



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 57 OF 2018

FRANCIS NJUGUNA.....PLAINTIFF

VERSUS

THE SECRETARY,

ANGLICAN CHURCH OF KENYA.....1ST DEFENDANT

THE ANGLICAN CHURCH OF KENYA,

DIOCESE OF ELDORET.....2ND DEFENDANT

RULING

[DEFENDANT'S NOTICE OF PRELIMINARY OBJECTION DATED 23RD APRIL, 2018]

1. The Defendant raises two grounds in their preliminary objection detailed above. The first is that the suit is an abuse of the Court process, and the second is that the Defendants are incapable of being sued except through their trustees.

2. The Plaintiff filed his grounds of opposition dated the 2nd October, 2018 summarized as follows;

(a) That the preliminary objection is fatally incompetent as it seeks final orders which cannot be granted at the interlocutory stage.

*(b) That the preliminary objection is frivolous, vexatious, scandalous, devoid of merit, offends **Order 1 Rules 9 and 10 of the Civil Procedure Rules** and should be dismissed with costs.*

2. That the preliminary objection came up for hearing on the 30th October, 2019 when Counsel for the parties agreed to file and serve written submissions. The learned Counsel for the Defendants filed and served their written submissions dated the 6th January, 2020 on the 6th February, 2020. The said Counsel has availed an affidavit of service sworn by **Victoria C. Lagat advocate** on 14th October, 2020 confirming that their submissions and mention notice for 7th December, 2020 were served upon the learned Counsel for the Plaintiff who acknowledged service on the 6th February, 2020 and 14th October, 2020 respectively.

3. The learned Counsel for the Defendants submitted that the 2nd Defendant is an association registered under the **Societies Act Chapter 108 of Laws of Kenya**, while the 1st Defendant is its employee. That in the case of ***Living Water church International Vs City council of Nairobi [2008] eKLR***, the Court stated that registered Societies are not legal personalities capable of being sued but through their officials or trustees as per their constitutions. That a similar position had been taken in ***Free Pentecostal Fellowship in Kenya Vs Kenya Commercial Bank – Nairobi Hccc No. 4116 of 1992, John Ottenyo Amwayi & 2 Others Vs Rev. George Abura & 2 Others*** and ***Bridge Hotel Ltd Vs Wilfred Mutiso Lai Jesus Celebration Center [2016] eKLR***. That from the decisions in the foregoing superior court decisions, **Section 3 of the Societies Act** and the case of ***DI Koisagat Tea Estate Ltd Vs Eritrea Othodox Tewhdo Church Ltd [2015] eKLR***, the 2nd Defendant is a non-party and the court's jurisdiction is ousted as it cannot make any orders against a nobody. The learned Counsel further submitted that the 1st Defendant, as an employee of the 2nd Defendant, lacks capacity to be sued as was determined in the case of ***Andrew Inyolo Abwanza Vs Board of Trustees of Pentecostal Assemblies of God – Kenya & 3 Others [2009] eKLR***. That as held in the cases of ***Mukhisa Biscuits Manufacturing Co. Vs West End Distributors (1969) E. A. 696, Avtar Singh Bhamra & Another Vs Oriental Commercial Bank – Kisumu Civil Suit No. 83 of 2004, David Karobia Kiiru Vs Charles Nderitu Gitoi & Another [2018] eKLR***, their preliminary objection should be upheld and the suit dismissed with costs.

4. The following are the issues for the Court's determinations;

- (a) *Whether Defendants, or any of them, are with capacity to be sued.*
- (b) *Whether the preliminary objection should be upheld and if so, what order to issue?*
- (c) *Who pays the costs?*

5. The court has considered the two grounds on the preliminary objection, grounds of opposition by the Plaintiff, the Defendants' Counsel's written submissions, the superior courts' decisions cited therein and come to the following conclusions;

(a) That the Plaintiff commenced this suit through the Plaint dated the 16th March, 2018 against the Defendants, described as the Secretary, Anglican Church Eldoret and the Anglican Church of Kenya Diocese of Eldoret. That paragraph 2 of the Plaint describes the 1st Defendant as ***"an adult of sound mind and the Secretary of the 2nd Defendant capable of being sued on his own behalf and on behalf of the 2nd Defendant."*** That paragraph 3 describes the 2nd Defendant as ***"a church within the Diocese of Eldoret carrying on church activities and duly registered under the Societies Act of the Laws of Kenya and equally capable of suing and being sued."*** That paragraphs 4 and 5 of the Plaint refers to the 2nd Defendant as trustees of land parcel ***ACK TOWN JUA KALI PLOT 4/98.***

(b) That from the description of the 2nd Defendant on the Plaint, and the submissions by the learned Counsel for the Defendants, the Court finds that the 2nd Defendant is a religious entity registered under the ***Societies Act Chapter 108 of Laws of Kenya.*** That further, and as was submitted by Counsel for the Defendants, ***Section 3*** of the said Act and the decisions of the Superior courts cited above, to the effect that religious entities registered under the ***Societies Act*** are without capacity to sue or be sued in their names, but only through their elected officials and or trustees in accordance with their constitution leads the Court to find that the 2nd Defendant is without capacity to be sued. That further, there is nothing in the pleadings to show that the 1st Defendant is one of the elected officials or trustees of the 2nd Defendant with capacity to be sued on behalf of the 2nd Defendant. That the Defendants have through their preliminary objection and submissions stated that the 1st Defendant is an employee of the 2nd Defendant which fact has not been challenged or rebutted.

(c) That the Defendants having shown that they have no capacity to be sued in their names and therefore no order can be issued against them by the Court, then the Court finds this suit is an abuse of the Court's process.

(d) That contrary to the position taken by the Plaintiff through their grounds of opposition that final orders cannot be issued at the interlocutory stage, the law allows preliminary objections to be raised at any stage of the proceedings. That further, where it has been shown like in this case that the Defendants are without capacity to be sued, then to proceed with the suit would only increase the costs of litigation not only to the parties, but also to the Court. That ***Article 159(2) (b) and (d) of the Constitution, Section 1A, 1B, 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya*** and ***Section 19 of the Environment and Land Court Act No. 19 of 2011*** obligates the Court to decide on the disputes before it without undue delay, expeditiously, timeously and with efficient use of resources. That the court, and indeed the parties, will have failed in their duty to the court if the suit with Defendants who have no capacity to answer to the Plaintiff's claim is allowed to remain pending ones that fact has become apparent.

(e) That as the Defendants' preliminary objection has merit, the Plaintiff should pay the costs of the suit.

6. That having considered the preliminary objection and come to the foregoing conclusions, the Court finds and orders as follows;

(a) *That the Defendants' preliminary objection dated the 23rd April, 2018 is hereby upheld.*

(b) *That the Plaintiff's suit commenced through the Plaint dated the 16th March, 2018 is hereby struck out with costs.*

It is ordered.

Delivered virtually and dated at Eldoret this 17th day of March, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Bett for M/s Lagat for Defendants.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.