



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 19 OF 2020

AFRICA INLAND CHURCH KENYA

REGISTERED TRUSTEES..... APPELLANT

-VERSUS-

JULIUS MWANZA.....1ST RESPONDENT

JOSEPH MUTINGA..... 2ND RESPONDENT

BONIFACE NDETO.....3RD RESPONDENT

(Being an Appeal from the Ruling of Hon. L.K Mwendwa (SRM) delivered on 14th July 2020 at Tawa Law Courts in Civil Suit No. 52 of 2020).

JUDGMENT

1. On 14th July 2020, the magistrate's court delivered a ruling to a Preliminary Objection to a Notice of Motion dated 16th March 2020 in which the court concluded as follows –

“Having found as above, it is my considered opinion that the only body with legal capacity to sue and be sued for and on behalf of a society's property is the incorporated body of the Trustees as per the express provisions of section 3 of the Trustees (Perpetual Succession) Act. Africa Inland Church Kenya Registered Trustees is not a legal entity for want of incorporation under the Trustees (Perpetual Succession) Act. It therefore lacks capacity to institute and maintain the motion herein as well as the suit herein. I also find lack of capacity to institute proceedings is

not a technicality of procedure curable under Article 159(2)(d) of the Constitution of Kenya 2010. The upshot is that I find strike out (sic) the plaint dated 16th March 2020 and filed on 18th March 2020. It is so ordered.”

2. Aggrieved by the above ruling of the magistrates' court, the Appellant, the Plaintiff in the Magistrate's court has come to this court on appeal through counsel on the following grounds –

1) The learned magistrate erred in law and in fact by finding that the Respondents Preliminary Objection dated 16th June 2020 raised a pure point of law.

2) The learned magistrate erred in law and in fact by holding that the Appellant was described as a society in its pleadings.

3) The learned magistrate erred in law and in fact by not considering the evidence of the Appellant.

4) The learned magistrate erred in law and in fact by striking out the Appellant's suit on the basis of triviality of an admitted typographical errors which did not occasion any prejudice on the Respondent.

5) The learned magistrate erred in law and in fact by holding that the Appellant lacked capacity to institute and maintain civil suit No. 52 of 2020.

3. The appeal proceeded through filing written submissions. Counsel for the Appellants M/s Mbugua Mburu & Associates filed written submissions on 11th September 2020 while counsel for the Respondents M/s Mwanja Mbithi & Company filed their written submissions on 23/11/2020.

4. I have perused and considered both submissions of the Appellant’s counsel and those of the Respondents’ counsel. I note that both counsel relied on several legal and case authorities.

5. The main issue in this appeal is whether the learned magistrate was correct in striking out both the application and suit of the Appellant herein on a Preliminary point.

6. It is trite that striking out of proceedings is a draconian act and courts have usually been slow to take such drastic steps. Several court cases have been decided on that point.

7. The above position taken by the courts over many years has been further strengthened by the Constitution of Kenya 2010 under Article 159(2) which has underscored the importance of courts administering substantive justice rather than dismissing matters on technicalities as follows –

159(1)

(2) In exercising Judicial authority, the courts and tribunals shall be guided by the following principles:

a) Justice shall be done to all irrespective of status,

b) Justice shall not be delayed,

c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3),

d) Justice shall be administered without undue regard to procedural technicalities and,

e) The purpose and principles of this Constitution shall be promoted and protected.

8. The underlining under (d) is mine for emphasis. The courts are thus enjoined by the Constitution to administer substantive justice in all cases except where the identified technical fault goes to the root of the whole cause and thus the suit cannot be saved, before striking out a case or an application on the basis of a technical error.

9. The Appellant has argued that the magistrate erred in striking out the proceedings and the application firstly, because the variance of name is a minor technicality which did not go to the root of the whole cause, and secondly, that the issues raised in the Preliminary Objection were a mixture of fact and law contrary to the principles set out in the case of **Mukisa Biscuit Manufacturing Company Limited vs- West End Distributors (1969) E.A 696.**

10. I note that the Notice of Preliminary Objection dated 15th June 2020 contains 4 paragraphs. All those paragraphs are challenging the validity of the proceedings brought by the Appellant before the Magistrate and the competency of the person who brought the proceedings. In the further affidavit dated 19th June 2020 sworn by Stephen Kithokoi, the Appellant does not challenge the correct designation of the Trustees given in the Preliminary Objection. He infact confirms this position in annexed documents to the affidavit. Nor does he deny that the suit had to be instituted by or under the authority of the duly appointed Trustees or Board of Trustees.

11. Thus it cannot be said that there were facts about the institution of the suit and the application that were in dispute before the magistrate. In my view therefore the Preliminary Objection was on a pure point of law as all the facts relating to the said objection had been agreed. Other disputed facts which were not relevant to the preliminary objection, could not make the objection not to be on a pure point of law as the point of law raised was specific and based on particular facts which were not in dispute.

12. With regard to the name of the Plaintiff, the variance in of the designation of the Trustees in my view was not a mere technicality. It would be a mere technicality only if the proper or genuine registered Board Trustees, Africa Inland Church Kenya Trustees Registered who are said to be a maximum of 15 in number according to the copy of Constitution, authorised the commencement of the proceedings. Such authority cannot be

given by an unidentified Administrative Secretary of another institution Africa Inland church Kenya registered Trustees and whose appointment and powers are not disclosed, and who does not have express authority from Africa Inland Church Kenya Trustees Registered.

13. I thus find no merit in the appeal. I dismiss the appeal with costs to the Respondents. Since the suit was struck out by the magistrate on technicalities, a proper suit in the names of correct parties can be filed on the same subject matter.

DATED AND DELIVERED AT MAKUENI THIS 2ND OF MARCH 2021.

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GEORGE DULU

JUDGE