



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Case 314 of 2012**

**THE PRESBYTERIAN FOUNDATION.....1<sup>ST</sup>  
PLAINTIFF**

**THE PRESBYTERIAN CLERK,PRESBYTERIAN CHURCH OF EAST AFRICA, LIMURU...2<sup>ND</sup>  
DEFENDANT**

**VERSUS**

**EAST AFRICA PARTNERSHIP LTD.....  
1<sup>ST</sup>DEFENDANT**

**EAST AFRICA PARTNERSHIP (AMERICA).....2<sup>ND</sup>  
DEFENDANT**

**RULING**

By a notice of preliminary objection dated 28<sup>th</sup> June 2012 and filed in this Court on 29<sup>th</sup> June 2012, the defendants have raised the following issues:

**1. The plaint dated 27<sup>th</sup> June, 2012 is incurably defective on the grounds that:-**

**(a) Contrary to Order 4 Rule 1 (4) of the Civil Procedure Rules, this suit has not been instituted by the First Plaintiff.**

**(b) The second plaintiff/applicant has no *locus standi* to institute this suit and the said application on behalf of the first plaintiff.**

**2. The Second plaintiff has no *locus standi* to institute these proceedings on his own behalf or on behalf of the unincorporated entity known as the Presbyterian Church of East Africa, Limuru Presbytery.**

**3. Under the Societies Act the Presbytery of Limuru has no capacity to sue on its own behalf or be sued in relation to the accounts of the Society known as the Presbyterian Church of East Africa.**

**4. The second plaintiff has no proprietary or beneficial interest in the suit property. In the**

**premises the reliefs sought are not available to the Second Plaintiff under Order 40 of the Civil Procedure Rules.**

**5. The suit herein and the said application have been instituted in express violation of the Constitution of the Presbyterian Church of East Africa (PCEA).**

In his submissions in support of the said objections, **Mr Kibe Mungai**, learned counsel for defendants, stated that the plaint is incurably defective for non-compliance with the provisions of Order 4 rule 1(e) of the Civil Procedure Rules. According to counsel, the 1<sup>st</sup> plaintiff is a foundation, a duly registered limited liability company, limited by guarantee. Within the meaning of the provisions of Order 4 rule 1, it is submitted that for it to properly institute a suit the plaint must be accompanied by a verifying affidavit of an authorised officer. In the present case, it is submitted that the deponent of the verifying affidavit describes himself as a clerk without stating that he is an official of the 1<sup>st</sup> plaintiff. Therefore not being an official, even though he states that he is authorised, there is no compliance with the law that the company has to swear an affidavit through authorised officer. Further, it is submitted that no authority has been annexed and hence there is no suit. The limb of the preliminary point is that even the 2<sup>nd</sup> plaintiff has no *locus standi* to institute the suit on behalf of the 1<sup>st</sup> plaintiff. According to counsel, the 2<sup>nd</sup> plaintiff is just a presbytery, one of the organs of the church which is the registered society. The 1<sup>st</sup> plaintiff is not an organ of Presbyterian Church of East Africa (PCEA). Therefore, it is submitted, the Presbytery of Limuru has no *locus standi* to institute the suit on behalf of the 1<sup>st</sup> plaintiff as it is not an official of the 1<sup>st</sup> plaintiff.

The second preliminary objection is that the 2<sup>nd</sup> plaintiff cannot institute the suit on own behalf or on behalf on an unregistered entity. A suit, it is submitted can only be filed by natural or legal person. In case of natural person, such as the Presbytery Clerk who has filed this suit, it is contended, he would require permission to file the suit in a representative capacity which has not been done. On the other hand if the 2<sup>nd</sup> plaintiff is the Presbyterian Church of Limuru then being not a legal person lacks *locus standi*.

Thirdly, under the Societies Act the Presbytery of Limuru cannot sue on behalf of the PCEA. A society, it is submitted, under the Act can only sue in the names of the registered officials. Yet it is not alleged that the second plaintiff is an official of the Church. All the branches or Presbyteries, cannot institute suits on their own.

Fourthly, it is submitted that the second plaintiff has no proprietary interest under Order 40 of the Civil Procedure Rules. The properties in question, it is contended, are in the names of the 1<sup>st</sup> plaintiff which has not instituted any suit. It is only the 1<sup>st</sup> plaintiff who, according to counsel, can seek the orders sought.

Finally, it is submitted that the plaintiffs have annexed a copy of the Constitution of the PCEA under which the Church, itself a registered society, is represented by registered officials. The foundation, on the other hand has its own directors and therefore as the suit is not brought by the registered officials or directors the suit must be struck out.

**Mr. Wasonga**, learned counsel for the plaintiff on his part opposed the objections. According to him, contrary to the submission that the 1<sup>st</sup> plaintiff is not properly in this suit, the suit has been properly filed. The plaint, according to counsel, is duly accompanied with a verifying affidavit as required by law. The deponent of the verifying affidavit has categorically stated that he is duly authorised to swear the affidavit and if the defendants are in doubt, then what they ought to do is to seek that the said authority be availed before the Court. The burden, according to counsel, shifts to the defendants to show that there was in fact no authority. Since there is nothing to show that the 1<sup>st</sup> plaintiff is denying the deponent's authority, there is, according to counsel, a competent verifying authority.

Secondly, it is submitted that looking at the verifying affidavit the deponent has clearly indicated that he is the Presbytery Clerk and hence the second plaintiff's officer. The second plaintiff is, it is submitted, in fact **Mr. Stanley Githu Kibicho**. It is therefore contended that both plaintiffs are properly in the suit

and if the Court were to find that the 2<sup>nd</sup> plaintiff is not properly before the Court then the same is not incurably defective and can be cured by amendment and have the matter heard on merits since there is a lot of property at stake.

In his rejoinder, **Mr Mungai**, opined that the plaintiffs were skirting round the issue which issue is that an official of the company has not sworn an affidavit. If the second plaintiff is not an official no authority can be conferred. If it is accepted that **Stanley Kibicho** is a natural person though his name does not appear in the title, the pleadings and the affidavits, it would still be necessary for the procedure for a representative suit be complied with. If it is his case that the dispensaries in dispute are his, counsel states, that contradicts the proprietary interest of the 2<sup>nd</sup> plaintiff and he cannot therefore sustain the suit for injunction.

I have considered the application and the submissions herein. The first issue for determination is the circumstances under which a preliminary objection can be entertained. In **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696, Law, JA** was of the following view:

**“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

As for **Newbold, P:**

**“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded 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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.**

In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J**(as he then was) expressed himself as follows:

**“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent’s very detailed “affidavit in reply to an**

**affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”... The applicant’s “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute”.**

The first issue for determination is whether on the facts, this suit has not been instituted by the First plaintiff. The first plaintiff is a Company Limited by guarantee. Under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so. In this case the verifying affidavit is sworn by one **Stanley Githu Kibicho**, the 2<sup>nd</sup> plaintiff herein. He deposes that he is duly authorised by the first plaintiff to swear the affidavit. The defendant’s quarrel is that he does not state that he is an official of the 1<sup>st</sup> plaintiff and not being such official there is no competent verifying affidavit sworn on behalf of the 1<sup>st</sup> plaintiff more so when no authority has been annexed.

I have had an occasion to deal with a similar objection in HCCC (Commercial & Admiralty Division) No. 122 of 2011 between **Mavuno Industries & Others vs. Keroche Industries Limited** in which I expressed myself as follows:

**“As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff’s bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaintiff or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of *Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR* and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage”.**

The Civil Procedure Rules do not define what an authorised officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavit be sworn by either directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word “authorise” which is defined by **Oxford Dictionary** as “sanction”; “give authority”; “commission”. That being the position, whether or not the 2<sup>nd</sup> plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted.

It is further submitted that the 2<sup>nd</sup> plaintiff, being a presbytery of Presbyterian Church of East Africa, a registered society, has no *locus standi* to institute these proceedings. I have not seen anywhere in the plaint where it is alleged that the suit is brought by a presbytery. Whereas that may be implied from the manner in which the plaint is drafted, from the title to the pleadings herein there are only two plaintiffs – the foundation and the presbytery clerk. The latter does not purport to bring the suit on behalf of any person. The mere fact that he has added his job description to his title does not necessarily make his employer a party to the suit and the mere fact that in the supporting affidavit he claims that the 2<sup>nd</sup> plaintiff is Limuru Presbytery does not make the Presbytery a party to the suit. Order 4 rule 1(1)(b) mandates that the plaint contains the name, description and place of residence of the plaintiff, and an address of service. The 2<sup>nd</sup> plaintiff is described as the Presbytery Clerk and not as the Presbytery itself. Whether or not he will be entitled to the orders sought if the pleadings are left in their present state must await the hearing of the application and the suit.

The second point is that the Presbytery being not a legal person cannot institute these proceedings and if the same are instituted by the clerk, then the provisions relating to representative suits should have been followed which has not been done in this case. I have already found that the presbytery is not a party to this suit. The 2<sup>nd</sup> plaintiff does not purport to bring these proceedings on its behalf. Accordingly the issue of representative procedure does not arise. The third issue is that under the Societies Act, the Presbytery of Limuru cannot sue on behalf of the church which is a Society under the said Act which can only sue in the names of the registered officials. Again my findings above that the Presbytery of Limuru is not the 2<sup>nd</sup> plaintiff herein takes care of the present objection.

The fourth issue is that the 2<sup>nd</sup> plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, that determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2<sup>nd</sup> plaintiff's position vis-à-vis the 1<sup>st</sup> plaintiff, I cannot say that the 1<sup>st</sup> plaintiff's suit is non-existent. It is further submitted that since the Church has registered officials and the 1<sup>st</sup> defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non-starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1<sup>st</sup> plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1<sup>st</sup> plaintiff's authorisation, that would be something else. However, that is not an issue that, properly speaking, can be the subject of a preliminary objection.

Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the defendants. In the result it is my view and I so hold that the issues raised in the notice of preliminary objection dated 28<sup>th</sup> June 2012 do not meet the threshold for preliminary objections. The same are accordingly dismissed with costs to the plaintiffs.

**Ruling read and delivered in court this 30<sup>th</sup> day of July 2012**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

Mr. Sumba for Mr. Wasonga for the plaintiffs

Mr. Wanyaga for Mr. Kibe for the defendants