



**Board of Management Karume Nursery School v Mithamo & 2 others; Ethics & Anti Corruption Commission (Interested Party) (Environment & Land Case E012 of 2023) [2024] KEELC 13717 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13717 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E012 OF 2023  
JG KEMEL, J  
DECEMBER 5, 2024**

**BETWEEN**

**THE BOARD OF MANAGEMENT KARUME NURSERY SCHOOL . PLAINTIFF**

**AND**

**JANE MUMBI MITHAMO ..... 1<sup>ST</sup> DEFENDANT  
COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**ETHICS & ANTI CORRUPTION COMMISSION ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 27/2/2024 filed pursuant to Order 2 rule 15 of the *Civil Procedure Rules*, Order 5 rule 1 (5) (6) of the *Civil Procedure Rules* and Sections 3, 3A and 63 of the *Civil Procedure Act*, the 1<sup>st</sup> Defendant/Applicant seeks to strike out the Plaint herein with costs. It is contended that that the Plaint is incompetent and an abuse of Court process; the suit is scandalous, vexatious and frivolous; the Plaintiff is not a legal entity and has no locus standi herein and lastly that the claim is res judicata.
2. The Application is supported by the Affidavit of even date of Jane Mumbi Mithamo. She averred that the Plaint filed herein expressly refers to another suit between the parties namely Kiambu CMELC No. 2 of 2018 which was conclusively determined as shown by annexure JMM1, a copy of Decree issued therein. That as such the suit is res judicata and in any event the instant Plaintiff lacks locus standi to sue hence the application.
3. Despite leave being granted for the Plaintiff/Respondent to respond, no objection was filed to the Application.



4. On 30/9/2024 directions were issued for parties to canvas the application by way of written submissions. None of the parties filed as at 14/11/2024.
5. The germane issue for determination is whether the application is merited.
6. The Motion is expressed to be brought under Order 2 Rule 15 (1)(b) & (c) of the [Civil Procedure Code](#) which deals with striking out of pleadings and provides as follows;

“Rule 15. (1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—

- (a) It discloses no reasonable cause of action or defence in law; or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.”

7. It is trite that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of [Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 Others](#) [2005] eKLR held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *DT Dobie & Company (Kenya) Ltd. v Muchina* [1982] KLR 1 in which Madan J.A. at page 9 said: -

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

8. In the instant application, the Applicant urges the Court to strike out the Respondent’s suit on grounds that it is scandalous, frivolous or vexatious and that the suit may prejudice, embarrass or delay a fair trial. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See *Blake v Albion Life Ass. Society* (1876) LJQB 663; *Marham v Werner, Beit & Company* (1902) 18 TLR 763; *Christie v Christie* (1973) LR 8 Ch 499.



9. However, the word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See J.P. Machira v Wangechi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.
10. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the Court really means in brief a pleading which is a misuse of the Court machinery or process. See Trust Bank Limited v Hemanshu Siriyakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999. A pleading is an abuse of the process where it is frivolous or vexatious or both.
11. A glean of the Complaint dated 14/7/2023 the Plaintiff accuses the 1<sup>st</sup> Defendant for unlawful and illegal acquisition of title over Land parcel No. Kiimbaa/Wagutha/699 (the suit land) said to be a public land on which the Karume Nursery School is built. That the Plaintiff has been in occupation of the suit land since 1984. Inter alia the Plaintiff prays for an order for cancellation of the 1<sup>st</sup> Defendant’s title and reversion of the suit land to the Plaintiff’s name.
12. In her Motion the 1<sup>st</sup> Defendant contends that the suit is an abuse of Court process, scandalous and vexatious. I am not persuaded in light of the claims in the Complaint aforesaid that the Plaintiff’s suit is scandalous or vexatious. The Complaint raises triable issues that warrant a hearing to ensure the ends of justice are met, whatever the outcome notwithstanding. It is no wonder then that the Applicant has mounted a substantial defence against it.
13. In Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000) the Court of Appeal expressed itself thus:

“A Plaintiff (Defendant) is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”
14. The 1<sup>st</sup> Defendant averred that the claim herein is res judicata based on Kiambu CM ELC NO. 2 of 2018. Indeed, the Complaint alludes to the said claim but I am unable to determine whether this suit is res judicata for want of satisfaction of the ingredients under Section 7 of the Civil Procedure Act. I say so because a copy of the decree annexed in the application as ‘JMM1’ is between Jane Mumbi Mithamo v Mary Mwhikai Gachoka & Others. On the face of it, it is only the 1<sup>st</sup> Defendant herein who is a common party as the Plaintiff therein. The identities of the rest of the Defendants (save for the first Defendant) are not disclosed. Further the suit property alluded to in the Decree issued on 11/7/2018 is not stated for this Court to satisfy itself on the commonality of the subject matter in the two suits.



On this limb and in the face of the scanty affidavit evidence, I am of the view that it is premature for the Court to hold in favour of the Applicant.

15. On the issue of the locus it is trite that the body which can sue or be sued on matters affecting a school is the Board of Management. Section 10(2) (2) of the *Education Act* Cap 211 provides that:

“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 the board shall have perpetual succession and a common seal with power to hold both moveable and immovable property, and may in its corporate name sue and be sued.”

16. Further Section 9 of the Education Act and the Education (School Committees) Regulation made thereunder provides that it is only a school committee of a primary school which is mandated with authority of managing the said primary school. See Civil Appeal No 9 of 2001, The *Headmistress Menengai Primary School v Jamila Anyona* where Kimaru J (as he then was) stated that:-

“It is the school committee of the primary school which can sue or be sued. The headmistress of a primary school cannot therefore be sued in respect of any action that she undertakes in school on behalf of the school. Secondly, The Parents Teachers Association cannot be sued because it is not a body which is recognized in law. The education Act does not recognize the existence of a Parents’ Teachers’ Association. In the circumstances of this case therefore, it is clear the Respondents sued the appellants wrongfully. The appellants lacked capacity to be sued on behalf of Menengai primary school. I therefore find merit on the ground of appeal by the appellants that they had been sued when they lacked capacity to be sued.”

17. Lastly, Mativo J (as he then was) stated in the case of *J.N. and 5 Others v Board of Management, St. G School Nairobi and Another* (2017) eKLR that;

“My understanding of the law and the above provision is that the Board of management is a legal entity, capable of suing and being sued and the school Principal cannot be sued in her name or personal capacity for decisions made by the Board. There is nothing to show that she made the impugned decisions made by the board. There is nothing to show that she made the impugned decision in her capacity or acted outside her mandate to warrant personal liability: the petition does not disclose a case against her in her personal capacity and it would be improper, unfair and unjust to drag her through these proceedings when the decision being challenged was arrived at by a legal entity.”

18. It is also expressly provided for under Order 1 Rule 9 of the *Civil Procedure Rules* which states that 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 controversy as between the parties before it.

19. In view of the forgoing I am satisfied that the Plaintiff has requisite capacity to sue in the manner it has sued. The upshot of the forgoing is that the instant application is bereft of merit. I make no orders as to costs.

20. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**



Delivered online in the presence of;

Plaintiff – Absent

Ms. Wangui for the 1<sup>st</sup> Defendant

Wanjiku for 2<sup>nd</sup> Defendant

3<sup>rd</sup> Defendant – Absent

Interested Party – Absent

Court Assistants – Ann/Melita

