



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.E081 OF 2018

J. D. CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

EVANGELIST TERESIA WAIRIMU KINYANJUI

T/A/FAITH EVANGELISTIC MINISTRIES (FEM).....DEFENDANT

RULING

1. This is a ruling in respect to the defendant's application dated 18th October 2018 in which she seeks the striking out of the plaintiff's case on the grounds that it is incurably defective. The defendant contends that the plaintiff's claim, if any, can only be against Faith Evangelistic Ministries (FEM) through its registered trustees and/or officials as the defendant has never entered into any agreement with the plaintiff and that no cause of action arises against the defendant. The application is supported by the defendants affidavit wherein she states that she does not trade as FEM and that FEM is a legal entity registered under the Societies Act and is therefore only capable of suing or being sued through its registered trustees/officials.

2. The plaintiff/respondent opposed the application through the grounds of opposition filed on 14th November 2018 in which it listed the following grounds:

- 1. The application before the court is incompetent and incurably defective.***
- 2. That application as drawn offends the provisions of Rule 15(2), Civil Procedure Rules, 2010.***
- 3. The remedy of striking out of pleadings is draconian remedy, that is only granted in plain and obvious cases.***
- 4. Striking out of pleadings is not allowed where, as here, the court would be required to undertake a detailed and minutiae examination of evidence and other material.***
- 5. There will be need for a detailed and minutiae examination of the documents filed by the plaintiff to enable the court to grant the application herein.***
- 6. The omission, if any, alleged by the plaintiff is curable by a short amendment of the plaint.***

3. The respondent also filed a supplementary affidavit sworn by its advocate one, **Kyalo Mbobu**, on 5th February 2019 in which he avers that the plaintiff was at the time of filing the plaint not been supplied with the Registrar of Societies' details pertaining to the defendants officials despite numerous requests. He states that the said details were however availed to the plaintiff through a letter dated 15th January 2019 a copy of which he attached to the supplementary affidavit as Exhibit "GK1".

4. He further states that the said exhibit "GK1" shows that the defendant is a director of FEM and that she was therefore properly sued in this case. He further avers that the plaintiff has already filed an application to amend the plaint so as to include all the defendant's registered officials in the suit.

5. Parties thereafter agreed to canvass the application by way of written submissions.

Applicant's submissions

6. The applicant submitted that a registered society can only sue or be sued in the name of its registered officials. For this argument the applicant cited several cases including the decision on the case of **Anglican Church of Kenya St. Peters Church, Gatunduini –vs- Secretary, Muranga County Government & Another [2015] eKLR** wherein the court stated:

“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 officer’s orders. It has not pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”

Respondent’s submissions

7. The respondent submitted that the rules of natural justice require that a court must not drive away any litigant from the seat of judgment without a full hearing. The respondent relied on the case of **Wanlock –Vs- Haloney and Others [1965] 1 WLR 1238** wherein it was held:

“Without a detailed and minutia examination of evidence and other materials before the court ought not to exercise its jurisdiction to strike out the pleadings.”

8. Reliance was also placed on the case **Blue Shield Insurance Company Ltd –vs- Joseph Mboya Oguttu [2009] eKLR** as mentioned in the case of **International Air Transport Association & Another –Vs- Connect Travel Ltd & 2 Others[2016] eKLR** wherein the principles governing the striking out of the suits were discussed as follows:

“The principles guiding the court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T.Dobie and Company (Kenya) Ltd vs Muchina [1982] KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13(1)(a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of the pleading is sought. It was held in that case inter alia as follows;-

“The power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

9. The respondent argues that its claim as elaborately stated through the plaint was that the applicant contracted it in 2015 through an Interior Fit Out Contract to restart its then stalled project and that the plaint therefore raises several triable issues which the court ought to consider.

10. Counsel submitted that the plaintiff’s annexure marked “GK1” attached to the supplementary affidavit clearly indicates that the defendant is a director of (FEM) and has thus been properly sued in this case.

11. It was the respondent’s case that the failure to mention the societies other officials in the plaint is a defect that is not fatal and can, under Order 12(3) of the Civil Procedure Rules, be corrected thought an amendment.

Analysis and determination

12. I have considered the application dated 18th October 2018 together with the written submissions and the authorities cited. The main issue that falls for determination is whether the respondent’s suit is defective and ought to be struck out on the basis that it has not been lodged against the registered officials/trustees of Faith Evangelistic Ministries. Section 3 of the Societies Act Cap 108 Law of Kenya stipulates as follows:

For the purposes of this Act, a society is established in Kenya, although it may be organized and have its headquarters or chief place of business outside Kenya, if any of its officers or members resides in Kenya or is present therein, or if any person in Kenya manages or assists in the management of the society or solicits or collects money or subscriptions on its behalf, except during such time as—

a. It is organized and is operating wholly outside Kenya and

b. No office, place of business or place of meeting is maintained or used in Kenya by it or by any person on its behalf; and

c. No register of all or any of its members is kept in Kenya; and

d. No subscription is collected or solicited in Kenya by it or by any person on its behalf.

13. In the instant case and having regard to the contents of annexure “GK1” I find that the plaintiffs’ suit was instituted against the defendant in her capacity as an official of FEM as the said annexure clearly lists her as a director of the said church and thus an official of the said organization within the meaning of Section 3 of the Societies Act.

14. My take is that failure to list all the registered officials of FEM in the plaint is not fatal to the case as the respondent has demonstrated that it has already filed an application to amend the plaint so as to name all the defendant’s officials.

15. My further finding is that the instant case is distinguishable from the cases cited by the applicant which refer to the suits filed by Church Societies directly instead of through their officials. In this regard, the plaintiffs case would have been defective had it been filed against FEM as the sole defendant.

16. As the case stands, I find no defect in it as the defendant is sued in her capacity as a director as I have already noted in this ruling.

17. Consequently, I find no merit in the instant application and I hereby dismiss it with orders that costs shall abide outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 30th this day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mrs Kamau for Kyalo for the plaintiff/respondents.

Miss Eboso for Mungisha for defendant/applicant.

Court Assistant- Fred