



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 18 OF 2020

AFRICA INLAND CHURCH KENYA

REGISTERED TRUSTEES.....APPELLANT

-VERSUS-

MESHACK KILUNI.....1ST RESPONDENT

PATRICK MUKILYA.....2ND RESPONDENT

PATRICK MUTISYA.....3RD RESPONDENT

MESHACK KILATYA.....4TH RESPONDENT

DANIEL MUTINDA.....5TH 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. 51 of 2020

JUDGMENT

1. In a ruling dated 14th July 2020 to a Preliminary Objection raised by the Respondents, the magistrate's court in Tawa Magistrates' Civil suit No. 51 of 2020 struck out both the Notice of Motion filed by the Appellant dated 16th March 2020 and the plaint therein filed for being incompetent on the finding that the applicant did not have the legal capacity to bring the subject proceedings.

2. Aggrieved by the decision of the trial court the Appellant has come to this court on appeal though counsel Mbugua Mburu & Associates on several grounds as follows:-

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

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

4) ***That 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 error which did not occasion any prejudice on the Respondents.***

5) ***That the learned magistrate erred in law and in fact by holding that the Appellant lacked capacity to institute and maintain civil suit No. 51 of 2020.***

3. The appeal proceeded by way of filing written submissions, and the Appellant's counsel M/s Mbugua Mburu & Company filed written submissions on 11th September 2020 while the Respondents' counsel M/s Mwanja Mbithi & Company filed their submissions on 23rd November 2020. Counsel opted not to highlight the written submissions filed.

4. I have perused and considered both sets of submissions. Both counsel cited a number of authorities. The Appellant's counsel emphasized

that there were facts before the trial court which were in dispute and therefore the purported Preliminary Objection raised was not on a pure point of law and relied on what was reiterated by the **Supreme Court in Aviation & Allied Workers Union –vs Kenya Airways Ltd and others - Supreme Court Application No. 50 of 2014 (2015) eKLR**. The Respondents' counsel on the other hand, urged this court to uphold the decision of the trial court arguing that the Appellant did not have legal capacity to bring the subject proceedings before the magistrates' court, as it was a nonexistent entity which purported to act through a person who was not a trustee.

5. I will start by stating that under Article 159(2) (d) of the Constitution of Kenya 2010, courts and tribunals are enjoined to be more inclined to administer substantive justice rather than determining matters on mere technicalities. Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) also echo this same principle that courts should be more inclined to administering substantive justice rather than procedural justice.

6. The magistrate struck out the Notice of Motion as well as the plaint filed by the Appellant on the basis of a Preliminary Objection. Indeed, striking out proceedings on a Preliminary point is a draconian action and courts have been slow to do so unless the suit or application are fatally defective and cannot be salvaged by the exercise of judicial discretion.

7. In the present case, the first issue is whether the variance of name of the Plaintiff is a mere technicality or goes to the root of the matter. Secondly, whether the person who brought the proceedings was a Trustee and whether he obtained the consent of the trustees to bring the proceedings. Thirdly, whether the Preliminary Objection raised was on a pure point of law.

8. With regard to the variance of name the Plaintiff, it was admitted by the Appellant in their further affidavit sworn on 19th June 2020 by Harrison Muthuka that the proper Plaintiff should have been Africa Inland Church Kenya Trustees Registered not the Plaintiff, Africa Inland Church Kenya Registered Trustees.

9. On the face of it, that variance would appear to be a clerical error. However, in the said further affidavit of Harrison Muthuka the individual who brought the proceedings in the names of the Plaintiff on record, it can be noted that, –he never swore to the existence of a clerical error nor did he state that he wanted to correct the name of the Plaintiff. Further in annex “HM1” to the said affidavit, he relied on an authority to file the proceedings from an organization called Africa Inland Church Registered Trustees, which is the same name of the Plaintiff on record herein not the correct party who should have been Africa Inland Church Kenya Trustees Registered. Therefore it cannot be said that there was a clerical error in the name of the organization that gave him authority to file suit.

10. In addition to the above, a court of law, cannot substitute or correct names of parties who are in court while they have not asked for such orders, especially where there is a dispute between two or more persons as to whom is the correct party to come in court. I thus find that the difference of names herein between Africa Inland Church Kenya Registered Trustees and Africa Inland Church Kenya Trustees Registered is a substantive difference and not a clerical error, thus it goes to the substance of the whole proceedings. The proceedings brought by a non-existent party claiming to be what it's not cannot thus be sustained and the magistrate was correct in striking out the proceedings. On that account the appeal will not succeed.

11. On the second issue whether Harrison Muthuka obtained valid authority from the Africa Inland Church Kenya Trustees Registered to institute the suit, annex “HM2 (a)” of his further affidavit which is an extract of the Constitution of the church, is very clear on the composition of Trustees. They can be up to 15 in number and include the Presiding Bishop, Deputy Presiding Bishop and members elected in various areas of the church. Harrison Muthuka does not claim to be one of the trustees. In addition, the authority he relies upon to bring the proceedings, “(annex HM1 to the further affidavit)” is signed on behalf of Africa Inland Church Registered Trustees the Plaintiff before the magistrates' court who are not proper Trustee. The authority letter is also signed by an Administrative Secretary AIC – Kenya, whose identity and powers have not been disclosed neither in the magistrates' court or in this court. The information in “HM1” was brought to court by Harrison Muthuka himself and there is no contest about it. I thus find that the person who brought the proceedings Harrison Muthuka did not obtain valid authority to commence the proceedings from the proper or genuine trustees of the church.

12. Lastly, when the Appellant says that there were factual issues in dispute which made the Preliminary Objection not a pure point of law, in my view he is not right. This is because all the facts about the correct party who should have come to court, have been agreed and that party Africa Inland Church Kenya Trustees Registered are not in court. Secondly, it is crystal clear to me that the person or persons who brought the proceedings in court did so without authority from the genuine Trustees of the church, but from Africa Inland Church Kenya Registered Trustees who are not the lawful or genuine trustees as evidenced by documents admitted by all parties herein.

13. In my view therefore, the Preliminary Objection was on a pure point of law as all facts relating to the same were not in dispute and the magistrate was thus right in finding that the proceedings were fatally and incurably defective. In my view the magistrate was correct in striking out the application and the plaint.

14. I thus find no merits in the appeal and dismiss the appeal with costs to the Respondents. For clarity, I want to put it on record that as the magistrate's decision was based on a technically, fresh and proper proceedings in the correct name may be brought on the same subject matter.

DATED AND DELIVERED AT MAKUENI THIS 2ND OF MARCH 2021

GEORGE DULU

JUDGE