



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 23 of 2006

BISHOP STANLEY MUTHOMI

**BISHOP GIKUNDA (Suing as the Bishops of NORTH IMENTI DIOCESE AND
SOUTH IMENTI DIOCESE OF THE AFRICAN INDEPENDENT PENTECOSTAL
CHURCH OF AFRICA PLAINTIFFS**

VERSUS

BISHOP SAMSON MUTHURI

PASTOR ERASTUS MUTHAURA

JOSEPH JOVAN

CHANCELLOR MOSES KIRIMA DEFENDANTS

RULING

This is a notice of preliminary objection to the applicant's suit filed on 16th March, 2006 and Chamber Summons filed on the same date.

The objection is based on five grounds as follows:-

1. That the plaintiff's lack capacity to sue as they are not trustees of the Church.
2. That the plaint and application raise no reasonable cause of action because they do not specify the role and capacity of the applicants and who they represent
3. That the plaint is incompetent and defective because there was no court order barring the applicants from being consecrated and because there was no diocese created in Central Imenti as per the Church Constitution.
4. That the court lacks jurisdiction to hear and determine this suit because it has not been handled internally by the Church itself.
5. That order 7 rule 1 (2) CPR has not been complied with.

The above grounds were argued before me on 29th March, 2007. Counsel for the applicant submitted that the applicants are the officials of the church according to a letter exhibited in this application from the office of the Registrar General. They have capacity to bring the suit and application on behalf of the society.

Internal mechanism for dispute resolution was put in place and the respondents ex-communicated. I found some difficulties in appreciating the grounds of objection as outlined in the previous paragraphs and as tabulated in the notice of preliminary objection. However, counsel for the respondent in his submissions before me raised three points to the effect that the applicants lacked capacity to sue on behalf of other members of the society because they are not the trustees and also that they do not have authority from the members to bring the suit.

The second point is that the applicants had not exhausted the laid down procedures for resolving disputes involving members of the society – and finally that the plaint has not properly described the respondents in terms of order 7 rule 1 of the Civil Procedure Rules. Other than the 1st and 2nd grounds, above, the last ground cannot be raised in a notice preliminary objection as it is not capable of disposing of the suit, particularly when the complaint is only that the applicants have described themselves as Bishops and the 2nd respondent is described as a pastor.

It is also alleged that the 3rd respondent, Joseph Joram does not exist. These are matters of fact to be proved by evidence. The last ground, for those reasons must fail.

Regarding the first ground, the capacity of the applicants to bring the suit on behalf of the other members has been challenged on two grounds. First that they are not trustees and secondly that they have not been authorized by the members of the society.

The objection must be seen in the light of the principles laid down in the case of *Mukisa Biscuit Manufacturing Co.Ltd V West End Distributors Ltd* (1969) EA 696, to the effect that a preliminary objection must relate to a pure point of law capable of disposing the suit and which does not entail ascertaining of facts.

Capacity in which a party sues is both a matter of law and fact. It is a matter of fact if, as in this case, it involves bringing of evidence to show that the applicants were not trustees of the society.

As I have said the second limb to this ground is that the applicants could only bring the suit on behalf of the society with the members authority. In other words, that this is a representative suit. That may be so, but the issue is whether the applicants needed authority from the members.

Order 1 rule 8 (1) that;

“8. (1) 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”(emphasis supplied)

Sub-section (2) further provides that;

“ (2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable by public advertisement, as the court in each case may direct”

The above provision does not place any obligation on the plaintiff to seek leave before instituting a suit against defendants in a representative capacity. Only if the defendants were sued as a class of persons who are numerous and have been the same interest in the suit will there have been need to seek a representation order before the suit is filed.

See Brollo (K) Ltd V Ondatto and 3 Others (1989) KLR 563. See also Desai V Patel t/a Sandpipers Constructions and Civil Engineering Services & 13 others (2001) KLR 120.

This ground must similarly fail. Finally the issue of whether or not mechanism for resolving internal disputes have been exhausted is controverted. It is a matter of evidence. On the one hand the applicant is stating that the dispute was resolved through internal dispute resolution mechanism after which the respondents were ex-communicated. On the other hand, the respondents deny this. Clearly this calls for evidence.

In the result I find that the preliminary objection has no merit and the same is overruled with costs to the applicant.

DATED AND DELIVERED AT MERU THIS 18th DAY OF May, 2007

W. OUKO

JUDGE