



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL SUIT 173 OF 2009

JOSEPH KAMAU MWANGI

FRANCIS KIGUNDA

JEREMIAH KARIUKI

KARIUKI GATHI

KARANJA MUKIRI

NUDNGU GATHOGA

SIMON MBUGUA KIHARA

J. NDICHU

ESTHER NYAKARURA

JOHN KINUTHIA

SOLOMON NJOROGE

GEORGE KINUTHIA PLAINTIFFS

VERSUS

SIMON KIMANI MBITIRU

SIMON NDIMI MUCHAI

SAMUEL MBUGUA

SHADRACK MUNDATI GATHOGA

GEORGE NJURUBA MUKURA

RULING

The Plaintiffs filed a Chamber Summons on the 1st of April, 2009. The same was brought under order 34 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The said application is seeking for orders that:-

- (a) This application be certified as urgent and service of the same be dispensed with in the first instance**
- (b) Pending hearing and determination of this application inter partes, an order of interim injunction do issue to restrain the defendants by themselves, their agents and/or servants and/or employees from holding themselves out as the officials of Independent Pentecostal Church of Kenya, Kiambu Branch and further be restrained from performing the functions of the office of the branch Committee, African Independent Pentecostal Church of Kenya, Kiambu branch whatsoever.**
- (c) An order of injunction do issue to restrain the defendants by themselves, their agents and/or servants and/or employees from holding themselves out as the officials of African Independent Pentecostal Church of Kenya, Kiambu Branch and further be restrained from performing the functions of the office of the branch committee, African Independent Pentecostal Church of Kenya, Kiambu branch, whatsoever, pending hearing and determination of this suit.**
- (d) The costs of this application be provided for.**

The said application is supported by the affidavit of *Karanja Mukiri* the 5th Plaintiff dated 31ST March, 2009 and further affidavit dated 15th April, 2009.

The Defendants/Respondents filed a Replying Affidavit sworn on 6th of April, 2009 by *George Njuruba Mukura* the 6th Defendant They also filed a Notice of Preliminary objection on same date.

In the Notice of Preliminary Objection the defendants want the whole suit and the Chamber Summons dismissed and/or struck out on the grounds that.

- 1. The Verifying Affidavit and the Supporting Affidavit are defective as they are not accompanied by a written authority from the Plaintiffs giving the 5th Plaintiff to swear two affidavits on their behalf.**
- 2. The claim against the defendant is non-suited as:**
 - (a) The Plaintiffs seems to bring the suit in their representative capacities a fact that has not been pleaded in the plaint.**
 - (b) The capacity under which the Defendants have been served has not been disclosed and therefore no cause of action has been pleaded as against them.**
- 3. This suit is premature and filed in haste as the Plaintiffs have not exhausted the dispute resolution mechanism as provided in the Constitution of the church before filing this suit.**
- 4. The suit which is in respect of the registered society is contrary to clear provisions of the Societies Act, Chapter 108 Laws of Kenya as all the defendants are acting in their capacities as representatives of the society.**

The counsel for the defendants/ applicants in his submissions relied on several authorities in advancing

his clients position. He also submitted that the authority given to the 5th Plaintiffs was filed after the inception of the suit and cannot affect the current suit, further, that the Plaintiffs ignored the Provisions of Order 1 Rule 8. He relied on his clients' version of the Church Constitution that require members to resolve disputes amicably.

In response, the counsel for the Plaintiffs/respondents submitted that an authority was filed in court on 6th of April, 2009 although signed on 2nd April, 2009. He stated that not filing the same was an oversight. He further submitted that this is not a representative suit. The Plaintiffs have sued in their personal capacity and have sued the defendants in their personality capacity, as the defendants are not the registered officials.

The counsel for the plaintiffs/respondents takes issue with the argument that the Plaintiffs have resorting to court is contrary to the constitution of the Church He submits that coming to court is a constitutional right and cannot be taken away.

There are 3 issues before the court:-

1. Whether the suit is representative or not.
2. Whether the suit before the court is fatally defective and ,
3. Whether the suit before the court is premature.

In arriving at its ruling the court considered the pleadings before it, submissions by counsel and authorities cited.

Order VII rule 1 states

- 1 (2) **“The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.**
- (3) **The court may of its own motion or on the application of the defendant order to the struck out any plaint which does not comply with sub rule (2) of this rule.”**

In this suit the plaint is accompanied by the verifying affidavit of the 5th Plaintiff whereupon in paragraph 1 thereof he depones that, he has the authority of the other Plaintiffs to swear the affidavit on their behalf. The defendants' first objection is that the verifying affidavit was not accompanied by an authority letter. As observed earlier the said authority dated 2nd April, 2009 was filed in court on 6th April, 2009.

In MICROSOFT CORPORATION v. MITSUMI COMPUTER GARAGE LT & ANOTHER CIVIL CASE NO. 810 OF 2000, Ringera J. (as he then was) held inter alia

“Where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standard, it would be to elevate form and

procedure to a fetish to strike out the suit.

Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In these issues the court should rise to its higher calling to do justice by saving the proceedings in issue.

In the matter at hand the court is of the view that the error manifested in the verifying affidavit neither went to the jurisdiction of the court non-prejudiced the defendants in any fundamental respect.

-----The broad purpose of the verifying affidavit is to verify the content of the plaint. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record.

If discretion can be exercised under Order VII Rule 1(3) in the case of an Omission of the Verifying Affidavit *a fortiori* it is also exercisable in the event of such an affidavit being incompetent.

The ends of justice would best be served in this case by sustaining the proceedings, by declining to strike out the suit while at the same time putting right the lapses in the offending suit.”

The Verifying Affidavit in paragraph 1 indicated that the 5th Plaintiff had authority. Indeed on 2nd April, 2009, 1st to 4th Plaintiffs confirmed the said authority vide the authority letter. The error of failing to file the authority letter together with the Verifying Affidavit does not go to the jurisdiction of the case neither is it in anyway prejudicial to the Defendants’ case, as the Plaintiffs rectified the error by filing the authority on the 6th April, 2009. The court is of the view that, striking out plaint on account of the said letter will be to defeat the ends of justice by elevating procedure at the expense of justice. I therefore decline to strike out the plaint on account of this limp.

Is the suit before the court representative?

Order 1 Rule 8 provides

“(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.”

The Plaintiffs in their plaint dated 31st March, 2009 have sued in their individual capacity. They have also sued the defendants likewise, in the individual capacity. They argue that the defendants are not recognized as officials of the Africa Independent Pentecostal Church.

The Plaintiffs/Respondents have nowhere in their pleadings purported to bring this action on behalf of other unnamed interested parties, neither have they alleged that the cause of action is to the benefit of others not named in the plaint.

On this account therefore this ground of the Preliminary Objection also fails. This indeed, may be an arguable issue depending on the defence to be filed. So far no defence has been filed. It may not therefore be purely a point of Law. I am guided by MUIRURI vs. KIMEMIA CIVIL APPEAL NO. 62 OF 2002 KLR 677 where Omollo, Lakha and O’kubasa JJA. held among other things that :-

“A Preliminary Objection is in the nature of a demurrer in that it raises put point of law which is argued on the assumption that all facts pleaded by the other side are correct. A preliminary Objection cannot be raised if any fact has to be ascertained or for what is sought is the exercise of judicial discretion.’

Is the suit before the court premature?

The provisions of the African Independent Pentecostal Church of Kenya Amended Constitution, Regulations and Standing order 2008 Edition, filed by the Defendants/Respondents as **Exhibits “c”** Clause F 10.4 and 10.5 provides

“10.4 Secular law courts. It should be clear that both the bible and the church are against Christians going to secular courts to sue one another, or their church leaders, especially before a secular Judge. All disputes and conflicts among church members, the elected leaders and the clergy shall be settled by wise and experienced members with the church ---”

“10.5 it shall be unlawfully for any church members or legal congregation affiliated to AIPCK to rush to a secular court against another Christian, local church, parish, dioceses or National leaders or clergy over religious church matters before exhausting all the avenues of arbitration or settling disputes within the hierarchy, when and where possible our church members are forbidden to take others to secular courts, even against non-Christian.”

The Plaintiffs’ version of the Constitution annexed to the affidavit of the Plaintiffs/Applicants marked as exhibit **KM3**, does not make such a provision. The Plaintiffs/Applicants in paragraph 10 of their further affidavit dated 15th April, 2009 deny knowledge of Amended Constitution.

The Courts where possible should encourage arbitration and other less tedious and acrimonious methods of solving disputes. The parties before the court are church leader who must where possible use the church machinery to resolve their issues. However, I do agree with advocates for the Plaintiffs/Applicants that they are well within their Constitutional right to refer this matter to this court.

S. 77(9) of the Constitution of Kenya provides

“A court or when adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or when adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

In short, the Plaintiffs/applicants preferred to bring this issue before a court of Law for adjudication. The duty of the court is to accord them an opportunity to ventilate their issues and to give them a fair hearing. Therefore, this ground that the suit is premature for failing to follow local machinery in solving disputes also fails.

Having addressed all the grounds raised in the Preliminary Objection I find that none of the grounds can stand and therefore orders as follows.

1. That the Preliminary Objection be and is hereby dismissed.
2. That parties do appear before me together with their Counsels on the date the Chamber Summons dated 31st March, 2009 is set for the hearing.
3. This being an issue involving members of one church I make no orders on costs.

Dated and delivered at Nairobi this 19th day of May, 2009.

ALI- ARONI

JUDGE

