



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL CASE NO. 12 OF 2016.

1. JOHN MAKOKHA

2. JOEL WEKESA

3. JAMES SIMIYU WABUKHA

4. GERAHAM KISIANG'ANI

5. JAPHETH MUKOYA).....PLAINTIFFS/RESPONDENTS

(Suing on behalf of KAMUSINGA YEARLY MEETING OF

FRIENDS (QUAKERS)

VERSUS.

1. TIMOTHY WANYONYI NASINGA

2. ZABLON WALIAULA

3. MARGARET NAULA WANYONYI

4. CHRISPINUA WANASWA

5. JOSEPH WASIKE WALELA

6. GABRIEL KHAEMBA

7. BENANIAH SISUNGO.....DEFENDANTS/RESPONDENTS

(Sued as officials of ELGON RELIGIOUS SOCIETY OF FRIENDS.

RULING.

The Plaintiff John Makokha and 4 others filed this suit against the defendants Timothy Wanyonyi and 6 others by plaint dated 20.12.2016 and filed in court on even date seeking a permanent injunction to restrain the defendants from interfering with the running and management of the named schools, and institutions quarterly meetings and village meetings named in the plaint. The Plaintiffs claim is that the plaintiff had been the Manager/Sponsor of the stated Institutions within Bungoma County after they were registered as Yearly Meetings by the Registrar of Societies and issued with Certificate No. 45492 dated 11.8.2014. Having been so registered the Plaintiff took over the running and sponsorship of the said Institution; and that the defendants have been interfering through their servants and/or employees in the plaintiffs management of the school and institutions. In paragraph 9 of the plaint the Plaintiff specifically states.

11. There is no other suit pending and/or decided between the parties herein on this cause of action save this hereof.

Simultaneously with filing the plaint the plaintiff filed application dated 20.12.2016 seeking the following orders;

1. THAT an interim injunction be and is hereby issued restraining the Defendant/Respondent, their agents and/or employees from interfering with the plaintiff/Applicants running of the 46 Institutions.

The application is premised on the grounds that;

(1) The plaintiff/Applicant has been the Manager/Sponsor of all learning institutions i.e. schools and polytechnics and colleges and has established subordinate meetings i.e. quarterly meetings and village meetings in Bungoma County.

(2) The Defendants/Respondents have either themselves and/or through their agents, servants and employees interfered and interrupted the plaintiffs' running and management of Institutions sponsored by the Plaintiff and quarterly monthly and village meetings.

(3) This suit reveals a prima facie case with overwhelming chances of success as the acts of the Defendants/Respondents are acting without any color of right.

(4) The Plaintiff/Applicants shall suffer irreparable loss unless the orders sought are granted.

The application is supported by the affidavit of John Makokha the presiding clerk of the plaintiff Society who depones that;

(a) The Plaintiffs/Applicants was duly registered and issued with a registration certificates No. 45492 on the 11th day of August, 2014.

(b) THAT the Plaintiff/Applicants then took over the running and management of the schools and institutions.

(c) THAT the Defendants/Respondents has either themselves and/or through their agents, servants and employees interfered and interrupted the Plaintiff/Applicants running and/or management of Institutions sponsored by the Plaintiff and the Quarterly monthly and village meetings.

The defendant Timothy Wanyonyi, Zablon Waliaula, Margaret Naula Wanyonyi, Chrispinua Wanaswa, Joseph Wasike Walela, Gabriel Khaemba and Benaniah Sisungu filed statement of defence dated 27.3.2017 denying plaintiff claim and aver that;

(a) The purported registration of the plaintiffs was done against the Defendants Society's Constitution which process was challenged vide Kitale High Court Civil Suit No. 10 of 2014 and the registration of the Plaintiffs was cancelled by the registrar of societies and the Defendants shall put the plaintiffs to strict proof of the contents of paragraph 4,5,6 and 7 of the Plaintiff.

(b) There is a pending suit between the parties herein over the same subject matter being Kitale Chief Magistrate's Court Civil Case No. 92 of 2016 formerly Kitale H.C.C.C. No. 11 of 2015.

Simultaneous to the filing of defence the defendants filed the application dated 27.3.2017. Seeking orders;

1) THAT the Plaintiff's Plaintiff as filed herein be struck out.

2) THAT in the result the suit as against the Defendants be dismissed with costs to the Defendants.

3) THAT in the alternative the instant suit be stayed pending the Hearing and determination of Kitale Chief Magistrate's Civil No. 92 of 2016.

The application is premised on the grounds that;

(a) The plaintiff have no legal capacity to present suit as:

(i) The certificate of Registration for Kamusinga Yearly Meeting of Friends was CANCELLED by the Registrar of Societies.

(ii) The Plaintiffs cannot purport to be members of Kamusinga Yearly Meeting of Friends as it not being Registered or exempted society is unlawful society.

The application is supported by the Supporting Affidavit of Timothy Wanyonyi Nasinya sworn on 27th March, 2017.

By Consent of Counsel for the parties both applications were to be canvassed together by way of Written Submissions. Each party filed respective Written Submissions. Mr. Were for the Plaintiff submitted that the plaintiff/applicant had satisfied all the elements for granting of

an injunction. He submitted that they have established a prima facie case, shown that they will suffer irreparable damage if order is not granted and demonstrated on a balance of convenience that the plaintiff should be granted then orders. He referred the court to the decision in *Giella -Vs- Cassman Brown & Co. Ltd 1973 EA 358*. In respect of the defendants application. Mr. Were submits that the parties in this case are not the parties in the other cases *i.e. Kitale Chief Magistrate's Court Civil Case No. 92 of 2016 (formerly Kitale H.C.C.C. No. 11 of 2015) and BUNGOMA Misc. Civil Application No. 14 of 2015*. Secondly, the Subject matter in this case is not the subject matter in the other cases. This can be clearly seen from the pleadings exhibited. He further submits that the Applicants having challenged the cancellation of their registration through an application for judicial review vide Bungoma Misc. Application No. 14 of 2015, can still properly and lawfully operate as a legal entity by dint of **Section 15(3) of the Societies Act** which provides;

“Notwithstanding the provisions of subsection 91) of section 4, where a society other than a society specified in paragraphs (i), (ii) or (iii) of the provision to section 4(1), lodges an appeal under subsection (1) of this section, such society shall not, pending the decision of the appeal, be an unlawful society”

Mr. Ingotsi for the defendants submits that the plaintiff has no legal capacity to prosecute this suit as their registration as Kamusinga Yearly Meeting of Friends had been cancelled and therefore cannot take any action or permit any action to be taken in furtherance of its objectives. This is pursuant to Sec. 12(5) of the Societies Act. Secondly counsel submits that there is a pending suit between the same parties over same claims in Kitale CMCC 92 of 2016 Formerly Kitale H.CCC No. 11 of 2015 and therefore the institution of the suit offends Sec. 6 of the Civil Procedure Act. He submits that the filing of this suit during the pendency of Kitale Chief Magistrate's Court Civil Case No. 92 of 2016 formerly Kitale H.C.C.C. No.11 of 2015 amounts to nothing but to an abuse of the process of the Court and should therefore be struck out to prevent abuse of the process of the court.

In respect of the plaintiffs application Counsel for the defendant submits that the defendant has been the Sponsor of the named Institutions since 1985; that the plaintiffs have not shown that they have been managing the Institutions; the plaintiffs have not established a prima facie case with probability of success as they have not shown that they are the Manages; have not shown any irreparable loss they will suffer if order is not granted and they have not given an undertaking as to damages.

On the issue of whether the plaintiffs have capacity to sue their registration having been cancelled by the Registrar of societies, I decline the invitation to make a finding on this issue as it is active in Litigation in Bungoma HC. Judicial Review (Hc. Misc. Civil Appl. No. 14 of 2015).

On the issue of whether the issue in the suit are also a matter directly and substantially in issue in KITALE CMCC 92 OF 2016 (Formerly; KITALE HCCC 11 OF 2015) and between the same parties; a close examination of the pleadings shows the following:

Plaintiffs; (1) Timothy Wanyonyi Nasinga (2) Zablon Waliaula (3) Margaret Naula Wanyonyi (4) Chrispinus Wanaswa (5) Joseph Wasike Walela

(6) Gabriel Khaemba (7) Benaniah Sisungu Defendants; (1) John Makokha (2) Joel Wekesa (3) James Simiyu Mabukha (4) Graham Kisiang'ani (5) Japheth Mukoya (6) And 13 others.

Parties in Bungoma Hcc. 12 of 2016 this present suit.

Plaintiffs; (1) John Makokha (2) Joel Wekesa (James Simiyu Wabukha (4) Geraham Kisiang'ani (5) Japhet Mukoya Defendants; (1) Timothy Wanyonyi Nasinga (2) Zablon Waliaula (3) Margret Naula Wanyonyi (4) Chrispinus Wanaswa (5) Joseph Wasike Walela (6) Gabriel Khaemba (4). Benaniah Sisungo

Prayers in Kitale Hcc. 11 of 2015

(b) A permanent injunction against the Defendants restraining them from in any manner whatsoever interfering with the plaintiffs' managed/sponsored schools and quarterly monthly and village meetings under it.

Prayers in Bungoma Hcc. 12 of 2016

(a) A permanent injunction restraining the defendants either themselves and/or through their servants, agents, employees from interfering with the plaintiffs' management and running of the plaintiffs' managed schools, quarterly meetings and village meetings listed in paragraph 9 herein above.

From the above I is clearly be established that the parties in Kitale HCC 11 of 2015 which is now Kitale CMCC 92 OF 2016 and the parties in this suit Bungoma HCC 12 OF 2016 are the same. The issues that both suits seem to have concerns one aspect that of management of the schools, quarterly meeting and villages meetings.

Section 6 of the Civil Procedure Act provides that:

“ No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The parties in these two suits are the same only that in one of the cases one is a defendant and in the other plaintiffs. The issues revolves around management of the schools, quarterly meetings and village meetings. It will not be prudent to proceed with this matter when it has been demonstrated that the same issues are alive in a previously instituted suit which is pending determination. In the premises the hearing of this suit is stayed pending the hearing and determination at Kitale CMCC No. 92 of 2016.

Ruling is read over and delivered in Open Court in the presence of Representatives of Plaintiffs and defendants.

Dated at Bungoma this 5th day of July, 2018.

S.N. RIECHI

JUDGE.