



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII Civil Suit 162 of 2004

JEREMIAH OTIENO OKENYE.....PLAINTIFF/APPLICANT

-VERSUS-

PASTOR ENOCH ARITA MOKUA)

DEACON HEZRON OTISO).....DEFS/RESPONDENTS

RIONCHIRI PENTECOSTOAL ASSEMBLIES OF GOD)

RULING

On 8/11/2004 the plaintiff/applicant brought this suit against the three defendants/respondents over land parcel LR.No.Gesima Settlement Scheme /45 which he claimed was registered in his name since 4/12/2003, but that the respondents had since about September, 2004 illegally entered and occupied a portion of it and erected church structures thereon. The applicant sought a declaration that he was the legal owner of the land; an eviction order against the respondents and the demolition of the structures; and, a permanent injunction against them.

The 1st and 2nd respondents were said to be pastor and deacon, respectively, of the 3rd respondent church.

The respondents denied the claim. The 1st and 2nd respondents denied they were officials of the 3rd respondent, or that they had trespassed on the said suit land, or at all. The alternative plea was that the applicant had got public land to be registered as part of the land he was claiming.

On 20/11/2006 the applicant obtained an order for temporary injunction against the respondents. Judgment had been entered for the applicant against the 3rd respondent on basis that it had been served but had not entered appearance or filed defence. The same was, however, set aside on 25/6/2008.

On 24/10/2008 the applicant filed the present application under *Orders 1 rule 10 and 6A rules 3,5,7 and 8 of the Civil Procedure Rules and sections 3,3A, 63(e) and 100 of the Civil Procedure Act* seeking leave to amend the plaint to enjoin the Registered Trustees, Pentecostal Assemblies of God Church as the 3rd defendants in place of Rionchiri Pentecostal Assemblies of God, who are the current

defendant. The applicant stated that it was a mistake and /or an error to sue the 3rd defendant which is an unincorporated body. He has found out that it is only the intended defendants who are mandated by law to sue or be sued for all actions and/or omissions of all the branch churches. The present 3rd defendant is one such branch church. The position taken by the respondents, in the Grounds of Opposition, is that the original plaint is a nullity and cannot therefore be amended. This is because the respondents have no capacity to be sued. It was stated that the amendment is likely to change or alter the nature and character of the cause of action and should not be allowed. The substitution of the 3rd respondent, it was stated, would not be allowed as it has been caught up by the period of limitation under *Limitation of Actions Act (Cap.22)*. It was further alleged that the suit had been overtaken by events due to the non-existence of LR. No Gesima Settlement Scheme/45.

I listened to Mr. Oguttu for the applicant and Mr. Ombachi for the respondents on the application. It was not alleged that there has been delay in bringing the application. It is also notable that the main suit has not been heard.

The applicant has since the filing of the suit subdivided parcel 45 to various parcels including parcel L.R. no. *Gesima Settlement Scheme/563* which, upon amendment, he wants to be the suit land. It is the portion he alleges the respondents trespassed on and built church structures thereon. This subdivision alone, I find, cannot be basis for saying that the suit has been overtaken by events, or that if the amendment is granted it will change or alter the nature or character of the cause of action.

Mr. Ombachi argued that this was an action regarding trespass which is a tort. It has a limitation period of 3 years which has since expired, and therefore amendment cannot be allowed as the applicant would be non-suited. Mr. Oguttu's response was that this was a suit to recover land and, by dint of *sections 6 and 7 of the Limitation of Actions Act*, can be lodged within 12 years and therefore the suit is not time-barred.

Paragraph 9 of the plaint alleges trespass against the respondents. Trespass is a tort. *Under section 4(2) of the Limitation of Actions Act*, an action founded on tort may not be brought after the end of three years from the date of cause of action. The cause of action arose in September, 2004. The amendment is being sought in October, 2008. The applicant would be non-suited. The decision in *Javed Iqbal Abdul Rahaman and another .V. Bernard Alfred Wekesa Sambu and Another, Civil Appeal no. 11of 2001at Nairobi* is relevant here. It follows that the amendment cannot be sanctioned. This is sufficient to deal with the application, which application I order dismissed with costs.

Dated, signed and delivered at Kisii this 20th day of January,2010.

A.O.MUCHELULE

JUDGE

20/1/2010

Before A.O.Muchelule-J

Court clerk-Bibu

Mr. Oguttu for Applicant

Mr. Ombachi for Respondent

COURT: Ruling in open Court.

A.O.MUCHELULE

JUDGE

20/1/2010