



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**ELRC APPEAL NO. E019 OF 2021.**

**THE CHAIRMAN B.O.M BISHOP ABIERO SHAURI MOYO SEC. SCHOOL.....APPELLANT**

**VERSUS**

**PHANUEL WAGAH OKUMU.....RESPONDENT**

*(Being an Appeal from the Ruling of the Chief Magistrate Court – Kisumu by Hon. P. N. GESORA CM*

*and delivered on the 21<sup>st</sup> April, 2021 in CMELRC Cause No. E017 of 2020)*

**JUDGMENT**

**Introduction.**

1. The Respondent herein lodged **Cause No. E017 of 2020** at the Chief Magistrate's Court at Kisumu, where he sought payment of one month's salary in lieu of notice, damages for loss of employment and pay in lieu of leave.
2. The Appellant filed a Notice of Preliminary Objection against the Respondent's suit contending that the suit as filed is fatally defective for the misjoinder of the Respondent; now Appellant, per Sections 55, 56, and 59 of the Basic Education Act, 2013 as read with Regulations 17 to 21 of the Basic Education Regulations, 2015, and further arguing that the proper party to be sued was the Board of Management of the School and not the Chairman of the Board or through the Chair of the Board.
3. The Preliminary Objection was heard, and the Trial Court delivered its ruling on 21<sup>st</sup> April, 2021, dismissing the Objection, leading to this appeal against that ruling of the Trial Court.

**The Appeal**

4. The Appellant was dissatisfied with the decision of the court and filed a Memorandum of Appeal dated 2<sup>nd</sup> June, 2021 and filed in court on 25<sup>th</sup> June, 2021, premised on the following grounds THAT:
  - i. The Honourable Chief Magistrate erred in law and facts by failing to appreciate that the Claimant's Claim was defective.
  - ii. The Honourable Chief Magistrate erred in law and facts by failing to take into account that the Respondent's claim was not properly instituted under paragraphs 1 and 14 of the Fourth schedule to the Basic Education Act, 2013.
  - iii. The Honourable Chief Magistrate erred in law and facts by failing to take into account that the Respondent's claim was not properly instituted under Sections 55, 56, and 59 of the Basic Education Act, 2013.
  - iv. The Honourable Chief Magistrate erred in law and facts by failing to take into account that the Respondent's claim was not properly instituted under Regulations 17 and 21 of the Basic Education Regulations, 2015.
  - v. The Honourable Chief Magistrate erred in law and facts by failing to appreciate that the Board of Management of the school was the right party to be sued.
  - vi. The Honourable Chief Magistrate erred in law and facts failing to appreciate that the members or officers of the Board of Management are protected from liability pursuant to the provision of paragraph 14 of the Fourth Schedule to the Basic Education

Act, 2013.

vii. The Honourable Chief Magistrate erred in law and facts by failing to appreciate that the Chairman of the Board of Management, is a member of the Board of Management hence has no capacity to be sued in his own name pursuant to the Provision of paragraph 1 of the Fourth schedule to the Basic Education Act, 2013.

viii. The Honourable Chief Magistrate erred in law and facts by failing to appreciate that the Board of Management is the organ empowered to recruit, employ, promote, demote or terminate the services of the employees in the institution pursuant to the provisions of Section 59(P) of the Basic Education Act, 2013.

ix. The Honourable Chief Magistrate erred in law and facts in failing to consider the Appellant's preliminary objection and submissions.

x. The Honourable Chief Magistrate erred in law and facts by failing to appreciate that striking out is not a draconian measure if you have intentionally sued a wrong party.

5. The Appellant prays that her appeal be allowed and the ruling and Orders of the Magistrate's Court delivered on 21<sup>st</sup> April, 2021, be set aside, and the Claimant/Respondent's memorandum of claim struck out and/or dismissed.

6. Parties canvassed the Appeal by way of written submissions. Submissions were filed for both parties.

### **The Appellant's Submissions.**

7. It is submitted for the Appellant that the issue at hand is founded on the Basic Education Act, 2013, and the Basic Education Regulations, 2015. It is further submitted that the Respondent sued the Appellant because he is the Chairman of the school Board, yet, only the Board can pay for liabilities of the school. The Appellant cited the cases of *Beatrice Tilitei & Another v William Kibet Chiboi (2017) eKLR* and *Republic v The Secretary to the Board of Governors, Musingu High School-Kakamega* for the holding that the body which can sue or be sued on matters affecting public schools, is the Board of Management.

8. It is further submitted for the Appellant that the Board of Governors of a secondary school is protected from personal liability for actions made in good faith in the course of their duties. It is submitted that liability per paragraphs 14 and 15 of the fourth schedule to the Basic Education Act, places liability on the school and not individual members of their Boards.

9. The Appellant submitted that the misjoinder and non-joinder goes to the root of the suit and cannot be wished away as the enforcement of the judgment will be difficult where a wrong party is sued. The Appellant sought to rely on the holding in *Zephic Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya (2014) eKLR* to support this position.

10. It is submitted that the Appellant does not have capacity to be personally sued on behalf of the school. The Appellant cited the holding by Mativo J, in *J.N and 5 Others v Board of Management, St. G School Nairobi & Another (2017) eKLR* to support this position.

### **The Respondent's Submissions**

11. It is submitted for the Respondent that a suit cannot be defeated for misjoinder or non-joinder of parties. The Respondent cited the provisions of **Order 1 Rule 9 & 10** of the Civil procedure Rules and the holding by F.Gikonyo J in *Zephic Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya (2014) eKLR* where the court held thus:

***"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 Rule 1 & 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties."***

12. The Respondent further submitted that Articles 159(2) (d) and 50(1) of the Constitution, intended to ensure a fair hearing for each party devoid of procedural technicalities. The Respondent cited the holding in *Republic v District Land Registrar, Uasin Gishu & Another (2014) eKLR*, to support this position.

13. It is submitted for the Respondent that the court goes by Order 10 Rules 2 & 4, which give the court discretion to order the name of a party improperly joined, whether as plaintiff or defendant struck out, and the name of any person who ought to have been joined added.

14. The Respondent further submitted that he should not be penalized for the errors of mis-description of its opponents to the dispute, as the error does not go to the merits of the case.

15. The Respondent finally prays that this court should decline to strike out the suit as an amendment to the claim can cure the defect. The Respondent further prays for an order that the Respondent amends the Memorandum of claim to give a proper description of the Appellant.

### **Analysis and Determination**

16. I have appraised the appeal and the submissions by the parties. The issue for determination is whether the ruling and orders issued by the Trial Court should be set aside, and the Appellant's Preliminary Objection upheld.

17. The Preliminary Objection dismissed by the Trial Court, and whose dismissal is the basis of this appeal, is that the suit as filed is fatally defective for the misjoinder of the Respondent, The Chairman of the **Board of Management of Bishop Abiero Shauri Moyo Sec. School**, instead of the school's Board of Management.

18. Order 1 rule 9 of the civil Procedure Rules provides as follows:

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***

19. The foregoing provisions of the Civil Procedure Rules, make it abundantly clear that misjoinder or non-joinder of parties is not a ground that warrants the striking out of a suit. The Court of Appeal in **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others (2016) eKLR** held that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

20. I find and hold that the Appellant's appeal is without merit and is hereby dismissed and the order of the lower court is upheld.

21. It is not disputed that the Appellant herein has been improperly sued in the suit before the Trial Court. The Respondent herein has admitted that much, and has proceeded to pray that this court makes an order for the amendment of the pleadings in the matter to enable him implead the proper party. Order 1 Rule 10 (1), (2) and (4), states thus:

***“(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.***

***2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.***

***(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.***

22. By dint of the foregoing provisions, the court makes the following orders:

- i. That the Appellant's appeal filed on 25<sup>th</sup> June, 2021, lacks merits and is hereby dismissed with costs to the Respondent.
- ii. That the order issued in **KISUMU C MELRC CAUSE NO. E017 OF 2020- PHANUEL WAGAH OKUMU V THE CHAIRMAN B.O.M** is upheld.
- iii. That an order is hereby issued that **The Chairman Board of Management, Bishop Abiero Secondary School** be struck out, and substituted with the **Board of Management of Bishop Abiero Secondary School**, within 14 days of the delivery of this Judgment.
- iv. That the matter be mentioned before the Trial Court for pre-trial directions upon filing of the amended claim.

23. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24<sup>TH</sup> DAY OF MARCH, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance**

Mr. Mwambah present for the Appellant

Ms. Atieno present for the Respondent

MS. Christine Omollo - Court Assistant.