

REPUBLIC OF KENYA

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

Civil Suit 672 of 2007

ERITREA ORTHODOX CHURCH. PLAINTIFF

VERSUS

WARIWAX GENERATION LIMITED.DEFENDANT

R U L I N G

This suit was instituted in this court on 26.9.2007 by a body referred to as Eritrea Orthodox Church. The plaint describes the plaintiff as: -

“ a church registered under the Societies Act Cap 108 of the Laws of Kenya

would appear that by an application accompanying the institution of this suit, the plaintiff was granted interim injunction orders for 14 days. On 8.10.2007, however, the defendant filed a Notice of Preliminary Objection on a point of law which was heard by the court on 15.10.2007 raising the ground that the plaintiff has no legal capacity to institute the suit which accordingly is bad in law and required striking out. The second point raised was not argued and the court need not go into or deal with it.

In his argument Mr. Kimondo for the defendant stated that the body shown as the plaintiff herein, had no legal capacity to sue or be sued as such body. He stated that Eritrea Orthodox Church as described in the plaint, is merely a society registered under the Societies Act Cap 108 of the Laws of Kenya and has no legal capacity to sue or be sued, except on a representative capacity under order 1 rule 8 of the Civil Procedure Rules – (CPR). Mr. Kimondo accordingly stated that the suit is no suit and should be struck out for being a nullity from the whole start.

Since the plaintiff who had been properly served with this application had not filed his replying affidavit, the court decided to give it no chance to say anything.

I have carefully considered the issue raised. There is no doubt that the plaintiff is non-incorporated body of many members registered under the Societies Act, Cap 108 of the laws of Kenya. That is how it has indeed described itself in paragraph 1 of the plaint. Nor does the plaint clothe the plaintiff in any other way or with any other name or capacity. It will therefore be so treated. It is now trite law that a society registered under the said Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. It is an ordinary society whose members, if they wish to sue, can do so only under a representative capacity under Order 1 rule 8 of Civil Procedure Rules.

In the above respect I would wish to refer to the case of **FREE PENTECOSTAL FELLOWING IN KENYA V KENYA COMMERCIAL BANK** in Nairobi HCCC No. 5116 of 1992 (Originating Summons) where Bosire, J. (as he then was) stated: -

“The position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil Procedure Rules. In the instant matter the suit was instituted in the name of the religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name”

The above statement has never been doubted as the proper restatement of our law. It has been adopted or approved and followed in many cases including **Simu Vendors Association v Town Clerk, City of Nairobi and another** in Nairobi HCCC Miscellaneous Application Number 427 of 2005. In this case, as earlier mentioned, the purported plaintiff is a religious unincorporated organization registered as so under the Societies Act. The institution of the proceedings by the persons who form the society without complying with Order 1 rule 8 of the Civil Procedure Rules aforesaid, renders the suit null and void ab initio. The suit is therefore, in law, non-existent. It cannot be amended as it does not exist and since it would be only through amendment that substitutions of parties would be possible. Indeed, the plaintiff herein is itself non-existent and cannot therefore be substitutable, even if this court would allow amendment to substitute.

For the above reason, this application has merit. The suit, if a suit it may be called, is hereby struck out with costs to the defendants. Orders accordingly.

Dated and delivered at Nairobi this 13th day of November 2007.

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JUDGE