



Mutua & another (Suing as the Office Bearers of African Church - Kenya) v Assistant County Commissioner Central Division & 2 others; Kivali (Interested Party) (Miscellaneous Application E001 of 2024) [2025] KEHC 11132 (KLR) (22 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E001 OF 2024**

**RC RUTTO, J
JULY 22, 2025**

BETWEEN

**REVEREND ONESMUS MUTUA 1ST APPLICANT
REVEREND ONESMUS MULI 2ND APPLICANT
SUING AS THE OFFICE BEARERS OF AFRICAN CHURCH - KENYA**

AND

**THE ASSISTANT COUNTY COMMISSIONER CENTRAL DIVISION 1ST
RESPONDENT
REGISTRAR SOCIETIES OF KENYA 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT**

AND

BISHOP RICHARD KIVALI INTERESTED PARTY

RULING

1. In their Notice of Motion dated 16th May 2024, the applicants have invoked the provisions of order 8, rule 3 & 5, order 51, rules 1, 3 & 4 as well as 10 (2) of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following reliefs:
 - a. That this Honourable Court be pleased to grant the ex-parte applicants leave to amend their notice of motion dated 26th January 2024 as per the draft amended notice of motion;
 - b. That this Honourable Court be pleased to deem the annexed amended notice of motion dated 17th May 2024 as duly filed;



- c. That costs of this application be in the main suit.
2. The application is supported by the grounds on its face, the supporting affidavit of the 1st applicant sworn on 17th May 2024 and the annexures thereto. The facts giving rise to the application is that the applicants are members of the African Church (Kenya), the society. Elections of the officials of the society took place on 27th November 2021 where the applicants were elected as its chairman and secretary general respectively.
 3. The applicants claim that in spite of the elections, the records failed to reflect the change of guard thereby deeming them to be unregistered officials. The applicants sought to amend their notice of motion to reflect their description as office bearers of the society. They urged this court to allow the application for it was necessary for preservation of the suit and it will not be prejudicial to the respondents as it would not alter the substance of the suit. It was their contention that if the orders sought are not granted, the applicants would be denied justice.
 4. Prior to filing of the Application, the Respondents filed a Notice of preliminary objection dated 19th April 2024, that the suit ought to be dismissed on the ground that the applicants lack the locus standi to institute the proceedings under sections 41 (1) and (2) of the Societies Act.
 5. In response to the application the respondents relied on the affidavit of Maria Goretti Nyariki, an advocate of the High Court of Kenya and the in charge of the societies section at the 3rd respondent, sworn on 2nd October 2024.
 6. The respondents make reference to their notice of preliminary objection dated 19th April 2024 and aver that, the Notice of motion was filed in response to their preliminary objection and the applicants had no capacity to sue. That the application was fatally defective and a nullity in law.
 7. The respondents aver that on 20th March 2020, the interested party was elected chairman of the society. The society submitted the notification of change to the 2nd respondent and those changes were approved and effected in the society's file.
 8. It is their averment that the current office holders were to hold office for a term of five (5) years set to lapse in 2025. Thus, it was not correct that elections were held a year after the interested party was elected.
 9. They state that in any event, the applicants had not exhausted all avenues of resolving the dispute before coming to this court.
 10. The interested party filed a notice of preliminary objection dated 22nd July 2024 for the application to be struck out on the following grounds: the applicants do not have leave to institute judicial proceedings and is therefore incompetent; the applicants lack capacity to commence these proceedings as they are not members of African Church; the application offended section 17 of the African Church Constitution; and the court lacked jurisdiction to hear and determine the subject matter.
 11. The interested party also filed a replying affidavit dated 23rd October 2024 in opposition of the Application.
 12. It is their averment that the application is not merited for the following reasons: the application is intent on defeating the preliminary objections on record; the applicants are neither members of the African Church Kenya nor its office bearers; the 1st applicant's pastoralism was terminated from the society on 16th December 2014; the applicants are greedy for power; and the applicants had filed a previous suit, Civil Suit No. 130 of 2011 that was dismissed.



13. The interested party further contends that the applicants had not exhausted all the internal dispute resolution mechanisms available. That the amendment being sought to be introduced is untenable because leave was granted to institute the judicial review proceedings in their capacities as office bearers and not as members. As such, an amendment could not operate retroactively as to grant locus standi. In his view, the amendment seeks to alter the nature of the proceedings since it is designed to alter their capacity.
14. On 24th July 2024, the Court directed that the application and the preliminary objections will be canvassed together through written submissions which were duly filed by all the parties. The Applicants filed their submissions dated 31st October 2024 the Respondents filed their submissions dated 2nd October 2024 while the interested party filed his dated 9th April 2025.
15. The respondents and the interested party have raised separate preliminary objections seeking to strike out the main suit and the Application respectively.
16. The applicants submitted that the notices of preliminary objection did not meet the threshold of a preliminary objection and therefore ought to be dismissed. It was their submission that the question as to whether the applicants were officials or not was not a pure point of law and it required examination of evidence and its authentication.
17. Distinguishing the suit from the provisions of section 41 of the *Societies Act*, the applicants submitted that the present suit was civil and not criminal in nature. They submitted that leave was sought to institute the present proceedings. It further distinguished these proceedings with those contemplated in section 17 of the society's Constitution arguing that those contained in section 17 were not the proceedings that governed the present dispute. Finally, the applicants urged that they were entitled to the reliefs sought in their application as they had met the threshold set out in granting the application.
18. The respondents submitted that by dint of sections 41 (1) and (2) of the *Societies Act*, the applicants had not demonstrated that they were elected officials or members of the African Church Kenya, a society incapable of suing or being sued in its own name. They submitted that the applicants, being neither officials nor members of African Church Kenya, had no capacity to sue on the society's behalf.
19. They further submitted that the applicants had not exhausted all internal dispute resolution avenues before coming to this court. Thus, the substantive and present applications were premature. They opined that the applicants ought to have invoked the procedure laid out in section 17 of the society's constitution. It was thus their prayer that the application be dismissed with costs.
20. The interested party argued that the applicants had failed to demonstrate that they were members of the society. Further, that the application offended the doctrine of exhaustion as the applicants ought to have invoked section 17 of the society's Constitution in laying credence to their claim.
21. He reiterated the contents of his replying affidavit and urged the Court to dismiss the application with costs.
22. I have considered the application, the preliminary objections, responses thereto and parties submissions.
23. It is trite law that a preliminary section can only succeed where points of law have been made or undisputed points of fact. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West*



End Distributors [1969] EA 696 sets the principles enunciated in determining a preliminary objection in the following words:

“ 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... [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 has to be ascertained or if what is sought is the exercise of judicial discretion . . .”

24. A preliminary objection raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.
25. In the instant case The respondents and the interested party seek to have the application as well as entire suit struck out for the reasons that that: it offends section 41 (1) and (2) of the *Societies Act* on account that the applicants are neither members nor officials of the African Church Kenya, the subject society in question; the applicants do not have leave to institute judicial proceedings and is therefore incompetent; the application offended section 17 of the African Church Constitution.
26. On the other hand, the Applicant contend that they are members and office bearers of African church Kenya, they have legal capacity to institute judicial proceedings and Section 17 of the Church Constitution was not applicable to the present dispute.
27. The Court holds that all the above issues require ascertainment of facts as pleaded by the parties and probing of evidence. Therefore, the Court finds that the grounds raised by the Respondent & Interested Party cannot be raised as Preliminary objection and the same are not merited.
28. Turning to the Application for amendment, order 8, rule 3 of the *Civil Procedure Rules* provides that the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings for the purpose of determining the real issue in controversy or correcting any error of defect in any proceedings.
29. In *Institute for Social Accountability & another vs. Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution (Interested Party)* [2014] KEHC 7356 (KLR), the court held as follows on amendment of pleadings and this court shall wholly adopt:

“ The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461 ; *Ochieng and Others v First National Bank Of Chicago* CA Civil Appeal Number 149 of 1991, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another* [2003] 2 EA.

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of



amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

30. It is worth pointing out that the denial of an amendment of a pleadings is a drastic order and a party supporting that denial must demonstrate that the objective of amendment is not met with that amendment. In this case, I find that the respondents and the interested party have failed to demonstrate such reason.
31. It is plausible that the present application was only galvanized by the notice of preliminary objection dated 19th April 2024. However, the applicants seek to amend the pleadings to bring all issues of controversy in question. The applicants would like to amend the descriptive part of their pleadings contending that they bring this suit as members and not officials of African Church Kenya. I find that such amendment will not be prejudicial to the respondents and the interested party.
32. Accordingly, the Court orders as follows:
 1. The Respondents and interested party Preliminary objections dated 19th April and 22nd July 2024 respectively are dismissed.
 2. The Notice of Motion Application dated 16th May 2024 is allowed
 3. The applicants shall amend and file their amended Notice of Motion within 14 days from the date of this order
 4. Costs to be in the Cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF JULY 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Selina Court Assistant

