



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO.392 OF 2010

CHARLES ODHIAMBO ONJIKO & OTHERS..... PLAINTIFFS

VERSUS

HOUSE OF GRACE MINISTRIES 1ST DEFENDANT

NAIROBI CITY COUNCIL..... 2ND DEFENDANT

RULING

A plaint was filed on 30th July 2010. It was filed by Mosi & Co. Advocates on behalf of the plaintiffs. It sought orders compelling the 2nd defendant to allow the plaintiffs pick their tools of trade at no fee at all. It also asked for special damages, general damages, costs of the suit, and interest.

On the same 30th July 2010 the plaintiffs filed a Chamber Summons under Order 39 rule 1, 2, 7, of the Civil Procedure Rules as well section 63(e) of the Civil Procedure Act (Cap.21 of the Laws of Kenya). The application sought restraining orders against both defendants.

Following the filing of the plaint and the Chamber Summons, on 12th October 2010 the 1st defendant through their advocates Ochieng, Onyango, Kibet & Ohaga Advocates filed a Notice of Preliminary Objections. In the objections, it was contended that the court did not have jurisdiction to entertain both the suit and the Chamber Summons. I will reproduce the objections hereunder. They are as follows:-

- (a) The suit herein is incompetent as it has been improperly brought as a representative suit without leave of the honourable court.**
- (b) That the suit is incompetent as it has been improperly brought contrary to the provisions of Order 1 rule 8 of the Civil Procedure Rules.**
- (c) That the House of Grace Ministries International is registered under the Societies Act Chapter 108 of the Laws of Kenya.**
- (d) That the House of Grace Ministries International being a society has no corporate personality in law and is incapable of being sued in that name.**
- (e) That the suit herein is incompetent as it ought to have been filed against the trustees of the House of Grace Ministries International.**

(f) **No substantive prayer for injunction has been pleaded in the plaint against the defendants contrary to the provisions of Order 39 of the Civil Procedure Rules.**

(g) **No verifying affidavits have been filed by any of the one hundred and one supposed plaintiffs contrary to the provisions of Order 7 (1) of the Civil Procedure Rules.**

(h) **No authority to plead or swear affidavits has been signed and filed by the other one hundred supposed plaintiffs to permit Charles Odhiambo Onjiko to swear an affidavit on their behalf contrary to the provisions of Order 1 rule 12 of the Civil Procedure Rules.**

The 1st defendant, through their counsel on 22nd October 2010, filed written submissions in support of their preliminary objections. It was contended that when the Chamber Summons application came up for hearing on 14th October 2010, the court made an order that the legal issues raised in the 1st defendants Notice of Preliminary Objections be determined first.

It was contended that the first issue in the preliminary objection is whether the suit had been properly instituted by the plaintiff. Counsel cited the provisions of Order 1(12) of the Civil Procedure Rules with regard to representative of suits. In particular, counsel referred to rule 12 (1) and (2) which provides as follows:-

“12 (1) where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more defendants than one, any one of them may be authorized by any other of them to appear plead or act forr such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

Counsel contended that no written authority was sought or filed herein by the other plaintiffs. The omission was fatal to the suit. Reliance was placed on the case **Bunson Travel -vs- Kenya Airways Ltd - HCCC NO.304 of 2004** (unreported). Counsel also added that the other one hundred plaintiffs had not filed their respective verifying affidavits together with plaint as required by the law. Counsel contended that the above two requirements were mandatory and therefore the omission by the plaintiffs meant that the suit was incompetent and the court should dismiss the suit with costs.

Counsel argued that the second issue in the objections was whether the suit had been properly instituted by the plaintiffs against the defendants. Counsel submitted that the 1st defendant was sued in its registered name pursuant to the Societies Act (Chapter 108 of the Laws of Kenya). This meant that the suit against the 1st defendant was fatally defective since societies could only be sued by the way of representative action pursuant to Order 1 rule 8 of the Civil Procedure Rules. House of Grace Ministries as a society had no corporate existence.

It was contended that though under Order 1 rule 8 of the Civil Procedure Rules, leave of the court to bring a representative suit was not a mandatory requirement, the practice had been for parties instituting representative action to seek the leave of the court before instituting the suit. Courts had also held repeatedly that suits against societies must be instituted by way of representative suit. Reliance was placed on the case of **Hinga & Another –vs- P.C.E.A.** through **Revered Dr. Njoya and Another [1986] KLR 317** wherein the court held that, though it was not mandatory to obtain leave to file a representative action against a church, the suit should not have been brought against Reverend Njoya who was not in the hierarchy of the P.C.E.A. church.

Reliance was also placed on **Eritrea Othodox Church –vs- Wariwax Generation Ltd [2007] e KLR** where Onyancha J held that a society is not an incorporated body which can sue or be sued in its own name.

The counsel for the 1st defendant, Mr. Oduol, also highlighted the preliminary object and the submissions

on the hearing date.

The plaintiffs did not file submissions to the preliminary objection. On the hearing date of the preliminary objection, Mr. Agina who appeared for the plaintiffs, submitted that the preliminary objections and submissions on the same were filed in 2010. However on 10th of January 2011 new Civil Procedure Rules came into force. The guiding principles in Chapter 1 of the Civil Procedure Act (Cap. 21) now imposed responsibilities on the courts to ensure that parties were allowed to ventilate their cases equally. The new rules require that the courts should consider the possibilities of hearing parties rather than striking out pleadings on the basis of technicalities. It was the contention of counsel that the preliminary objections had been overtaken by legislation. Counsel argued that the case authorities relied upon were based on provisions which were no longer good law. Counsel urged the court to dismiss the preliminary objections.

Mr. Oduol for the 1st defendant responded by stating that the provisions of the Societies' Act had not been amended. In addition, Order 51 of the Civil Procedure Rules still provided for the filing of the preliminary objections. Counsel contended that the jurisdiction of the court could only be invoked in accordance with the law and procedure. He argued that counsel for the plaintiffs had not cited any law that negated the provisions of the law relied upon by the 1st defendant.

I have considered the preliminary objections filed, the submissions, both written and oral, and the authorities cited. This is an objection that challenges the whole suit. It is the contention that the suit and any subsequent application herein are incompetent because of issues regarding leave to sue or be sued in a representative capacity as well as an objection that House of Grace Ministries International is a registered society and therefore should have been sued through its trustees. There is also an objection that the plaintiffs did not give consent to one of them to file affidavits and act on their behalf.

Authorities have been cited. Indeed, there are authorities that hold that a society such as the 1st defendant should be sued through its trustees. The case of **Eritrea Orthodox Church –vs- Wariwax Generation Ltd 2007 e KLR** supports this position. The 1st defendant was sued in its own name. In my view however, such an error can be corrected at an appropriate time, in the course of proceedings. There is no contention herein that the 1st defendant is a wrong party. The only contention being that its trustees were not named.

It is also true that Order 1 rule 12 of the Civil Procedure Rules requires that where there is more than one plaintiff filing suit, then any one of them or more of them may be authorized to appear on behalf of others, provided there is authority in writing signed by those others who are not listed as plaintiffs. In the present case, there are listed one hundred and one (101) plaintiffs. The verifying affidavit filed was sworn by Charles Odhiambo Onjiko. Filed also with the plaint is a “consent” wherein the plaintiffs authorized Charles Odhiambo Onjiko to represent the others in the suit. I find the argument that the other plaintiffs did not authorize of him to conduct the proceedings on their behalf to be untenable. Even if there was an irregularity in that regard, it can still also be rectified.

The 1st defendant has not stated that it has been prejudiced or misled by any of the alleged irregularities. The notice of preliminary objections herein was filed on 12th October 2010 after a new Constitution was promulgated in August 2010. Under Article 159 (2) (d) of the Constitution, courts are enjoined to exercise judicial authority and be guided by, among others, the principle that substantive justice should be administered. It provides –

“159. (1) (d) Justice shall be administered without undue regard to procedural technicalities;.”

Indeed, there might be irregularities herein. However, the 1st defendant has not shown that they will suffer any prejudice or be handicapped in defending themselves due to the said irregularities. In addition, in my view, the irregularities complained of could be rectified through amendments, if necessary, which can be considered by the court at an appropriate time.

The previous Constitution did have a provision that justice should be administered without undue regard

to procedural technicalities. Our present Constitution has such a provisions. The Constitution is superior to Acts of Parliament as well as Rules made thereunder. The Constitution requires that, as far as possible, substantive justice should be administered by all the courts.

The plaintiffs are more than a hundred people and their names are listed in the plaint. They have given some sort of “consent” in writing which was filed with a plaint for one of them to pursue the matter on their behalf. The 1st respondent (objector) has been described in the correct name. In those circumstances, I am of the view that if there are any irregularities, they have not caused substantive prejudice to any of the parties. They are also irregularities which could be corrected for substantive justice to be done between the parties. I therefore find no merits in the preliminary objections raised by the 1st defendant at this stage. The legal issues raised are premature.

Consequently the preliminary objections of the 1st defendant are hereby dismissed. Costs in the cause.

Dated and delivered at Nairobi this 14th Day of July 2011.

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GEORGE DULU
JUDGE

In the Presence of:

No appearance for Plaintiff

Mrs. Oduor holding brief for Mr. Oduol for 1st Defendant

No appearance for 2nd Defendant

C Muendo – Court clerk