



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE 47 OF 2005

AFRICA INLAND CHURCH MWINGI

DISTRICT CHURCH COUNCIL PLAINTIFF

VERSUS

GEOFFREY MUSAVA MATITI

STEPHEN MWINZI

JONATHAN MULI

DOMINIC KAINDI

BENSON MOMBA

JAPHETH KASAU DEFENDANTS

RULING

The applicant Africa Inland Church, Mwingi District Church Council (through the Chairman) filed this suit against the six defendants. The 1st defendant was employed by the plaintiff at Katangini Africa Inland Church as a pastor whereas the 2nd to 6th defendants are members of the plaintiffs congregation, that is, elders.

In the Chamber Summons dated 15/6/05, the applicant seeks an interim orders of injunction to restrain the defendants from interfering with land parcel No. 3726 Kanzanzu Adjudication Section in Mwingi District, pending the hearing and disposal of the suit. The defendants apart from filing a replying affidavit in opposition to the application filed a Notice of Preliminary Objection dated 1/7/05.

A look at the Preliminary Objection as framed reveals that it is not Preliminary Objection at all. It refers to paragraphs in the affidavit and grounds of opposition. The filing of the notice was to put the plaintiff/applicant on notice on points of law to be raised but a look at the frame of the notice left a lot to be desired. The defendant/Respondent was allowed to argue the Preliminary Objection anyway and bring out the points of law that were intended to be raised at this preliminary stage. The first point taken by the Respondent is that the plaintiff has no locus standi in the matter because the plaintiff has pleaded that it is a society Registered under the Societies Act but the court was invited to take judicial notice of the fact that Africa Inland Church is the registered Society but not Mwingi District Council. The defendant/Respondent's counsel also submitted that the Chairman swore the verifying affidavit as if he was the plaintiff yet he is not, and that the society can only sue through its registered officials and that

there is no pleading to that effect.

The 2nd point argued was that the plaintiff did not include the pleading that Section 30 of Land Adjudication Act is complied with. That the consent from the Adjudication officer was only annexed and in any case leave was only granted to sue the 1st defendant but not the rest of the defendants.

The 3rd point taken was that this matter should have been filed in the subordinate court as the land is unregistered and that Section 11 of Civil Procedure Act was not complied with.

That the defendants are wrongly sued because any claim that the plaintiff has should be against the Katangini Fellowship Church. It was contended that order 1 Rule 8 was not complied with. The 4th ground is that there is no evidence of ownership of land and lastly, that the suit contravenes the Africa Inland Church constitution in that plaintiff cannot hold property on behalf of the Africa Inland Church. Counsel prayed that the suit be struck out.

The Preliminary Objection was opposed. On the issue of locus standi, counsel for plaintiff argued that to prove whether or not one has locus standi is a matter of evidence and the Chairman merely verified that contents of the plaint are correct but as to whether he holds that office is a matter of evidence.

On whether Mwingi District Church Council exists as a society, counsel argued that Section 2 of the Society's Act defines a society to include a club, branch of a society and that Mwingi District Church can therefore sue and that the Respondent has not cited any law that shows that the plaintiff cannot sue.

In response to whether Section 30 of the Land Adjudication Act was complied with, it was argued that since the consent is filed, it is a matter of evidence and that the Land Adjudication Officer does not need to state who should be sued and that since the defendants are officials of Katangini Fellowship they can be sued.

As to whether this court has jurisdiction to entertain this matter, counsel for plaintiff argued that this court has unlimited jurisdiction to entertain any matter being the High Court of Kenya.

In response to whether Order I Rule 8 was complied with or not, it was argued that, that provision can only be invoked if one of the defendants wants to sue on behalf of others. It was further argued that a plaint is a pleading and a Preliminary Objection cannot be raised on it but if the Respondent wants it struck out, he should have proceeded under Order 6 Rule 13 Civil Procedure Rules to have it struck out.

I have considered the Preliminary Objection raised; the submissions by both counsels. Before I go into considering the arguments of both counsels may be I should remind ourselves of what a Preliminary Objection is. The court of appeal in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. Versus WEST END DISTRIBUTORS LTD 1969 E.A 696** stated as follows: at page 700:

“ So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a Preliminary Point may dispose of the suit:.....” At page 701, it stated:

“.....A Preliminary Objection is in the nature of what used to be 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 Section has to be ascertained or if what is sought is the exercise of judicial discretion.”

Bearing the above in mind, I will go ahead to consider whether the grounds raised by the Respondents are Preliminary points of law.

The court was asked by the Respondent's counsel to take judicial notice of the fact that Africa Inland Church is registered society but not Mwingi District Church Council. The court is not aware of that

position. It would need to ascertain that. It is not a matter of common knowledge that the court would take judicial notice of. The court will have to be told how the Africa Inland Church runs or conducts its business and from this, it would not be possible to ascertain whether or not the plaintiff has capacity to bring this suit. It is a matter of evidence and that limb of the Respondents' ground does not amount to a Preliminary Objection on a point of law at all.

As per requirements of Land Adjudication Act Section 30, the consent of the Adjudication Officer is required for one to file a suit in respect of a land situated in an adjudication section. The plaintiff annexed a copy of the consent. The Respondent says it should have been pleaded in the plaint. He further argues that the 2nd to 6th defendants are not named as defendants in that purported consent. The consent that was filed specifically gives consent to the plaintiff to sue 1st defendant and Katangini Fellowship Church. It has been pleaded that the 2nd to 6th defendants are elders or officials of the said fellowship. If indeed they are the representatives of the fellowship, then they are the correct people to be sued. If they are not the proper persons to be sued that can only be ascertained after evidence is adduced. Besides, the Respondent argues that the plaint is incompetent for reasons that the proper parties are not sued and that the plaintiff has no locus. If the Respondent wants the plaint struck out for any reason, there are provisions under the Civil Procedure Rules and specifically Order 6 Rule 13 under which the court can be moved to strike out the plaint. That point is not a preliminary point of law.

The other point raised by the Respondent is that this suit offends provisions of Section 11 Civil Procedure Act because the lower court has jurisdiction to hear and determine this matter since the land is unregistered. It is true that the law provides that suits will be filed in the courts of the lowest grade but that does not oust the jurisdiction of this court. This court has unlimited jurisdiction to try any matter. Besides, the fact that the suit has been filed in this court does not mean that the case cannot be transferred to a lower court for hearing and disposal.

Does the suit offend Order 1 Rule 8 Civil Procedure Rules? It was argued that the defendants are sued as representatives of Katangini Fellowship and yet they are just members and that the suit should have been against Katangini Fellowship Church and that since it is a representative suit, Order 1 Rule 8 Civil Procedure Rule should be complied with. As properly argued by counsel for plaintiff, the above quoted rule is clear that where there are several people having the same interest in one suit, one or more of these 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 the others interested. In the present case, if one defendant is interested in defending the suit on behalf of others, the court can allow him to do so or if the court considers it necessary it can authorize one to defend the suit on behalf of others. There is nothing wrong with the manner in which the defendants are sued as they are said to be sued as representatives of Katangini Fellowship Church. If they are not representatives, then the Respondents will adduce evidence to that effect.

The Respondent also argued that there is no evidence of ownership of the land by the plaintiffs and so the suit should not be in existence. The Respondent realizes the need for evidence to prove ownership. That being the case, it just means that this point cannot be a Preliminary Objection on a point of law.

It was further submitted that by the constitution of Africa Inland Church the plaintiff cannot hold property on behalf of Africa Inland Church. No specific provision was cited in the said constitution. That will have to be ascertained by adduction of evidence.

In sum, I find that the points raised by Respondents' counsel are not Preliminary Objections on points of law. They are not pure points of law. The defendants do not accept the plaintiff's facts as pleaded and it cannot be said that all facts as pleaded are correct and need not be ascertained. Nearly all the facts need to be ascertained. This is a matter that needs to go to full hearing for determination on merit. The court dismisses the Preliminary Objection with costs to the plaintiffs/applicants.

R.V. WENDOH

JUDGE

Dated at Machakos this 6th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE