



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
ENVIRONMENTAL & LAND CASE 105 OF 2011

EDWARD STEVEN MWITIPLAINTIFF

--VERSUS--

PETER IRUNGU1ST DEFENDANT

JIMMY KIMANI2ND DEFENDANT

CITY COUNCIL OF NAIROBI3RD DEFENDANT

RULING

1. I have before me a preliminary objection by the 1st and 2nd defendants dated 10th May 2011. The defendants pray that the suit be dismissed on grounds that: the suit is at the behest of a society known as Deliverance church; that the plaintiff has sought orders against persons who are not parties to the suit; and, that there has been no compliance with procedures for presenting a suit of this nature.

2. The objection is primarily founded on the pleading at paragraph 7 of the plaint;

“The plaintiff avers that the 1st and 2nd defendants have acquired an interest in the adjacent plot, that is to say L.R. No.NRB/Block 122/134 upon which they are in the process of illegally and unlawfully erecting an Evangelical church (Deliverance church) and a school thereof, without having obtained the necessary legal authority regarding the change of user from residential to the current use, and an Environmental Impact Assessment report thereof to warrant such a development”.

In a synopsis, the defendants say that they have been sued in their personal capacities whereas the plaint is unequivocal that the true defendant is a society or organization known as Deliverance church or a school. The defendants’ case is that the orders of injunction and declarations sought against them are thus untenable. The defendants contend that the plaintiff should have sued the church organization and complied with the requirements of order 1 rule 8.

3. Order 1 rule 8 of the Civil Procedure Rules 2010 provides as follows;

“8. (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit”.

The defendants take up cudgels on the suit for want of compliance with that rule.

That would be a sound argument if I had cogent evidence before me that the 1st and 2nd defendants are merely members or employees of the said Deliverance church. That may be so. But it would require the court to delve into evidence. As the plaintiff submits, his claim as pleaded is against the 1st and 2nd defendants in their personal capacity. That may not be fully borne out by the plaint. It could even be a result of poor draftsmanship. The key point is that there is a contest as to whether the 1st and 2nd defendants are sued in a representative capacity or in person. It is also disputed that Deliverance church or the school, as a registered society, is the owner of the suit property or causing or abetting nuisance. I am also alive that this is not an application to strike out the 1st and 2nd defendants from the suit or even to enjoin new parties.

4. A preliminary objection should ideally consist of a pure point of law which has been pleaded or arises by clear implication from the pleadings; and, which is capable of or may dispose of the suit. Mukisa Biscuit Manufacturing Company Limited Vs West End Distributors Limited [1969] E.A 696 at 700. But it was Sir Charles Newbold, president of the court, who put it succinctly at page 701;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

I am of the view that that decision is on all fours with the present motion. To determine the matters proposed by the applicant would require the court to delve into the status of the parties and the claim without the full benefit of evidence. The preliminary objection as pleaded does not raise a pure point of law arising out of clear implication of the pleadings. It is not an application to strike out or add some parties as contemplated by order 1 rule 10 of the Civil Procedure Rules 2010. It is not entirely obvious from the plaint that the claim should be a representative suit. If it was unequivocally so, I would have no qualms about the application of order 1 rule 8. Law society of Kenya Vs Commissioner of Lands and 2 others [2003] KLR 110.

5. Furthermore, this court is now enjoined by articles 50 and 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. Upholding the preliminary objection would be inimical to the letter and spirit of the law. For all the above reasons, I find that the preliminary objection dated 10th May 2011 lacks merit. I dismiss it with costs to the plaintiff.

It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of May 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Mwangi for the Plaintiff.

Mr. Mugo for the 1st and 2nd Defendants.

Mr. Mugo for the 3rd Defendant.