



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Suit 69 of 2009

ANDREW INYOLO ABWANZA..... PLAINTIFF

VERSUS

1. BOARD OF TRUSTEES OF PENTECOSTAL

ASSEMBLIES OF GOD – KENYA

2. REV. JOTHAN MATIVA

3. REV. PETER BARASA

4. DAVID LUVAYO.....DEFENDANTS

RULING

The plaintiff filed this suit by a Plaint dated 18th February, 2009 seeking declarations and injunctions against the defendants and particularly that the 1st Defendant abdicated its responsibilities to supervise the 2nd, 3rd and 4th defendants in the performance of their duties. And in relation to the latter, that they are unfit to hold any office in the 1st Defendant Church. He also sought audited accounts of the 1st Defendant and costs.

At the same time as he filed the plaint, he also filed an application by Notice of Motion seeking temporary injunctions for similar prayers, pending the hearing and final determination of the suit.

The defendant having filed an Appearance on 11th March, 2009, also filed a Notice of Preliminary Objections in points of law, dated 7th July, 2009. It was agreed that the Preliminary Objections should be argued first.

The points of law raised are: -

- a) That the application is incompetent, vexatious and an abuse of the court process for reasons that it offends the express provisions of Order 1 Rule 8 of the Civil Procedure Rules.**
- b) That, the issues raised in the plaint are not justiciable in law.**
- c) That the plaintiff has no locus standi.**

Mr. Mugalo for the Defendant first argued that the Plaintiff, under Order 1 Rule 8, was required to first obtain leave of court to file this suit. This view was opposed by the Plaintiff. The said Rule 8(1) of the Civil Procedure Rules, provides: -

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

I have carefully examined the above quoted rule. I find nowhere in it where it imperatively requires a person or a few persons who have an interest in a matter, to seek leave of court before they can file such a suit. The words used are **“one or more of such persons may sue.....”** The requirement, if requirement I shall call it, is not in my view, mandatory. It is only where a party is the defendant, and seeks to represent numerous other persons who have a similar interest, that he will need authority of the court to represent those others. The suit or application filed by the Plaintiffs/applicants herein is not therefore incompetent or vexatious or an abuse of process on the point raised above. That point is hereby accordingly rejected.

The Defendant also, argued that the plaintiff’s suit cannot be sustainable as the 1st defendant has no legal capacity to be sued. Although this point of objection was not included in the Notice of Objection served, the Plaintiff did not object to it being argued. So the court allowed it to be argued.

It is observed that the defendants who are sued are four: -

- i) **The Board of Trustees of Pentecostal Assemblies of God – Kenya**
- ii) **Rev. Jotham Matava sued as District Overseer**
- iii) **Rev. Peter Barasa sued as the Pastor of Local Church of Ngara**
- iv) **David Luvayo sued as Treasurer of Ngara Church.**

The Defendants’ argument was that the first Defendant, being an organization registered under the Societies Act, Cap 108, of the Laws of Kenya, is not an incorporated association which has capacity to sue or be sued and should not therefore, have been sued.

I have considered that argument carefully. It can be noticed that the Pentecostal Assemblies of God – Kenya, was not, sued as such church. What is sued is the Board of Trustees. The pleadings, particularly the plaint, does not indicate whether the Board of Trustees is registered under any relevant law or not. No certificate of registration is annexed or referred to, to remove the existence of the said **“Board of Trustees”** from under the Societies Act to under any other law that would suggest that the same is incorporated and therefore endowed with capacity to sue or be sued. In those circumstances the safe assumption to make would be that the 1st Defendant whether by its name or through the **“trustees”** is registered only under the Societies Act aforesaid and not under any other law.

The above conclusion would lead the court to necessarily consider the issue raised i.e whether the 1st plaintiff which is a church registered under the Societies Act, Cap 108, has capacity to sue or be sued. A similar issue arose before Bosire, J (as he then was) in Nairobi HCCC No. 6339 of 1990 – **John Ottenyo Amwayi & Two others V. Rev. George Abura and Two others.** He stated thus: -

“The Societies Act, does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the Legislature did not intend that suits be brought by or against those societies in their own names.”

To the best of my recollection the above finding which was asserting a general rule that an unincorporated society cannot sue or be sued, has not been overturned. Indeed it has again and again been confirmed and followed by one court after another. Of course in certain cases, leave can be given by the court to some church members to bring a suit or file defence in a representative capacity. In this case,

upon the earlier assumption that the Board of Trustees of the first Defendant is not incorporated, it is my finding that the 1st defendant, on its own, had no capacity to be sued by the plaintiff.

However, the above conclusion does not completely settle the issue herein raised since the plaintiff did indeed, in addition sue individual persons, i.e, the 2nd, 3rd and the 4th Defendants in their names. He sued them as the District Overseer, the local church pastor, and the local church treasurer. I have considered the question as to whether the 2nd, 3rd and 4th defendants could be considered as the correct representatives of the 1st defendant which in the plaint is described as

“a faith based organization registered under the Societies Act (Cap 108) and having its registered office at Nyangori, Western Province within the Republic of Kenya”.

I have however, come to the conclusion that the three defendants do not and could not have been the proper representatives of the 1st defendant who might be sued on its behalf. This is because the 2nd defendant, Rev. Jotham Mativa is described as only the district overseer of the district churches. The 3rd defendant is described merely as the plaintiff’s church pastor. The 4th defendant is described as the same local church’s treasurer. These persons clearly are very junior and localized officers of the 1st Defendant Church branch and could not represent the national church.

The above conclusion is reinstated by the fact that the overall management of the Church appears to be reposed day-to-day, in the Executive Committee of the Church which is described as the **“Supreme Management Committee of the Church and the Implementing authority of P.A.G – Kenya Policies”** the committee is not shown to be limited in its authority except by the authority of the Church Council when the latter is in session. The Church Constitution, copy of which was submitted herein, shows that

“Nothing done by the Executive Committee shall be deemed to be contrary to the Constitution or unlawful unless it contravenes specific articles of the constitution or by-laws made thereunder.”

It seems to me accordingly, and because the complaints raised by the Plaintiff in the plaint are alleged to be a contravention of the Church Constitution, that the suit should have been filed against the Executive Committee through the General Superintendent, the General Secretary and the General Treasurer, when identified by names and described in respect of their office. The effect of the failure by the plaintiff to sue the 1st Defendant in the manner above described, was really suing the Church as such church, which the court has ruled, was fatally incompetent for lacking no legal capacity to be sued.

The above finding should be able alone to dispose of this suit together with the application. However, I will also deal with the other points of objection raised by the Defendants.

The third point raised by the Defendant is that the Plaintiff’s suit does not raise justiciable issues and is therefore incompetent. By **“justiciable”** I understood the defendant to say that the issue or issues raised in the suit do not concern any right of property, any right of contract, or any other known legal right.

I have examined, the plaint to understand the Plaintiff’s complaint. His complaint includes the claim that the 1st Defendant had failed, ignored and/or neglected to ensure that the his church’s books of account for 2007 to 2008 have not been properly maintained and/or audited; that the 2nd Defendant has failed or ignored to convene an Assembly meeting for the 4th defendant to render audited accounts annually to the Assembly; that the 2nd and 3rd defendants have failed or ignored or neglected their duty to facilitate an Annual General Meeting and/or Special general Meeting over the two years to constitute the Assembly or Church Committee as required; and finally, that the 3rd and 4th defendants have colluded to misappropriate and mismanage the funds and properties of Ngara Assembly. The plaintiff also claimed that the 2nd and 3rd defendants conducted a sham election on 12th October, 2008 which ousted him, the plaintiff, and that the conduct of the defendants in total was in breach of the 1st Defendant’s constitution. In conclusion the plaintiff claims that the conduct of the 1st, 2nd, 3rd and 4th defendants had caused the

plaintiff loss and injury. The plaintiff upon the above grounds, sought for a declaration that the Defendants abdicated their responsibilities and duties to supervise and that the 2nd to 4th defendants should therefore be declared unfit to hold their positions. That they also should in future be restrained from holding any position of responsibility in the National Church, and that by a mandatory injunction, they should be forced to render to the church, audited accounts for the years 2007-8.

I have considered the plaintiffs said prayer. I find that the plaintiff's relationship with the defendants in his capacity as a member of the 1st defendant church, arises merely and incidentally from his membership of the church. The issues and the concerns he raises in this suit as between him and the defendants do not concern any right of or to property, or of contract, or of any particular legal right. The concerns he raises relate only to the manner the 2nd to 4th defendants performed their duties or carried out their obligations in the positions they occupy in the church.

Furthermore the 2nd, 3rd and 4th defendants were not answerable to the plaintiff in the said performance of their duties but to the 1st defendant and to the institutions of the 1st defendant reposed with authority to supervise and discipline the 2nd to the 4th defendants in accordance with the constitution of and/or rules made under, the church constitution.

In the above circumstances, it seems to me that all the plaintiff would do, would be to raise complaints to the relevant church institutions that have such authority to supervise or take action. It would be too bad for the plaintiff if the relevant institutions ignored the plaintiff's complaints since that is as far as the constitution of the church appears to allow in relation to an individual member as such member. Otherwise Article 22 of the Constitution of the 1st Defendant herein provides that no member, pastor or official of the church, shall take any matter or dispute involving a member, pastor, official organ of the church or the church to court of law or any tribunal without first exhausting the dispute resolution machinery provided in the Church constitution.

What I understand of Article 22 aforementioned is that for any of the persons therein mentioned, including the church, to have a justiciable depute which the court can have jurisdiction to handle, all the machinery for internal dispute resolution must first have been exhausted.

In an English case **Forbes V Eden (1867)** L.C. Sc and Divisional Appeal Cases 508, the House of Lords through Lord Cranworth stated:-

“There is no jurisdiction in the Court of Session to reduce the rules of Voluntary Society, or indeed, to inquire into them at all, except so far as may be necessary for some collateral purpose.”

In the case of **Hinga & Another v P.C.E.A Through Rev. Dr. Njoya & another**, (1966)KLR 317, at 324 the court having examined several cases on this principle of non interference by the court in church or social societies affairs, stated: -

“All those cases discussed the issue of justiciability, with the result that they found that for an issue to be justiciable, it must constitute a cause of action in law, and it must be an issue concerning a right to property, contract or any other legal right. Also the issue must not be a domestic matter that can be dealt with by the laws and regulations concerning a particular body or organization.”

In the said case Aluoch, J (as she then was) found further that the plaintiff's complaints concerned the conduct of a church priest in his capacity as a priest. She also found that such complaint had sufficient church constitution or regulations which could have adequately resolved the complaints internally. She found indeed, that the constitution of the church had a different “**court**” set up for dispute resolution. The honourable Judge added at page 325: -

“Infact, these church courts are vested with powers to suspend church minister, investigate him, expel him etc, etc. I would say that Mr. Makhecha appreciated this point during his submissions except he said that his clients were not given a hearing. That the church turned a “deaf-ear” so to

speak, to their problems.”

Turning to the case before me, it is clear that the facts in the above quoted case are closely similar to those in this case. Here too, the plaintiff is complaining about the conduct not only of the church for appearing to be “**deaf**” to plaintiff’s complaints about the 2nd to 4th defendants’ poor performance and conduct, but also of the officials failure or perceived failure to carry out their duties and obligations properly to his satisfaction.

The conclusion and finding I come to, as did that court, is that the plaintiff had failed to exhaust the dispute resolution machinery of the 1st defendant church. He accordingly has no cause of action in this court which has no jurisdiction to hear him in matters he has complained about herein which are in the domain of the church’s dispute resolution machinery. Put differently, the plaintiff’s complaints as pleaded in his plaint are not justiciable. His coming to this court with this case in general is premature and outside of his church’s constitution.

It is observed that since this suit was filed, the 1st defendant church has held one or possibly two church elections, bringing in new officials. It is hoped that there may have been adequate change in the church leadership to bring peace to plaintiff’s mind. If not, and the church being consistent of many church members like the plaintiff, would be trusted to carry out proper church elections that would satisfy the will of the majority of the members.

For the above reasons, I hereby find that the defendants’ points of objection dealt with above have no merit. The consequence is that the plaintiff’s application by Notice of Motion dated 18th February, 2009 is hereby ruled to be fatally incompetent and liable to be struck out. It is hereby struck out.

Orders are granted accordingly.

The court *suo moto*, hereby also strikes out the plaintiff’s plaint dated 18th February, 2009. Costs are to the defendants. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of December, 2009.

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D A ONYANCHA

JUDGE