



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 61 OF 2020

REV. PETER ADIR AND THE LODWAR

PENTECOSTAL ASSEMBLIES OF GOD

KENYA CHURCH DISTRICT COMMITTEE.....1ST PLAINTIFF

PENTECOSTAL ASSEMBLIES OF GOD-KENYA.....2ND PLAINTIFF

VERSUS

DEBORAH TARASH SIRJOOSINGH

(Sued for and on behalf of

PENTECOSTAL ASSEMBLES OF CANADA).....1ST DEFENDANT

THE REGISTERED TRUSTEES OF

CHRIST IS THEANSWER MINISTRIES (CITAM).....2ND DEFENDANT

RULING

1. By a notice of preliminary objection dated 30/10/2020 and filed in court on 10/11/2020 the defendant objected the plaintiff's suit herein on the following grounds:

(1) The plaint as filed is unmerited and misconceived in law.

(2) The 1st plaintiff has no capacity to bring this suit. He is neither the head of the PAG Assembly in Namoruputh nor a Trustee of Pentecostal Assemblies of God in Kenya (PAG-K). His action offends Article 7, specifically 7, 4, Article 8 and Article 19 of the PAF-K Constitution.

(3) The 1st plaintiff does not have instructions to file the suit on behalf of the 2nd plaintiff.

(4) The 2nd plaintiff denies issuing any instructions to the advocate on record to originate this suit in its name.

(5) The 1st plaintiff is in violation of Article 22 of the PAG-K Constitution, which requires exhaustion of internal mechanisms before moving to court. That Article provides that where a dispute arises, the same should be subjected to the internal dispute resolution mechanism established in the PAG-K Constitution.

(6) Article 21 of the PAG-K Constitution provides the Executive Committee with the power to establish contacts with other churches, organizations and institutions. PAG-K has a working relationship with Pentecostal Assemblies of Canada (1st defendant) and Christ is the Answer Ministries (CITAM) 2nd defendant, formerly called Nairobi Pentecostal Church, Valley Road.

(7) The ownership of the 21 acres of land is not contested. The defendants have no interest in the land, neither do they intend to sale the land in whatever manner. Indeed, the 1st plaintiff confirms in his annexes that the land is in the name of PAG Namoruputh Church and Namoruputh PAG Health Centre respectively.

(8) The first prayer in the plaint is therefore superfluous in light of the fact that the ownership of the land is uncontested.

(9) It flows from number eight above that the second prayer is untenable and without basis.

(10) The dispute as framed, has nothing to do with environment and land. This court has no jurisdiction to hear a matter not related to its mandate.

(11) The suit is scandalous, frivolous and vexatious and an abuse of the process of court and should be dismissed with costs to the defendants.

2. The defendant filed submissions on **23/11/2020** in support of the preliminary objection. The submissions of the defendants narrate a lengthy history of the Namoruputh health facility. It is urged that the 1st plaintiff instituted the instant suit on his own motion and without consent as per the provisions of the PAG constitution, and he is neither the head of the PAG Assembly Namoruputh nor a trustee of the Pentecostal Assemblies of God. It is urged that he has not deponed that he has the authority of the church or its relevant organ to institute the suit and that the general superintendent has sworn an affidavit denying ever giving consent to the plaintiff to commence the suit. Counsel for the defendants invites this court to refer to **Articles 7.4 and 19** of the PAG-K Constitution which are said to address the issue of real property of the PAG Church and the persons allowed to act on behalf of the church in real property matters. He cites **Black's Law Dictionary 8th edition** as defining locus standi thus: *"the right to bring an action or to be heard in a given forum"* and submits that the 1st plaintiff has not demonstrated that he has locus standi in this suit. He further cites the case of **Law Society of Kenya V Commissioner of Lands** which cited an Indian case, **BV Narayana Reddy vs State of Karnatika Air (1985) Kan 99, 106** on the issue of locus standi. He stated that based on the foregoing, the plaintiff holds no proprietary rights over the suit land. He states that only the trustees of PAG-K and the Namoruputh PAG Assembly have the proprietary rights over the said land. He further submitted that this court should find that the 1st plaintiff and the advocate for the plaintiffs in the matter are acting without the authority of the 2nd plaintiff. Citing the case of **Ohaga V Akiba Bank 2008) 1 EA** where it is stated as follows:

3. It is also submitted that the 1st plaintiff has violated **Article 22** of the PAG-K Constitution, to the effect that no pastor member or official of the church shall take any matter involving the church to a court of law or any tribunal without first exhausting the dispute resolution machinery provided in the constitution and states that the 1st plaintiff has not demonstrated that he exploited the internal mechanisms so provided for before filing this suit. In the same breath counsel submits that the advocate for the plaintiffs has not disclosed that he is appearing in other litigation involving the issue of the disputed leadership of the PAG-K church and its constitution.

4. A more revealing submission is made that the 1st plaintiff is the overseer of the PAG Turkana District, which does not recognize or submit its returns to the PAG-K Headquarters; further the 1st plaintiff is said to have taken sides against the PAG leadership and is indirectly a party to the other litigation mentioned herein before. It is therefore submitted that the advocate ought to, in accordance with the provisions of **Order VII Rule 1(1) (e)** of the **Civil Procedure Rules**, averred in the plaint that *"there is no other suit pending ...in any court... between the plaintiff and the defendant over the same matter."* The decision in **Ruaha Concrete Co. Ltd and Others V Paramount Universal Bank and Others HCCC 430 of 2002** is cited for the proposal that the consequences of non-disclosure should apply in the present case: dismissal of the suit.

5. The issue of jurisdiction is also addressed. Citing **The Owners Of The Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd, 1989 KLR** and **Samuel Kamau Macharia v KCB & 2 Others Civil Application No 2 of 2011**, it is said that this suit is neither a *"land matter"* nor a *"dispute about the developments"* thereon but a suit about *"an apprehension that the respondents intend to sell the land"* and therefore this court has no jurisdiction.

6. The plaintiffs filed submissions in respect of the preliminary objection on **15/12/2020**. The plaintiffs' first submission is that all the 11 grounds in the preliminary objection call for evidence and can only be proved after full hearing. Further it is said that numerous triable issues has been disclosed in the plaint which are admitted by the defendant and a preliminary objection should be dismissed since in law even the existence of one triable issue demands for a full trial of the suit. The plaintiff submits that this court has jurisdiction and refer to **ground 7** of the preliminary objection which states as follows:-

"The ownership of the 21 acres of land is not contested. The defendants have no interest in the land, neither do they intend to sale the land in whatever manner. Indeed, the 1st plaintiff confirms in his annexes that the land is in the name of PAG Namoruputh Church and Namoruputh PAG Health Centre respectively."

7. It is stated that the **ground No. 7** above *per se* is an admission that this matter falls within the realm of the Environment and Land and that this court has jurisdiction under **Article 162 (2) (b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act**.

8. Regarding locus stand of the plaintiffs it is submitted that from the face of the pleadings the 1st plaintiff is in possession of the suit premises and that Reverend Peter Adir is an official of the Pentecostal Assemblies of God Kenya Church, being an overseer in the church and therefore he and the committee of the church have capacity to institute these proceedings. It is also argued that the 1st defendant in her affidavit of **14/10/2020** clearly recognizes the 1st plaintiff and the District Committee of the church and therefore the allegation that the plaintiffs have no locus standi is not well founded.

9. On the issue of instructions to advocate to file the suit, it is submitted that the advocate works for the PAG church and has authority to file the suit on behalf of the church given by the Lodwar PAG-Kenya Church.

10. It is further submitted that **ground 7, 8 and 9** amount to an admission of the plaintiffs' claim which warrants the dismissal the defendants' preliminary objection.

11. The plaintiffs also filed further supporting affidavit and in opposition to the defendant preliminary objection on **15/12/2020**.

Determination

12. The issue that arises in the instant application is whether the instant suit ought to be dismissed on the basis of the preliminary objection.

13. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** the court stated as follows in defining a preliminary objection:-

"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."

14. In the same case the court, decrying the habit of raising points which did not qualify as preliminary objections, it was observed as follows:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

15. This court has examined the notice of preliminary objection dated **30/10/2020**. Excluding the first and the last limbs thereof which are quite general in nature, the same raises only **9** substantive grounds.

16. An analysis of the **9** grounds shows, as the plaintiff's counsel has submitted, that most of them require evidence to be adduced to enable this court arrive at a determination of the issues raised therein.

17. Grounds No. 2, 5, and 6 call for an exhaustive examination of the relevant provisions of the Constitution of the PAG -Kenya Church if the issues raised therein are to be effectively determined. The defendants counsel's submission that there is other litigation involving the issue of the disputed leadership of the PAG-K church and its constitution is an own goal in that even if this court were inclined to examine the constitution, presenting of the constitution would be by way of giving of evidence, and it appears that it would not be certain which constitution is applicable at the moment. Those grounds do not amount to valid preliminary objections.

18. Grounds No. 3 and 4 also demand an examination of evidential documents to establish them. First, regarding **ground No. 3**, the statement that **"the 1st plaintiff does not have instructions to file the suit on behalf of the 2nd plaintiff"** is an incorrect statement as both the 1st and 2nd plaintiffs are named as parties in the suit in their own right. The question of the 1st plaintiff suing on behalf of the 2nd plaintiff does not therefore arise. Secondly, regarding **ground No. 4**, at the present moment it is not clear who the trustees of the 2nd plaintiff are and establishing that would require an examination of the governance documents of the PAG Kenya church. Consequently the mere statement that **"the 2nd plaintiff has denied giving instructions to the advocate to file the suit"** does not evoke an immediate sense of any wrongdoing on the part of the advocate in question. An examination of the membership of the 2nd plaintiff has to be examined in detail first to enable the court to reach any conclusion of impropriety on the part of counsel. For the present moment as no evidence has been adduced, this court may be acting on mere conjecture if it upholds **ground no 4** of the preliminary objection.

19. Grounds Nos. 7 and 8 only relate to the issue of ownership of the suit land and even if they were upheld they would not terminate the entire suit. Besides, the contents thereof appear, as the plaintiff's counsel has submitted, to be an admission beneficial to the plaintiffs.

20. Ground No. 10 which suggests that this court has no jurisdiction to hear and determine this suit on the basis that it is not an environmental or land matter, contradicts the prayers in the plaint which seek a declaration that the land belongs to the 2nd plaintiff. The defendants' counsel's submission that this suit is neither a **"land matter"** nor a **"dispute about the developments"** thereon but a suit about **"an apprehension that the respondents intend to sell the land"** and that therefore this court lacks jurisdiction is not easily understandable given that he has already stated that the matter concerns land! A litigant can not be allowed to blow both hot and cold at the same time as in the ancient man and satyr fable, and that ground too must fall.

21. In **Equity Bank Limited v West Link MBO Limited [2013] eKLR** the Court of Appeal (Musinga JA) stated as follows:

"Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met."

22. I do not think that the grant of the preliminary objection herein would serve justice in the present suit, for that would ignore the admission of the defendants made in the preliminary objection that the 1st plaintiff has an interest in the suit land. If the defendants are of the view that they do not contest the plaintiff's claim that the land belongs to the 2nd plaintiff nothing would be easier than making express admissions without taking all parties and the court on a circuitous route in the form of a multi-limbed preliminary objection most of whose contents scarcely relate to the core issue of ownership of the land in dispute.

23. Finally, I have noted that most of the factual material supporting the submissions on the preliminary objection is drawn from an affidavit filed by one **Patrick Lihanda** who describes himself as the General Superintendent of the Pentecostal Assemblies of God-Kenya. In this court's view, that deponent is a total stranger, not having been made a party to these proceedings. In a preliminary objection that has not been

ordered to be tried by way of application supported by affidavit evidence, his affidavit evidence is of no aid to the preliminary objection.

24. In the light of the foregoing the entire preliminary objection comprising of **11 grounds** is dismissed with costs to the plaintiffs.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 18th day of February, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.