



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 30 OF 2013

EAST AFRICA PENTECOSTAL CHURCHES

THRO' REG. TRUSTEESAPP/PLAINTIFF

-VERSUS-

REV. PETER KITHAE KABIRA 1ST RESP/DEFENDANT

REV. PETER MEEME 2ND RESP/DEFENDANT

REV. JOSEPH KARUTI M'MBATARU..... 3RD RESP/DEFENDANT

REV. DAVID MURIUNGI 4TH RESP/DEFENDANT

REV. JAPHET NTOITI 5TH RESP/DEFENDANT

REV. STEPHEN MUNGATHIA 6TH RESP/DEFENDANT

RULING

Preliminary Objection

[1] The respondents took out a preliminary objection in a Notice of Preliminary Objection dated 17th January 2014. The objections taken are as follows:-

1. Among the list of documents is a letter dated 18th November, 2013 shows that the purported new church stood to be dissolved after 30 days from 18th November, 2013 annexed is the said letter marked as PKK.1.

2. The person swearing an affidavit acting as an agent of the 1st defendant in case no. CMCC. 350 of 2010 has been barred from being in any court until they comply with orders dated 4th November, 2010 annexed is the said order marked as PKK 11.

[2] Before determining the substance of the Preliminary Objections taken up by the Respondent, the court must first be satisfied that the points raised pass the test of the law on preliminary objections. The test was set out in the famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD vs. WEST END DISTRIBUTORS LTD (1969) EA 696** as per Law JA that:

“So far as I’m aware, 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.”

Similarly **Sir Charles Newbold** in the same case stated that:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

And for further illumination on the point I cite the case of **Oraro vs. Mbaja [2005] 1 KLR 141** Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

“The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

Accordingly, a preliminary objection consists in a point of law which when argued will dispose of the entire suit. However, if probing of evidence will be required to prove the particular point or points taken, then that objection is not a true preliminary objection in the sense of the law. Such point must go for trial. Applying this test; are the points raised herein true preliminary objections in the sense of the law?

[3] First, the question of dissolution of the plaintiff church is a matter of both fact and law and will require probing of evidence to establish. The letter dated 18th November, 2013 upon which the objection is based is a piece of evidence that will have to be considered by the court in a trial. With due respect the first point is not a preliminary objection in law: It cannot be determined in limine. That objection fails.

[4] I will also place the second objection on the scale of the law. Again, the question on whether a deponent of affidavit on behalf of another had authority to do so is a matter of fact which shall require evidence to be taken to prove or deny the authority thereto. I note also that such arguments that defendant was barred from being in court until he complies with orders made on 4th November, 2010 in CMCC. NO. 350 of 2010 invite two things: (a) production of the said order; and (2) proof that the order is still in force and binding on parties in this case. That notwithstanding, I note that a certified copy of the alleged order is not annexed to the preliminary objection. Similarly, the plaintiff has argued that the said order relates to another case involving different parties and that it does not bind the parties herein. All these are matters of fact which will require extrinsic evidence to prove. Accordingly, I find the second objection not to be a true preliminary objection as it is known in law. I reject it as such. All these points shall be determined in the main cause. It is so ordered.

[5] I, however note that Mr. Kirima raised another objection in his submissions: that article 21a, b, c & d of the Constitution of the plaintiff church requires disputes such as this one to be litigated through church organs. This point was not one of the objections raised in his notice. It has come up in the submissions. In any case, for referral of the dispute to such other alternative dispute mechanism to be attained, a proper application in that behalf should be made at earliest opportune time. For those reasons, the point is incapable of being determined as a Preliminary Objection in the manner it was introduced. I decline to

consider it. The upshot is that I dismiss the Preliminary Objection. Costs shall be in the cause. It is so ordered.

Dated, signed and Delivered in open Court at Meru this 28th July, 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Muthomi advocate for Mr. Murango advocate for plaintiff

Mr. Mutegi advocate for Mr. Kirima advocate for defendant

F. GIKONYO

JUDGE