REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 22 OF 2000

1. STEPHEN KOECH

2. CHARLES MURGOR

3. DANIEL KURGAT

4. PAUL KONGWALEI

5. STANLEY MINING.....PLAINTIFFS

VERSUS

1. ISAIAH YEGO

2. AFRICAN INLAND CHURCH OF KENYA TRUSTEES.....DEFENDANTS

RULING

The plaintiffs Stephen Koech, Charles Murgor, Daniel Kurgat, Paul Kongwalei and Stanley Mining have come to this Court by way of originating summons taken out against Isaiah Yego and African Inland Church of Kenya Trustees seeking a determination of two issues namely whether the African Inland Church of Kenya Trustees (registered) was entitled to amalgamate Nandi/Kamoiywo/308 and Nandi/Kamoiywo/317 to form Nandi Kamoiywo/2076.

2.Whether such amalgamation and consequent registration in favour of the Trustees at the detriment of Saniak Primary School was fraudulent.

The originating summons was accompanied by an injunction application under order 39 rules 1, 2 and 9 and order 36 rule 2 of the CPR seeking to restrain the defendants by themselves and their agents or servants from interfering, wasting or developing the determinate portion of land formerly registered as Nandi/Kamoiywo/317 pending the hearing of the application inter parties and (2) to be restrained from interfering with wasting, or developing that determinate portion of land formerly known and registered as Nandi/Kamoiywo/317 pending the hearing and determination of the main suit. The plaintiffs namely Stephen Koech, Charles Murgor, Stanley Kirwa Mining and Birgen and Paul Kongwalei swore affidavits in support and replying affidavits filed on 31.1.2000, 28.3.2000, and 10.5.2000 which affidavits contain the grounds in support of the application. The defendants/ respondents namely Isaiah Yego and African Inland Church of Kenya Trustees have filed replying affidavits namely Mariko Kirwa Singoei Chairman of the District Council AIC Nandi district, Isaiah Yego Chairman of the local church council Saniak Africa Inland Church AIC. They also rely on the annextures exhibited.

Their counsel filed a notice of preliminary objection filed on 14.4.2000 to the effect that the plaintiffs have no *locus standi* and that the entire suit as well as the application should be dismissed with costs to them. The reasons are that the plaintiff have purported to file the action on behalf of the local community claiming that the intended action is an injury to the existing public school. As per provision of section 61 of the Civil Procedure Act such an action can only be brought with the consent of the Attorney General and no such consent has been exhibited.

2. The plaintiffs have not shown they have any private right which has been infringed by the amalgamation and which they seek to protect and so they cannot complain on their own behalf and or on behalf of the local community.

3. That the 2nd defendant as the registered proprietor of the two parcels of land had the right to consolidate the two parcels of land and a parent of a child whose only right is for the child to attend school and then go home has no legal right to restrict the owner of the land the use of the land.

4. The plaintiffs have not alleged that they have been denied the right to take their children to the original school or the intended school.

5. They have not alleged that they have any overriding interests to be protected under section 30 of the RLA.

6. That the said land was held in trustee by Sirikwa County Council in trust for Saniak AIM and as required of a trustee the property was transfered to the beneficiary on 17.3.99 and they plaintiffs who have no registrable interest in the property where the 2nd defendant has been an owner from time immemorial to bring an application under section 143 RLA to challenge the rights of an owner who has been an owner from time immemorial. They have no right to complain as their children have not been refused entry either in the original school or the intended school.

7. The plaintiffs have no right to complain as they are merely committee members and parents of the school and that does not give them any proprietory rights to complain about the merger.

8. There is no dispute that the 2nd defendant owns both parcels and it matters not that one parcel had a church and another a school and the merger of these two parcels thereof is merely administrative and it is not in breach of anybody's proprietory rights and they plaintiffs have no right to interfere in the internal management of the defendants.

For the reasons given the counsel urged the Court to find that it is so obvious from the facts that there is no dispute to go to trial and the whole exercise is an abuse of the due process of the law and it should be refused.

The applicant’s counsel on the other hand has opposed the application on the basis that in raising the preliminary objection the learned counsel should not have gone, into the merits of the affidavits in support but he should have confined himself to the points of law.

1. That all that is necessary is to plead in what capacity they have filed the action. Herein applicants came as members of the management committee of Saniak Primary School and the respondents have not rebutted that assertion and it must therefore be assumed that what they are alleging is correct.

2. That the preliminary objection goes to the substance of the main trial and not the points of law only.

3. That the complaint is not about user but about ownership and so the activities cited have no relevance here.

4. That since the land was registered in the name of the school with the church as a trustee the church has no right to become an owner.

5. That the plaintiffs have rights under section 143 of the RLA and they need to plead that they have overriding interests, they were entitled to state that the 2nd defendant had no right to amalgamate the two parcels of land complained of.

In reply counsel for the applicant/defendant reiterated his earlier stand that they have no *locus standi* and they have no right to protect and no right of theirs have been infringed and that they cannot fetter the rights of an owner. Further that the authorities relied on apply to the facts of this case and that all they are raising are legal issues and not fact.

On the Courts assessment of the facts it is clear that objector has objected on 2 fronts namely that applicants/plaintiffs have no legal right to protect and 2ndly that they have no *locus standi*. They rely on the authorities cited also. I have perused the same and considered them briefly. In the case of *Nairobi Permanent Markets Society and 11 others -vs- Salima Enterprises and 2 others* Nairobi CA 185/97.

The appellants went to Court on their own behalf and on behalf of some other unnamed stall owners of the Westlands Permanent Market Nairobi for a declaration on the basis that the 2nd to 8th appellants were permanent market stall owners while the 9th - 12th were temporary stall owners in the market at Westlands situated on land known as LR 1870145/IX and that appellant No 2-12 are members of appellant No 1. The council sub-divided the alleged piece of land and allegedly unlawfully leased out a portion thereof namely LR 1870/1X/120 and leased to the 1st defendant for a term of 99 years. It was contended that the said lease was unlawful as the same was not signed by the then Mayor of Nairobi nor did it carry the seal of the council. It was further contended that it was a condition of the Government grant to the council that the said land would only be used for purposes of convenience, developing houses or covered market and for such other purposes as may be approved by the Commissioner in writing and it was also a condition of the said grant that the council would not sell, transfer or part with possession of the said land without consent of the commissioner in writing except for letting of the market stalls on monthly basis.

The appellants further averred that though the condition had not been met and the lease was totally irregular but the commissioner had caused the same to be registered and in consequence thereof the appellants had suffered loss and damage and so they sought a declaration that the subsequent registration was unlawful.

The appellants lost the case in the first instance and they went on appeal contending that the suit property was leased out by the council unlawfully thereby prejudicing the rights of a number of stall holders who were in occupation of the land with the permission of the council, that the learned judge erred in holding that the appellants had no *locus standi*, that the learned judge also erred in holding that the appellants had failed to establish a *prima facie* case and that the council by selling the suit land to the company without offering the appellants a hearing had violated the legitimate expectation of the appellants to be treated fairly. It was further noted that the company had purchased the suit land from the council for valuable consideration and there was no allegation that the company had purchased or that it was a party to any fraud or misrepresentation perpetrated upon the appellants in the acquisition of the said suit land.

It was held *inter alia* that the appellants have not disclosed what right or interest they had in the suit land and in the absence of that they could not expect the Court to interfere with the company's right of ownership by putting hold on its activity or development of the suit land. That the appellants *prima facie* did not have *locus standi* to bring the said action for an injunction against the respondent.

3. That Rules of Natural Justice would apply only where legal right, liberty or interest of an aggrieved party has been affected and so the appellants had no right to be heard unless if they were in some position to establish some right interest in the suit land which they failed to do.

In the case of *Wreck Motor Enterprises v The Commissioner of Lands and 3 others* Nairobi CA 71/97, the appellant had gone to Court avering that he was carrying on business on this plot and his Excellency the President had allocated it to him and he went to Court to seek the 1st respondents to give consent to that allocation under section 36 of the Government Lands Act. The first respondent responded that the suit

land had been allocated to another person. The appellant went to Court seeking an order of *mandamus* directed against the Commissioner of Lands to accordingly give effect to the appellants application as approved by His Excellency the President.

The second respondent herein raised objection to the proceedings on the basis that he being the properly registered proprietor of the suit plot the application by the appellant who had no interest in the suit plot which was no longer an unallocated land that can be granted by the President to it was misconceived and bad in law.

The preliminary objection was upheld and the suit dismissed and on appeal the dismissal was upheld as the land had been registered at the time the allocation was done.

In the case of the *Commissioner of Lands v Kunste Hotel Limited Nakuru* CA 234/95 where it was observed at the outset that in a suit strictly so called the hotel could only properly litigate on behalf of the general public with the written consent of the Attorney General in terms of section 61 of the CPA.

Applying the principles in the said cases to the facts of this application it is clear that in order for one to litigate one has to have *locus standi* and 2ndly one must have an interest capable of being protected.

In this case the applicants have filed the action in their capacity as members of the management committee of Saniak Primary School AlC in their own behalf and on behalf of the community which donated the land for the school to be built. Although it is not expressly stated so the reading of their papers clearly indicate so. In order for the claim to stand in so far as it relates to them as management committee members it has to be shown that they are indeed members of the management committee as alleged. This can be proved by production of the minutes of the meeting in which they were so appointed or 2ndly by letters of appointment. There are no minutes or letters of appointment exhibited by them and so there is nothing to show that they are such members. The averments and confirmation contained in the various affidavits alone do not go to prove this fact.

As regards the right to litigate on behalf of the community which donated the land section 61 of the CPA comes into play. Such a claim would amount to a claim in the public interest and for one to litigate on behalf of the public one has to obtain the mandate of the many members of the public to litigate on their behalf and 2ndly seek authority from the Attorney General to file such proceedings. There is no such authority or permission from the local community which is exhibited neither is there authority from the Attorney General or the Court to validate the proceedings.

Turning to the second aspect of the objection mainly lack of interest to protect. It is clear from the history papers exhibited that the land was set aside for the purposes of putting up a school under the sponsorship of the church. The school was put up and it is still in existence. The school was to serve the local community and it is on record that it is still serving the local community. The church came in and put up a church. The applicants have not stated how the land came to be registered separately for the church and the school. This land was formerly held in trust but that has now been converted to free proprietorship. The defendants allege that a hedge was put between the church compound and the school compound and when surveyors came round they mistook this to be a boundary hence the issuance of the two separate titles 317 and 308. There are 2 maps exhibited one shows the two parties without a sub-division in between while another MKC 5 shows the division with braces either side. The meaning of braces in land matters is that it shows that the parcels are an extention of the other. All the same activities went on on the two parcels one being a school another a church.

At some point in time the titles were converted from trusteeship to absolute proprietorship. Although the earlier registration was a trust the particulars of the trusteeship are not shown and it appears none were set out. The rights of say or consultation on change of user were not reserved. When these titles were converted they gave the church the absolute proprietorship. Once again the rights of say and the right of the community to have a say on the change of user were not reserved. The action complained of is change of user or additional user and amalgamation by an absolute proprietor whose titles have no reservations on them.

If the community is aggrieved by this action and they feel convicted that they should dictate the destiny of the use of the said properties then they have to bring themselves within the law, go back to the adjudication records or the records of existing rights made during the registration, establish the nature and the terms of the trust or donation of the land. If they go contrary to absolute proprietorship then move the Court to have these terms and conditions reflected either on the title or in the register. Before that is established the community has no interest to protect in so far as change of user is concerned so long as the purpose for which the land was set aside namely education and the children of the community are not being denied education has not been abolished or compromised.

The activities complained of the starting of a boarding school alongside the existing one. It has not been avered that the children from the local community have been excluded from the facility and in the absence of such a move I do not see how this additional facility has departed from the original purpose for the donation namely provision of education. For the reasons given the preliminary objection is upheld. The application together with the entire originating summons be and are hereby struck out with costs to the defendant/objector.

Dated and Delivered at Eldoret this 5th day of July 2000.

R.NAMBUYE

JUDGE