



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 101 OF 2016

AFRICAN INDEPENDENT PENTECOSTAL

CHURCH OF AFRICA (AIPCA) (REGISTERED TRUSTEES).....PLAINTIFF

VERSUS

1. AFRICAN INDEPENDENT PENTECOSTAL CHURCH-KENYA

(REGISTERED TRUSTEES).....1ST DEFENDANT

2. KIUNGANI TRADING CENTRE COMMITTEE

SIMON KINGA-CHAIRMAN DANIEL KAMAU-SECRETARY2ND DEFENDANT

SAMUEL NJERU- TREASURER

JUDGMENT

INTRODUCTION

1. This is a judgment in a suit involving a church that split into two different factions. A plot had apparently been allocated to the church before the split and the question arises as to who between the plaintiff who is the church with the original name and the faction that split from it should be declared the owner of the suit land herein.

2. By a plaint dated 11/4/2016 and filed on the 15/6/2016, the Plaintiff seeks judgment against the defendants jointly and severally for:-

- (a) A declaration that the plaintiff is the lawful and sole owner of Plot No. 92 Kiungani farm and that the 1st Defendant be evicted there from forthwith
- (b) An order directing the Land Registrar Trans-Nzoia County to register the suit plot in the names of the plaintiff and or in the alternative the register be rectified by removal of the 1st Defendant's names and insert the name of the plaintiff.
- (c) Permanent injunction
- (d) Costs
- (e) Any other relief that the court deems just and fit to grant

PLEADINGS

The Plaint

3. It is the plaintiffs' contention is that the proprietor of AIPCA Church housed in Plot No. 92 Kiungani Farm measuring ½ acre or thereabouts which was part of L.R. No. 5706 which was allocated to it in 1974 or thereabouts and issued with an Allotment Letter in 1993 or thereabouts by Kiungani Farm Management Committee; that it took possession and developed the same by setting up a church building

however the title deed has not yet been processed; that in the year **2006**, a disagreement ensued amongst church members and it split into two factions, being the plaintiff and the 1st Defendant; that the original Africa Independent Pentecostal Church-Africa (AIPCA) members were expelled by the Africa Independent Pentecostal Church-Kenya (AIPCK) and took possession of the church thus obstructing the Plaintiff from carrying its activities; that the 1st Defendant has colluded with the 2nd defendants' officials who happen to be AIPCK members to have the title deed issued in the name of the 1st Defendant; that they have had several cases before the local administration and the police to no avail; that the defendants' actions are unjustified, illegal without any legal basis and the defendants are trespassers and a nuisance who should be stopped from such acts and the plaintiff ought to be declared the lawful owner of the suit land and the 1st defendant should be ordered to move out and give vacant possession failure to which it be evicted.

The Defence

4. The defendants filed a joint statement of defence on the **26/7/2016**; they deny the allegations contained in the Plaintiff. The 1st defendant avers that the land comprised of Plot **No. 41** in Kiungani Trading Centre and the developments standing thereon solely belong to the 1st defendant and the plaintiff does not have any legal interest whatsoever in the suit land; that by the time the suit land was allocated to the Plaintiff (**AIPCA**) the members of the 1st defendant were the majority and they are the ones who constructed the church; that they concede that there was a dispute between the church members in **2001** and a few members of the plaintiff voluntarily moved out of the church; that after the split of the church, the faction that remained on the suit land was registered as Africa Independent Pentecostal Church of Kenya (AIPCK) who have remained in possession to date; that the Registrar of Societies heard the two factions and decided that each faction was to retain the assets under its control; that aggrieved by the decision, the plaintiffs faction challenged it vide **Nairobi HC Civil Application No. 1220 of 2003** when the Judicial Review Application was heard and was dismissed; that the 1st Defendant is the lawful owner of land comprised of **No. 41** in Kiungani Trading Centre and that the plaintiff does not have any interest on the suit land; that the suit is incompetent, misconceived and an abuse of the due process.

Reply to defence

5. The Plaintiff filed reply to defence dated **14/8/2016** on the **23/8/2016** maintaining that the plot and the developments thereon in **No. 92** (being the new plot **No. 41**) belongs to the Plaintiff which has legal interest in it to the exclusion of all others; that the plot was developed before the split of the church; that its members were evicted forcefully when police intervened; that both groups were not called to a meeting and the Registrar of Societies' ruling did not affect Trans-Nzoia area; it was stated that the factionalism problem only affected the Githunguri area and that that the Judicial Review proceedings were not in relation to Trans-Nzoia but was in respect to Central Province.

6. Before I delve into the evidence of the parties I observe that the defendants have raised an objection which may if it succeeds, dispose of the entire suit without reference to the evidence.

7. The defendant has stated that both the plaintiff and the 1st defendant are not body corporates and they are therefore incapable of suing or being sued in their names.

8. Paragraph 3 of the joint defence states as follows:

“It is denied that the plaintiff and the 1st defendant are body corporates and it is intended that none of them has capacity to sue or be sued, and the plaintiff is invited to strict proof of the allegations in paragraphs 1 and 2 of the plaint.”

9. The 1st defendant relies on **Kenya Auto Bazaar Association Vs Kenya Revenue Authority Inspection and Control Services Ltd [Nbi HCCC No. 1491 of 2000,] Trustees of The Agricultural Society of Kenya Vs James Gitonga [Nbi Civil Appeal No 150 of 2015]** as well as **Free Pentecostal Fellowship Kenya Vs Kenya Commercial Bank [Nbi HCCC No. 5116 of 1992 (OS) 1992 eKLR]** to support the objection.

10. The plaintiff totally eschewed addressing this issue in that his reply to defence did not address the allegation and no amendments were sought to purport to enjoin parties who would be thought to have capacity.

11. The 1st defendant did not also attempt any amendments to the pleadings, and proceeded with the parties descriptions as pleaded.

12. A preliminary objection should be raised at a very early stage in the proceedings as the determination thereon may save the court much judicial time otherwise spent in hearing the evidence in the case. In this case, although the plaintiff never addressed the contents of **paragraph 3** of the plaint, the 1st defendant never moved the court to have the issue of capacity of the parties determined *in limine* but rather allowed the hearing to proceed to conclusion whereupon it raised the issues in the submissions, and this should have a bearing on the order as to costs.

13. I have taken note of the authorities cited by the defendants which in my view espouse the correct position in law. Further in the case of **Kipsiwo Community Self Help Group v Attorney General And 6 Others [2013] eKLR** the court (Munyao J) stated as follows:

“38. I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal

capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”

14. The same legal approach was endorsed in **Kituo Cha Sheria vs John Ndirangu Kariuki & Another, Nairobi Election Petition No. 8 of 2013, [2013] eKLR** and also in **St. Mary School, Nairobi vs Josphat Gitonga Kabugi, Nairobi (Milimani) HCCC No. 65 of 2004 [2004] eKLR**.

15. This case may be slightly distinguished from the above cited cases in that the plaintiff appears to have added the parenthesized words “*Registered Trustees*” at the end of the names of both the plaintiff and the defendant in the title to the plaint. However in this court’s view the said addition can not be equated to the express inclusion of names of the actual registered trustees of both organizations and it does not help the plaintiff’s situation at all. The fact remains that both the plaintiff and the 1st defendant are unincorporated bodies and they do not therefore have capacity to sue or be sued.

16. For the above reasons I find that the suit between two bodies lacking capacity is a non-starter. Consequently the suit against all the defendants is hereby struck out. Leave is however granted to file a fresh suit in the name of the correct parties within **90 days** of this judgment. For the reason earlier set out in this judgment, the parties shall bear their own costs of this suit.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 20th day of April, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE