



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 299 OF 2013

AFRICAN ORTHODOX CHURCH OF KENYA..... PLAINTIFF

VERSUS

REV. CHARLES OMUROKA1ST DEFENDANT

LAGOS MINISTRY FOR ORTHODOX RENEWAL2ND DEFENDANT

RULING

1. African Orthodox Church of Kenya (the plaintiff) has sued Rev. Charles Omuroka and Lagos Ministry for Orthodox Renewal as defendants in this suit. The suit was instituted by way of a Plaint dated 25/10/2013 and filed in court on the same date. At paragraph 1 of the Plaint, the plaintiff has been described thus:

“The plaintiff is a duly registered church with its head office at Valley Road Nairobi...” At paragraph 3 of the Plaint, the 2nd defendant has also been described as **“a duly registered church and or organisation...”**

2. The dispute between the parties relates to some parcel of land known as KAKAMEGA/MUNICIPALITY/BLOCK IV/470, which, according to the plaintiff, was fraudulently transferred by the 1st defendant to the 2nd defendant. After the defendants were served, they entered appearance and filed a joint statement of Defence through the firm of Mukele & Company Advocates. The defendants pleaded at paragraph 2 of their defence as follows:-

Para 2. ***“The Defendants aver that the suit/plaint is bad in law and should be struck out for:***

- a. ***Parties to the suit having no capacity to sue or be sued.***
- b. ***The Plaint having no particulars of how the plaintiff acquired the property in question and not stating the value of the said property.***
- c. ***Basing the claim on alleged criminal activities that are prejudicial to the Defendants.”***

3. In its reply to Defence, the plaintiff in an attempt to cure the allegation that its suit is bad in law, denied that the Plaint is bad in law and stated that the 1st Defendant had sworn a false affidavit which necessitated the fraudulent transfer of the property to the 2nd Defendant.

4. On 21/7/2014, parties appeared before Kibunja, J. when they agreed to argue the Preliminary Point

of Law on 13/10/2014. That is how the matter ended up before me.

5. On 13/10/2014, Mr. Elung'ata appeared for the plaintiff and Mr. Mukele was for the Defendants. Mr. Mukele, learned counsel for the Defendants, argued the Preliminary Point and I understood him to raise only one point that is paragraph 2 (a) of the Plaintiff – Capacity of the parties to sue and be sued. The learned counsel argued that both the plaintiff and the 2nd Defendant are registered Societies under the Societies Act (Cap. 108) of the Laws of Kenya, and as such, they cannot sue or be sued in their own names. He therefore prayed that the suit be struck out with costs. He relied on the decision in **NBI. HCCC NO. 762 OF 2007 - ERITREA ORTHODOX CHURCH –VS- WARIWAX GENERATION LTD. [2007] eKLR.**

6. Mr. Elung'ata, learned counsel for the plaintiff, opposed the Preliminary Objection arguing that the Objection did not bring the suit to conclusion. According to counsel, in terms of Article 159 of the Constitution, the Objection is a mere technicality and asked that the Preliminary Objection be dismissed.

7. I have considered the rival arguments by both counsel on this matter. I have also perused the pleadings and documents filed by the parties herein. The plaintiff was registered on 5/7/1965 under the Societies Act and issued with Certificate Number 3801. On the other hand, the 2nd Defendant was registered on 5/1/2006 under the same Act (Cap. 108) and issued with Certificate Number 25689. There is no doubt therefore, that both the Plaintiff and the 2nd Defendant as societies or Associations registered under the Societies Act are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. They can only sue through Trustees, if they have one, or in the names of their officials in a representative capacity.

8. I agree with the decision of ***Onyancha, J.*** in **ERITREA ORTHODOX CHURCH –VS- WARIWAX GENERATION LTD. [2007] eKLR** where he held that the plaintiff in that suit was a religious un incorporated organization registered under the Societies Act and that the institution of proceedings by the persons who form the society without complying with rules governing representative suits renders the suit null and void.

9. In **John Ottenyo Amwayi & two others –vs- Rev. George Abura & two others – Civil Appeal No. 6339/1990** Bosire, J. (as he then was) held as follows:-

“The Societies Act does not contain Provisions with regard to the presentation and prosecution of suits by or against the 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.”

10. I am not aware that the law has since changed and I have no reason to hold otherwise.

11. The plaintiff in the suit before me, is a religious organization registered under the Societies Act. So is the 2nd Defendant. That being the case, both the plaintiff and 2nd Defendants have no capacity to sue or be sued in the manner the suit herein has purported to do.

12. Mr. Elung'ata, counsel for the plaintiff, has submitted that the Preliminary Objection raised is only a technical matter. With respect, I do not think so. The point raised by Mr. Mukele goes to the root of the suit. If the plaintiff does not have capacity to bring the suit herein against the 2nd defendant, which does not also have capacity to be sued the way it has, I see nothing technical about that. This is a pure point of law, which arises from the pleadings.

13. In AVTAR SINGH BHAMRA & ANOTHER –VS- ORIENTAL COMMERCIAL BANK – Civil Suit No. 53 of 2004, the High Court sitting at Kisumu held that ***“a Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points***

of law with no facts to be ascertained.”

14. The plaintiff has pleaded in paragraph 1 of its Plaint that it is a duly registered church. At paragraph 3 of the Plaint, the plaintiff has described the 2nd defendant as a duly registered church or organization. Obviously, churches are societies registered under the Societies Act. Societies do not have capacity to sue or be sued in their own names.

15. In the circumstances, I find that the Preliminary Objection is well founded and must succeed. The plaintiff's suit is hereby struck out with costs to the Defendants.

Dated and delivered at Kakamega this 28th day of October, 2014

E. C. MWITA

J U D G E