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

**Civil Case 507 of 2009**

**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CIVIL CASE NO. ELC NO.507 OF 2009**

**1.BISHOP REV. JOSEPH MEMBA SYUMA**
**2.BISHOP ELIJAH MULELA**
**3.BISHOP JOEL KIJIRU**
**4.JEREMIAH NZIOKA NGIEMA**
**5.THOMAS MUTUSE**
**6.ISAAC BETT (Suing on their own behalf as members and as registered Trustees and for and on behalf of GOOD NEWS CHURCH OF AFRICA AND THE GOSPEL FURTHERING BIBLE CHURCH TRUST (Registered Trustees)**
**7.GOOD NEWS CHURCH OF AFRICA AND THE GOSPEL FURTHERING BIBLE CHURCH TRUST……….....................................................................…..PLAINTIFFS**
**-VERSUS-**
**DARASA INVESTMENTS LTD……….......................…………………DEFENDANT**

**RULING**

The application before me is by way of Chamber Summons dated 30th August, 2010 under Order XI Rules 1 and 2, Order VI Rule 13(1) D of the Civil Procedure Rules and Section 3A of Civil Procedure Act for orders that;

1. This suit stayed by the court on 8th April, 2010 be and is hereby reinstated at the instance of the applicant for purposes of this application only.
2. The following suits and all proceedings pending thereunder be consolidated with this particular suit:
a. NAI ELC NO.470 OF 2009
b. NAI ELC NO.1909 OF 2001

3. All the suits so consolidated and all proceedings pending thereunder be and are hereby dismissed or struck out for being an abuse of the process of the court.

4. The costs be provided for.

There are three grounds set out in support of the orders as follows;

1. The plaintiffs in all the said suits are none existent entities in law, filing a multiplicity of suits in the hope that by some lapse of vigilance, one will stick.

2. Having no *locus standi*, all the suits filed by the respondent are stillborn *ab initio*
3. It follows that any applications filed on behalf of the respondents are non-staters and abuse of the process of the court.

There is in addition to the said grounds, an affidavit sworn by Mr. Paul K. Kamau who is the advocate for the defendant/applicant. The application is opposed and there is an affidavit sworn by Bishop Rev. Joseph Memba Syuma on behalf of the plaintiffs.

Both learned counsel for the parties herein have filed submissions which I have noted. On 13th September, 2010 Rawal J. recorded an order by consent where by the suits were consolidated in terms of prayer No.2 of the said Chamber Summons. The issue before me now is the striking out or otherwise of the said suits in terms of prayer No.3 of the said Chamber Summons.

Order VI Rule 13(1)(d) reads as follows;

**"13(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that**

**(a)–**
**(b)–**
**(c)–**
**(d) It is otherwise an abuse of the process of the court,**
**and may order the suit to be stayed or dismissed or judgment may be entered accordingly, as the case may be."**

The learned counsel for the defendant/applicant has set out in detail the reasons why he seeks the order for dismissal, while the learned counsel for the plaintiffs has in equal measure set out the reasons why such an order should not be granted. The thrust of the application is that the plaintiffs are not the trustees of the 7th plaintiff to have the *locus standi* to sue on its behalf. Even if they were, the 7th defendant, it is alleged, is not registered and therefore has no capacity to litigate. On the other hand, it is the plaintiffs' case that the plaintiffs are clothed with sufficient authority to litigate against the defendant in their individual capacities and also as officials of the 7th defendant. From the pleadings the plaintiffs have pleaded on the face of the plaint that they are "suing on their own behalf and as registered trustees for and on behalf of" the 7th defendant.

The issue of *locus standi* has been addressed in several authorities but for good reason I shall not be referring to any of those decisions for to do so at this stage, may be prejudicial to the parties. I say so because, in the respective plaints in the consolidated cases the plaintiffs have set out not only their capacities in those suits but also the transgressions alleged against the defendant such that, it is not only their capacity that is in issue, but also several other matters that touch on the subject matter herein. At the centre of these protracted proceedings is a parcel of land known as LR. No.36/VII/586 Grant No.23941/1 situate in Eastleigh Nairobi. This property has been a subject of multiple suits and also some allegations that boarder on criminal offences still under investigation.

*Locus standi* in literal terms means a party's interest in a particular matter that is brought before the court. That interest may be official, personal, economic or even environmental. It may also be an interest that covers all those categories but not necessarily limited thereto. Severally authorities have been cited by the learned counsel for the applicant to dislodge the plaintiffs as litigants capable of suing the defendant in this case. These include **High Court Misc Application No.427 of 2005, Simu Vendors Association -vs – The Town Clerk City Council of Nairobi and Another, Civil Case No.606 of 2007 (O.S) Gabriel Muli Musilu - vs – George Mwangi and Another,** and **High Court Civil Case No.672 of 2007, Eritrea Orthodox Church vs – Wariwax Generation Limited**. The thrust of all these decisions point to the fact that the plaintiffs herein lack the legal capacity to institute this suit. The plaintiffs have shown that the defendant has previously sued the 7th defendant among others in respect of the same suit property. In so doing, it is my considered view that they recognized the interest of the 7th defendant in the suit property. Additionally, Order I Rule 8 of the Civil Procedure Rules has not been cited by the defendant to dislodge the plaintiffs from these proceedings.

In one of the defences filed by the parties herein, and in particular Civil Case ELC No.507 of 2009 which has been reinstated for purposes of this application, the issues raised therein are instructive. Paragraphs 5, 7, 11 and 16 when read with the rest of the plaint clearly show that the issue of the capacity and or *locus standi* of the plaintiffs is only but one of many go to the root of the whole dispute. The question that follows is whether or not such an issue can be determined by an application such as the one before this court? As one would expect, evidence has to be adduced to justify the capacity of the plaintiffs in terms of the pleadings both in the plaint and the defence filed herein.

The decided cases on applications of this nature point to the fact that courts should always endeavour to sustain a suit rather than strike it out because, striking out of a suit is a drastic measure that should only be invoked in very clear and unambiguous situations. In the case of ***DT Dobie and Company (Kenya Ltd) -vs – Muchina [1982] KLR 1*** the Court of Appeal held *inter alia;*

> 1. The words in "**reasonable cause of action**" in Order VI Rule 13(1) means an action with some chance of success, where the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.
> 2. The words "**cause of action**" means an act on the part of the defendant which gives the plaintiff his cause of complaint.
>
> 3. As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery or oral evidence, it should be used sparingly and cautiously.

In the same case the learned judges quoting several English decisions said as follows;

**"In *Republic of Peru v – Peruvian Guano Company*, 36, Ch Div 489 at pp 495 and 496**

> "It has been said more than once that the rule is only to be acted upon in plain and obvious cases and in my opinion the jurisdiction should be exercised with extreme caution."

**Per Swinfen Eady LJ in *Moore – vs. _ Lawson and Another* (1915) 31 TLR 418 at p.419.**

> "It is a very strong power indeed. It is a power which, if it not be most carefully exercised might conceivably lead a court to set aside an action in which there might really after all be a right and in which the conduct of the defendant might be very

> wrong and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon….Therefore unless the case be absolutely clear, I do not think the statement of claim ought to be set aside as not showing a reasonable cause of action.
>
> We are asked to set it (action) aside, partly on the ground that it discloses no reasonable cause of action. I will not decide the case upon that ground, although I think it is most difficult to see what is the reasonable cause of action upon the pleadings as they stand."

**Per Denman J in *Kellaway v Bury* (1892) 66LT 599 at pp 600 and 601 upon appeal:**

> " That is a very strong power and should only be exercised in cases which are clear and beyond all doubt … the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments"

**per Lindley LJ ibid p 602.**

> "It has been said more than once that rule is only to be acted upon in plain and obvious cases and in my opinion, the jurisdiction should be exercised with extreme caution."

**per Lord Justice Swinfen Easy is *Moore v – Lawson and Another* (supra) at p.419.**

> "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved."

**per Lord Herschell in *Lawrence v – Lord Norreys* 15AC 210 at p.219**

> "The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court."

The reasons for such a cautionary approach are clear. A party who comes to court expects to have his day in court to justify whatever claim that he may advance. That is not to say that the court is bound to hear all cases that are brought before it. Some of the cases may indeed disclose no cause of action and are an abuse of the court process. Whatever the case, however weak a litigant's case may be he or she should not be driven from the seat of judgment. Indeed, in ***Nagle v – Fielden and Others (1966) 2QBD 663 at 648 Danckwerts, L.J*** had this to say:

> **"It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly it is necessary to consider whether or not this plaintiff has an arguable case………"**

Further to the foregoing, the cases are coached in such a way that where a suit may be salvaged by way of an amendment then such an opportunity should be granted to the litigants. I hasten to add that the subject matter of the suit itself is a relevant consideration in addressing applications of this nature. The history of this litigation is awash with claims that all transactions relating to the suit property from the time the plaintiffs started litigating are tainted with fraud and other untoward allegations attributed to several parties.

There is also the allegation that in the pendency of court orders and, notwithstanding the fact that restraining orders were registered against the title, transactions have continued in respect of the said title.

Issues of land are very close to the Kenyan people and the plaintiffs are not exempted from that. It is an emotive issue which the court takes judicial notice of, and so, considering that the subject matter herein is land the application to strike out a suit of this nature in a summary manner, cannot be sustained because injustice may result.

The order sought by the defendant is prerogatory and the court has to exercise that discretion judicially. In my view, the application must fail because it cannot be granted without resultant injustice on the part of the plaintiff. I am fortified in so holding by the provisions of Section 1A of the Civil Procedure Act as introduced by Act No.6 of 2009 which emphasizes the overriding objective of the Civil Procedure Act and the rules made thereunder, that is, to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes governed by the Act.

Accordingly this application is dismissed with costs to the plaintiffs.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 4th day of November, 2010.***
**A. MBOGHOLI MSAGHA**
**JUDGE**