



REPUBLIC OF KENYA



KENYA LAW
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**Makete & 6 others (Suing for and on behalf of Elgon East Friends Church
(Quaker Yearly Meeting) v Lusweti & 5 others (Environment & Land
Case 10 of 2023) [2023] KEELC 17005 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 10 OF 2023
FO NYAGAKA, J
APRIL 25, 2023**

BETWEEN

**FRANCIS MAKETE 1ST PLAINTIFF
DANIEL WATITI 2ND PLAINTIFF
GREGORY MUPALIA SIMIYU 3RD PLAINTIFF
ANN NAFUNA LUMAKALI 4TH PLAINTIFF
ALBERT BAKASA WEBALE 5TH PLAINTIFF
DAVID WANJALA WABUKE 6TH PLAINTIFF
ANDREW MULOSSI SIRENGO 7TH PLAINTIFF
SUING FOR AND ON BEHALF OF ELGON EAST FRIENDS CHURCH
(QUAKER YEARLY MEETING**

AND

**MOSES LUSWETI 1ST DEFENDANT
ANTONINA NYONGESA 2ND DEFENDANT
KENNETH CHERWENYI 3RD DEFENDANT
TOM MIKISI 4TH DEFENDANT
MARTIN KHAKULA 5TH DEFENDANT
ISAAC MAKOKHA 6TH DEFENDANT**



RULING

1. The Notice of Preliminary Objection dated March 10, 2023 was filed by Defendants on March 13, 2023. It challenges the legality of the Plaintiffs' suit and seek to have it struck out with costs on the following grounds:
 - a. That the plaintiffs are not the registered trustees of Elgon East Friends Church.
 - b. That the plaintiffs are not a body corporate under Section 3 (3) of the *Trustees (Perpetual Succession) Act* with power to sue and be sued.
 - c. That the property comprised in LR No 2116/598 is not vested in the Plaintiffs and consequently have no *locus standi* to commence a suit over the said property.
2. On March 14, 2022 when the Preliminary Objection came up for hearing this Court directed that it be argued by way of written submissions.

The Defendants' Submissions

3. The Defendants' submissions dated March 22, 2023 and filed on that day were that from the pleadings, the church, in whose behalf the pleadings were instituted by the Plaintiffs, was registered under the *Societies Act*, Chapter 108 Laws of Kenya. It thus became an unincorporated body governed by the dictates of Section 3 (1) and 3 (3) of the *Trustees (Perpetual Succession) Act*. The Defendants submitted that by a comparison of the said provisions as against the Plaintiff, the Plaintiffs were not trustees of the church and had not been appointed as such. To them, thus, the Plaintiffs lacked *locus standi* to institute the present proceedings on account of the fact that they were not registered trustees.
4. The Defendants continued that since the suit was about immovable property and not administrative issues, this Court should find that they have no standing to sue. They fortified their submissions with the case of *Kipwiwo Community Self Help Group vs Attorney General and 6 others* [2013] eKLR urging this Court to uphold their Preliminary Objection with costs.
5. On their part, the Plaintiffs filed joint written submissions dated March 28, 2023 on that day. They opposed the Preliminary Objection arguing that since the church was registered under the *Societies Act*, it could not sue or be sued in its own name. To them, suits for and against it could only be prosecuted and defended by its registered officials. They contended that the responsibility was not carved out for only administrative issues. They cited the case of Nairobi Civil Case No 764 of 2007; *Dima Jillo (Suing as the secretary for and on behalf of Damesa Association) vs County Council of Isiolo & 4 Others* for this presupposition.
6. Reading Section 3 (1) together with Section 3 (3) of the *Trustees (Perpetual Succession) Act*, the Plaintiffs submitted that the provisions did not make registration of a trust a mandatory requirement. Theirs was that the Section 3 (3) was only injected with life when a trust was constituted and effectively registered. They argued that in light of the foregoing, the Preliminary Objection was unmerited since it called for evidence on the existence of a registered trust. They pointed out that certain averments contained in the Plaintiff were not contested by the Defendants. Finally, they urged this Court to invoke the particulars of Article 159 (2) (d) of the *Constitution* necessitating that justice be administered without undue regard to procedural technicalities. They opined that the said contest was curable by amendment. They thus prayed that the Preliminary Objection be dismissed with costs.



Analysis and Determination

7. I have considered the Preliminary Objection. I have also analyzed the respective rival written submissions by parties and given due consideration to the relevant law. The Preliminary Objection is hinged on the provisions set out in Section 3 (1) and (3) of the [Trustees \(Perpetual Succession\) Act](#) as read with the [Societies Act](#) to contend that the Plaintiffs lack *locus standi* to institute the present suit.
8. To successfully prosecute a Preliminary Objection, the party lodging must meet the parameters set out in the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 where the court held:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

9. In order to succeed, thus, a party must demonstrate that the grounds in support of the objection in limine are on pure points of law or argued on the basis that the facts are uncontested will not invite this court to exercise judicial discretion. Thus, where a court is called upon to ascertain certain facts by way of calling evidence for instance, the Preliminary Objection will not succeed. It means also that the preliminary objection herein must be one whose grounds are drawn from the pleadings impugned, namely the Plaintiff, as compared with the law alleged to have been breached. It does not require for a search even towards the documents that were filed accompanying the Plaintiff as that would amount to evidence being sourced for assistance.
10. In the present case, parties conceded that the suit church is an unincorporated body registered under the [Societies Act](#). A reading of Section 3 of the said Act connotes that such a body cannot sue or be sued in its own name. Vindication of its rights can only be taken by the official holders therein. On this point, the pronouncements of Nambuye J (as she then was), in [Living Water Church International vs City Council of Nairobi](#) [2008] eKLR is instructive. In the same vein, Order 1, Rule 8 of the [Civil Procedure Rules](#) allows parties to file suit on its behalf by way of a representative suit.
11. The Defendants argued that the suit was filed in violation of the provisions set out in Section 3 (1) as read with Section 3 (3) of the [Trustees \(Perpetual Succession\) Act](#) which provide as follows and the same are reproduced sequentially:

“Any person or body of persons who have lawfully constituted themselves for the purpose of forming a trust may apply to the Principal Registrar for a certificate of incorporation.

...

The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest



therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation”.

12. From the above provisions, I firstly observe that a plain reading of Section 3 (1) provides that the registration of a trustee is not couched in mandatory terms. Secondly, once a trustee is registered, it is issued with a certificate of incorporation as evidence of its registration. It is upon its registration that the trustee is pleased to conduct itself in the manner set out in Section 3 (3) of the Act.
13. It is evident that from the arguments of the parties that the suit church is a registered society. At Paragraph 3 of the Plaint they stated that the church was registered under the *Societies Act*. I also gather that they tried to support the same from the Plaintiff's list of documents as per the Certificate of Incorporation numbered 15581. It is for this reason that the Defendants have posited that the Plaintiffs are in breach of the Section 3 (1) as read with Section 3 (3) of the Act.
14. Regarding a registered society, I refer to the *Halsbury's Laws of England*, 3rd Edition Volume 18 paragraph 239 which states:

“The trustees of a registered society or branch or officers authorized by its rules may bring or defend actions of legal proceedings with respect to any property, right, or claim of the society or branch and may sue and be sued in their proper names without other description other than the title of their office.”
15. I thus take the view that a registered society can sue or be sued through its registered trustees. It must be borne in mind however that such registration is not mandatory. By dint of Order 1, Rule 8 of the *Civil Procedure Rules*, parties may still file suit on behalf of a church as a representative suit as long as they demonstrate that they are acting on similar interests. However, the provision as read with the excerpt by the learned authors of the Halsbury's Laws of England which I have quoted above imports one thing: that even where there is need to file a representative suit on behalf of such an organization, it has to be done in the proper names of the officials but who must be described by their office titles. But from the description of the Plaintiffs, at paragraph 1 of the Plaint, they only state that they “are officials of...” (the Church). While I sympathize with the situation of the seemingly ‘body of Christ’ fighting within itself, which is akin to a cancer that spreads in a being, am afraid that I may not do much to sustain the instant suit to permit the ‘cancer’ to keep spreading slowly. It appears in this suit the cancer has eaten the body to extent of it not ‘knowing’ how to approach the right forum for medication. None of the people are described by their titles as the law requires. The Plaintiffs claimed to be suing for and on behalf of the church. But their description leaves them as individuals describing themselves in an amorphous manner as officials, failed them from qualifying as such having capacity to institute suit on behalf of the church.
16. In *Peter Ngugi Geoffrey & 3 Others v Mithini SDA Church* [2019] eKLR the learned judge held:

“8. In the plaint the Defendant is described as a church registered under the Societies Act. The plaint has not exhibited any form of registration in respect to the Defendant's entity. It is trite that a non-juristic person is incapable of suing or being sued in its name. If indeed the Defendant is registered under the Societies Act, then the right thing was to have it sued through its officials. None has been disclosed.



9. In the instant matter the suit was filed against a religious organization. It is not a body corporate which would then mean it would be sued as a legal personality. That being so it lacks the capacity to be sued in its own name.
10. A Society can only sue or be sued through its officials. That is the law. Having failed to sue the officials or trustees of the Defendant, or the specific members of the Defendant I find that the Preliminary Objection as raised is a pure point of law.”
17. Such is the situation I see in the instant case. I cannot be called upon to gather which officials the Plaintiffs are or their positions apart from the pleadings. To do so would take me beyond what amounts to determination of a preliminary objection hence taking me outside of the principle in the *Mukisa Biscuits* case (*supra*). The suit cannot therefore stand. For these reasons, I find that the Preliminary Objection dated March 10, 2023 and filed on March 13, 2023 merited. It is hereby strike out the suit. Since the dispute relates to members of the same church, each party will bear their own costs. The interim orders issued herein are hereby discharged.
18. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 25TH DAY OF APRIL 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

