



Republic v Attorney General; East African Pestecostal Churches (Exparte Applicant); Muthinja & 2 others (Interested Parties) (Judicial Review E005 of 2022) [2024] KEHC 6244 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW E005 OF 2022
TW CHERERE, J
MAY 23, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE HON. ATTORNEY GENERAL RESPONDENT

AND

EAST AFRICAN PESTECOSTAL CHURCHES EXPARTE APPLICANT

AND

BISHOP GEOFFREY MUTHINJA INTERESTED PARTY

BISHOP ROBERT BANDA NGOME INTERESTED PARTY

REV. DANIEL KIROGI INTERESTED PARTY

RULING

1. The Notice of Preliminary Objection dated 31st August, 2022 was filed by Respondents on 09th September, 2022. They seek that the suit be struck out with costs on the following grounds:
 - i. That the exparte Applicant lacks locus standi to institute this suit in its name
 - ii. The suit is fatally defective
 - iii. The exparte Applicant is registered under the *Societies Act* and is not a body corporate with capacity to sue or be sued in its own name



2. By their submission filed on 11th April, 2021, the Interested Parties supported the P.O on the grounds that the exparte Applicant has sued in its own name and not through its officers and trustees and that the said officers and/or trustees have not been disclosed.
3. The exparte Applicant opposed the P.O on the grounds that the omission to include the words thro registered trustees is not fatal and is curable.
4. This court has considered the preliminary objection and the submissions therein. The issues for determination are as follows:

1. Whether the exparte Applicant has the locus standi to file this suit.
2. Whether the suit should eb struck out
3. The locus classics on Preliminary Objection is the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696, where Law J.A. stated:

“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. 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.”

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.”

4. J.B. Ojwang, J (as he then was) in the case of Oraro v Mbajja (2005) eKLR had the following to state regarding a ‘Preliminary Objection’.

“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.”.

5. From the foregoing, I find that the issue as to whether or not the exparte Applicant has locus standi to bring this suit is a pure point of law properly raised as a Preliminary Objection.
6. It is trite that a society under the Societies Act is not a legal person with capacity to sue or be sue and a society can only sue or be sued through its officers. (See in Madrassa Society v Zafar Niaz & 8 others (2021) eKLR). In Veronica Wanjira Maringa & 26 others v A C K Buxton Diocese of Taita Taveta & another [2022] eKLR, it was held that a church is not a body corporate and so it lacks the capacity to be sued in its own name.



7. From the foregoing, I find that the suit as filed is defective as the ex parte applicant lacks capacity to sue and be sued in its own name.
8. The ex parte Applicant acknowledges that the suit as drawn contains what it refers to an error of omission on the part of its advocate and urges that it be not punished for the said mistake of counsel. (See *Belinda Murai & 9 others vs. Amos Wainaina* [1979] eKLR and *Philip Chemwolo & Anor. Vs Augustine Kubende* (1982 – 88) KAR 103). The ex parte Applicant additionally submits that the error is curable and urges the court to focus on substantive justice. (See *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] eKLR).
9. In *Crescent Construction Co. Ltd v Delphis Bank Ltd* [2007] eKLR where the Court of Appeal stated:
However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle.
10. The Court of Appeal in the case of *Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others* [2005] eKLR held that:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases....” .
11. In my considered view, the error on the ex parte party’s pleadings is curable by an amendment.
12. I therefore decline to strike out the suit and direct that the ex parte Applicant moves with speed to regularize its pleadings.
13. Mention on 17th October, 2024 to confirm compliance with paragraph 12 above and for further directions.
14. It is so ordered.

DELIVERED AT MERU THIS 23RD DAY OF MAY 2024

T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Ex parte Applicant - Mr. Murango for Murango Mwenda & Co Advocates

For Respondents - Mr. Njoroge

For Interested Parties - Mr. Kariuki for Mithega & Kariuki Advocates

