



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 342 OF 2014

SKAIR ASSOCIATES ARCHITECTS.....PLAINTIFF

VERSUS

THE EVANGELICAL LUTHERAN CHURCH OF KENYA.....1ST DEFENDANT

THE ARCHBISHOP OF THE

EVANGELICAL LUTHERAN CHURCH OF KENYA.....2ND DEFENDANT

THE GENERAL SECRETARY

EVANGELICAL LUTHERAN CHURCH OF KENYA.....3RD DEFENDANT

THE TREASURER

EVANGELICAL LUTHERAN CHURCH OF KENYA.....4TH DEFENDANT

THE TRUSTEES OF THE

EVANGELICAL LUTHERAN CHURCH OF KENYA.....5TH DEFENDANT

RULING

INTRODUCTION

1. The Defendants' Notice of Motion dated 24th February 2015 and filed on 25th February 2015 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rule 10(2), Order 2 Rule 15 (1) (a), (b), (c) and (d) and Order 4 Rules 1 (1) (f) and 5 of the Civil Procedure Rules 2010 It sought the following orders:-

- 1. The suit and/or Plaintiff herein be struck out.**
- 2. In the alternative and without prejudice to the foregoing, the names of the 1st, 2nd, 3rd, 4th and 5th Defendants be struck out from the suit.**
- 3. The Defendants be awarded the costs of this application and the costs of the entire suit together with interest.**
- 4. This Honourable Court do grant any other or further orders as may be deemed fit in the circumstances**

THE DEFENDANTS' CASE

2. The application was not supported by any affidavit but was based on the several grounds stated therein. The Defendant's Written Submissions were dated and filed on 20th March, 2015.
3. The Defendants' case was that the present suit as filed was incompetent, hopeless and bad in law. According to them, the Plaintiff did not disclose parties who were capable of being sued in the suit and any reasonable cause of action against them.
4. It was their position that the Plaintiff failed to establish any connection between their claim and each of the Defendants and that it could prejudice, embarrass or delay the fair trial of the suit.
5. They therefore urged the court to allow the prayers as had been sought in their application.

THE PLAINTIFF'S CASE

6. In response to the said Application, Karima Magambo, a Partner of the Plaintiff's firm, swore a Replying affidavit on 5th March 2015. It was filed on even date. The Plaintiff's written submissions were dated 2nd April 2015 and filed on 9th April 2015.
7. The Plaintiff averred that the 2nd Defendant, as the Administrative and Spiritual Head of the 1st Defendant, had capacity to get into contractual relationships for and on behalf of the 1st Defendant. It further averred that the 3rd, 4th and 5th Defendants derived their administrative functions from the 2nd Defendant and that the 2nd Defendant appointed them through the office of the 3rd Defendant.
8. Its case was that if the orders sought in the Defendant's present application were granted the same would amount to a suppression and defeat of justice. It therefore prayed that the Defendants' said application be dismissed with costs to it.

LEGAL ANALYSIS

9. The Defendant's application was not supported by any affidavit which the Plaintiff termed as defective. On its part, the Defendants contended that the deponent of the Verification Affidavit herein did not show that he was a partner in the Plaintiff's firm and that he did not also produce the authority by other partners to bring the suit on behalf of the firm. The court thus deemed it prudent to deal with these issues right at the outset as the same were preliminary in nature.
10. Order 51 Rule 4 of the Civil Procedure Rules, 2010 provides as follows-
"Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served." (emphasis Court)
11. It is clear from the above that it is not all motions that should be supported by an affidavit. Indeed, no affidavit evidence is required where an application has raised points of law. An affidavit is, however, necessary where the motion is to be supported by evidence.
12. In this regard, the court did not wholly concur with the Plaintiff's submissions that an application that was not supported by an affidavit was incurably defective as there are clearly instances when such affidavit evidence is not required.
13. Notably, the case of **Simon Muteti Mutune vs Co-operative Bank of Kenya Limited [2015] eKLR** that was relied upon by the Plaintiff was distinguishable from the facts of this case as the same had sought injunctive orders in which affidavit evidence was critical before the court therein could establish whether or not the plaintiff therein was entitled to the orders he had sought.

14. The present application was premised on the grounds on the face of the application. This meant that the Defendants were essentially relying on points of law that need not have been supported by affidavit evidence.

15. The Defendants placed reliance on all the grounds set out in Order 2 Rule 15 (1) of the Civil Procedure Rules. In this regard, they were required to adduce evidence to support Grounds Nos (j), (k) and (l) which were in essence, grounds (b), (c) and (d) of Order 2 Rule 15 (1) of the Civil Procedure Rules. The case law relied upon by the Defendants, though noted by the court, was therefore irrelevant in the circumstances of the case herein.

16. The only ground that did not require the filing of an affidavit was Ground No (g) of their application. This was equivalent to ground (a) of Order 2 Rule 15 (1) of the Civil Procedure Rules. Notably, Order 2 Rule 15 (2) of the Civil Procedure Rules provides as follows:-

“No evidence shall be admissible on an application under subrule 1(a) but the application shall state concisely the grounds on which it is made.”

17. On this ground alone, the application could therefore not be deemed to have been defective or incompetent for the reason that the court was being invited to consider whether or not the Plaintiff had disclosed any reasonable cause of action without relying on any affidavit evidence. As this was a substantive issue, the merits of the same together with the other remaining grounds on the face of the application, were considered hereunder.

18. In respect of the Verifying Affidavit, the Defendants submitted that the Plaintiff was incompetent and bad in law as the said Verifying Affidavit was fatally defective. It was their contention that Kairima Magambo, the deponent therein had not provided any evidence to show that he was a partner of the Plaintiff or who were the other partners of the Plaintiff were or if he had authority to swear the affidavit on behalf of the other partners of the Plaintiff. The Defendants relied on the provisions of Order 30 of the Civil Procedure Rules that contemplates the disclosure of the identity, names and addresses of partners.

19. Order 30 of the Civil Procedure Rules stipulates as follows:-

“1. Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of accruing of the cause of action, and any party to a suit may in such cases apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their advocate shall, on demand in writing by or on behalf of any defendant, within seven days, declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is filed”

20. The issue of defectiveness of the Verifying Affidavit and Replying Affidavit was raised by the Defendants at the submission stage. The Plaintiff did not submit on this issue. Be that as it may, it was the finding and holding of the court that there was no requirement in law that the authority or resolution had to be filed together with the Plaintiff. In fact, there was no provision that such a partner was required to produce the authority of the other partner(s) as seen in Order 30 of the Civil Procedure Rules as was rightly submitted by the Plaintiff.

21. Indeed, Order 4 Rule 4 of the Civil Procedure Rules provides that where the plaintiff is a corporation, which the Plaintiff herein was not, the verifying affidavit shall be sworn by an officer of the corporation duly authorised under the company seal to do so.

22. In the event that the Defendants wanted the identity of the partners of the Plaintiff's firm, it was their

responsibility to make a written demand as was required under Order 30 rule 2 of the Civil Procedure Rules. There was therefore no onus on the part of the deponent of the Verifying Affidavit herein to prove his partnership in the Plaintiff firm.

23. In the circumstances foregoing, the Defendants' case that the Verifying affidavit was wanting could not stand. In any event, the court has moved from the practise of striking out plaints on the ground that a Verifying Affidavit is defective in view of the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandate the court to administer justice without undue regard to procedural technicalities.

24. Similarly, the court did not find the Replying Affidavit to have been defective as the deponent had indicated in Paragraph (1) therein that he was a partner in the Plaintiff firm and had been authorised to swear the said Replying Affidavit.

25. Turning to the merits of the application, the Defendants argued that the Plaintiff did not state precisely how each of them had contributed to its cause of action and how each of them was to answer to that claim which they said was contrary to the provisions of Order 2 Rule 15 (1)(a) of the Civil Procedure Rules,.

26. As was stated herein above, under this ground, the court would only be required to consider the merits or otherwise of an application seeking to strike out a pleading merely by looking at the grounds that have been cited on the face of an application and comparing the same with the pleadings to determine whether or not the same disclose a reasonable cause of action. It is not sufficient for a party to assert that a pleading does not disclose a reasonable cause of action against it, it is required to demonstrate how this is manifested.

27. A perusal of the pleadings herein reveals that there was an apparent contractual relationship between the Plaintiff and the 1st Defendant. The Defendants did not out rightly deny the existence of the agreement that gave rise to the said relationship. This was evident in Paragraphs (7), (8) and (9) of the Plaintiff. In fact, the documentation annexed to the Plaintiff shows that the 1st Defendant appointed the Plaintiff as the Project Manager and Project Architect.

28. It was not clear from the Plaintiff the circumstances under which the contract was not fully performed. However, Paragraph (16) of the Plaintiff seems to have attributed the non-payment and non-compliance of the Agreement and Conditions of Contract for Building Works to the 2nd Defendant. It was also the 2nd Defendant who was said to have executed the said contract.

29. In view of the aforesaid contractual relationship, it cannot be said that the Plaintiff does not raise any cause of action. Evidently, issues raised in the pleadings can only be determined at a full trial. The question that now arises is against whom was the cause of action?

30. It was the Defendants' contention that if the matter were to proceed for trial, it would end up generating a judgment or order that was incapable of being enforced for the reason that the same would be directed at defendants who were not recognised persons in law as they did not have capacity to sue or to be sued.

31. It did appear to the court that this argument was closely related to the Defendants' assertions that the Plaintiff had offended the provisions of Order 4 Rule 5 of the Civil Procedure Rules that provide as follows:-

“The plaintiff shall show how the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand.”

32. In the Plaintiff, the 1st Defendant was described as a Christian Society registered in the Republic of Kenya under the Societies Act No. 2 of 2012. **It is trite law that a society under the Societies Act is not**

a legal person with capacity to sue or be sued. In Nairobi HCCC No 6339 of 1990 John Ottenyo Amwayi & 2 Others vs Rev George Abura & 2 Others Bosire, J (as he then was) stated as follows: -

“The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the Legislature did not intend that suits be brought by or against those societies in their own names.”

33. The above position has been restated time and again in several other cases- See Trustees Kenya Redeemed Church & Another vs Samuel M’ Obuya & 5 others (2011) eKLR and Andrew Inyolo Abwanza vs Board of Trustees of Pentecostal Assemblies of God-Kenya & 2 Others (2009) eKLR.

34. In light of the above, it was evident that the 1st Defendant had no capacity to sue or be sued. It had to be sued in the names of its officials. In the circumstances, there was a misjoinder of parties and consequently, the name of the 1st Defendant should be struck out from the pleadings.

35. As regards the 2nd, 3rd, 4th & 5th Defendants, it was the Plaintiff’s case that they had been sued as officials/ trustees of the 1st Defendant as they were members of the supreme decision making body, which according to Article X Clause (5) of the 1st Defendant’s Constitution that was annexed to the Plaintiff’s Replying Affidavit, was the General Assembly.

36. While it may well have been that the 2nd, 3rd and 4th Defendants were members of the General Assembly, the court would be proceeding on an assumption that they had capacity to sue or be sued when there was no evidence to support this assertion. There was no proof, whatsoever in the 1st Defendant’s Constitution, showing that the General Assembly had capacity to sue and to be sued.

37. If indeed the General Assembly or the 1st Defendant’s Council were the ones that had capacity to sue or be sued, then it was not clear to the court why the Plaintiff opted to sue the 2nd, 3rd and 4th Defendants only when there were so many other members listed in Article X Clause (5) of the said Constitution.

38. Whereas as the Plaintiff correctly submitted that the court could not strike out a pleading on the basis on non or misjoinder of parties as provided in Order 1 Rule 10 (2) of the Civil Procedure Rules and as seen in several cases it relied upon in this regard (See- Abdulrazak Khafan & Another vs Supersonic Travel & Tours Ltd [2005] eKLR and the Administrator Oshwal Academy vs Beresa Limited [2014] eKLR), the court could not ignore the fact that parties who are enjoined in any suit must be legal persons with capacity to sue or to be sued, evidence which it did not furnish this court with.

39. The court was thus persuaded by the Defendants’ submissions that the Plaintiff ought to have sued the holders of the offices of persons who had capacity to sue or be sued in accordance with the 1st Defendant’s Constitution. They could not be sued by their titles. Rather they had to be sued in their individual names as contemplated in the Societies Act.

40. It was immaterial as the Plaintiff argued that the holders of the offices were not permanent as they would change with every election. It is for that reason that suits filed against a Board of Trustees would be a more viable option as it has perpetual succession.

41. Indeed, the Plaintiff did admit in its submissions that the **“legal personality of every church is manifested in the trustees thereof”** who would ordinarily be quite distinct from a chairman, secretary or treasurer of a society. For the foregoing reasons, the 2nd, 3rd and 4th Defendants were wrongly enjoined in the proceedings herein and ought to be struck out as there was no evidence that they had capacity to sue or to be sued.

42. In respect of the 5th Defendant, **“The Trustees of the Evangelical Lutheran Church of Kenya”**, it was not clear and there was nothing to show that they were duly registered and therefore capable to sue and to be sued or if indeed there was a Board of Trustees.

43. There was also no evidence to show that the said Trustees were the officials who were envisaged within the meaning of the Societies Act. The Plaintiff was well aware of the Defendants' contentions that the 5th Defendant had no capacity to sue and to be sued. It was incumbent upon it to have submitted evidence to demonstrate that there a Board of Trustees or that the Trustees, as named, had capacity to sue and to be sued.

44. In the absence of such proof, the court could not make an assumption that such Trustees had been registered as a body corporate and had capacity of suing and being sued. Nothing would have been easier than for the Plaintiff to have at least provided proof to demonstrate that all the Defendants had capacity to sue or had capacity to be sued and in particular, as regards the 5th Defendant.

45. Similarly, nothing would have been easier than for the Plaintiff to have conducted a search at the Companies Registry to establish the names of the 1st Defendant's officials who could then have been sued, if at all its Constitution provided that the said officials were the ones to be sued.

46. It did appear to the court that the Plaintiff was not certain who it could sue and was on a fishing expedition. It had cast its net far and wide in the hope that any of any of the Defendants could be found liable. Indeed, ability to enter into contractual arrangements was not the same thing as having capacity to sue or to be sued.

47. The court concurred with the Defendants' arguments that any orders or judgment against them would be incapable of being enforced and would lead to an absurdity for the reason that a defendant must be clear as to what he would be expected to answer to as stipulated under Order 4 Rule 4 of the Civil Procedure Rules.

48. An example of this would be, if there were contempt of court proceedings, who in the 1st Defendant's General Assembly or Council would be found liable?

49. Having said so, the court is alive to the fact that Order 1 Rule 7 of the Civil Procedure Rules provides that **"where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."**

50. However, where a suit has been instituted in the name of the wrong person or where the court is doubtful that the suit has been instituted in the name of the right plaintiff, Order 1 Rule 10 (1) of the Civil Procedure Rules states as follows:-

"...the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order that any other person to be substituted or added as a plaintiff in the suit or added as a plaintiff upon such terms as the court thinks fit."

51. In addition, Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows:-

"2. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as a plaintiff or a defendant, be struck out, and that the name of any person who ought to have joined, whether as a plaintiff or a defendant, or whose presence before the court may be necessary in order to enable the effectually and completely to adjudicate upon and settle all questions involved in the suit be added."

52. Accordingly, having considered the pleadings, the affidavit evidence, the written submissions and case law in support of the respective parties' cases, the court found and held that the Defendants' application was not defective or incompetent as their arguments were mainly points of law, having disregarded the grounds under Order 2 Rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules that

required to be supported by affidavit evidence.

53. However, it was evident that the Defendants had not made out a case to warrant the striking out of the Plaintiff or the suit herein under the provisions of Order 2 Rule 15 (1) (a) of the Civil Procedure Rules . Rather, they had satisfied the court that the suit herein could not be sustained against them as sued. That notwithstanding, the Plaintiff still had a chance under the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules to have the proper defendants added in the suit herein.

54. Indeed, Order 1 Rule 9 of the Civil Procedure Rules is very clear that no suit shall be defeated by reason of misjoinder or non-joinder of parties strike out parties who had been improperly enjoined in a suit and order that the correct parties being added in a suit so as to adjudicate upon the questions before it. The court was in doubt whether the Defendants as filed really had capacity to sue or to be sued hence the need for the plaintiff to enjoin the proper Defendants in the suit herein

DISPOSITION

55. In the circumstances foregoing, the upshot of this court's ruling was that the Defendants' Notice of Motion dated 24th February 2015 and filed on 25th February 2015 was merited in terms of Prayer No 2 therein.

56. However, as striking out of the Defendants from this suit will leave the plaint bare and non-existent, they shall not be struck out at this stage. The granting of the said prayer is hereby deferred to the time the Plaintiff will file its application.

57. This decision has been informed by the provisions of Order 1 Rule 9 of Civil Procedure Rule that provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and Section 1B (d), Civil Procedure Rules that mandates the court in furthering the overriding objectives, to handle matters in a timely and affordable manner. Striking out the suit when there is an alternative way of addressing the misjoinder or non-joinder of parties will only increase costs as the Plaintiff paid hefty court filing fees.

58. The Plaintiff is therefore hereby directed to make the necessary application to enjoin the proper defendants in the suit herein within the next thirty (30) days from today, failing which its suit shall stand dismissed without any further reference to the court.

59. Costs to the Plaintiff shall be addressed at the time of considering the Plaintiff's said application. For the avoidance of doubt, in the event the Plaintiff does not file its application within the period stipulated herein, the Plaintiff shall automatically bear the Defendant's cost of the suit and those of the Defendant's present application together with interest thereon at court rates.

60. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of June, 2015

J. KAMAU

JUDGE