC 1399 (KLR) (8 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1399 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 354 OF 2015
MN NDUMA, J
JUNE 8, 2023**

BETWEEN
**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS CLAIMANT**
AND
EASTLEIGH HIGH SCHOOL RESPONDENT

JUDGMENT

1. The suit was filed by the union against the respondent, Eastleigh High School on March 11, 2015. The respondents have moved the Court to strike out the suit as it is filed against a non-existent entity. The parties proceeded on the merits of the case by way of written submissions.
2. The respondent is described in the suit as an “*Education Institution Registered under Education Act, cap 211 now repealed by Basic Education Act No 14 of 2013 as Eastleigh High School.*”. Ordinarily, a school is sued through its Board of Management established under section 55 of the Act. In terms of section 59 of the Act, the functions of the Board of Management include:-

“(p) recruit, employ and remunerate such number of non-teaching staff as may be required by the institution in accordance with this Act.”
3. In terms of the law therefore, it is the Board of Management which is the legal employer of the grievants herein, who worked as security officers of the respondent.
4. The claimant being a union that has been registered and has operated in the Education system for many years is aware of the manner of bringing schools to court.
5. The respondent has in its submissions sought to have the suit struck out since it is filed against a non-existent entity.



6. Section 55 of the Act provides:-
- (i) Board of Management
 - (ii) There shall be a Board of Management for every Public:-
 - (c) Secondary school
- In terms of Section 62:-
- (1) The head of a basic education institution shall be the secretary to the Board of management.”
7. In terms of section 76 of the *Basic Education Act*, 2013, every school must be registered before it commences its operations and in terms of section 79:-
- (1) The County Education Board shall establish and maintain a databank of all- (a) registered, accredited, licensed and incorporated institutions of education, training and or research in the County; (b) teachers in the County;
 - (2) The register established and maintained under subsection (1) shall be open to the public for inspection during normal working hours.”
8. It is however clear that a school operates through the Board of Management whose secretary is the head or principal of the school.
9. In terms of Fourth Schedule to the *Basic Education Act*, titled:-
- “Part 1 – Conduct of Business and Affairs of the Board of Management”,
10. It is provided under Regulation 1 as follows:-
- “Incorporation of Board of Management:-
- The Board of Management shall be a body corporate with perpetual succession and common seal, and shall in their corporate names be capable of:-
- a. Suing and being sued.
 - b.
 - c.
 - d. Entering into contracts, and
 - e. Doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.
10. Clearly, a school such as Eastleigh High School, may only be sued through its Board of Management. Merely citing the name of a school as the claimants did in this case does not suffice to found a suit against the school since the respondent cited herein has no legal capacity to sue or be sued.



11. The court was referred to the case of *Evans Otiende Omollo v School Committee Union Primary School and another* [2015], eKLR in which the Court held:-

“The parties described as defendants herein do not exist as they are not legal entities under the *Basic Education Act* capable of being sued or to defend this suit having found that the four named defendants are non-existent as entitled capable of being sued, the court finds that to allow the suit as filed to continue to further hearing could be an abuse of the court’s process.”
12. In the present case, the counsel for the school has submitted that the issue of misjoinder was raised way back in August, 2016, but the claimants have failed to rectify the same despite lapse of many years since the suit was filed.
13. Having considered the pleadings and the submissions by both parties herein, the court finds that this suit cannot stand against non-existent person in law capable of being sued.
14. The parties herein had not adduced any oral evidence in this matter but had only opted to file written submissions for consideration by the court. However, having found that the suit cannot stand against a non-existent person, the suit is struck out in its entirety.
15. 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 conformity between the parties before it.
16. In the present matter, the respondent does not exist. The claimant has not taken any steps to withdraw the memorandum of claim and/or amend it to sue the proper respondent that exists legally with capacity to sue and be sued.
17. The suit is therefore struck out subject to the law of Limitation of Actions. Allowing the suit to proceed in its present form would be abuse of court process. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8TH DAY OF JUNE, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Wangira for the claimant

M/s Purity Makori for Respondent

Ekale: Court Assistant

