



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 192 OF 2018

JAMES YULU & 2 OTHERS (Suing as representatives of TIWI

INDEPENDENT FAITH BAPTIST CHURCH) PLAINTIFFS

VERSUS

SAMSON NZUKI & 2 OTHERS (Officials and Representatives of

INDEPENDENT FAITH BAPTIST CHURCHES OF KENYA.....DEFENDANTS

RULING

(Application seeking orders for leave to file suit in a representative capacity; no leave required as the persons to be represented have been named, given their consent, and signed authority to the applicants ; Order 1 Rule 8 not applicable; application dismissed but with no orders as to costs)

1. The application before me is that dated 17 August 2018 and was filed contemporaneously with this suit. The application is said to be brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and seeks the following orders :-

- i. That leave be granted to the plaintiffs/applicants herein to proceed with the instant suit on their own behalf and on behalf of members of Tiwi Independent Faith Baptist Church.*
- ii. That the costs of this application be in the cause.*

2. The application is based on the following grounds :-

- a. That the plaintiffs/applicants are the elected officials of Tiwi Independent Faith Baptist Church whose members have authorised the filing of the instant representative suit against the defendants.*
- b. That the members of the Church conducted an election and resoundingly voted for the withdrawal of the Tiwi Independent Faith Baptist Church from the Independent Faith Baptist Churches of Kenya.*
- c. That the plaintiffs/applicants duly notified the defendants of the aforesaid resolution and requested them to surrender the title deed respecting the plaintiffs' parcel of land No. Kwale/Tiwi/1428 but the defendants have refused to accede to the request.*
- d. That the defendants/respondents' refusal and/or failure to release the title deed is without any colour of right or legal basis whatsoever since the Independent Faith Baptist Churches of Kenya does not have any proprietary right or interest over the property which it is holding under trust.*
- e. That the long standing dispute and excessive meddling and interference by the officials of the Independent Faith Baptist Churches has greatly affected operations at the Tiwi Independent Faith Baptist Church and donor funding to its affiliated institutions viz the Tiwi Academy and Tiwi Dispensary.*
- f. That the Honourable Court is indeed espoused with wide and unfettered discretion to grant the orders sought herein.*
- g. That in the premises it is only fair and in the wider interest of justice that leave be granted to the plaintiffs herein to proceed with*

the instant suit on their own behalf and on behalf of the members of Tiwi Independent Faith Baptist Church.

3. The application is supported by the affidavit of James Yulu, John K. Chacha and Samuel Makau. They are the Chairman, Secretary and Treasurer respectively, of Tiwi Independent Faith Baptist Church (the Church), and have stated that they have the requisite authority from the members of the Church. They have averred that members of the Church have authorized the filing of the suit as a representative suit against the defendants and an authority to file suit is annexed. They have deposed that members of the Church in an election conducted on 11 March 2018, voted for the withdrawal of the Church from the Independent Faith Baptist Churches of Kenya (the Organisation). They thereafter notified the Organisation of their decision and requested them to surrender title to the land parcel Kwale/Tiwi/428 (the suit land) but they refused to do so. They thus want leave to proceed with the intended suit on their own behalf and on behalf of the Church.

4. The application is opposed by the replying affidavit of Daniel Charo the Secretary of the Organisation. He has contended that the applicants are not officials of the Church because any official of the Church has to be recognised/elected in accordance with the constitution of the Organisation. He has deposed that there have been disputes in the Church for some time which resulted into a splinter group and that the applicants are members of that splinter group and not the church. He has averred that the respondents have never recognised the splinter group. He has averred that the suit land is the property of the Organisation and they cannot release the title deed to the applicants. He has stated that the dispute caused by the splinter group led to the filing of the suit Kwale CMCC No. 105 of 2017. He has further contended that the persons who have signed the authority are not members of the Church.

5. A supplementary affidavit was filed wherein the applicants pointed out that the respondents have not filed a contrary list/register of the entire membership of the Church.

6. I thought that this is the sort of matter that ought to be negotiated or mediated, given that both parties claim to profess the Christian religion, and I gave parties time to do so. To my disappointment, no consent was forthcoming and I directed parties to file their written submissions to this application. I have taken into account the written submissions of counsel for the applicants and the respondents.

7. In his submissions, counsel for the applicants submitted that under Order 1 Rule 8, it is necessary for leave to be granted in a case brought in a representative capacity for an unincorporated group and he referred me to various authorities. In his submissions, counsel for the respondents inter alia submitted that the applicants have failed to prove the existence of any trust between them and the respondents over the suit land. I have also taken note of the authorities that he relied on.

8. It is clear that what the applicants want in this application is for leave to commence the intended suit as a representative suit on their own behalf and on behalf of members of the Church. Counsel has cited Order 1 Rule 8 which provides as follows :-

Order 1 Rule 8 : One person may sue or defend on behalf of all in same interest

1. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

2. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

3. Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

9. It is apparent from the above that one or several persons can file suit while representing others. In my view, sub-rule 2, would apply where those being represented are not specifically named, or have not specifically given their authority for the filing of the suit. In other words, the suit would be for the benefit of many others who may not specifically be known to the applicants, or not specifically named, yet they stand to benefit from the final decision of the suit. That is indeed what was held in the case of *Sonko and Others vs Haluna & Another (1971) EA 443*, cited by counsel for the applicants.

10. However, from what I can see in this application, the applicants intend to file suit on behalf of persons who have been specifically named and who have in fact given them their written authority to do so. I do not therefore think that this is a matter that requires the application of Order 1 Rule 8. In this instance, the persons who stand to benefit from the suit have been specifically identified and they have already given their authority, and it is not said that the suit will also benefit others who are not named or have not given their authority. The applicants are thus at liberty to file suit as they have indeed done so on behalf of the named persons. No leave of the court is required. The respondents in opposing the application went to argue that the applicants do not deserve the final orders sought. That is a matter to await the final determination of the case.

11. I see no place for this application and it is therefore dismissed. I however make no orders as to costs.

12. For the avoidance of doubt, the plaint filed on 17 August 2018 is deemed properly filed by the applicants on behalf of the persons named who have given their written authority.

13. Orders accordingly

DATED and delivered this 23RD day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA