

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 171 OF 2010

CHURCH OF GOD IN EAST AFRICA (K) (Suing through

Right Revered Dr. Byrum A. Makoha, Rev. James

Obunde, Jeremiah Maenye & William Shimanyula,

Trustee of the Church.....APPELLANT

VERSUS

REUBEN AKOYO & 7 OTHERS.....RESPONDENT

Being an appeal in Civil Case No. 8003 of 2009 from the Ruling of Senior

Principal Magistrate Milimani Hon. A.K. Ndungu dated 16th April, 2010)

JUDGMENT

On 16th April, 2010 the lower court held that the plaintiff's application which sought an injunction be dismissed for reasons of it being *res judicata*. The defendant's had raised a preliminary objection on the ground that the lower court lacked jurisdiction in view of the constitution of the plaintiff's church. In that ruling there was also mention of CMCC No. 2340 of 2008.

Alongside the dismissal order in that ruling, the court dismissed the suit with costs to the defendant. I have looked at the pleadings in CMCC No. 8003 of 2009 and CMCC No. 2340 of 2008. In both cases, the prayers are more or less identical and there is evidence that an application for injunction in the previous suit, that is CMCC No. 2340 of 2008, was dismissed.

Clearly therefore, any address to the court relating to the parties based on the same facts and seeking the same orders would rightly be considered *res judicata*. However, an interlocutory application can never dispose of all the issues in a suit without the hearing, and therefore without going to the merits of the case in lower court, I find that the ruling leading to this appeal did not address the substantive issue on merit.

The capacity of the parties is a triable issue and to lock out parties at interlocutory stage, is to drive them out of the seat of judgment without a hearing.

In the circumstances, this appeal must be allowed. I find that the application for injunction was *res judicata* but the suit must be reinstated and be subjected to a full hearing to address the issues on merit. I also note that this is a church dispute where relationships of the parties may survive a dispute beyond the court and therefore, alternative dispute resolution should have been applied in this case.

However, I leave that to the parties and the court that may be seized of this matter. The lower court file shall now be transmitted to the lower court for hearing and final determination.

Parties shall bear their own costs.

Dated, signed and delivered at Nairobi this 26th Day of April 2017.

A. MBOGHOLI MSAGHA

JUDGE