



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 372 of 2009

**MUDHIHIRI MOHAMMED
MOHAMMED MUDHIHIRI
AHMED RAMADHAN**

**Suing for and on behalf of the Board of Trustees of
PUMWANI MUSLIM COMMUNITY**

CENTRE ASSOCIATION.....PLAINTIFFS/APPLICANTS

VERSUS

**AHMED IMANI ALI
ABDUL KARURI**

**(sued in their own individual capacities and for and on behalf of
Pumwani Riyadhha Mosque Committee by virtue of being its officials)**

**MOHAMMED ABASS
MWAI MWINYI**

PUMWANI RIYADHA MOSQUE COMMITTEE.....DEFENDANTS/RESPONDENTS

RULING

1. The Plaintiffs commenced this suit by way of a plaint that was filed in court on 29/07/2009. The Plaintiffs sought a number of reliefs among them a prayer for a permanent injunction to restrain the Defendants, their servants, representatives, employees and/or agents jointly and severally from dealing, trespassing and/or entering the disputed piece of land known as LR No. 209/2378/15 together with the developments standing thereon. Contemporaneously with the plaint, the Plaintiffs filed a Chamber Summons seeking interim orders of prohibitory injunction and also prayed for a mandatory injunction ordering the Defendants to open/unlock the entrance to Ukumbusho hall within the disputed property and to remove metal railings blocking the entrance to the parking area of the same Ukumbusho hall.

2. The Defendants have raised Preliminary Objections to the suit. On 3/08/2009, the 1st and 2nd Defendants filed their notice of Preliminary Objection and raised the following objections:-

1. *The Plaintiffs have no locus standi to institute the suit herein.*

2. *The suit is incurably defective as the Board of Trustees of Pumwani Muslim Community Centre Association does not exist in law and in fact.*

3. *The Plaintiffs' application dated 29th July 2009 is incurably defective.*

3. The 5th Defendant, Pumwani Riyadhha Mosque Committee, raised the following Preliminary Objection's:-

1. *The Plaintiffs have wrongfully and unlawfully enjoined the 5th Defendant in this suit.*

2. *The Plaintiffs have no locus standi to sue the 5th Defendant in respect of the suit property known as LR No. 209/2378/15.*

3. *The Plaintiffs suit vide the plaint dated 29th July 2009 and application dated 29th July are incurably defective.*

4. On the 6/10/2009, the 5th Defendant filed yet another notice of Preliminary Objection on the grounds that:-

1. *The Plaintiffs have no locus standi to institute the suit herein.*

2. *The Plaintiffs' case against the 5th Respondent is null and void ab initio.*

5. In their written submissions on behalf of the Defendant dated 15/10/2009 counsel for the Defendants, **M/s Kinoti & Kibe Company Advocates**, summarized the Grounds of Preliminary Objection as follows:-

(i) *Whether the Plaintiff's have locus standi to institute the suit*

(ii) *Whether the Plaintiffs' case against the 5th Defendant is null and void ab initio*

(iii) *Whether the plaint dated 29th July 2009 and the application dated 29th July 2009 are incurably defective*

(iv) *Whether the suit is incurably defective on account of non-existence of a Board of Trustees of Pumwani Muslim Community Centre Association*

6. The Defendant's counsel in their written submissions dated 15/10/2009 said that they would not pursue ground number (iv) of the Preliminary Objection. Learned Counsel for the Defendants underscored the fact that a Preliminary Objection proceeds from the assumption that the facts pleaded or deponed to by the other party are true; that is to say that the facts as pleaded in the plaint and the supporting affidavit sworn by Mudhihiri Mohammed on 29/07/2009 and the Further Affidavit dated 28/09/2009 are true (see **Mukisa Biscuit Company vs Westend Distributors Limited [1969] EA 696**). The **Mukisa Biscuit** case defines what a Preliminary Objection is in the following terms at page 701:-

"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."

Do the Plaintiffs have locus standi to institute?

7. Learned counsel for the Defendants argued that the answer to the above question is in the negative on the grounds that:-

(a) *the beneficial owner of the suit property is Pumwani Muslim Community Centre Association which is a registered society and that in the circumstances, the Plaintiffs do not possess the locus standi to institute the suit*

(b) *the Constitution of the said society provides at clause 29 for the appointment of Trustees who shall be vested with the property of the Association as provided under clause 17 of the Constitution which says that management of the association shall be in the hands of a committee comprising the following members:- Chairman, Vice-Chairman, Secretary, Vice-Secretary, Treasurer and Vice-Treasurer*

8. The argument by the Defendants regarding the society's right to sue is that such right is vested in the Managing Committee of the Association as opposed to its trustees whose function it is to keep custody and investment of the funds and property of the society; as provided under Section 2 of the Societies Act. The Defendants contend that the Plaintiffs are not officials of the society and cannot therefore sue. (see **Simu Vendors Association –vs- The Town Clerk, City Council of Nairobi & Another (2005)e KLR**).

9. The Defendants argued further that since a society can only sue or be sued through its registered officers, the Plaintiffs herein had no capacity to institute this suit and that as such the suit is a nullity **ab initio**. The Defendants also contended that the suit as it is cannot be salvaged by amendment. They argued that the Plaintiffs, who are all trustees of the Association have acted in contravention of Section 24(a) of the Societies Act. Finally the Defendants contended that since it is admitted that the Society is the beneficial owner of the suit property, the Applicants cannot purport to institute this suit on behalf of the society.

Is the Suit Agent the 5th Defendant void ab initio?

10. The second issue on whether the Defendants have made passionate submissions is whether the Plaintiff's case against the 5th Defendant is null and void ab initio. It is their contention that since the

5th Defendant/Respondent is a registered society run by identifiable officials, no proceedings can be instituted in its name as held by Bosire J (as he then was) in HCCC No. 5116 of 1992 (OS) – **Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank**, where the learned Judge held as follows:-

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 Civil Procedure Rules. In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name.”

11. The Defendants contended that the instant suit was commenced in the name of a religious organization which is not a body corporate and therefore with no capacity to institute proceedings in its own name. The issue that arises here is whether the reverse position is true.

Are both the suit and the Application dated 29/07/2009 incurably defective?

12. The third ground of objection is that both the suit dated 29/07/2009 and the Chamber Summons of the same date are so incurably defective that they ought to be struck out. To buttress this argument, the Defendants argued as follows:-

(i) *that under Order XXXVI Rule 1(a) and (g) of the Civil Procedure Rules, the applicant ought to have commenced this suit by way of Originating Summons and not by way of a plaint as the issues directly in issue in this suit affect the Plaintiffs’ right or interest and administration of the suit property. That failure to comply with the rules is fatal to the whole suit.*

(ii) *That the plaintiff failed to comply with Order VII Rule 4(1) of the Civil Procedure Rules in that the Plaintiffs failed to state in what capacity they were suing and in what capacity the Defendant was being sued. The Defendants contend that there is a glaring discrepancy between the description the Plaintiffs give themselves in the title of the plaint and their description in paragraph 1 of the plaint. This omission the Defendants state is fatal to the Plaintiff’s suit, in light of the provisions of Order 1 Rule 8 of the Civil Procedure Rules.*

(iii) *That the Plaintiffs’ plaint does not comply with Order VII Rule 5 of the Civil Procedure Rules which requires that a plaint must show that the Defendant is or claims to be interested in the subject matter and that he is liable to be called upon to answer the Plaintiff’s demand. Counsel for the Defendants submitted that the Plaintiffs failed to supply particulars of pleadings sought by the Defendants vide a request filed in court on 4/08/2009.*

(iv) *That the Plaintiffs failed to comply with Order 1 Rule 8 of the Civil Procedure Rules as regards the representative suit.*

13. The Preliminary Objections are opposed. The Plaintiffs/Applicants filed their written submissions dated 6/11/2009 through the firm of N.O. Sumba & Company Advocates. It is the position of the Plaintiffs that the grounds of objection relied upon in seeking to dismiss this suit for allegedly being defective are frivolous and do not meet the requirements as in law provided.

14. Regarding the first ground as to whether or not the Plaintiffs have locus standi to institute this suit, the Plaintiffs submitted that the Plaintiffs are suing in their capacities as trustees of Pumwani Muslim Community Centre Association and by extension the registered lessees in their official capacities of the suit property. The Plaintiffs rely in section 3(3) of the Trustees (Perpetual Succession) Act Cap 164 of the Laws of Kenya which states:-

“(3) The Trustees shall thereupon become a body corporate by the name described in the certificate and shall have perpetual succession and a common seal and power to sue and be sued in their corporate name subject to the conditions contained in the certificate, to hold and acquire and by instruments under the common seal to convey, transfer, assign, charge and demise any moveable or immoveable property or any interest therein now or hereafter belonging to or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.”

15. It is to be noted that in paragraph 1 of the plaint the Plaintiffs describe themselves as trustees of Pumwani Muslim Community Centre Association on whose behalf they have brought the suit. Counsel for the Plaintiffs has argued that from the provisions of section 3(3) of Cap 164, the Plaintiffs are the rightful persons to institute this suit. The Plaintiffs are urging the court to reject the first ground of objection raised by the Defendants herein.

16. Counsel for the Plaintiffs contended further that the Plaintiffs stated status is made even stronger by the fact that the beneficial owner of the suit property is Pumwani Muslim Community Centre Association and that section 29 of the said Associations Constitution makes provision for the appointment of trustees into whose hands is vested the power and authority to sue and be sued and the vesting of the Association property. Counsel for the Plaintiffs further submitted that the furthest that ground 1 of the Preliminary Objection can go is to result in misjoinder of parties which would in any event not be fatal to the Plaintiff's suit.

17. Concerning the second ground of objection, that is to say whether the Plaintiff's suit against the 5th Defendant/Respondent is null and void ab initio, counsel for the Plaintiffs submitted that such a ground cannot properly fall within the definition of a Preliminary Objection as set out in the **Mukisa Biscuit** case (above). Counsel argued that such a ground would, if upheld by the court only amount to misjoinder of parties that would be curable under the relevant provisions of Order 1 of the Civil Procedure Rules. Counsel submitted that the 5th Defendant has no trustees who could be sued. Counsel for the Plaintiffs was of the view that the 5th Defendant was and still is a necessary party to this suit in line with the provisions of Part VIII Section 50 of the Societies Act which provides:-

"50. (1) Every order, notice, summons or other document issued under this Act or under any rule made thereunder shall be validly served –

(a) On a society, if it is sent by registered post addressed to it at its registered postal address; or

(b) On an individual, if it is sent by registered post addressed to him at the registered postal address of the society with which he is concerned.

18. On ground 3 of the Preliminary Objection, namely whether both the plaint and the application are defective for failure by the Plaintiffs to commence suit by way of an Originating Summons, counsel for the Plaintiffs submitted that there is no merit in the said objection because this suit is not about "any question affecting the rights or interest" of the Plaintiffs as creditors, devisees, legatees heirs or cestuique trustees, nor is the court being asked to determine any question arising directly out of the administration of the estate of a trust. Counsel for the Plaintiffs submitted that the reliefs sought in this suit are clear:- the grant of mandatory injunctive orders under Order XXXIX of the Civil Procedure Rules. For these reasons, counsel for the Plaintiffs submitted that it would be draconian to strike out these proceedings when it is not so plainly clear that this suit is hopeless. Counsel relied on the Court of Appeal decision in **Civil Appeal No. 132 of 1989 Nitin Properties Ltd. versus Jagjit Singh Kalsi & Another**, in which the Court of Appeal held that even where a party had used the wrong procedure, a suit could be given a new lease of life through amendments. Counsel argued further that the Plaintiffs status in this case is not in doubt since the Trust Deed under which they have come to court is duly registered.

19. Counsel for the Plaintiffs also submitted that the Plaintiffs in this suit are not suing in a representative capacity as alleged by the Defendants, and that this fact is evidenced by the various verifying affidavits sworn by the Plaintiffs who are suing in their capacity as Trustees of the Pumwani Muslim Community Centre Association which the beneficial owner of the suit property. I entirely agree with the Plaintiffs' submissions in this regard.

20. The Plaintiff's counsel cited a number of authorities all of which have been considered by the court. Counsel submitted that the authorities cited by Defendant's counsel in this case have no relevance as the circumstances in this case are clearly distinguishable from the circumstances in those other cases. Counsel for the Plaintiffs has urged the court to dismiss the objections and allow the Plaintiffs to proceed with their case.

21. I have now considered the two contending views on the Preliminary Objection raised by the Defendants against the Plaintiff's suit. I have also considered the law, and in particular Section 3(3) of the Trustees (Perpetual Succession) Act, Cap 164 Laws of Kenya. The question that arises is whether the Defendants Preliminary Objection has met the threshold of what constitutes a Preliminary Objection that was set out in the **Mukisa Biscuit** case (supra). While counsel for the Defendants says so, counsel for the Plaintiffs thinks otherwise.

22. As a starting point, it is worth noting that the Defendants' abandoned ground number 4 of their Notice of Preliminary Objection which was whether the suit is incurably defective on account of non-existence of a Board of Trustees of Pumwani Muslim Community Centre Association. I think that the Defendants were wise in abandoning this ground because there is evidence on record to show that there is in place a Board of Trustees of Pumwani Muslim Community Centre Association on whose behalf this suit has been brought by the Plaintiffs.

23. Having thus resolved ground number 4 in favour of the Plaintiffs, are the remaining three (3)

grounds valid grounds to warrant the striking out of this suit together with the application? The answer to this question is in the negative. The reason for reaching this conclusion is found in the documentary evidence on record. The suit property is registered in the names of the three Plaintiffs as trustees for Pumwani Muslim Community Centre Association. By the provisions of Section 3(3) of Cap 164 of the Laws of Kenya, the three Plaintiffs are the rightful people to sue and be sued on behalf of Pumwani Muslim Community Centre Association which is the beneficial owner of the suit property. The court is therefore satisfied that this suit is properly before the court as filed by the three (3) Plaintiffs. In the circumstances, I do not agree with the position taken by the Defendants that the Plaintiffs ought not to have been the ones to bring this suit. It is true the Constitution of the said Association provides for the establishment of a Management Committee, but as rightly pointed out by counsel for the Plaintiffs, the written law supercedes the internal constitutional arrangements of the Association. Grounds 1 and 3 of the Preliminary Objection are therefore rejected.

24. As regards the second ground, namely whether the Plaintiffs' case against the 5th Defendant/Respondent is void ab initio I find that the Defendants have not come out clearly to demonstrate in what way the suit would be void abinitio against the said 5th Defendant. The initial complaint by the Defendants was that the 5th Defendant has been unlawfully enjoined in the suit. If that be the complaint, and I believe it is because all the arguments put forward by the Defendants pointed in that direction, then such an error is not fatal to the Plaintiffs' case. Order 1 Rule 10 of the Civil Procedure Rules would take care of the 5th Defendants concerns without necessarily resorting to the drastic step of striking out the Plaintiffs' suit. The court has power to order that the name of any party improperly joined whether as Plaintiff or Defendant be struck out and there is equal power for the court to bring on board a party "*whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the sui.*"

25. The upshot of what I have said above is that the Defendants Preliminary Objections filed by the 1st, 2nd and 5th Defendants/Respondents on 3/08/2009 and 6/10/2009 have no merit. The Preliminary Objection is hereby dismissed with costs to the Plaintiffs. The Plaintiff's application shall now proceed to be heard on its merit on a date to be appointed hereafter.

Orders accordingly.

Dated and Delivered at Nairobi this 19th day of January, 2010.

R.N. SITATI
JUDGE

Delivered in the presence of:-

Mr. Simba (present) for the Plaintiff/Applicant

Mr. Wanyaga for the Defendant/Respondent

Weche – court clerk