



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO. 404 OF 2018

JOSEPH M.E SIMEKHA

JOY RAEL ANDAMBI

WILBERFORCE MAKATE

TOM ISAAKA MONG'ARE

SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE MEMBERS

OF THE LOCAL CONGREGATION OF MARIAKANI CHRISTIAN CENTRE

CHURCH OF GOD IN EAST AFRICA (KENYA)PLAINTIFFS

VERSUS

MOST RIGHT REVEREND DR.BYRUM A.MAKOHKA,

RT.REV JAMES OBUNDE

REV WYCLIFF OMUSEBE

REV RAPHEAL MUYELA

REV.MONICA OPANGA

REV BENSON MAOSA

WILLIAM SHIMANYULA

THE REGISTERED TRUSTEE OF CHURCHOF

GOD IN EAST AFRICA (KENYA)

U DESIGN ARCHITECTS AND INTERIOR DECORATORS.....DEFENDANTS

AND

AIRTEL NETWORKS KENYA LIMINTED.....APPLICANT

RULING

1. This is a ruling in respect of two separate applications. The first application is dated 17th January 2019. It is brought by the Defendants/Applicants and it seeks to have the Plaintiffs/Respondents' suit struck out with costs. The second application is dated 23rd April

2019. This is an interpleader proceeding in which Airtel Networks Kenya Limited seeks to know to whom rent should be payable.

The First Application

2. The Applicants in this application are contending that the Respondents' suit does not disclose a reasonable cause of action; that it is **scandalous, frivolous or vexatious**; that it may prejudice, embarrass or delay the fair trial of the action and that it is otherwise an abuse of the process of the court. The Applicants also argue that the Respondents have no capacity to bring this suit and that they have contravened the provisions of Order 1 Rule 8 of the Civil Procedure Rules.

3. The Applicants also contend that the Respondents' suit is res-judicata in view of the decision in **Nairobi HCCC No.6339 OF 1990 John Otenyo Amwayi & 2 Others Vs Rev George Abura & 2 Others** which held that a court should not grant an injunction to prevent a church from doing what it considered as its duty under the constitution. The Applicants also contend that the title deed to **LR No.209/6723** is held in the name of Church of God in East Africa (Kenya).

4. The Applicants' application is opposed through a replying affidavit sworn on 15th April 2019. The Respondents contend that the Applicants have always recognized them as members of Mariakani Christian Centre and that therefore they should not claim that the Respondents do not have locus standi. The Respondents further contend that they have inherent powers to question or stop the activities of the Applicants which they claim they have not been properly sanctioned and are intended to benefit a few individuals to benefit from the church property by engaging in private commercial interest.

5. The Respondents further argue that they have a right to participate in making decisions on all temporal affairs of their church including management of fixed and movable assets. They contend that the Applicants have usurped the powers of the General Assembly and Executive Council of the General Assembly of Church of God in East Africa (Kenya) and that they are exploiting their illegitimate positions. They also argue that there is no valid or legally constituted General Assembly of Church of God in East Africa (Kenya).

6. The Respondents deny that they have violated the provisions of Order 2 Rule 8 of the Civil Procedure Rules and that the 8th Applicant merely holds title to the suit property in trust for the members of Mariakani Christian Centre and any fraudulent dealing with the property cannot be countenanced.

7. I have carefully considered the Applicants' application as well as the opposition thereto by the Respondents. The parties were directed to file written submissions in respect of this application. As at 23rd October 2019 when the date of ruling was reserved, it is only the Applicants who had filed their submissions. The Respondents were given 14 days within which to file their submissions. As at the time of writing this ruling, no submissions had been filed and if any were filed, they are not in the court file.

8. The only issue for determination in this application is whether the Respondents' suit should be struck out for being scandalous, frivolous or vexatious or being an abuse of the process of the court. There is no contention that **LR No. 209/6723 IR 21781** is registered in the name of the Church of God in East Africa Registered Trustees. The Constitution of Church of God in East Africa (Kenya) gives mandate to the Trustees to undertake any development on properties held by the church as long as the proper procedure for carrying out that activity is followed.

9. In the Instant case, the Trustee were in the process of carrying out development on the property in issue when the Respondents moved to court and filed a suit claiming the following reliefs:-

1) A permanent injunction restraining the Defendants whether by themselves, their servants or agents or any person acting under their direction, permission and/or authority from interfering with the Mariakani Christian Centre local congregation of the Church of God in East Africa's (Kenya)'s right to quiet enjoyment ,use and possession of all that parcel of land known as Land Reference Number LR 209/6723 I.R 21781 situated along Muchumbi Road in South B within Nairobi County .

2) A declaration that the Mariakani Christian Centre Local Congregation of the Church of God in East Africa (Kenya) is the owner of the parcel of land known as Land Reference Number LR 209/6723 I.R 21781 situated in South B within Nairobi County .

3) The suit property be transferred to Mariakani Christian Centre Church of God in East Africa (Kenya).

4) Costs of this suit.

10. I have gone through the documents relating to this dispute. It is clear that the real issues behind this suit is a leadership dispute. In the replying affidavit sworn by the 1st Plaintiff/Respondent; it is clear that the main bone of contention is the manner in which the Trustees are carrying out their duties. There is a church constitution which gives the Trustees mandate to carry out the activities on behalf of the church. If there are any grievances by the Respondents who are members of the church, such grievances should be resolved by the relevant church organs as per the constitution.

11. The Respondents are seeking a declaration that the property belongs to Mariakani Christian Local Congregation of the Church of God in East Africa (Kenya) and the property should be transferred to the congregation. This property was granted to the church in 1965 and it was registered in the name of the 8th Applicant who holds it in trust for the church. To bring a suit seeking to transfer the ownership to the congregation in the face of clear provisions of the Constitution of the Church is clearly an abuse of the process of the Court.

12. In the case of **Mpaka Road Development Ltd Vs Kana (2001) 2 EA 468** Justice Ringera as he then was held as follows:

“ A matter would only be scandalous, frivolous and vexatious if it would be inadmissible in evidence to show the truth of any allegation in the pleadings which was sought to be impugned, for example imputation of character where character was not in issue. A pleading is frivolous if it lacks seriousness. It is vexatious if it annoys or tends to annoy. It would annoy or tend to annoy if it were not serious or contained, scandalous matter irrelevant to the action”.

13. In Bullen ,Leak and Jacob’s precedents of pleadings 12th Edition Page 148 the authors state as follows:-

“The term “abuse of the process of the court” is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its functions as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation”.

14. It is clear that the Respondents have brought this litigation as means of vexing the Applicants. The Litigation is not serious because the church cannot seek to wrest a property from Trustees who are mandated by the constitution to undertake development. The Respondents have also brought in the issue of character of the Trustees and how they have usurped the powers of the Executive Council.

15. In the case of **Andrew Inyolo Abwanza VS Board of Trustees of Pentecostal Assemblies of God –Kenya & 3 others (2009) eKLR justice D.A Onyancha** held as follows:-

“.....I have considered the Plaintiff’s prayer. I find that the Plaintiff’s relationship with the Defendants in his capacity as a member of the 1st Defenant church arises merely and incidentally from his membership of the church. The issues and the concerns he raises in this suit as between him and the Defendants do not concern any right to property, or contract, or of any particular legal right. The concerns he raises relate to the manner the 2nd to 4th Defendants performed their duties or carried out their obligations in the positions they occupy in the church. Furthermore the 2nd , 3^r and 4th Defendants were not answerable to the Plaintiff in the said performance of their duties but to the 1st Defendant and to the institutions of the 1st Defendants reposed with the authority to supervise and discipline the 2nd to 4th Defendants in accordance with the constitution and/or rules made under the church constitution . In the above circumstances, it seems to me that all the Plaintiff would do, would be to raise complaints to the relevant church institutions that have the authority to supervise or take action”.

“...He accordingly has no cause of action in this court which has no jurisdiction to hear him in matters he has complained about herein which are in the domain of the church’s dispute resolution machinery. Put differently, the Plaintiff’s complaints as pleaded in his plaint are not justiciable. His coming to this court with this case in general is premature and outside the church’s constitution”.

16. Just as in the **Andrew Inyolo Abwanza case (Supra)**, the Respondents’ grievances seem to stem out of the work the Applicants are doing in their official capacity and by bringing this suit to court is an abuse of the process of the court. As I have said hereinabove, the underlying cause of the dispute is leadership which should be resolved in accordance with the constitution of the church.

17. The Applicants argued that this suit is res judicata. I do not see the basis for this submission. The parties herein have never had a case before which was decided upon as to make this case res judicata. The fact that Justice Bosire (as he then was) held that a court should not grant an injunction against a church when it is clear that it is its duty to do that particular thing, in the case of **John Ottenyo Amwayi & Others Vs Rev George Abura & Others Nairobi HCCC No. 6339 of 1990** (Unreported) does not mean that this suit is res judicata or an injunction cannot be given in appropriate cases. In the instant case, the injunction which is in place which will incidental collapse with this case, was granted by consent of the parties.

18. I agree with the reasoning of Justice Bosire (as he then was) in John **Ottenyo Amwayi case (supra)** where he found that a suit brought by church members as a representative suit without compliance with Order 1 Rule 8 of the Civil Procedure Rules is not proper. There was no notice given to other church members whom the Respondents seem to be litigating on their behalf. I therefore find that this suit has not only failed to comply with Order 1 Rule 8 of the Civil Procedure Rules but it is also an abuse of the Court process. I therefore allow the Applicants’ applications and proceed to dismiss the Respondents suit with costs to the Applicants.

It is so ordered.

The Second Application.

19. In this application, the Applicant Airtel Networks Kenya Limited has brought interpleader proceedings for the court to determine to whom it should pay rent to; whether it is the Plaintiffs or the Defendants. The Applicant argues that when an injunction was granted in this matter against the Defendants, the Plaintiffs through their lawyer sent an auctioneer who distrained its goods. The Applicant argues that it used to have a tenancy agreement with the Registered Trustees of Church of God in East Africa (Kenya). The tenancy agreement lapsed but it continued to remain in the property registered in the name of the 8th Defendant and as such became a tenant from month to month.

20. The Applicant therefore contends that there is a dispute as to who is to be paid rent and this court should determine the issue as to who is to be paid rent.

21. The Plaintiffs have opposed the Applicants’ application based on a replying affidavit sworn on 30th April 2019. The Plaintiffs contend that the Applicant has no business being in these proceedings and that the issue as to the persons to be paid rent does not arise. The Plaintiffs contend that the Applicant had been communicating with Mariakani Christian Centre and even remitted the initial rent to Mariakani Christian Centre but later, they entered into a contract with the 8th Defendant in a clandestine manner and that the contract was signed by two people

who had no authority to do so.

22. I have considered the Applicant's application as well as the opposition to the same by the Plaintiffs herein. There is no contention that there is a dispute regarding ownership of the property where the Applicant has a tenancy licence. There is also no contention that the Plaintiffs have through their lawyers sought to distress for rent. It is therefore clear that there have to be directions as to who rent is to be paid. The Applicant had sought to deposit rent due which is undisputed in court until the ownership dispute is sorted out. The Court has already delivered a ruling, dismissing the Plaintiffs suit. This therefore means that rent due which is undisputed and the rent to be ascertained as outstanding will be paid to the Defendants who are trustees of the property in issue. This therefore means that the prayer for injunction against both the Plaintiff and the Defendants from distressing for rent has been rendered mute. The Applicant should pay the rent to the Defendants. The costs of this application shall be paid by the Plaintiffs. It is so ordered.

Dated, Signed and delivered at Nairobi on this 30th day of January 2020.

E.O.OBAGA

JUDGE

In the presence of:

M/S Kaburu for Mr. Ataka for the interpleader

Mr. Mwangi for Mr. Mbiyu for defendants

Mr. Rabala for plaintiff

Mr. Odhiambo and Mr. Mbiyu for defendants

Court Assistant: Waweru

E.O. OBAGA

JUDGE