



Shalom Grace Church (Suing through its Registered Trustees Dickson Wambugu Paul Mwangi Mutunga & Agnes Wangui Mwangi) v Kuka Investments Limited (Environment & Land Case E089 of 2022) [2023] KEELC 16274 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E089 OF 2022
MD MWANGI, J
MARCH 16, 2023**

BETWEEN

SHALOM GRACE CHURCH (SUING THROUGH ITS REGISTERED TRUSTEES DICKSON WAMBUGU PAUL MWANGI MUTUNGA & AGNES WANGUI MWANGI) PLAINTIFF

AND

KUKA INVESTMENTS LIMITED DEFENDANT

RULING

1. What is before this court for determination is the Defendant’s Preliminary Objection dated May 11, 2022. The Preliminary Objection was raised in response to the Plaintiff’s application dated April 27, 2022 as well as the suit itself.
2. The Preliminary Objection is premised on grounds that:
 - a. That the Plaintiff/Applicant’s application is misconceived, incompetent, frivolous, vexatious, lacks merit, bad in law and an abuse of court process and the same should be struck out.
 - b. That the Plaintiff’s application dated April 27, 2022 is fatally defective by reason that the Certificate of Urgency and the Notice of Motion are not signed while the Supporting Affidavit is not dated.
 - c. The Plaintiff/Applicant’s application is incurably defective as he has not annexed the court order the subject of the application for contempt.
 - d. That the Applicants lack locus standi to bring this suit as they are impostors and not the officials/trustees of Shalom Church and have no consent from the registered church officials to bring this suit.



Court's Directions

3. The Court directed that the parties canvass the Preliminary Objection by way of written submissions on December 13, 2022. The parties complied and filed their respective submissions. The Defendants/ Objectors filed submissions dated May 12, 2022 and the Plaintiff/Respondent's submissions are dated the on January 23, 2023.

Defendant/Objector's submissions

4. The Defendant in support of the Preliminary Objection assert that the Preliminary Objection meets the threshold set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696. The Defendant submits that its preliminary objection is capable of disposing off the suit preliminarily without the court having to resort to ascertaining the facts from elsewhere other than from looking at the pleadings alone.
5. The Defendant made reference to the provisions of Order 1 rule 13 (1) (2) and Order 4 Rule 1 (3) of the *Civil Procedure Rules, 2010*. The provisions are to the effect that where there are more than one Plaintiffs, one may be authorized in writing by others to act on their behalf. The authority however has to be in writing and must to be filed in court.
6. On the issue of locus standi, the Defendant cited the Supreme Court case of *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others* (2014) eKLR, where the court stated that locus atandi touches on jurisdiction of the court and its determination should be made at the earliest.
7. On the first limb of unsigned/defective pleadings, the Defendant avers that the Certificate of Urgency and the Notice of Motion are unsigned while the Supporting Affidavit is undated. This renders the application incurably defective in law. It should therefore be struck-out with costs.
8. The Defendant submitted that the signing of pleadings enables the court to determine the owner of the averments contained therein; failure to which invalidates the documents in law as they are not authenticated. They cited the case of *Regina Kavenya Mutuku & 3 Others -vs- United Insurance Co. Ltd* (2002) eKLR to that effect. The case was cited with approval in the recent case of *Lucy Ougo and 3 others vs County Government of Nairobi and Another* (2021) eKLR.
9. On lack of locus standi, the Defendant submitted that Agnes Mwangi and Paul Mutunga are not the registered trustees of the Plaintiff church which is registered under the *Societies Act*. They therefore lack the locus standi. Dickson Wambugu on the other hand is a treasurer and not the Chairman of the Plaintiff as alleged. This is evident from the Letter issued by Registrar of the Societies.
10. Finally, on the lack of authority, the Defendant submits that the written authority is provided for under Order 1 Rule 13 (1) (2) and Order 4 Rule 1 (3) of the Civil Procedure Rules. That Dickson Mwangi lacks the requisite locus standi to institute these proceedings and the instant application as no such written authority has been exhibited herein. The proceedings herein and the suit are therefore incurably defective having been filed by persons without the requisite standing in law. The application and the suit should therefore be struck out with costs.

Plaintiff/ Respondent's Submissions

11. The Plaintiff submits that the Preliminary Objection by the Defendant raises three issues for determination identified as;
 - a. Whether the Plaintiff/ Applicant's application is fatally defective



- b. Locus Standi to file the suit herein
 - c. Lack of authority
12. On whether the application is fatally defective, the Plaintiffs submitted that the application was filed by the Applicant who at the time of instituting this suit was acting in person. That the application was drafted by the Chairman of the applicant, who is a lay person. The failure to sign the Certificate of Urgency and the Notice of Motion and to date the Supporting Affidavit was an inadvertent omission and/or mistake.
 13. They argue that such mistakes are curable by Article 159(2)(d) of the *Constitution*. Justice should be administered without undue regard to procedural technicalities. The Plaintiff's application should therefore should be heard and determined on its merit. They rely on the case of *Philip Keipto Chemwolo & Another -vs- Augustine Kubende* (1986) eKLR to augment their position.
 14. Further, the Plaintiffs submitted that pursuant to the provisions of Order 19 Rule 7 of the *Civil Procedure Rules*, the court is mandated to admit affidavits regardless of their technical defects. That an omission of the date in the jurat does not affect the substance of the Affidavit.
 15. The second issue is on the locus standi to file the suit herein. The Plaintiff submit that at the time of instituting this suit, though Agnes Wangui Mwangi and Paul Mwangi Mutunga were not church officials they were later registered as trustees and vice chairperson respectively. That under the Society's Act, a Society can only act through its office holders as it has no legal personality.
 16. Further that Order 1 Rule 8 of the *Civil Procedure Rules* allows one or more persons to sue on behalf of others where they have the same interest in one suit; therefore, Dickson Wambugu, the Chairman who was a duly registered official of the church at the time of instituting the suit had the locus standi to institute the suit in a representative capacity.
 17. On the final issue of lack of authority, the Plaintiffs submitted that Dickson Wambugu's lack of authority to institute this suit and the application is not fatal and they invited the court to exercise its discretion to have the Plaintiff comply with the rules of procedure. They cited the case of *Samuel Cheboi & 3 Others -vs- Paul Kanda & 4 Others* (2022) eKLR, where the court held that

“courts should be hesitant to strike out cases on procedural technicalities unless what is omitted goes to the root of the case.”
 18. The Plaintiffs submitted that the Preliminary Objection by the Defendant was therefore unmerited, an abuse of the court process and should therefore be dismissed with costs.

Issues for determination

19. It is important from the onset for this court to ascertain if the Preliminary Objection raised herein qualifies as such. In the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, the Court of Appeal as per Sir Charles Newbold, P. stated thus: -

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a Preliminary Objection may dispose of the suit”



20. In the case of *Oraro vs Mbaja* (2005) eKLR, the Court held that: -

“I think the principle is abundantly clear. A Preliminary Objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

21. From a perusal of the impugned application and the pleadings, this court is convinced that the Preliminary Objection raised herein qualifies as such for the reason that it is not blurred with material facts calling for evidence to be authenticated. A preliminary objection should be raised on a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.

22. Having said that and further having perused the Notice of Motion Application dated April 27, 2022, the Preliminary Objection raised thereon and the Submissions filed by both parties, I am of the view that the issues for determination in this matter are; -

- A. Whether the Applicant’s unsigned notice of motion is fatally defective and whether it is curable under Article 159 (2) (d) of the Constitution of Kenya 2010.
- B. Whether the Applicants’ have the Locus Standi to file this suit

Analysis and determination

Whether the Applicant’s unsigned notice of motion is fatally defective and whether it is curable under Article 159 (2) (d) of the Constitution of Kenya 2010

23. There is no dispute that the Notice of Motion dated April 27th April, 2022, is not signed by either the Applicant’s counsel or the parties. The Supporting Affidavit on the other hand is not dated at the jurat.

24. Order 2 Rule 16 of the Civil Procedure Rules provides as follows:

“Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.”

25. Order 2 Rule 6 of Civil Procedure Rules is framed in mandatory terms. That is the position of the law and failure to sign a pleading raises not only a question of who the marker of the document really is but also of the validity and genuinity of the document.

26. In *Regina Kavenya Mutuku & 3 Others vs. United Insurance Company Limited* Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250, Justice A. Ringera, as he then was, stated that;

“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity”.



27. The Applicant counsel urged that failure to sign the pleading is not fatal as it is curable by Article 159 (2)(d) of the Constitution which provides:-
- “ 159 (2) (d) In exercising judicial authority, the courts and tribunals shall be guided by the ...
(d) justice shall be administered without undue regard to procedural technicalities”
28. The Counsel for the Respondent submitted that failure to sign a pleading was not a procedural matter but it was a substantive issue going to the root of the pleadings.
29. The major issue for consideration is whether the authentication or ownership of the pleadings is a mere procedural technicality that may be cured by invocation of Article 159 (2) (d) of the Constitution of Kenya 2010.
30. In *Cheraik Management Ltd vs National Social Security Services Fund Board of Trustees & Another* [2012] eKLR the court held that, the tenets of the constitution are that parties must be treated equally in the eyes of the law and none of the parties should be accorded undue advantage in the legal profession.
31. Article 159 (2) (d) of the Constitution and even the inherent jurisdiction of the court or the overriding objectives of the law cannot be resorted to by a party whose act is declared a nullity under the law.
32. The Applicants’ counsel argued further that the application was filed by Mr. Dickson Wambugu in person. Being a lay person, the advocate argued that his failure to sign the Certificate of Urgency and Notice of Motion and to date the Supporting Affidavit were inadvertent omissions and/or mistakes on his part which are excusable.
33. It is indeed true that the application was filed by Mr. Dickson Wambugu in person. However, I have noted that at the time of filing the said application, the firm of Waruhiu K. Owade & Ng’ang’a Advocates were still on record for the Plaintiffs/Applicants. The firm of M/s Ngaramba Njoroge & Company Advocate took over the matter on May 17, 2022 vide Notice of Change of Advocates of even date and filed on the 18th May, 2022.
34. In the Court of Appeal case of *Kiptoo Arap Korir Salat v IEBC & others* Civil Application 228/2013 Nairobi - the Kiage J.A stated that;
- “I am not in the least persuaded that Article 159 of the constitution and the oxygen principles which both command courts to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an archical free-for-all in the administration of justice. This court, indeed all courts, must never provide the succor and cover to parties who exhibit scant respect for rules and timelines. These rules and timelines serve to make the process of Judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”
35. The requirement to have a pleading signed is a mandatory requirement and it is not a mere procedural technicality; it is a substantive issue that goes to the very root of the pleadings. The object of the statute



requiring the pleading to be signed by the pleader or his counsel is to make a party signing or filing any of the pleading take ownership and responsibility for the contents of the pleading.

36. The Kenyan position is well settled by myriads of authorities. That a party who files an unsigned pleading has no case that is properly before court. The so called motion before this court is a nullity is a nullity for all purposes and intention and ought to be struck out for non-compliance with the law.

Whether the Plaintiff's suit is incurably defective and should be struck-out

37. The Defendants have in their preliminary objection challenged the validity of the proceedings before this court and the competency of the persons who brought those proceedings. The Defendant objects that the suit is incurably defective as the Applicants lacks locus standi to bring this suit as they are imposters and not the officials/trustees of Shalom Church and further that they had no consent from the registered church officials to bring this suit.
38. The Defendant submitted that Agnes Mwangi and Paul Mutunga were not the registered trustees of the Plaintiff church which is registered under the *Societies Act*. They therefore lacked the locus standi. Dickson Wambugu on the other hand was a treasurer not the Chairman of the church as he alleged.
39. This evident from the Letter issued by Registrar of the Societies. The said Letter is dated March 23, 2022 from the Registrar of Societies marked as annexure "KK 3A" to the Replying Affidavit of Kagiri Kung'u deponed on the 11th March, 2022.
40. The Plaintiff admits that at the time of instituting this suit, Agnes Wangui Mwangi and Paul Mwangi Mutunga were not church officials but avers that they were later registered as trustee and vice chairperson respectively. That under the Society's Act, a Society can only act through its office holders as it is not a legal person.
41. In *Trustees Kenya Redeemed Church & Another vs Samuel M'Obuya Morara & 5 Others* [2011] eKLR, it was held that it is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due office holders.
42. In *African Orthodox Church of Kenya vs Charles Omuroka & another* [2014] eKLR the court held that;
- "There is no doubt therefore, that both the Plaintiff and the 2nd Defendant as societies or Associations registered under the *Societies Act* are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. They can only sue through Trustees, if they have one or in the names of their officials in a representative capacity"
43. The designation of the Trustees instituting the suit is in my view not a mere technicality as alleged by the Plaintiff's counsel. It goes to the root of the whole cause. It would be a mere technicality only if the proper or genuine registered Board of Trustees, authorised the commencement of the proceedings. The Plaintiff's counsel has indeed confirmed that at the time of instituting the suit, Agnes Wangui Mwangi and Paul Mwangi Mutunga were not church officials but were only later registered as trustee and vice chairperson respectively. This is in tandem with the Letter from the Registrar of Societies adduced by the Defendant. Clearly, the said Agnes Wangui Mwangi and Paul Mwangi Mutunga had no capacity whatsoever to sue on behalf of the Plaintiff. That rendered their suit a nullity ab initio.
44. As for Dickson Wambugu, he was a registered Treasurer although the Plaintiff's counsel argued that he is currently the Chairman of the Plaintiff. He had not exhibited the written authority authorizing him to act on behalf of the Society. This requirement is provided for under Order 1 Rule 13 (1) (2) and Order 4 Rule 1 (3) of the Civil Procedure Rules.



45. In *Eritrea Orthodox Church –vs- Wariwax Generation Ltd.* [2007] eKLR, in which the Plaintiff was a religious un-incorporated organization registered under the *Societies Act*, Onyancha J held that;
- “the institution of proceedings by the persons who form the society without complying with rules governing representative suits renders the suit null and void.”
46. In *John Ottenyo Amwayi & two others –vs- Rev. George Abura & two others* – Civil Appeal No. 6339/1990 Bosire, J. (as he then was) held as follows: -
- “The *Societies Act* does not contain Provisions with regard to the presentation and prosecution of suits by or against the unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names.”
47. The plaintiff in the suit before me, is a religious organization registered under the *Societies Act*. Societies do not have capacity to sue or be sued in their own names but through its registered trustees or officials. As stated earlier Agnes Wangui Mwangi and Paul Mwangi Mutunga lacked the capacity to institute the proceedings as purported to. Dickson Wambugu on the other hand lacks the authority to file a suit on behalf of the Plaintiff.
48. The suit herein is therefore incurably defective ab initio.
49. In the circumstances and based on the foregoing, I find that the Preliminary Objection by the Defendant is well founded and must succeed. The Plaintiff’s application dated April 27, 2023 and Plaintiff’s suit in its entirety are hereby struck out with costs to the Defendant.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2023

M.D. MWANGI

JUDGE

