



Lihanda (Suing on behalf of Pentecostal assemblies of God Kenya) v Munavo (Environment & Land Case 3 of 2022) [2022] KEELC 14738 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14738 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 3 OF 2022
E ASATI, J
NOVEMBER 10, 2022
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT 22 LAWS OF KENYA
AND
IN THE MATTER OF PARCEL NO. NORTH MARAGOLI/CHAVAKALI/145
BETWEEN
BETWEEN
PATRICK LIHANDA APPLICANT
SUING ON BEHALF OF PENTECOSTAL ASSEMBLIES OF GOD KENYA
AND
STEPHEN LUSINA MUNAVO DEFENDANT

RULING

1. This ruling is in respect of a preliminary objection raised by the Respondent herein vide the Notice of Preliminary Objection dated 4th July 2022. The Respondent seeks that the Originating Summons filed herein be struck out with costs to the Respondent on the grounds that:-
 - a. The Applicant has no locus standi to bring, sustain, entertain or sue on behalf of the Pentecostal Assemblies of God Church- Kenya.
 - b. The Applicant does not fall under the persons named under Order 37 Rule 1 to sustain and bring this suit.
 - c. The Supporting Affidavit in Support of the Originating Summons has been sworn by an incompetent person.
 - d. The Applicants are guilty of laxity by sleeping on their rights (if any)



- e. The entire Originating Summons and Supporting Affidavit is an abuse of the court's process and waste of judicial time and such should be struck out.
 - f. The Application and the suit cannot be sustained in law and more, under the provisions of the Societies Act Cap 108 Laws of Kenya.
2. The background of the matter is that the Applicant, the Pentecostal Assemblies of God- Kenya, commenced the suit herein by way of Originating Summons dated 10th June 2022 seeking for orders, inter alia, that the Applicant is entitled to ownership of land parcel known as L.R. North Maragoli/Chavakali/145(the suit land herein) by adverse possession. The suit was filed through Rev. Patrick Lihanda on behalf of the Applicant.
 3. In response to the Originating Summons, the Respondent filed a Replying Affidavit sworn by himself on 4th July 2022, Grounds of Opposition dated 4th July 2022 and a Notice of Preliminary Objection, the subject of this ruling.
 4. When the matter first came up for mention for directions on 6th July 2022, parties agreed to dispose of the preliminary objection first. Directions were taken that the preliminary objection be canvassed by way of written submissions.
 5. The Respondent filed written submissions dated 4/7/2022 through the firm of Ondego Ogaro Advocates in support of the preliminary objection. The Applicant filed written submissions dated 20/9/2022 through the firm of KaraniGrey & company Advocates opposing the preliminary objection.
 6. I have read and considered the pleadings in the case, the notice of preliminary objection and the rival submissions filed. The issue for this court to decide is whether the preliminary objection has merit.
 7. The threshold for a preliminary objection to be sustainable in Kenya was set in the case of *Mukisa Biscuit Manufacturing Co. Ltd - vs- West End Distributors Ltd* [1969] E.A 696 relied on by the Applicant herein. The court described a preliminary objection as follows;

“...a Preliminary Objection consists a point of law which has been pleaded, or which order by clear implication out of pleadings and which if argued as a Preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

The court further held that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Also in *Avtar Singh Bhamra & Another vs Oriental Commercial Bank* Kisumu HCCC No 53 of 2004 the court held that:-

“a preliminary objection must germinate from the pleadings filed by the parties and must be based on pure points of law...”



And in *Oraro vs Mbaja* [2005]eKLR where it was held that:-

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle a true preliminary objection which a court should allow to proceed.”

8. Form the foregoing decisions, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained through production of evidence; or if what is sought is the exercise of the court’s discretion and must not raise substantive issues from the pleadings which must be determined by the court upon consideration of the evidence.
9. The purpose of preliminary objections is to ensure compliance with the procedural and substantive law obtaining at the time. The preliminary objection raised herein by the Respondent relates to Rev Patrick Lihanda’s capacity to sue on behalf of the Applicant. Capacity of parties to sue is a preliminary issue that a court ought to determine before embarking on entertaining the suit, lest the court spends precious court time in entertaining nullities. In the case of John Mundia Njoroge & 9 Others vs Cecilia Muthoni Njoroge & Another [2016] eKLR, the court held that capacity of a party to sue or be sued is one of the grounds upon which a preliminary objection may be raised.
10. The central issue in the preliminary objection is the capacity of Rev. Patrick Lihanda to bring the suit herein on behalf of the Pentecostal Assemblies of God Kenya. The grounds upon which the capacity of Rev. Patrick Lihanda is challenged are shown on the face of the Notice of preliminary objection.
11. The first ground is that Rev. Patrick Lihanda has no locus standi to bring, sustain, entertain or sue on behalf of the Pentecostal Assemblies of God Kenya. According to the Respondent, Rev. Patrick Lihanda was elected as General Superintendent of the PAG Kenya in the year 2013 to hold office for a period of 5 years which term ended in the year 2018. That there have not been any further elections of the church officials since 2013 as by its order dated 5/12/2018 the High Court suspended the Church’s elections to date and hence Rev Patrick Lihanda was not a General Superintendent of the PAG-Kenya Church as at the time of filing the suit herein. Secondly, that on 8th November 2018 the High Court in Kakamega HC Pet No. 6 of 2018 issued orders of injunction against Rev. Patrick Lihanda restraining him from carrying himself out as the General Superintendent of the PAG-Kenya Church. Further that the Chief Magistrate in Kisumu CMCCC No. 543 of 2018 placed the leadership and running of the PAG-Kenya Church under a Caretaker Committee and the orders are still in force. That to date the church is in the hands of the Caretaker Committee. That as such Rev. Patrick Lihanda has no locus standi to bring the suit on behalf of the church.
12. The Applicant, on its part, contended that Rev. Patrick Lihanda had locus standi to bring the suit as at the time of filing it. That this is because firstly, as at the time of filing the suit, he was the General Superintendent of the PAG-Kenya Church. Secondly that none of the orders issued by the court barred him from filing suit on behalf of the church. That although in case No KisumuCMCCNo. 543 of2018 Tom OlendovsPatrick Lihanda, the court appointed the caretaker committee to take charge of the affairs of the PAG-Kenya which Committee was tasked with the responsibility to resolve the governance issues that were outstanding, the court capped the caretaker’s term to six (6) months with



- effect from 8/3/2019. That the six months expired without anything tangible being realised. That at the expiry of the six months the Caretaker Committee was discharged and its mandate extinguished.
13. Counsel for the Applicant relied on the decision in Kitale ELCC No.134 of 2017 PAG through its Registered Trustees and 4 others vs Joseph Ogola Elegwaraising similar issues as herein wherein the court held that it was unable to find that the Rev. Patrick Lihanda breached the orders in Kisumu CMCC No. 543 of 2018 by testifying in court on behalf of the PAG- Kenya. Counsel submitted that Rev Patrick Lihanda was not only the General Superintendent of PAG-Kenya church but was also a Trustee of the same Church. Counsel further submitted that the orders made in Vihiga HC JR No. E002 of 2022 Republic vs Rev Anthony Kenyakise, Registrar of Societies & Patrick Lihanda were obtained after the present case had been filed. That in the premises, the pleadings in the suit can be regularized so as to accord the Plaintiff/Applicant Church to ably pursue its rightful property. That the Applicant has already moved court with an application seeking to amend the pleadings. That the intended amendments are meant to address the developments following the court order restraining the applicant and to cure some minor issues raised by the Respondent.
 14. The Plaintiff in this suit is the Pentecostal Assemblies of God Church- Kenya. It is not disputed Rev. Patrick Lihanda was in the year 2013 elected as the General Superintendent of the Plaintiff for a term of 5 years and who is one of the Trustees of the Applicant. It is also not in controversy that leadership of the Plaintiff Church has been the subject of a number of court cases since November 2018 and that Rev. Patrick Lihanda has featured as a party in most of the cases. It is further not contested that various court orders have emanated from the court cases. Among the orders are the ones relied on by the parties and particularly the Respondent herein.
 15. I have read the court order dated 8th November 2018 in Kakamega HC Const. Pet No. 6 of 2018. It reads as follows: -
 - a) an injunction restraining the Superintendent of the PAG-Kenya Rev Patrick Lihanda his servants, agents or any other person acting under him through him or on his behalf howsoever inhibiting them from receiving names of pastors from district Overseers, registering Pastors, compiling and or constituting the names into a register or list of voters in connection with the election of the Pentecostal Assemblies of God Kenya.
 - b) an order of injunction against the General Superintendent Rev. Patrick Lihanda restraining and inhibiting the General Superintendent, the General Secretary, General Treasurer, the Church Administrator or any member of the PAG- Kenya Church howsoever acting from convening or holding any meeting of the management committee or organs of the church in connection with or relation with or in preparation of the PAG-Kenya business conference until further orders of the court.
 - c) an order of injunction staying and suspending a notice dated 11th July 2018 or any notice issued thereafter by the General Superintendent purporting to convene the Pastors conference, General Conference and the Business Conference.
 - d) the following cases to be and are hereby consolidated and to be heard with the Petition Kakamega Misc. Appl. 129 of 2018, Kakamega Misc. Appl 131 of 2018, Kisumu CMCC No. 421 of 2018 and Kakamega H.C Misc. JR 145 of 2018.”
 16. I do not find anything in this order that bars Rev. Patrick Lihanda from acting for the Pentecostal Assemblies of God -Kenya Church and more specifically from filing suit on its behalf. It was an order concerned purely with elections of the leadership of the Plaintiff.



17. The order dated 8th March 2019 in Kisumu CMCC No. 543 of 2018 Tom Olendo vs Patrick Lihanda and others reads as follows:

1. that pending the inter-parties hearing of this suit an order of injunction is hereby granted barring Respondents, the Executive Committee of PAG Kenya Church and all District overseers of the PAG Church acting either by themselves or their agents servants, employees and/or in any manner whatsoever hereby restrained from carrying out executive administration levelled at Nyang'ori PAG Headquarters and or calling or attending any meeting convened by them or by anyone else and they be restrained from accessing and/or using and/or utilizing the Pentecostal Assemblies of God funds and/or monies and/or running and operating any PAG Church bank accounts including but not limited to Account No. 12602-681614 held at Equity Bank Kisumu Branch.
2. that pending the hearing and determination of this suit an order of injunction is hereby granted barring and Respondents, their agents, employees and or anyone acting on their behalf from carrying out any duties in and pertaining to the P.A.G Church Kenya Church and that the Trustees or the Church in exclusion of the 1st Respondent Church council Chairman and former General superintendent who shall have retired or attained the age of retirement do take over the Administration and Finance of the P.A.G Church and they make any decision furtherance of the sound administration of P.A.G Kenya Church.
3. For the avoidance of doubt, to the complete exclusion of the defendants and any of them, Three existing of PAG Kenya Church as recognized under Article 17 of the PAG Kenya Church Constitution, together with current Chair of the PAG Church Council shall from the date hereof be the exclusive caretakerCommittee for a period not exceeding six months from the date hereof to enable it resolve anymatter that face the P.A.G Kenya Church , and they shall exercise such powers as those conferred to the Executive Committee of the PAG Committee until further orders of this court.
4. that the Officer Commanding Seremi Police station do provide adequate security for the implementation of the orders given herein.
5. Costs shall abide the result of the suit.

18. The High Court in handling an application citing Rev. Patrick Lihanda and others for contempt of court in Kakamega HC Const. Pet. No. 6 of 2018 analysed the order dated 8th March 2019 by the CM in KSM CMCC 543 of 2018 as follows:

"the other order was made in Kisumu CMCCC No. 543 of 2018 on 8th March 2019. It restrained the 1st Respondent and others from carrying out managerial and administrative duties in relation to the affairs of the church. The 1st Respondent challenged that order at Kisumu in HCCA No. 28 of 2019. He asserted in his Supporting affidavit that he was the general superintendent of the church and articulated his arguments against the order. It is not clear whether a stay of execution order was made by the High Court but what is clear is that in Kisumu CMCCC No. 543 of 2018 the court made an order for maintenance of status quo. It is not clear who the status quo order favoured, because it is not clear who was in control of the church as at 24th October 2019 when the order was made. In his Affidavit in response to the application herein, the 1st Respondent concedes that he was aware of the order of 8th March 2019 and appears to say that the persons who were to take over from him did not take up office.



Overall, I am not persuaded that the applicants have demonstrated that the 1st Respondent breached the said order. It is not clearly articulated how and when the order was violated, nothing points at all at the 2nd Respondent with breach of- the order of 8/3/2019.”

19. From this ruling it is clear that the conviction for contempt concerned the elections. Secondly, the orders in the Kisumu case were interlocutory. The case was not one of the cases consolidated to pet 6 of 2018. There is nothing to show whether the case ever ended and what was the outcome. It appears that a lot may have transpired between March 2019 when the order was made and September 2019 when the status quo order was made including appointment of care taker committee, failure of caretaker committee to take over office, continuation of the office bearers in office, mediation and elections in the face of court orders. It is not clear what the current position of the leadership of the church is. These are matters that require production of evidence to ascertain.
20. The other order is the one in Vihiga H.C Judicial ReviewNo. E002 of 2022. It was made on 21st July 2022. The order inter alia prohibited Rev. Patrick Lihanda and others from acting as or holding themselves out as or claiming to be the General Superintendent General Secretary, General Treasurer respectively of the Pentecostal Assemblies of God Kenya pending hearing and determination of the judicial Review proceedings.

The Applicant submitted that this order was made after the suit had been filed and cannot therefore be the basis of striking out the suit but instead the suit can be amended to accord. Perusal of the court file indeed shows that the suit was filed before the order.
21. The Church as a religious society registered under the Societies Act can only sue through its office bearers. In *African Orthodox Church of Kenya vs Charles Omuroka & Another* [2014] eKLR the court held that a church can only sue through Trustees, if they have one or in the names of their official in a representative capacity. Hence it is the same official or Trustee to swear the Supporting Affidavit.
22. The preliminary objection seeks to have the Applicant’s suit commenced by way of Originating Summons struck out. Striking out of pleadings/ suits is a draconian measure. Where any error or shortcoming in the suit can be cured by amendment, the court should give a chance for the amendment. The Applicant may need to consider filing and prosecuting their actions through a different official or Trustee.
23. The upshot is that the preliminary objection is not merited. The same is hereby dismissed. Costs to abide the outcome of the suit.

Orders accordingly.

RULING READ, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 10TH DAY OF NOVEMBER 2022.

E. ASATI

JUDGE.

In the presence of:

Neville: Court Assistant.

Karani Advocate for the Applicant.

Ondego Advocate for the Respondent.

E. ASATI



JUDGE.

