



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO 179A OF 2018**

GEORGE KYAKA .....1<sup>ST</sup> PLAINTIFF  
DR. JOHN JARED ODUOR.....2<sup>ND</sup> PLAINTIFF  
GERALD ODIWUOR KELLY.....3<sup>RD</sup> PLAINTIFF  
JULIUS W. KIMANI.....4<sup>TH</sup> PLAINTIFF  
MOSES TANGARA.....5<sup>TH</sup> PLAINTIFF  
ZACHARY KIBALIACH.....6<sup>TH</sup> PLAINTIFF

(Suing in their capacities as Office Bearers of

**KINGS OUTREACH CHURCH**

Occupying the respective positions of Chairman,  
Vice Chairman, Secretary, Ass. Secretary, Treasurer,  
And Assistant Treasurer)

JOHN LITUNDA.....7<sup>TH</sup> PLAINTIFF  
ZABLON MWITI.....8<sup>TH</sup> PLAINTIFF  
JAYNE NJERI GATHAARA.....9<sup>TH</sup> PLAINTIFF  
CHARLES GERO.....10<sup>TH</sup> PLAINTIFF

(Suing in their capacities as the Office Bearers of

**MINISTRY OF REPENTANCE AND HOLINESS**

Occupying the respective positions of Chairman,  
Vice Chairman, Secretary General and Vice Treasurer)

**VERSUS**

KEVIN NDUNGU KIRIGA.....1<sup>ST</sup> DEFENDANT  
PAUL NANGABO AKHONYA.....2<sup>ND</sup> DEFENDANT

## RULING

### INTRODUCTION

1. On 27<sup>th</sup> July 2018, the Plaintiffs filed their Notice of Motion application dated 26<sup>th</sup> July 2018 seeking orders to restrain the Defendants by themselves or their agents and/or their servants from distributing audio visual, sound recording works, pictorial content and broadcast works on their own social media platforms and videos so as to cause confusion and deceive the public on similar platforms like theirs amongst several other orders.
2. On 17<sup>th</sup> August 2018, the 2<sup>nd</sup> Defendant filed a Notice of Preliminary Objection of even date. His objection was that the Plaintiffs had no *locus standi* to institute and sustain a suit. In view of the fact that the said Preliminary Objection related to the *locus standi* of the Plaintiffs herein, the court directed that the same be heard before the aforesaid application.
3. The 2<sup>nd</sup> Defendant's Written Submissions were dated 10<sup>th</sup> September 2018 and filed on 11<sup>th</sup> September 2018. The 1<sup>st</sup> Defendant's Written Submissions were dated and filed on 25<sup>th</sup> September 2018 while those of the Plaintiffs Written Submissions were dated and filed on 25<sup>th</sup> September 2018.
4. When the matter came up on 26<sup>th</sup> September 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

### THE 2<sup>ND</sup> DEFENDANT'S CASE

5. The 2<sup>nd</sup> Defendant contended that the Plaintiffs were not the right persons capable of lodging the suit herein. Their question was whether or not a party can file suit on behalf of another. He asserted that the target was the Prophet Dr David Owuor.
6. He also pointed out that the 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> Plaintiff had doubled as advocates and filed their Notice of Appointment on 23<sup>rd</sup> August 2018 and that there were several deponents who had sworn affidavits but were in fact not parties to the suit herein.
7. He added that the Plaintiffs were all employees, faithfuls and/or followers of Prophet Dr David Owuor and they were agitating for his rights. It was his contention that although every person had a right to access the court as was stipulated in Article 50 of the Constitution of Kenya, the phrase "**without undue regard to technicalities**" under Article 152 (2) (d) of the Constitution of Kenya had been misapplied generally.
8. He placed reliance on the case of Wilmot Mwadilo & Others vs Eliud Timothy Mwamunga & Another [2017] eKLR where this very court held as follows:-

**"Indeed, as the issue of *locus standi* of the Plaintiffs goes to the root of the matter, poring over and examining of their documents cannot be avoided as this court will have to be satisfied that they had jurisdiction to institute the proceedings herein. Indeed no busy bodies ought to be permitted to occupy the court's time if indeed they are not closely related to the matter. Judicious time is precious and must be guarded jealously".**

9. He also alluded to the provisions of Section 32 of the Copyright Act Cap 130 (Laws of Kenya) but did not elaborate how the same related to the question of *locus standi*.
10. Be that as it may, it was his contention that proper parties must be identified before a cause of action can be found to be competent. He averred that despite him having notified the Plaintiffs of this anomaly, they had failed to rectify the same thus rendering their present application and suit void *ab initio*.
11. He further averred that there could be no claim on behalf of unnamed party and consequently, he urged this court to dismiss the suit in limine.

### THE 1<sup>ST</sup> DEFENDANT'S CASE

12. The 1<sup>st</sup> Defendant submitted that in the case of Mukisa Biscuits, Sir Charles Newbold stated that a preliminary objection:-

**"raises a pure point of law which is argued on the assumption that all the acts pleaded are correct".**

13. He asked this court to note the contents of Paragraph (5) of the Plaintiff in which the Plaintiffs had contended that the message infringed upon was the message of Prophet Dr David Owuor who was not a party to the proceeding herein.
14. It was his averment that it could be deduced from the pleadings that Jason Munyiri Githeko, Michael Niewswand and David Owuor were the authors of the copyright material that the Plaintiffs contended had been distorted and as they had exclusive rights over the material, in accordance with Section 32 of the Copyright Act, they were the only ones who could bring the suit herein for the reason the Plaintiffs had not demonstrated that the copyright material had been transferred to them by the aforesaid three (3) authors.
15. He referred this court to the case of The Law Society of Kenya vs Commissioner of Lands and Others KLR 706 where it was held

that for one to be heard, then he ought to have *locus standi* to institute proceedings.

16. He also urged this court to dismiss the Plaintiff's suit with costs to him.

### **THE PLAINTIFFS' SUIT**

17. On their part, the Plaintiffs also alluded to the case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd [196] EA 66** and **Oraro vs Mbaja [2005] 1 KLR 141** where the question of what constitutes a preliminary point of law was addressed.

18. It was their submission that a preliminary objection on the sole issue of *locus standi* had to fail. They placed reliance on the provisions of Order 1 Rule of the Civil Procedure Rules, 2010 where it is provided that a suit cannot be defeated on account of mis-joinder of parties as the same is curable. They also relied on the case of **Wilham Kiprono Towet & 157 Others vs Farmland Aviation Ltd & 2 Others [2016] eKLR** where a similar conclusion was arrived at.

19. They stated that the material infringed upon was owned by Kings Outreach Church and the Ministry of Repentance and Holiness which were duly registered societies under the Societies Act Cap 108 (Laws of Kenya) and of which they were officials thus giving them *locus standi* to sue.

20. It was their submission that the Preliminary Objection was defective and was merely intended to divert the court's attention to the issues that had been raised in their suit and thus urged this court to dismiss the same.

### **LEGAL ANALYSIS**

21. As was agreed by all parties, a preliminary objection is a point of law that can dispose of the entire suit. This means that the suit cannot be cured in any manner lending it to be dismissed *in limine*.

22. The preliminary point of law cannot deal with disputed facts as was held in the case of **Oraro vs Mbaja** (Supra) that was relied upon by the Plaintiffs.

23. It emerged from the said Preliminary Objection that it was the *locus standi* of the Plaintiffs to institute the suit that was in issue. However, the Plaintiffs were emphatic that they had the *locus standi* because they were officials of the Kings Outreach Church and Ministry of Repentance and Holiness that were the authors of the audio visual works, recordings and broadcasts that were said to have been infringed upon by the Defendants.

24. A perusal of the pleadings shows that the 1<sup>st</sup> -6<sup>th</sup> Plaintiffs were suing in their capacities as office bearers of King's Outreach Church while the 7<sup>th</sup> – 10<sup>th</sup> Plaintiffs were office bearers of Ministry of Repentance and Holiness. Whether or not the 1<sup>st</sup> -10<sup>th</sup> Plaintiffs were the office bearers of the said Societies was a matter of evidence. It was not a point of law as the Defendants had argued.

25. Going further, this court agreed with the Plaintiffs submissions that a suit cannot be defeated due to mis-joinder of the parties. Order 1 Rule 9 of the Civil Procedure Rules provides as follows:-

**“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.**

26. Whereas this court had held in the case of **Wilmot Mwadilo & 3 Others vs Eliud Timothy Mwangunga & Another** that **“busy bodies ought not to be permitted to occupy the court's time,”** in dismissing the Preliminary Objection that had been raised therein, this court was also categorical that the issues raised therein were beyond the scope of a preliminary objection and were matters of evidence for determination during hearing of the main suit.

27. The question of who was the author of the aforesaid material was not a question that could be answered at this point. It was a disputed fact that could only be interrogated during the hearing of the suit. Dismissing the Plaintiffs suit on the basis that it was only Jason Munyiri Githeko, Michael Niewswand and David Owuor who could bring the suit herein was a matter of evidence. Who was the author of material and who could tender evidence and if that evidence had any weight was a matter of evidence and not a point of law that could be interrogated before evidence had been adduced.

28. Accordingly, having considered the parties Written Submissions in respect of the 2<sup>nd</sup> Defendant's Preliminary Objection, this court came to the conclusion that substantive issues had been raised by all parties that would require further ventilation. Interrogating the issues at this stage would clearly be proceeding against the natural principle that parties must be given an opportunity to fully present their cases for hearing and determination. It also had the potential of leading the court to consider the merits or otherwise of the case which would be clearly prejudicial to the Plaintiffs case.

### **DISPOSITION**

29. For the foregoing reasons, the upshot of this court's decision was that the 2<sup>nd</sup> Defendant's Preliminary Objection that was dated and filed on 17<sup>th</sup> August 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

30. It is so ordered

**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of November 2018**

**J. KAMAU**

**JUDGE**