



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.7 OF 2010

HABAKUK ONYANGO ABOGNO.....APPELLANT

VERSUS

WILLIAM NYAIM OPOT1ST RESPONDENT

MILKA AOKO AJUOGA2ND RESPONDENT

[Being an appeal from Original Judgment from Winam Principal Magistrate's Court by P. C. Biwott – SRM in SRMCC No.519 of 2009.]

J U D G M E N T

The appellant was dissatisfied with the ruling delivered on 10/12/09 by the Senior Resident Magistrate at Winam. The trial court dismissed the preliminary objection that he had raised against the respondents' suit on the question of *locus standi*. Mr. D. Otieno prosecuted the appeal which was not defended.

In the plaint filed in the suit, the respondents claimed to be the registered trustees of The Church of Christ in Africa. They sought to have the respondent permanently enjoined from assuming or purporting to act in the office of the Archbishop of the Church or to control or operate the finances until a new Archbishop had been appointed by the synod conference. The office had become vacant on 27/5/09 following the death of the Archbishop Dr. Mathew Ajuoga. It was claimed that the purported assumption of the office by the appellant was against the constitution of the church. The appellant filed a defence to deny that the respondents were the registered trustees of the church. Consequently, he pleaded that they lacked the *locus standi* to bring the suit. It was denied that the constitution provided that the vacant position could only be filled by the synod, or that the appellant had illegally assumed the office of the Archbishop.

A chamber application for interlocutory injunction was filed to stop the appellant from carrying himself out as the Archbishop of the church, operating the named accounts of the church, or making appointments in the church. There was an affidavit sworn by the 1st respondent to support it.

The appellant swore a replying affidavit, and placed on record minutes of the standing committee of the church dated 11/11/05, to show that the respondents resigned from being Treasurer and General Secretary, respectively, of the church and that their places had been taken by Benson Ogot and Dick Ochieng, respectively. It was deposed that the respondents were trustees of the church by reason of holding the positions. Now that they had resigned, they were no longer trustees. It followed that they lacked capacity to bring the suit, it was averred. The appellant went on to state that following the death of

Archbishop Ajuoga he had on 4/6/09 been elected as the Chairman of the church who on 24/7/09 had been elected by the synod conference to become the Archbishop. He had then been appointed as the signatory to the accounts of the church.`

In the affidavit sworn by the 1st respondent to support the chamber application there was annexed the Revised Constitution 1997 of the church. It shows that the trustees shall be between three and ten, and shall include three office bearers of the church. The constitution shows that the office bearers include the Chairman, Secretary and Treasurer.

It is not in dispute that the respondents did not swear any further affidavit to challenge the averments contained in the replying affidavit. The trial court appreciated this fact, but went on to state as follows:

“The Defendant does not recognise plaintiff's as trustees. He says they resigned. The plaintiffs claim they are trustees. They hold themselves as such. There is no proof that they resigned availed by Defendants. Minutes are not enough proof of resignation. Evidence of resignation by plaintiffs not yet before me. I gave the plaintiffs benefit of doubt. P.O. will not solve the dispute between the parties herein. Evidence ought to be taken then matter is disposed off on its merit.....”

I find that the court fell into error. Once the appellant swore an affidavit to say that the respondents had resigned as office bearers of the church and produced minutes as evidence of that resignation, and there was no evidence in rebuttal, the court had no option but to accept the fact of resignation. That meant that the respondents were no longer trustees, unless they showed that they had become trustees by other means than being office bearers.

It is now settled that a preliminary objection 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 (**MUKISA BISCUITS COMPANY .V. WEST END DISTRIBUTORS LTD. [1969] EA 696**).

I find that the fact that the respondents were not trustees of the church at the time they filed the plaint against the appellant is certain, and formed a legitimate basis for him to raise the preliminary objection. The objection ought to have been sustained.

The result is that I allow the appeal with costs. The decision of the lower court to dismiss the preliminary objection with costs is set aside, and is replaced with the order allowing the objection with costs.

Dated, signed and delivered this 31st March, 2014.

A, O, MUCHELULE

J U D G E