



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NO.67 OF 2008**

**PRESBYTERIAN FOUNDATION.....PLAINTIFF**

**VERSUS**

**CHARLES NDUNGU.....DEFENDANT**

**AND**

**MARGARET WANJIKU WARIUKI**

**GRACE WAHITO NGARI**

**OBADIAH KAIRI MAINA**

***(suing as officials being Session Clerk, Session Treasurer and Finance Chairman respectively of P.C.E.A DR. AURTHUR PARISH....INTERESTED PARTY***

**RULING**

1. P.C.E.A Dr. Arthur Parish, hereinafter called the interested party/applicant, through its officials namely, **Margaret Wanjiku Wariuki, Grace Wahito Ngari and Obadiah Kairi Maina**, brought the Chamber Summons dated **22nd May, 2013** seeking the following orders:-

i. That pending the hearing and determination of this application inter partes, there be a stay of further proceedings in this suit;

(ii) That the interested party/applicant, through its officials hereinabove stated be enjoined in these proceedings as an interested party;

(iii) That costs of the application be provided for.

2.The application is brought under **Order 1 Rule 10(2)** of the **Civil Procedure Rules** and **Sections 1B, 1B and 3A of the Civil Procedure Act**.

3. It is premised on the grounds that the proposed interested party is the equitable owner and/or beneficial owner of the suit land; that the proposed interested party legally bought the land at an auction and the plaintiff only holds it as a trustee; that the matter has proceeded without full involvement of the interested party and certain orders compromising its position made. Further that the application by the defendant's was informed by the non participation of the interested party in earlier proceedings; that the presence of the interested party in these proceedings will enable the court to effectively determine all issues in

controversy and that both the plaintiff and the defendant have acknowledged the equitable and beneficial ownership of the interested party.

4. The application is supported by the affidavit of **Margaret Wanjiku Wariuki**, an official of the interested party/applicant, in which she has reiterated the interested party's desire to be enjoined in the suit.

5. Regarding ownership of the suit property she has deposed that the proposed interested party purchased it at an auction as witnessed by a bundle of documents annexed to her affidavit and marked **Ex MWW1**.

6. It is contended, on behalf the applicant, that the plaintiff only holds the suit property as a trustee for it and that the defendant through its pleadings has acknowledged the applicant's interest in the suit property.

7. Further that there are crucial and material representations that the interested party needs to make in the proceedings as it is the legal or equitable owner of the land.

8. Through the affidavit of the defendant/respondent, **Charles Ndung'u Waithaka**, it is contended that the application is misconceived, incompetent and bad in law; that the interested party was well represented by the plaintiff so cannot seek to be enjoined in a matter they are already represented; that there is already a consent judgment in the respondent's favour which the interested party cannot upset. Further that the plaintiff is the only entity authorized to deal with the applicant's land matters across the country, that no matter how aggrieved by the conduct of the plaintiff, the applicant has no locus stand to deal with land matters concerning it as only the plaintiff has power to do so.

9. It is also contended that if the interested party is aggrieved by the manner in which the consent judgment was obtained, it should address them within the administrative structure of the church; and that the interested party cannot undo/withdraw the plaintiff's authority to deal with the suit property so as to affect his rights under the consent judgment.

10. It is also contended that the application is filed without authority of the registered owner of the suit property, that the plaintiff appreciated the respondent's interest in the suit property after considering all the issues relating to the suit land; that the application is meant to delay the finalization of the matter; and that before the consent judgment was entered the matter was fully deliberated upon by the Nakuru P.C.E.A Presbytery and approved.

11. In an affidavit filed in reply to the averments by the defendant, the applicants have averred that the defendant is not candid in his claim and has concealed or distorted material facts; that there is no question that the interested party is the sole true, beneficial and equitable owner of the suit land; that the defendant through his pleading has acknowledged the interested party's interest, that as principal/beneficial or true owners of the land the interested party has sufficient stake in the suit property to warrant their being enjoined in the suit to state their case. Further that it would be a travesty of justice if the true owner of the land cannot be heard where its trustee acts in breach of its trust obligations; that Article 60 as read with Article 40 of the constitution secures the interested party's rights over the suit property.

12. Parties with the concurrence of the court agreed to have the application disposed off by way of written submissions. Subsequently, they filed their respective submissions which I have read and considered.

13. The questions for determination are:-

- (i) *Whether the applicant has locus standi to bring and prosecute the application herein?*
- (ii) *Whether the applicant has made up a case for granting of the orders sought?*
- (iii) *What is the order as to costs?*

14. Regarding the first question it is submitted, on behalf of the respondent, that the applicant lacks *locus*

*standi* to bring and prosecute the instant application. This submission is premised on the fact that the plaintiff who is the applicant's appointed agent for purpose of any dealings to its properties (the suit property included) was a party to the impugned consent. Therefore, it is argued that the situation complained of having been occasioned by the applicant's agents, (the plaintiff and its advocate) the applicant cannot be heard to complain about the conduct of its agents.

15. It is further submitted that the application is incompetent as it is premised on the applicant's constitutional right to property yet the right procedure of lodging a constitutional reference has not been followed.

16. In a rejoinder the applicant submits that the issue for consideration by this court should be whether the applicant has demonstrated sufficient interest in the subject matter to justify their inclusion in the proceedings.

17. In this regard it is pointed out that the applicant is the true, beneficial and equitable owner of the property in dispute and that the plaintiff only holds the property in trust for it. It is contended that when the plaintiff and the defendant (now respondents) entered into the consent judgment hereto, the interested party was not consulted. It is further submitted that the applicant bought the suit land for its educational institutions and that the moneys paid by the respondent, through his wife (a senior official of the applicant) has ever since been refunded.

18. Based on **Article 22(1)(a) and (b)** of the **Constitution of Kenya**, the applicant maintains that as the true equitable or beneficial owner of the suit property, it has sufficient interest to bring and prosecute the instant application. **Article 22** of the **Constitution** aforementioned provides:-

**“(1.)Every person has the right to institute court proceedings claiming his right or fundamental freedom in Bill of Rights has been denied, violated or infringed or is threatened.**

**2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-**

**(a) a person acting on behalf of another person who cannot act in their own name;**

**(b) a person acting as a member of, or in the interest of a group or class of persons;**

**(c) a person acting in public interest; or**

**(d) an association acting in the interest of one or more of its members.”**

19. Reliance is also made **on Order 1 Rule 10(2)** of the **Civil Procedure Rules** which empowers a court 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 plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. (emphasis mine)

20. Having considered the aforementioned provisions of the law and the affidavit evidence adduced in this application, I am persuaded that the applicant, even though ably represented by the plaintiff/respondent, will, in appropriate circumstances, have *locus standi* to bring and prosecute an application like the instant one. I also find and hold that for the applicant to rely on **Article 22** of the **Constitution** aforementioned, it does not need to file a constitutional reference as submitted by the respondent.

21. On whether the applicant has made up a case for granting of the orders sought? I must point out that there is no doubt that the applicant was represented by the plaintiff and/or the plaintiff's advocate in the

impugned proceedings. Ordinarily, the actions of the plaintiff and/or its actions will be binding on their principal (the applicant) but for such actions to be binding on the principal, it has to be demonstrated that the agent was specifically authorized to act for the principal (see **Ajayi v. Lagos** (1967) ALR 213. It is also noteworthy that an advocate's position vis-a-vis his client is fiduciary in nature. For this reason an advocate is obliged to act in the best interest of his client.

22. Although in the instant application the applicant's agents (the plaintiff) does not complaint that its appointed advocate acted without authority or against its best interest, I take note of the fact that the plaintiff and/or its advocate has not controverted the allegations levelled against it. For this reasons this court cannot determine, with certainty, whether the plaintiff and/or its advocate acted in the best interest of the applicant.

In **Kafuma v. Kimbowa Contractors** (1974) E.A 91 it was held:-

**“1. the advocate who entered the judgment had no authority to do so from the defendant;**

**2.....**

**3.the advocate had no authority from the Corporation;**

**4. the consent judgment was accordingly a nullity and would be set aside.”**

23. In the instant application, there being no response from the plaintiff and/or its advocate on the circumstances leading to the recording of the consent judgment herein and the applicant having demonstrated sufficient interest in the suit property, I find and hold that it is a necessary party for effectual and complete adjudication of the matter in issue.

24. For the foregoing reasons the application is merited and is granted as prayed.

**Dated, Signed and delivered this 2nd day of December 2013.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Matiri for the Applicants/Interested party

Mr Waiganjo for the Respondent

Court Assisant : Emmanuel Maelo.

**L N WAITHAKA**

**JUDGE**