



**Kenya Union of Domestic, Hotels Educational Institutions
Hospital and Workers v St. Peters Mumias Boys High School (Cause
E006 of 2021) [2022] KEELRC 1711 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1711 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E006 OF 2021**

**JW KELI, J
JULY 21, 2022**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS EDUCATIONAL INSTITUTIONS
HOSPITAL AND WORKERS CLAIMANT**

AND

ST. PETERS MUMIAS BOYS HIGH SCHOOL RESPONDENT

RULING

1. The Ruling is on the Notice of Preliminary Objection dated February 21, 2022 by the Respondent against the Statement of Claim dated September 14, 2021 seeking the following reliefs: -
 - a. A declaration that the Respondent action was unfair, unlawful and/ or illegal.
 - b. The Respondent be encouraged /advised to negotiate the CBA
 - c. The cost of this suit be paid by the Respondent.
2. The Respondent entered appearance through the law firm of G Ombito & Co Advocates and filed written statement of defence dated March 15, 2022 and the Notice of Preliminary Objection dated February 21, 2022.
3. On the May 24, 2022 the court gave directions that the Notice of Preliminary Objection be dispensed with first and canvassed by way of written submissions.
4. The Respondent's written submissions on the Notice of Preliminary Objection are dated March 15, 2022 and received in court on the March 21, 2022.
5. The Claimant's written submissions on the Notice of Preliminary Objection are dated June 20, 2022 and received in court on the June 28, 2022.



6. On the June 29, 2022 the court having confirmed filing of written submissions by both parties issued the ruling date.
7. The Respondent's Notice of Preliminary Objection raises objection to the proceedings on the following grounds:-
 - a. That the suit is improperly before the court in view of Section 10 sub-Section 2(2) of the [Education Act 2011](#)
 - b. That the Respondent lacks capacity to defend the suit.

Determination

Issues for determination

8. The Respondent addresses two issues under its written submissions namely:-
 - a. Whether the defendant's capacity is proper
 - b. Whether the non-joinder or misjoinder is curable under order 1 rule 9.
9. The Claimant in its submissions addresses the merit of the preliminary objection in general.
10. The court is of the considered opinion, taking into account the grounds under the notice of preliminary objection that, the issue to be determined in the ruling is whether the Respondent has capacity to be sued.

Whether the respondent has capacity to be sued.

11. The Respondent submits that under Section 10 sub-section 2 of the [Education Act](#) (Cap 211 Laws of Kenya) only the Board of Governors of the school has capacity to be sued. The said provision reads"-

“10(1) The Minister may, by order, establish a Board of Governors for any maintained or assisted school, other than a primary school managed and maintained by a local authority, or, if the manager of any unaided school applies to him, for that unaided school, and the Minister may— (a) establish one board of governors for two or more schools; or (b) establish boards of governors for two or more schools by means of the same order. (2) The Minister may, by order, declare a Board of Governors to be a body corporate under the name of the Board of Governors of the school or schools, and such board of Governors shall have perpetual succession and a common seal with power to hold both movable and immovable property, and may in its corporate name sue and be sued.”
12. The Respondent to buttress its submissions relies on the authority of [Beatrice Tiritei & Another v Kibet Chiboy](#) (2017) eKLR where the Respondent had sued the Head Mistress in person, the High court, on appeal held that it is the school committee that had capacity to be sued and hence the head mistress had been sued wrongly. The Court in that case held that the Appellants lacked capacity to be sued on behalf of the primary school.
13. The Respondent further relies on the decision of the court in Kisumu ELC No 225 of 2014 [Evans Otiende Omollo v School Committee Union Primary School and another](#) (2015) eKLR by Justice Kibunja who held that, ‘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 defend this suit.’. The court further stated that it would be an abuse of court process to allow the suit as filed, to continue to further hearing.



14. The Claimant in response states that although the suit has listed the Respondent as St. Peters Mumias Boys High School instead of BOM St. Peters Mumias Boys High School the omission is a mere technicality under *the Constitution of Kenya 2010*, that considering all the communications leading to this suit up to and including the conciliator's office all letters were sent to the Principal and Secretary of the Board of Management and that the suit was served on the Principal who doubles up as the Secretary of the Board of Management. That further, there is no other school registered in the name of St. Peters Mumias Boys High School in the Republic of Kenya.
15. The Claimant to buttress his submission relies on the decision by Justice Radido on a similar preliminary objection in *Kudbeiba Workers v Cheptuech Secondary School* (2014)eKLR. At paragraph 11 the court agreed that the proper party was the Board of Governors of the Respondent who ought to have been sued not the school. However it was the view of the court that this was a mere irregularity and technicality which can be cured through appropriate amendments.
16. The court finds merit in the Notice of Preliminary Objection's ground of lack of capacity to be sued of the Respondent, St Peters Mumias Boys High School. Indeed, the authority cited by Claimant of Justice Radido agrees that the School has no capacity to be sued. This court further notes that even the Principal of the school who is the secretary of the Board cannot be sued. The Court for that reason deviates from the cited decision of Justice Radido.
17. The court is persuaded by the decision of Justice Lenaola (as he then was) in the case of *Republic v The Secretary of the Board of Governors, Musingu High Schools – Kakamega* (2011) eKLR where at paragraph 5 the Judge stated:-

“it is obvious that the body lawfully capable of being sued on behalf of a school is the Board of Governors as a corporate entity and not one of its officials such as the Secretary to the Board. I also note specifically that the Board of Governors for Musingu is created by the Education (Board of Governors) Order. That order provides in Rule 10 as follows;

“No Governor shall be subject to any personal liability in respect of any matter or thing done or omitted or any contract entered into by or on behalf of the board of which he is a governor or by or on behalf of any school or group of schools administered by that board.”

The Judge in this case struck out the motion for lack of proper respondent.
18. Considering the provisions of the law under section 10 sub-section 2 of the *Education Act* (supra) that creates the Board of Governors as the legal entity to be sued on behalf of the school and the fact that the issues raised of Collective Bargaining can only be addressed by the Board of Governors then the court finds that the party sued in the instant claim is the wrong defendant. The Court upholds the decision in Musingu High School(supra) of Justice Lenaola (as he then was) and holds that the doors of justice must be shut for the Claimant in the instant suit.
19. The Respondent is not the right party to defend in the instant suit under the law. There being no proper Respondent before the court I proceed to strike out the Statement of Claim dated September 14, 2021.
20. No order as to costs.
21. Orders accordingly.

DATED, DELIVERED AND SIGNED BY JUDGE IN OPEN COURT AT BUNGOMA THIS 21ST DAY OF JULY 2022.

J.W. KELI,



JUDGE.

IN THE PRESENCE OF:-

COURT ASSISTANT:-Brenda Wesonga

FOR CLAIMANT :-Kamuya.

FOR RESPONDENT :- Ombito.

