



Were & 3 others v Board of Management Changamwe Secondary School (Cause 434, 435, 436 & 437 of 2014 (Consolidated)) [2016] KEELRC 1868 (KLR) (7 October 2016) (Ruling)

Antony Were & 3 others v Board of Management Changamwe Secondary School [2016] eKLR

Neutral citation: [2016] KEELRC 1868 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 434, 435, 436 & 437 OF 2014 (CONSOLIDATED)

ON MAKAU, J

OCTOBER 7, 2016

BETWEEN

ANTONY WERE & 3 OTHERS & 3 OTHERS & 3 OTHERS CLAIMANT

AND

THE BOARD OF MANAGEMENT CHANGAMWE SECONDARY SCHOOL RESPONDENT

RULING

Introduction

1. The four claimant's herein brought separate suits against the Changamwe Secondary School on 10.9.2014 and amended them without leave on 23.10.2014 substituting the said school with 3 individuals in their official capacity. Thereafter the parties engaged each other in fruitless negotiations until 20.4.2015 when they agreed to consolidate all the four suits under this file.
2. After several mentions to allow the parties time to exchange documents, the claimant sought and obtained 7 days leave to make further amendment to the claim and in order to substitute the individuals with the correct respondent. The claimants failed to file the Re-amended claims within the 7 days window given by the court.
3. On 30.6.2016 the day agreed by the parties for pre-trial directions, the claimant's counsel who had never appeared before the court, but was sending counsel to hold his brief, send Mr. Wandera Advocate to hold his brief to take directions that a date be fixed the trial of the suit. However Mr. Ngare learned state counsel appearing for the respondent objected to the hearing and requested for a hearing date for his Preliminary Objection (P.O) contained in the Notice dated 30.6.2016 which is now before me for consideration.
4. The Preliminary Objection is founded on following three grounds:-



- (a) The respondents are improperly joined in to this suit.
 - (b) The claim against the respondents is filed contrary to section 62 of the [Basic Education Act](#).
 - (c) The claimants are not desirous of prosecuting the claim.
5. In response to the Preliminary Objection, the claimant's filed their Re-amended claims on 12.7.2016 and a reply to the Preliminary Objection on 27.7.2016. The Preliminary Objection was then disposed of by written submissions.

Respondent's case

6. It was submitted for the respondent that the suit against the three respondents should be struck out because it offends section 62 of the [Basic Education Act](#) read with section 4 of the [Government Proceedings Act](#). They relied on the decision in Petition 231 of 2013 Patrick Wanyonyi Khaemba vs Secretary TSC and ZaharaBashir Sheikh [2014]e KLR in which the High Court dismissed the suit against the 2nd Respondent because she had been wrongly sued in her own personal capacity for actions carried out in her official capacity.

Claimant's case

7. The claimant's urged the court not oust them from the seat of justice because the misjoinder was occasioned by a mere and inadvertent typographical error which can be rectified without prejudice to the defence. That the right to amend pleadings is guaranteed by the Article 50(1) (c) of [the Constitution](#) and Section 100 of the [Civil Procedure Act](#). They relied on the decision in Institute for Social Accountability & Another vs Parliament of Kenya & 3 others [2014]e KLR in which the High Court allowed the petitioners to amend their petition because that way the court would ensure that the litigation between the parties is conducted and determined in more effective and substantive manner.
8. In addition the claimants submitted that the misjoinder is curable by amendment under Rule 10 of the Civil Procedure Rules and Article 159 of [the Constitution](#). They submitted that they had already amended their claim to cure the defect occasioned by the misjoinder and urged the court to find that the Preliminary Objection is already overtaken by events.

Analysis and Determination

9. The issues for determination are:-
- (a) Whether of the three individual respondent's should be struck out of the suit for misjoinder.
 - (b) Whether the Preliminary Objection has been overtaken by events.

Misjoinder

10. There is no doubt that the individual respondents are wrongfully enjoined as the respondents. Under section 62 of the [Basic Education Act](#), the correct person to be sued on behalf of Changamwe Secondary School is the Board of Management which enjoys the status of a Body Corporate. It is therefore wrong to isolate some of the Board members and sue them on behalf of the school.

Overtaken by events

11. There is no dispute that the claimants filed Re-amended claims on 12.7.2016 which was outside the time of seven days given by the court on 8.6.2016. Those re-amended claims were therefore filed as a



desperate attempt to defeat the Preliminary Objection. Consequently I find and hold that such Re-amended claims are worthless without the leave of this court.

12. After considering all the material presented to the court, and more so the mandate given to the Judiciary under Article 159 of *the Constitution*, I make the following orders:-
- (a) The Preliminary Objection is allowed to the extent that the claim against the three individual respondent's is struck out.
 - (b) The leave to amend claim granted on 8.6.2016 is extended upto 12.7.2016 and the Re-amended claims filed on the 12.7.2016 deemed as properly filed.
 - (c) Costs of the Preliminary Objection to the respondent.
13. The Preliminary Objection dated 30.6.2016 is allowed and leave given to the claimant's as shown above.

SIGNED, DATED AND DELIVERED THIS 7TH OCTOBER 2016.

ONESMUS MAKAU

JUDGE

