



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. E002 OF 2020

IN THE MATTER OF: A PETITION BY GIDEON ESTATE RESIDENTIAL ASSOCIATION AND JOSEPHAT KARUNGO WAWERU, IBRAHIM ORUMA AND JOHN MUREITHI

IN THE MATTER OF: THE BILL OF RIGHTS AS ENshrined IN ARTICLES 19, 20 AND 21 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22(1) AND 23 (1) OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ENFORCEMENT OF ENVIRONMENTAL RIGHTS UNDER ARTICLE 70 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED INFRINGEMENT OF RIGHTS UNDER ARTICLE 42 OF THE CONSTITUTION OF KENYA, 2010.

BETWEEN

GIDEON ESTATE RESIDENTIAL ASSOCIATION.....1ST PETITIONER

JOSEPHAT KARUNGO WAWERU.....2ND PETITIONER

IBRAHIM ORUMA.....3RD PETITIONER

JOHN MUREITHI.....4TH PETITIONER

VERSUS

STANLEY MAINA.....1ST RESPONDENT

ACK RIMPA CHURCH, DIOCESE OF

MOUNTY KENYA SOUTH.....2ND RESPONDENT

FRANCIS KURENDE.....3RD RESPONDENT

RULING

This ruling is on the Preliminary Objection dated 6th April, 2021 which is based on the following grounds;

- (1) The Petition is premature as the Dispute Resolution Mechanism laid down in the Physical Planning and Land Use Act and the Environmental Management and Coordination Act have not been exhausted.
- (2) The Petition is incurably defective and incompetent as the second Respondent herein is a church registered under the Societies Act and hence not capable of being sued.
- (3) The Petition before the Court is totally defective as no proper authority to act on behalf of the first Petitioner has been filed with the Petition in contravention of ***Order 1 Rule 13(1) and (2) of the Civil Procedure Rules.***

The Preliminary Objection was filed by the counsel for the Respondents who has cited various provisions of the Constitution and the Law as well as decisions which have held that where alternative dispute resolution mechanisms exists, they should be exhausted before the filing of suits.

In particular counsel for the Respondents has relied on **Sections 73, 75 and 76 of the physical and Land Use Planning Act (Act No. 13 of 2019)**.

The Preliminary Objection has been opposed by the Petitioner's Counsel who filed written submissions dated 29th June, 2021 in which he urges that the Preliminary Objection as raised is not on a pure point of law as per the authority of ***Mukisa Biscuit Manufacturing Company Limited –vs- West End Distributors Limited (1969) EA 696***.

On the first ground, Counsel urges that there is no law be it under EMCA or Physical and Land Use Planning Act that makes it mandatory for a complaint to be raised with any other institution before it is filed in Court.

Regarding the capacity of the second Respondent to be sued, counsel urges that there are other Respondents namely the first and the third who can continue with the suit.

On the third ground of failure of the Petitioners' to obtain the authority of other residents of the estate to institute the suit, counsel says that such authority is indeed on record.

I have carefully considered the Preliminary Objection in its entirety including the submissions and the jurisprudence contained therein.

On the first ground, I find that provisions of EMCA and the ***Physical and Land Use Planning Act, 2019*** or other provisions of the Constitution or the Law do not make it mandatory that ADR be the first port of call.

The Courts must promote access to justice rather than impede it. It would not be fair or just to turn away a party who comes to Court before hearing such party unless the Court lacks jurisdiction.

On the second ground, I find that the church is not the only party in this case. There are two other parties. A Court of Law should always sustain a suit rather than dismiss it. A suit even when defective can be salvaged through an amendment.

On the third ground, I find that the issue of whether authority to plead has been given to the petitioners is a matter of fact and evidence and not a matter of law. It cannot be raised as a Preliminary Point of Law.

Finally, it is trite law that striking out pleadings is a draconian move that should be exercised sparingly. It would be a derogation of the right to a fair hearing under ***Article 50 (1) of the Constitution*** if the Court were to strike out pleadings that can be amended.

For the above stated reasons, I dismiss the Preliminary Objection dated 6th April, 2021.

Costs in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 10TH DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE