



Evangelical Church of Christ In Africa (E.C.C.A-Hera Maradier) (Suing through the Chairman, Secretary & Treasurer) v Church of Christ In Africa C.C.A-Kwogo Church; Marimo (Interested Party) (Environmental and Land Originating Summons E018 of 2022) [2022] KEELC 15253 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E018 OF 2022
AY KOROSS, J
DECEMBER 8, 2022**

BETWEEN

EVANGELICAL CHURCH OF CHRIST IN AFRICA (E.C.C.A-HERA MARADIER) PLAINTIFF

SUING THROUGH THE CHAIRMAN, SECRETARY & TREASURER

AND

CHURCH OF CHRIST IN AFRICA C.C.A-KWOGO CHURCH DEFENDANT

AND

TITUS OBUNGA MARIMO INTERESTED PARTY

RULING

1. The application for consideration is the plaintiff's notice of motion dated 3/10/2022. The motion has been moved pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* and Sections 24, 25, 28 and 68 of the *Land Registration Act* and Order 40 Rules 1 and 2 of the *Civil Procedure Rules*. The plaintiff sought the following reliefs against the defendant;
 - a) That this application be certified urgent and be heard on priority basis;
 - b) That pending the hearing and determination of this application inter parties, there be an order of temporary injunction restraining the defendant either by itself, its agents, employees or any other person deriving authority from them from constructing, alienating, selling, occupying or in any manner interfering with the plaintiff's quiet possession, ownership and occupation of Siaya/Usigu/4444;



- c) Upon prayer number 2 being granted, the OCS Usenge police station and the area chief East Yimbo Location do assist in compliance with this order; and
 - d) That costs of the application be provided for.
2. The motion is based on the grounds set out on its face and on the joint supporting affidavit of Charles Ooko Akelo, Timothy.J. Opiyo.J. Aol and Joash Adera Akello who are respectively described as the Chairman, Secretary and Treasurer of the plaintiff.
 3. The officials deposed inter alia, the plaintiff had been in occupation and possession of land parcel No. Siaya/Usigu/4444 ('suit property') which was a subdivision of Siaya/Usigu/1238 since the year 2005; they had established a permanent church building on it; they had enjoyed an open, continuous and exclusive possession of the suit property; In 2022, they learnt that the suit property had been transferred from the interested party's name to that of the defendant and the defendant had threatened to demolish the developments thereon and evict the plaintiff.

Defendant's and interested party's case

4. In reply, Habakkuk Onyango Abogno who was an archbishop emeritus and described himself as a trustee of the defendant filed a replying affidavit sworn on October 21, 2022. He deposed *inter alia*; the defendant was registered on 6/01/1958; the plaintiff which was registered in July 2011 was a splinter church from the Evangelical Christ Church of Africa ('E.C.C.A') which was itself a splinter of the defendant and the interested party had been its member for over 60 years.
5. He further deposed, the suit property was owned by the defendant through its archdiocese of Johera Masogo; it had been in occupation of the suit property; In 2005, some of its members left its membership and formed E.C.C.A. and claimed entitlement to the suit property; in Kisumu HC Civil Case Number 121 of 2005, the court issued temporary injunctive orders barring its former members from interfering with the defendant's buildings and properties pending the hearing and determination of the suit-the suit had not been concluded; the plaintiff had only been in existence for 11 years and the suit was incompetent because the plaintiff ought to have instituted suit in the names of its registered officials.
6. The interested party neither filed a response to the motion nor participated in these proceedings.

Plaintiff's rebuttal

7. By a supplementary affidavit deposed on October 21, 2022 by Charles Ooko Akelo, Timothy.J. Opiyo.J. Aol and Joash Adera Akello, the plaintiff's officials swore *inter alia*; the defendant's replying affidavit ought to be struck out because the deponent was a retiree of the defendant; Kisumu HC Civil Case Number 121 of 2005 was against E.C.C.A and not it and the injunctive orders granted on May 14, 2007 had been abused by the defendant to an end.

Parties' submissions

8. As directed by the court, counsel disposed of the motion by written submissions.
9. Mr Mulinge, counsel for the plaintiff filed his written submissions dated October 7, 2022. He identified three issues for determination; (i) whether the plaintiff had established a prima facie case with probability of success, (ii) whether the plaintiff would suffer irreparable injury which would not adequately be compensated by an award of damages and (iii) if the court was in doubt, a balance of convenience would suffice. He placed reliance on *Giella v Cassman Brown* [1973] EA 358.



10. On the 1st issue, counsel submitted that the plaintiff had been on the suit property since 2005 and had built permanent structures thereupon and had enjoyed quiet possession for more than 12 years and therefore, the plaintiff had established a *prima facie* case. He relied on the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] KLR 125 which defined a prima facie case to mean one that was genuine and arguable.
11. On the 2nd issue, counsel submitted that the plaintiff had constructed permanent structures on the suit property and it did not have an alternative parcel of land. Consequently, an award of damages would not be a suitable recompense. He cited the case of *Waitbaka v Industrial and Commercial Development Corporation* [2001] KLR 374 where the court held as follows;

‘...it is not an inexorable rule that where damages may be an appropriate remedy and interlocutory injunction should never issue.’
12. On the 3rd issue, counsel submitted that the balance of convenience tilted in the plaintiff’s favour.
13. Mr Ndolo, counsel for the defendant filed his written submissions dated October 21, 2022. Counsel identified two issues for determination; (i) whether the suit was properly instituted and (ii) whether the court should grant the injunctive orders sought.
14. On the 1st issue, Counsel submitted that the suit was improper as a society was incapable of suing or being sued except in the names of its officials. Owing to this, it was Counsel’s submission that the suit was totally defective and deserved to be struck out. In support of his argument, counsel cited several authorities including *Football Kenya Federation v Kenyan Premier League Limited & 4 others* [2015] eKLR and *Republic v Registrar of Societies ex parte Narok Muslim Welfare Association* [2017] eKLR. The latter decision cited the case of *John Ottenyo Amwayi & others v Rev. George Abura & others* HCCC Number 6339 of 1990 where the court expressed itself 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.’
15. Relying on the principles of *Giella v Cassman Brown (Supra)* in addressing the 2nd issue, counsel submitted that the plaintiff had not established a prima facie case since the plaintiff came into existence in the year 2011 which was obviously below the statutory period of 12 years to the time it filed suit.
16. On irreparable injury, counsel submitted that the plaintiff could adequately be compensated by an award of damages. Counsel submitted that the church could congregate anywhere because God was omnipresent.
17. On balance of convenience, it was counsel’s submission that the balance tilted in the defendant’s favour because Kisumu HC Civil Case Number 121 of 2005 issued injunctive orders in its favour and the instant motion would be inimical to the administration of justice.

Analysis and determination

18. I have carefully considered the motion, parties’ affidavits and rival submissions and the issues for determination are; (i) whether the motion’s prayers are spent (ii) whether the plaintiff and defendant as described are legal entities with capacity to sue or be sued and (iii) what orders should this court issue. I will deal with the issues sequentially.



I. Whether the motion's prayers are spent

19. In its substantive prayer that was referenced earlier, the plaintiff sought temporary injunctive orders 'pending the hearing and determination of this application inter partes...'. This relief was spent and there is nothing for this court to render itself on save for costs.
20. It is trite law that courts are bound by parties' pleadings and the court cannot enter into the realm of litigation and infer the intent of the parties because to do so would lead to a miscarriage of justice, deny an opponent an opportunity to argue its case and obviously, it would lead to a deviation from the course of litigation. See *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR where the court cited with approval the decision of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3.

II. Whether the plaintiff and defendant as described are legal entities with capacity to sue or be sued

21. It is not in dispute that the plaintiff and defendant are churches. It is not in dispute that both were registered within the auspices of the *Societies Act*; the plaintiff's registration took place on July 20, 2011 and the defendant's on 6/01/1958. The originating summons and motion do not refer to the name of any person capable of being an official of either the plaintiff or defendant.
22. In the pleadings, the plaintiff described itself as 'Evangelical Church of Christ in Africa (E.C.C.A- Hera Maradier) (Suing through its Chairman, Secretary and Treasurer)'. The defendant's counsel argued that it was a cardinal principle of law that any suit by a society had to be filed in the names of its officials which was not so in the circumstances obtaining in this case. Counsel urged for the suit to be struck off. The plaintiff's counsel did not address me on this issue.
23. Within the provisions of Section 9 of the *Societies Act*, the officials of a society include a chair, treasurer and secretary and their respective deputies are usually disclosed and subject to Section 17 of the same *Act*, the officials can be changed. The import of this is that the particulars of every office bearer of a registered society are known.
24. I agree with the defence counsel that it is trite law that a society is an unincorporated entity and therefore it has no legal personality with capacity to sue or be sued in its own name. See *Kenya Federation v Kenyan Premier League Limited (Supra)*, *Republic v Registrar of Societies ex parte Narok Muslim Welfare Association (Supra)* and *John Ottenyo Amwayi & others v Rev. George Abura & others (Supra)*
 25. The use of the descriptive terms of the plaintiff as 'chairman' 'secretary' and 'treasurer' do not disclose the identity of the persons who are respectively the holders' of these offices for purposes of service of court processes and participation in the court proceedings. The same fate applies to its description of the defendant and that may well explain why an emeritus office holder of the defendant swore a replying affidavit instead of a subsisting office holder. Nothing could have been easier than for the plaintiff to obtain particulars from the registrar of societies before instituting suit.
26. Lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of these proceedings and it is my considered view that it is not curable by Article 159 of *the Constitution*.
27. For the reasons stated above, it my ultimate finding that the entire suit and proceedings are incompetent and a nullity and I hereby strike out the suit. It is trite law that costs follow the event and for the



reasons that the interested party did not participate in these proceedings, I will only award costs to the defendant. I hereby issue the following disposal orders;

- a) The plaintiff's suit is hereby struck out with costs to the defendant.

DELIVERED AND DATED AT SIAYA THIS 8TH DAY OF DECEMBER 2022.

HON. A. Y. KOROSS

JUDGE

8/12/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Ochieng for the plaintiff

Mr. Ndolo h/b for Otieno, Ragot & Co. Advocate for the defendant

Court assistant: Ishmael Orwa

