



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 7 of 2005

NZOMO WAMBUA:.....PLAINTIFF

versus

WOTE TOWN COUNCIL:.....DEFENDANT

RULING ON A PRELIMINARY POINT

1. By a Notice of Preliminary Objection dated 18.2.2005, the advocate for the Defendant, Mr. Wambua Kilonzo has raised a point of law; that by dint of L.N. 402 of 14.10.1997 as read with section 28(3) of the Local Government Act, the true title for the Defendant should be “*Town Council of Wote*” and not “*Wote County Council*” as is the title in the Plaintiff. That since the title ascribed to the Defendant is against the statute, then no such entity exists and that being the case, no Defendant exists and the suit is a nullity and should be struck off.

2. Miss Kamende for the Plaintiff on the other hand argues that the misdescription of the Defendant is exactly that and does not go into the substratum of the suit. That the anomaly can be cured and is no bar to the suit as is the rule under Order VI Rule 10 of Civil Procedure Rules. She relies on the decision of *Wendoh, J.* in James Mwangangi & 64 others vs Wote Town Council, HCCC 113/2004 where the judge declined to strike out that suit when an objection similar to the present one was raised.

3. Section 28 (3) of the Local Government Act provides as follows:-

“Every county or town council shall, under the name of “the County Council of” or “the Town Council of”, as the case may be, be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued, and acquiring, holding and alienating land.”

4. Granted, the statute uses the words “*shall*” but one must look to the intent of the statute. The title ascribed to all County and Town Councils is for purposes of consistency in their nomenclature. A misdescription is a mere error in title and does not go to the root of say a suit such as the one before me. I say this because in the Memorandum of Appearance dated 15.2.2005 Wambua Kilonzo & Co. Advocates made the following bold declaration;

“PLEASE ENTER APPEARANCE FOR TOWN COUNCIL OF WOTE wrongly sued as Wote Town Council the above named defendant...”

5. Clearly, the advocates as did their client, knew who was being sued and understood the misdescription in the name of the Defendant but that fact does not change the cause of action against it nor the substratum of the suit as well as the questions in dispute.

6. I therefore agree with *Wendoh, J. James Mwangangi* (supra) when the learned judge stated as follows:-

“The Defendant/Respondent is not properly described but mere misdescription of a party cannot render a suit incompetent. This matter has just been filed and the court has wide discretion under Order 1 Rule 10 of the Civil Procedure Rule to an amendment of the parties on its own or upon an application.”

7. I am aware that the High Court in previous decisions has upheld objections such as the one before me but my humble view is that injustice will certainly be caused to parties when otherwise justified lawsuits are struck out on such a minor technicality.

8. In the end therefore, the objection does not meet the favour of this court and is best overruled with costs. The Defendant is at liberty to seek amendment of the Plaintiff in the usual manner.

9. Orders accordingly.

10. Dated and delivered at Machakos this 26th day of June 2008

Isaac Lenaola

Judge

In the presence of: Miss Kamende for Plaintiff

Mr. W. Kilonzo for Defendant

Isaac Lenaola

Judge



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