



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL CASE 82 OF 2007**

ACHODOMOI ITARUK)

BENJAMIN OGOLA) :::::::::::::::::::: PLAINTIFFS.

LOU LOMULEN)

VERSUS

JOHN LODINYO :::::::::::::::::::: DEFENDANT.

R U L I N G.

The defendant has brought an application by way of a summons in chambers, pursuant to the provisions of Order 6 to rule 13 (1) (d) of the Civil Procedure Rules and Order 7 rules 1 (e) and 3 of the Civil Procedure Rules. It is the defendant's prayer that this suit be struck out for being an abuse of the process of the court.

The first issue raised by the defendant was the fact that there existed another suit, on the same subject matter, yet the plaintiffs' had said that this was the only suit between the parties to this suit.

The said other suit is **SAMUEL LOKWANGOLE & JAMES LIMERENG as trustees of ASSOCIATED CHRISTIAN CHURCHES OF KENYA VS. ACHODOMOI ITARUK, BENJAMIN OGOLA & LOU LOMULEN, KAPENGURIA RMCC NO. 28 OF 2006.**

In the light of the persons cited as the defendants in that suit, there is no doubt at all that they are the very same individuals as the plaintiffs' in the suit before this court. However, it is also equally true that whereas in the Kapenguria case the plaintiffs herein were sued in their personal capacity, in this case they have brought action in their capacity as trustees of Dick Hamilton and also as trustees of the East African Christian Mission (Hereinafter cited as "EACM").

But the defendant also lays claim, in this suit, to being a chairman of the same church.

Although that was the contention of the defendant during the hearing of the application before me, in an affidavit sworn on 22/5/2007 the defendant did describe himself as being the chairman of Associated Christian Churches of Kenya (ACCK).

The second issue raised by the defendant was in relation to the subject matter of the suit. I was told that in the Kapenguria case the subject matter were;

- (i) The Kiwawa Pilgrim Presence;
- (ii) The Workshop; and

(iii) The Drilling Equipment.

A perusal of the plaint herein reveals that the subject matter of the suit included;

- (a) Heavy Duty Drilling equipment;
- (b) A motor vehicle, Toyota Hardtop, registration number KAC 687 C;
- (c) Kiwawa Workshop;
- (d) Doctor's House;
- (e) Water Tank; and
- (f) Kiwawa Pilgrim Presence.

Incidentally, the Kiwawa Pilgrim Presence is described as a guest rest place and meditation centre.

In the light of the foregoing, there is no doubt at all that some of the items are common to both suits.

In this suit, the plaintiffs lay claim to the ownership of all the property that are the subject matter of the suit; they say that the property belongs to the East African Christian Mission (EACM). The plaintiffs also wish to have the defendant compelled to hand over the property to EACM. Furthermore, the plaintiffs request the court to restrain the defendant from using, leasing out, transferring disposing of or in any way dealing or interfering with the said property. All those prayers are premised on the plaintiff's contention that the defendant had no authority to act as an officer, agent, attorney, employee or servant of EACM. Therefore, the plaintiff also requested the court to restrain the defendant from holding himself out as having any authority from EACM.

In a nutshell, the issue for determination in this suit is as regards the ownership of the subject matter; the possession and use thereof; and the authority (if any) of the defendant over the said property.

Meanwhile, in the Kapenguria case, the Associated Christian churches of Kenya (ACCK) also lays claim to some of the very same assets. Indeed, they too ask that the plaintiffs herein be restrained from taking over or in any other way interfering with the said assets.

For that reason, the defendant has faulted the plaintiffs for having stated, at paragraph 14 of the plaint, that there was no previous proceedings in any court between the plaintiffs and the defendant, over the same subject matter.

On a prima facie basis, I do find that that contention is accurate, as the defendant, JOHN LODINYO, is not a party to the Kapenguria case.

But it cannot escape scrutiny that the plaintiffs have expressly asserted that the actions of the defendant herein have been undertaken by him, on the grounds that the property over which he lays claim belongs to the Associated Christian Churches of Kenya (ACCK).

When the plaintiffs herein were sued in the Kapenguria case, they did file a Defence and Counterclaim. The said Counterclaim was basically the same as the suit herein.

However, the Defence and Counterclaim were thereafter withdrawn by the plaintiffs herein, on 23/2/2007. It is only after the said withdrawal that this suit was instituted. Therefore, the plaintiffs cannot now be said to have a claim against the defendant in any other suit.

The reason advanced by the plaintiffs herein for bringing this action was that the value of the subject matter of their claims exceeded the jurisdiction of the Resident Magistrate's Court, Kapenguria.

If indeed the plaintiffs applied for the setting aside of orders which had been made in the Kapenguria case, and also for a finding that the Resident Magistrate's court had no jurisdiction to hear and determine the suit, the plaintiffs should then have awaited the determination of those applications before making a decision on the next course of action. If, for instance, the learned Resident Magistrate at Kapenguria held that he had jurisdiction, then it would have been wrong for the plaintiffs' herein to have made a presumption that that court lacked jurisdiction.

In the event that the plaintiffs were dissatisfied with such a decision, they would then have challenged it by way of an appeal to the High Court, instead of bringing a separate action before the Resident Magistrate had made his ruling.

The plaintiffs did tell me that the plaintiffs in the Kapenguria case had not obeyed an order made on 25/1/2007, for the preservation of the equipment until the application then pending before the Resident Magistrate was determined. Even if that be the case, it would not have justified the institution of a new suit in the High Court.

All those would have worked against the plaintiffs herein, in the event that they had sued in the same capacity as that in which they had been sued, in the Kapenguria case. However, they have now brought this action in their capacity as trustees of the East African Christian Mission and Dick Hamilton, whereas in the Kapenguria case they had been sued in their personal capacity.

The ruling by the Resident Magistrate Kapenguria, in RMCC No. 28 of 2006 has not been made available to this court. Therefore, I do not know whether or not the said court has ruled that it has jurisdiction to hear and determine the suit before it. If that court has ruled that it has jurisdiction, then it would be improper to allow this case to proceed simultaneously with the Kapenguria case. I say so because ultimately the question that needs to be answered is as regards the ownership of the subject matter of the two suits.

As I understand it, the two parties laying claim to ownership are the Associated Christian Churches of Kenya (ACCK), and the East African Christian Mission (EACM) respectively.

It would expose the judicial system to possible ridicule if the two suits were allowed to proceed before two different courts, at the same time, as there would be a distinct possibility of the two courts arriving at inconsistent decisions.

But then again, I acknowledge the fact that the matters in issue in this suit are wider than those in the Kapenguria case. Therefore, the same could not have been adjudicated in the Kapenguria case, as currently constituted. That implies that this suit is not necessarily an abuse of the process of the court. It shall therefore not be struck out. However, as it would be ill-advised to have both suits proceed at the same time, the parties are directed to give due consideration to the consolidation of the said suits. In the meantime, this suit is hereby stayed until further orders.

Each party shall however be at liberty to apply.

And in the meantime, the costs of the application dated 22/5/2007 are awarded to the defendant in any event. It is so ordered as I hold the view that the step taken by the defendant has given rise to orders which will ensure that substantive justice is done, and without the danger of inconsistent decisions on the same subject matter, by two different courts, at the same time.

Dated and Delivered at Kitale, this 16th day of October, 2007.

FRED A. OCHIENG.

JUDGE.