



Supreme Council of Kenya Muslims (SUPKEM) & another v Registrar of Societies; Omar & 2 others (Interested Parties) (Judicial Review E104 of 2023) [2024] KEHC 1320 (KLR) (Judicial Review) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E104 OF 2023
JM CHIGITI, J
FEBRUARY 16, 2024**

BETWEEN

SUPREME COUNCIL OF KENYA MUSLIMS (SUPKEM) 1ST APPLICANT

AL HAJJ HASSAN KIRUA OLE NAADO 2ND APPLICANT

AND

REGISTRAR OF SOCIETIES RESPONDENT

AND

MOHAMUD SALIM OMAR INTERESTED PARTY

ABUYA MOGENDL INTERESTED PARTY

T/A M/S SALIM OMAR & CO ADVOCATES INTERESTED PARTY

RULING

1. What is before this court are Notice of Preliminary Objection dated 12th October, 2023; and a Notice of Preliminary Objection dated 4th October, 2023.
2. In response to and opposing the Applicant’s Chamber Summons dated 31st July, 2023 the Respondent filed their Notice of Preliminary Objection dated 12th October, 2023 on the following grounds:
 1. That the 1st Applicant has no locus standi to institute this suit in its own name.
 2. That the suit herein is fatally defective in law as the 1st Applicant lacks the capacity to institute proceedings in its own name.



3. That a society registered under the *Societies Act* Chapter 108 Laws of Kenya is not a body corporate for it to sue or be sued as a legal personality.
 4. That consequently this suit should be struck out with costs.
3. Further, in response to and opposing the substantive judicial review motion dated 11th August, 2023 the Interested Parties filed their Notice of Preliminary Objection dated 4th October, 2023 on the grounds:
1. That the 1st Applicant which is a society lacks the locus standi to institute these proceedings in its own name contrary to Section 41(1) of the *Societies Act* which stipulates that a society can only sue and/or appear in a suit through an appointed representative acting on its behalf.
 2. That the 2nd Applicant lacks the locus standi to institute these proceedings on behalf of the 1st Applicant as he has not been duly appointed in writing by the 1st Applicant as a representative to represent it in these proceedings contrary to section 41(2) of the *Societies Act*.
 3. That Consequently, the substantive motion dated 11th August 2023 and the entire proceedings are bad in law, misconceived, fatally defective and a blatant abuse of the court process and ought to be struck out with costs.
4. In support of the Preliminary objections the Respondent, and the Interested Party filed their respective written submission. The Respondents submissions are dated 11th December, 2023; while the Interested Party filed written submissions dated 5th December, 2023 and also filed as Supplementary written submissions dated 31st January, 2024.
 5. In the main, the Respondent submits that the 1st Applicant being a society registered under *Societies Act* Chapter 108 Laws of Kenya it lacks legal capacity to sue and be sued in its own name.
 6. It is posited that societies registered under the *Societies Act* or other unincorporated bodies are not legal persons [with the capacity to sue or be sued in their own names] and the only way such societies can approach court is through their elected officials or members.
 7. To affirm this position reliance was placed on the cases of Republic Versus Registrar of Societies Ex Parte Narok Muslim Welfare Association, [2017] eKLR.; Kiserian Isinya Pipeline Road Resident Association & Others V Jamii Bora Charitable Trust And Another Civil Appeal No. 307 of 2006; Free Pentecostal Fellowship In Kenya V Kenya Commercial Bank HCC No. 5116 of 1992 (O.S); Islamia Madrassa Society V Zafar Niaz & 8 Others [2021] eKLR; and African Orthodox Church of Kenya vs Rev. Charles Omuroka & Anor [2014] eKLR.
 8. As per the Respondents, this instant suit is incurably fatal for having been instituted in the name of the society, as opposed to its elected leaders or members. Also that consequently any proceedings emanating from the suit is a nullity ab initio which cannot be cured by Article 159 of *the Constitution*. To that end, the Respondent beseeches this court strike out this instant suit with cost.
 9. On their part, also in supporting the Preliminary Objections the Interested Party submits that the 1st Applicant lacks locus standi to sue or be sued in its own name, and that the 2nd Applicant lacks locus standi as he is not duly authorized in writing to sue on behalf of the 1st Applicant. Section 41 of the *Societies Act* was relied on. That merely stating one has authority does not suffice as the section 41(2) is couched in mandatory terms and any failure to comply with it renders a suit defective.
 10. They contend that locus standi is a point of law that goes to the root of the court's jurisdiction to entertain a certain party and such issue should be resolved in limine. Reliance is placed upon the case of



Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000.

11. In the absence of capacity and locus standi, the entire proceedings herein are incompetent and ought to be struck out. The cases of Bridge Hotel Ltd v Wilfred Mutiso Lai Jesus Celebration Center [2016] eKLR, and Republic v Registrar of Societies Ex-parte Narok Muslim Welfare Association [2017] eKLR are relied upon.
12. The Interested Parties avers that Article 22 and 258 of *the Constitution* expanded the scope of locus standi but only limited to violation to enforcing violations of the fundamental rights and *the Constitution*; which is not the case herein. Relied on Kenya Council of Employment and Migration Agencies & another v Samuel Mwangera Arachi & 2 others [2015] eKLR case.
13. In the end, the Interested Parties prays for the Preliminary Objections to be sustained with costs.

Ex-parte Applicants case:

14. The ex parte applicant's filed submissions dated 15th day of January 2024. According to ex parte applicant, Article 50(1) of *the Constitution* of Kenya provides as follows:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

15. They also rely on Section 41 (1) of the *Societies Act* which provides that:

“Where a society is charged with an offence under this Act or any rules made thereunder, the society may appear by a representative, who may enter a plea on behalf of the society and conduct the society's defence on its behalf.”

16. It is clear that to decide the Preliminary Objections raised, this Honourable Court has to scrutinize the EVIDENCE of the Ex Parte Applicants' deposition tendered to establish the veracity of the allegations made by the Objectors.

17. The Interested Parties object as follows:

“2) That the 2nd Applicant lacks the locus to institute these proceedings on behalf of the 1st Applicant as he has not been duly appointed in writing by the 1st Applicant as a representative to represent it in these proceedings contrary to Section 41(2) of the *Societies Act*.”

18. Contrary to the Interested Parties' allegations, the 2nd Ex Parte Applicant averred in paragraphs 1, 2, and 3 of his Verifying Affidavit herein filed and sworn on 31st July 2023:-

1. I am the 2nd Ex Parte Applicant herein. I make this deposition as such, and with the consent of the 1st Applicant herein.
2. I am the current Chairman of 1st Applicant, Supreme Council of Kenya Muslims (SUPKEM). As such, I am familiar with, and aware of the matters I depose to herein below.
3. The 1st Ex Parte Applicant, The Supreme Council of Kenya Muslims (the SUPKEM) is registered as the umbrella body of all Muslim organizations, societies, Mosque committees and groups in Kenya.”



19. Prima facie, the 2nd Ex Parte Applicant, has deposed as above that having been authorized by the 1st Applicant SUPKEM as its National Chairman to make the said deposition there can be no question that the consent of SUPKEM has been expressed as granted under oath. It thus becomes a matter and an issue of evidence as to whether or not such consent was given.
20. Further, the Ex Parte 2nd Applicant deposed that the capacity in which he was lodging the Judicial Review proceedings herein was as an official of the 1st Ex Parte Applicant SUPKEM, being the current Chairman of the said Society.
21. Consequently, it would call for evidence to answer the issue whether or not the 2nd Ex Parte Applicant is still the Chairman of the SUPKEM as he averred, or he ever ceased to be so. J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] eKLR regarding the scope of a ‘Preliminary Objection’ stated: -

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement ... that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.” [emphasis added]

22. According to them there is no deposition by the Respondent or even the Interested Parties that the 2nd Ex Parte Applicant is not the current Chairman of SUPKEM. Hence the P.O.s fail as they are not pure points of law, but assertions that require evidence to disprove. As stated in the classical case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“...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”

23. In the same case, Sir Charles Newbold said:

“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”.

24. Specifically, for a full determination of the capacity of the 2nd Ex Parte applicant, evidence would be required. Order 19 Rule 2 of the Civil Procedure Rules directs parties to invoke the power to cross examine a deponent on the contents of their deposition. This power could have been readily invoked by the Objectors on an application before the Court which was not achieved.
25. Still, such an approach would clearly involve delving into evidence to establish the capacity, authority and veracity of the 2nd Ex Parte Applicant’s averments in relation to the 1st Ex Parte Applicant as stated in the Verifying deposition. According to them the two P.O.s fail.



26. According to them the statutory description of the parties' paragraphs (h) and (i) thereof the 2nd Applicant was described as such:

“(h) The 2nd Applicant, AL Hajj Hassan Kirua Ole Naado is the National Chairman of the 1st Applicant, The Supreme Council of Kenya Muslims (the SUPKEM) as well as the Chairman of the SUPKEM National Executive Committee.

(i) The 2nd Applicant has been granted the Authority to Plead by the 1st Applicant to lodge these proceedings as demonstrated in the Verifying Affidavit and he supports the matters specified herein within the Statement of Claim and duly verified.”

27. The current Chairman of the SUPKEM, the 2nd Ex Parte Applicant has the capacity to act in the matter.

28. Reliance is also placed in *Kirinyaga United Bar Owners Organization vs County Secretary Kirinyaga County Government & 6 Others* [2014] eKLR, the Court stated:

“The above Constitutional provisions for me indicate that a person named with a capacity to act on his own can bring a representative suit on his behalf and on behalf of others. A person who lacks capacity to institute a suit can also bring an action under Article 22(1) through another person. The person bringing the action should clearly indicate his name in the suit stating that he/she is bringing the action on behalf of another or on his own behalf in addition to others....”

29. Neither the Respondents nor the Interested Parties contested the fact that the 1st Ex Parte Applicant, swore in his Verifying Affidavit dated 31st July 2023 the fact that he is the National Chairman of the 1st Ex Parte Applicant SUPKEM, and as its said official was bringing the Judicial Review equally on behalf of the said SUPKEM 1st Ex Parte Applicant.

30. Part VIII Section 50 of the *Societies Act*, Cap 108, it provides that a Society is to be served with process, recognizing it as a lawful entity as follows:-

“ 50.

(1) Every order, notice, summons or other document issued under this Act or under any rule made thereunder shall be validly served

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(a) On a society, if it is sent by registered post addressed to it at its registered postal address; or

(b) On an individual, if it is sent by registered post addressed to him at the registered postal address of the society with which he is concerned.”

31. The Legislature did not intend or provide for the service of legal processes on a registered Society to be served on its registered officials as the only manner of effecting service. The Society is a stand-alone entity duly registered under the statutory regime of the *Societies Act*.



32. Reliance is placed in the case of Kipisiwo Self Help Group vs Attorney General & 6 others [2013] eKLR where the Court held that: -

“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 however sue through an entity with legal capacity.”

33. According to them the allegation that no written authority lodged with the process isn't a sound basis of a Preliminary Objection as guided by the case of Kandara Residence Association & another v Ananas Holdings Limited & 4 others; Director of Survey & 3 others (Interested Parties) [2020] eKLR on a similarly raised Preliminary Objection, the Court dismissed the P.O and held as follows:

“Further, it is important to note that though over time, there has been a requirement for a written authority to be presented, the Courts have pointed out that the said written authority is not necessary as long as the deponent has stated that he has the said authority. See the case of Bethany Vineyards Limited & Another v Equity Bank Limited & 2 Others [2020] eKLR where the Court held that;

“The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.

It does become apparent that there no requirement for a company to present a resolution of a company indicating that a company has authorized the filing of a suit or has authorized the swearing of an affidavit on its behalf nor, for that matter, confirming it has authorized an advocate to represent it. It suffices for the deponent to state that he has authority to do such act.”

Therefore, this court finds and holds that the Preliminary objection based on non-existence of the 1st Plaintiff and lack of written authority are not merited and the Court dismisses the same.” [emphasis added]

34. The Ex Parte Applicants rely similarly on the holding of the Court in the case of Damani Drums Limited & another v George Kimani Mbugua & 3 others [2015] eKLR where the Court declined to strike out a suit on a similar objection and held:

“In a situation such as the present one where the respondent has shown that authority had in fact been given to bring the suit but not exhibited at the time of filing the suit the court will exercise its discretion and decline to strike out the suit.” [emphasis added]

35. Faced with a similar scenario Sitati L.J. in the case of Mudhihiri Mohammed & 2 others v Ahmed Imani Ali & 4 others [2010] eKLR respectfully declined to strike out the suit and held:

“The court has power to order that the name of any party improperly joined whether as Plaintiff or Defendant be struck out and there is equal power for the court to bring on board a party “whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

The upshot of what I have said above is that the Defendants Preliminary Objections filed by the 1st, 2nd and 5th Defendants/Respondents on 3/08/2009 and 6/10/2009 have no



merit. The Preliminary Objection is hereby dismissed with costs to the Plaintiffs.”[emphasis added]

36. According to them the Preliminary Objections by the Respondent and the Interested Parties respectively seek to curtail the Ex Parte Applicants’ right to a fair trial and to access Justice guaranteed under Article 48 of *the Constitution*. Neither of the Objectors has demonstrated in their respective Submissions what, if any prejudice they stand to suffer in the Judicial Review Proceedings.

37. The Ex Parte Applicants’ right (and indeed the right of every person) to a fair trial in Article 50 is one that is not subject to limitation pursuant to Article 25(c) of *the Constitution* of Kenya. Such is a draconian and oppressive action sought by the Objectors, antithetical to the Constitutional imperative of determining disputes on merit.

38. In the case of *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga ...Vs...Eliud Timothy Mwamunga & Sagalla Ranchers Limited* [2017] eKLR, where the Court held that: -

“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.

39. It is their case that the 1st Ex Parte Applicant indeed is a Society and there is no allegation that another Chairman other than exists or has been recorded by the Registrar of Societies.

40. In *Fubeco China Fushun v Naiposha Company Limited and 11 Others* ML HCCC No. 222 of 2012 [2014] eKLR, Gikonyo J., expressed the following view:-

The use of Fubeco China Fushun as the Plaintiff, at worst, is a misdescription of the party, that is, China Fushun No. 1 Building Engineering Company Limited. Such mis-description of the Plaintiff is not fatal to the proceedings and does not defeat a party’s cause of action. In taking this decision, the Court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such case in order to reflect and have the correct parties before the Court. Under that power, the Court would still allow the amendment to correct the misdescription. I so order for the avoidance of doubt. I hold and find that this is not a case of non-existent or faceless entity that would invariably be incapable of suing or being sued. It is a case of pure misdescription of a party and is governed by the same law on misdescription of parties in a contract.

41. The grant or refusal of a P.O. is entirely discretionary. There is no prejudice demonstrated by the Objectors which they stand to suffer. *Majanja J* in the case of *EMK Advocates v Rhombus Construction Company Limited* [2021] eKLR similarly held:

“6. I can only conclude that raising the issue that the Advocates are a non-existent entity is an afterthought. I find that from the onset, the Respondent knew that it was dealing with Ericson Mungami Khayota, Advocate under the name



and style of ‘EMK Advocates’. The correspondence and dealings show that the Respondent was not in any way confused or misled by Ericson Mungami Khayota, Advocate that it was dealing with another party or entity.

7. I am therefore in agreement with the Advocates that the use of EMK Advocates and not Ericson Mungami Khayota is a misdescription and an honest mistake capable of rectification. It will not prejudice the Respondent in any way, is not fatal to the proceedings and does not defeat their claim.” [emphasis added]

42. Korir J. (as he then was) while addressing and dismissing a similar objection as herein raised in the case of Republic v Advocates’ Disciplinary Committee Interested Party Daniel Mutisya Ngala Ex-Parte Danstan Omari Mogaka [2015] eKLR held as follows:

“Any defect in the name of a party can always be rectified through an application for amendment. In the circumstances of this case, I would say that the Court should do justice without undue regard to technicalities. In any case, allowing the Interested Party’s objection would render his complaint before the Respondent invalid and I do not think that is what he wishes to achieve. I therefore dismiss the Interested Party’s assertion that the Respondent is a non-existent body.”

43. Indeed, although Judicial Review proceedings are sui generis, a parallel analogy can be drawn from Order 8, rule 5 of the Civil Procedure Rules which stipulates as follows:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

44. This has been emphasized by Judicial Authority in Tang Gas Distributors Ltd vs. Said & Others [2014] EA 448 the Court held to the effect that:

“The power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.” [emphasis added]

45. This decision was recently cited with approval on a similar objection as herein raised by the Interested Parties and the Respondent in the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”



46. This Honourable Court when faced with a similar scenario and a similar objection in *Local Building and Construction Limited v Institute of the Blessed Virgin Mary Loreto Msongari & 2 others* [2019] eKLR declined to strike the suit and held:

“There is no greater complaint in regard to our administration of justice than the technicalities of procedure. At the very onset of the new constitution 2010 under Article 159(2) (d) substantive justice is given prominence to technicalities of procedure.

There are probably key principles under Article 10 of *the Constitution* aimed at not to make the administration of justice a legal fiction i.e. the principles of equity and equality, integrity, transparency and accountability. The all-important requisite to the vindication of the rights of the individual citizens as anchored in Article 50(1) is a court of justice able to do justice and to do it expeditiously with the right to access stated in Article 48 in mind.

... I concur that the provisions of Order 1 Rule 9 do except defeat of a suit for misjoinder or non-joinder. Accordingly, I decline to strike out the suit on that ground as, in any event, an amendment to the plaint can easily cure that defect.

I would therefore dismiss this notice of motion and in the circumstances of this case order the plaintiff to amend the plaint to give a proper description of the legal entity in the name and style of the defendant. That upon amendment of the claim to serve the new pleadings on or before the 18/2/2019.”

47. They argue that Striking out Ex Parte Applicant’s Suit is Draconian and Against Constitutional Judicial Policy. In *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

48. The 2 P.O.s require the evidence of both parties to ascertain the veracity of the claims made as was held in the case of *Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another* (2014) EKLRL, where the Court held: -

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

Analysis and Determination

49. After careful consideration of the materials before this court, I find the issue for determination that arises as: Whether the Preliminary Objections dated 4th October, 2023 and 12th October, 2023 are merited.



50. In *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd* [1969] E.A.696 in the celebrated case, Law J.A states a preliminary objection to be thus: -

“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”

51. Sir Charles Newbold, President stated in the same judgment as follows: -

“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”

52. It is established that the 1st Applicant is a registered society pursuant to the provisions of the [Societies Act](#) Chapter, 108 Laws of Kenya.

53. It is trite that societies registered under the [Societies Act](#) or other unincorporated bodies are not legal persons with the capacity to sue or be sued in their own names. Such societies can only sue or be sued through their elected officials or members who are duly authorized.

54. In the case of *Republic Vs Registrar of Societies Ex-Parte Narok Muslim Welfare Association*, [2017] eKLR, the Court in upholding the Preliminary Objection made reference to several decided case law and held as follows:

“I associate myself with the sentiments by Githua J in HCA No. 128 of 2013 *Peter Taracha & Anor -Vs- Holiness Church & Anor* [2016] eKLR, where the court stated-

“I have carefully gone through the entire [Societies Act](#) Chapter 108 of the Laws of Kenya and I have not come across a single provision that provides for the institution of suits by or against entities registered under the Act. I thus wholly agree with the sentiments expressed by Justice Bosire (as he then was) in *John Ottenyo Amwayi & Others V Rev. George Abura & Others* HCCC No. 6339 Of 1990 when he stated as follows: -

“The [Societies Act](#) does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names.” (Emphasis Added)

55. In the case of *Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank* HCC No. 5116 of 1992(O.S) Justice Bosire (as he then was) expressed himself in the following terms,

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules. In the instant matter, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name. It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural issue.



The consequences of instituting a suit without legal capacity to sue are grave: such a suit is incompetent and any proceedings flowing from it are a nullity in law.”

56. In the case of Trustees Kenya Redeemed Church & Anor vs Samuel M’Obiya & 5 others [2011] eKLR it was held thus;

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers’ orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”

57. Further, in the case of African Orthodox Church of Kenya vs Rev. Charles Omuroka & Anor [2014] eKLR. The court observed that;

“The plaintiff has pleaded in paragraph 1 of its plaint that it is a duly registered church. At paragraph 3 of the plaint, the plaintiff has described the 2nd defendant as a duly registered church or organization obviously churches are societies under the *Societies Act*. Societies do not have capacity to sue or be sued in their own names.”

58. Section 41 of the *Societies Act* provides for proceedings against societies. A representative of the society in court has to be authorized and appointed in writing to the satisfaction of the court. The sections provide:

“ 41. Proceedings against societies

(1) Where a society is charged with an offence under this Act or any rules made thereunder, the society may appear by a representative, who may enter a plea on behalf of the society and conduct the society’s defense on its behalf.

(2) In this section, "representative" in relation to a society means a person who the court is satisfied has been duly appointed in writing by the society to represent it, but a person so appointed shall not by virtue of such appointment be qualified to act on behalf of the society before any court for any purposes other than those specified in this section.” (Emphasis Added)

59. I have perused the materials in this matter and I have not found any appointment of the 2nd Applicant, in writing, authorizing him to represent the society [1st Applicant herein] being the Supreme Council of Kenya Muslims (SUPKEM). As such, I find that the 2nd Applicant has not complied with Section 41 of the *Societies Act*.

60. Having found that the 1st Applicant instituted this proceeding in its own name and being a registered society, the same is defective in law. Article 159 of *the Constitution* cannot cure the defect, in the circumstances. Also, having found the 2nd Applicant is without any written appointment to represent the Society [1st Applicant] the Preliminary objections are with merit.

61. Consequently, the Judicial Review Application commenced by way of Chamber Summons dated 31st July, 2023; and the substantive Notice of Motion dated 11th August, 2023 and the consequential proceedings are struck out.



Order:

1. The Notice of Preliminary Objection dated 12th October, 2023; and the Notice of Preliminary Objection dated 4th October, 2023 are merited and the same are upheld.
2. Cost to be borne by the Applicants.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI ON 16TH FEBRUARY, 2024.

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CHIGITI J (SC)

JUDGE

