



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E034 OF 2021

ISLAMIA MADRASSA SOCIETY.....PLAINTIFF

VERSUS

ZAFAR NIAZ.....1ST DEFENDANT

ABDUL HAMID BARI.....2ND DEFENDANT

MUNWAR KHAN.....3RD DEFENDANT

KADIR HAWA.....4TH DEFENDANT

NAUSHAD HAKADA.....5TH DEFENDANT

ABDUL MAJID ABDUL KARIM.....6TH DEFENDANT

SAHIR MALIK.....7TH DEFENDANT

ZULFIKAR KARAM DIN.....8TH DEFENDANT

SHABIR FAKI.....9TH DEFENDANT

RULING

1. This Ruling is in respect of a preliminary objection (P.O.) raised by the defendants vide a notice dated 9th March 2021.
2. They seek for the entire suit including the notice of motion herein to be struck out on the following grounds with costs payable to the defendants and each of them by Mohamed Munir Chandri;
 - (i) That the suit is incompetent, bad in law, does not disclose any cause of action and is otherwise an abuse of the court process.
 - (ii) That the reliefs sought should have been first addressed to the Registrar of Societies under the Fair Administrative Action Act No. 4 of 2015.
3. Both counsel orally submitted on the preliminary objection. Mr. Mungu for the defendants submitted that the plaintiff had no capacity to sue the defendants. He has referred to paragraph 1 of the plaint and the Societies Act and his submission that the plaintiff lacks the legal capacity to file a suit. He has further argued that the plaintiff has not submitted any copy of registration conferring upon it the power to sue or be sued in its own name.
4. Counsel has also referred to a number of authorities and argues that parties such as the plaintiff can only sue through their officials. The plaintiff's registered officials happen to be the defendants he says. Counsel adds that the deponent of the supporting affidavit has sworn the affidavit in his own name.
5. Counsel referred to the following cases in support of the preliminary objection:
 - (i) Living Water Church International vs City Council of Nairobi [2008] eKLR.

(ii) Peter Taracha & Anor vs International Pentecostal Holiness Church & Anor [2016] eKLR.

(iii) Eritrea Orthodox Church vs Waniwax Generation Ltd [2007] eKLR.

(iv) The Anglican Church of Kenya St. Peters Church, Gatunduini [2015] eKLR.

6. Mr. A. B. Shah for Mr. Malik for the plaintiff opposed the preliminary objection and submitted that a society generally acts through its officers, but there was nothing in the Act which says it can't sue in its own name. He referred the court to Section 18 of the Societies Act. Its his argument that the society is enabled to sue or be sued for settlement of disputes.

7. Counsel has referred to the case of **Mukisa Biscuits** on what a preliminary objection is. He argues that the party suing here is the society as there is a dispute as to who the officers of the society are. He referred to Articles 58(2) and 260 of the Constitution which describe who a person is. The original officers cannot sue since they were ousted yet those elected were elected through an irregular meeting.

8. He therefore submits that this is not a matter to be determined by way of a preliminary objection.

9. In response Mr. Mungu has argued that one party in this suit is non-existent. He maintains his submission that the society can only sue through its registered members and/or officers. Further that neither Section 18 of the Act or Article 260 of the Constitution can confer legal rights on the plaintiff to sue.

Analysis and determination

10. I have considered the submissions by counsel and the cited authorities. The issue is whether the issue raised by the defendants qualifies as a preliminary objection.

(ii) Whether the plaintiff is a legal person capable of suing and being sued.

11. On the first issue the definition of a preliminary objection was well set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696** where it was held;

“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 objection may dispose of the suit.”

Sir Charles Newbold in the same matter stated thus:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion confuse the issue. The improper practice should stop.”

12. In **Artar Singh Bhamra & Anor vs Oriental Commercial Bank – Civil Suit No. 53 of 2004 – High Court Kisumu** the court held:

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

13. A perusal of the plaint and annexures confirms that the plaintiff is a society and one exempted from registration under the Societies Act. Being a society under the Societies Act, the issue being raised in the preliminary objection is whether the plaintiff can sue in its own name, as it has done. This to me is a noble legal question which goes to the root of the matter herein. It is a point of law which could dispose of the case depending on how it goes. I therefore find the issue raised satisfy the principle in the **Mukisa Biscuit** case.

14. Article 58 and in particular Article 58 (2) of the constitution referred to by Mr. A. B. Shah has no relevance in this matter. Article 260 of the constitution defines a person as:

“Person” includes a company, association or other body of persons whether incorporated or unincorporated.”

It is Mr. A. B. Shah's argument that following this definition of a person then the plaintiff is a person and can sue in its own name. The reason he gives is that the original officials have been ousted.

15. According to the pleadings the original officials were ousted through an “*unlawful meeting*” and the defendants elected as the officials. Does that in itself give the plaintiff the power to file this suit in its own name when it has officials?

16. 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.”

17. Further in the case of Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank Nairobi HCCC No. 4116 of 1992 Justice Bosire (as he then was) stated thus:

“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 is instituted in the name of a religious organization. It is not a body corporate for it to sue as a legal personality. That being so it lacks the capacity to institute proceedings in its own name.

18. Similarly, in the case of African Orthodox Church of Kenya vs Rev. Charles Omuroka & Anor [2014] eKLR. Justice E. C. Mwita in his Ruling on a preliminary objection raised challenging the plaintiff’s capacity to sue in its own name stated as follows:

“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.”

19. It is clear that there is a dispute in the plaintiff society as to who the officials are. The laid down procedure in resolving this impasse is set out in Section 18 of the Societies Act and should be adhered to. The action by the plaintiff in filing this suit when it lacks capacity to do so was a short cut.

20. In the circumstances I do find merit in the preliminary objection raised by the defendants. The result is that the plaint and notice of motion are struck out with costs.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 18TH DAY OF MAY 2021 IN OPEN COURT.

H. I. ONG’UDI

JUDGE