



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 3 OF 2020

PIUS WATENE D. MAINA (Suing for and on behalf of the

Baptist Convention of Kenya)..... PLAINTIFF/APPLICANT

VERSUS

THE DIRECTOR GENERAL KENYA URBAN ROADS

AUTHORITY.....1ST DEFENDANT/RESPONDENT

HYPERTECK CONTRACTORS & EQUIPMENT

LIMITED2ND DEFENDANT/RESPONDENT

KENYA POWER & LIGHTING COMPANY.....3RD DEFENDANT/RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH DEFENDANT/RESPONDENT

THE OCS CHUKA POLICE STATION.....5TH DEFENDANT/RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. Although the 6th defendant’s submissions concern the Notice of Preliminary Objection filed by him and dated 19th June, 2020 and his application dated 29th June, 2020, this ruling will primarily concern itself with the Notice of Preliminary Objection. It is noted that the 6th defendant has filed submissions on behalf of the 1st, 4th, 5th and 6th defendants/respondents.

2. The objection was canvassed by way of written submissions.

3. The 1st, 4th, 5th and 6th defendants’/respondents’ submissions are reproduced herebelow in full and without any alterations whatsoever.

1ST 4TH 5TH AND 6TH DEFENDANTS/RESPONDENTS SUBMISSION ON THE NOTICE OF PRELIMINARY OBJECTION DATED 19TH JUNE 2020 AND THE APPLICATION DATED 29TH JUNE 2020

May it please your Lordship, we submit on behalf of the 1st, 4th, 5th and 6th defendants/respondents (**referred herein as defendants**) on the Notice of preliminary objection dated the 19th June 2020 and the application dated 29th June 2020 as follows;

Your Lordship the plaintiff filed this suit vide the plaint dated 21st May 2020. The plaintiff in the verifying affidavit to the plaint at paragraph 2 states that he has authority of the registered trustees of the Baptist Convention of Kenya to swear and plead on their behalf hence the filling of this suit. Your lordship on the same day the plaintiff filed under certificate of urgency the application dated 21st June 2020. The plaintiff was issued with injunctive orders against the defendants vide the order dated 26th June 2020.

Your Lordship the plaint, the application and the orders of 26th June 2020 was served upon the defendants. The defendants filed the Notice of preliminary objection dated the 19th June 2020 and the application dated 29th June 2020 in opposition to both the application and the plaint on ground that the plaintiff has no locus to sue on behalf of Baptist Convention of Kenya. The defendants

hence seek setting aside of the orders granted on the 26th June 2020 and the striking out the plaint for want of locus.

Your Lordship we submit that Baptist Convention of Kenya is a registered society in the office of the 6th defendant under Cap 108 laws of Kenya. Your Lordship Baptist Convention of Kenya is governed by a constitution that has been registered by the Registrar of Societies a department in the office of the 6th defendant. The constitution of Baptist Convention of Kenya was amended on 28th February 2015 and registered as such by the Registrar of Societies.

Your lordship the defendants in their preliminary objection dated the 19th June 2020 and the application dated 29th June 2020 oppose the entire suit and seek vacation of orders of 26th June 2020 for want of locus. Your Lordship the constitution of Baptist Convention of Kenya the person mandated to deal with all **LEGAL MATTERS AFFECTING THE CONVENTION is the SECRETARY GENERAL** not any other person. The plaintiff herein states that he is a representative of the registered trustees of the Baptist Convention of Kenya hence the reason for him to institute this suit. It is our submission that REGISTERED TRUSTEES OF THE BAPTIST CONVENTION OF KENYA have no locus to institute and/or to defend any legal proposition on behalf of the Baptist Convention of Kenya. The person clothed with such powers is only the SECRETARY GENERAL. The constitution of Baptist Convention of Kenya expressly confers upon the office of the SECRETARY GENERAL. The responsibilities of the secretary general have been clearly articulated. Subsection (b) (xxvii) provides that the secretary general shall be **responsible for all legal matters affecting the convention**.

Your Lordship the same constitution of the Baptist Convention of Kenya provide for the office of BOARD OF TRUSTEES OF BCOK. Under that office their responsibilities are also clearly stipulated. Their responsibility is to keep in trust all properties that are owned by the convention. They do not have any mandate to deal with any legal issue that affects the convention such as this suit. It is only the Secretary General (**Emphasis ours**) who has such mandate. We submit that based on the foregoing the plaintiff herein does not have locus and is indeed acting in contravention of the constitution of Baptist Convention of Kenya. Your Lordship we submit that the suit and the orders of 26th June 2020 were issued to a person without locus hence the same should be set aside and the plaint be struck out with costs to the defendants.

Your Lordship we wish to submit that this is the second suit to be filed on behalf of Baptist Convention of Kenya. In CHUKA CMCC NO 9 OF 2020 was filed by the CHUKA BAPTIST CHURCH again all the defendants herein was withdrawn when the 6th defendant herein raise a notice of preliminary objection dated 13th of March 2020 challenging the locus of the plaintiff in that suit (CHUKA BAPTIST CHURCH). The plaintiff s then withdrew the suit vide notice of withdrawal of suit dated 4th may 2020. It is our submission that the plaintiff herein does not have any locus to file this suit just as the Chuka Baptist church lacked the locus hence withdrawal of the suit it had filed.

Your Lordship the application dated 29th June 2020 is supported by the affidavit of DORCAS KANAN GITONGA which we entirely rely on. In the affidavit at paragraph 6 we have annexed a copy of the constitution of Baptist Convention of Kenya marked as annexure **DKG** which clearly gives the secretary general the powers to sue and be sued on behalf of the convention and not the board of trustees as alleged by the plaintiff herein.

Your Lordship it is for the above reason that we submit that the plaintiff herein has no locus to institute this suit for and on behalf of Baptist Convention of Kenya because the same contravenes the clear provisions of the said Constitution. The orders granted on 26th June 2020 should hence be set aside and the plaint struck of for want of locus with costs to the defendants.

Your Lordship in support of our submissions we rely on the case of **Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others [2014] eKLR** where Justice R.E Aburili held inter alia that “..... Furthermore, the freedom and right of worship under the Constitution is not absolute. It comes with responsibilities, when exercised in association with others through the means of voluntary organizations such as a church. Its exercise can be limited to the extent that is dictated by membership of that society’s constitution”.

Your Lordship we submit that as Justice R.E Aburili held in the above case, the plaintiff herein must adhere to the provisions of the constitution of Baptist Convention of Kenya. He cannot purport to cloth himself with powers that do not belong to him. The secretary general has his duties the board of trustees also have their duties. No organ can perform the other obligations unless the constitution is amended to give such powers otherwise the actions of the plaintiff herein are null and void.

Your Lordship we submit that our application dated 29th June 2020 and our notice of preliminary objection dated 19th June 2020 are merited and pray that you do set aside the orders of 26th June 2020 and further strike out the plaint filed by the plaintiff herein for want of locus wit costs to the defendants.

This is our humble submission and prayer.

We so pray.

DATED at MERU this DAY OF 2020

J.M. KIONGO

SENIOR LITIGATION COUNSEL

FOR: HON. ATTORNEY GENERAL

4. The Plaintiff's/Respondent's submissions are reproduced herebelow in full and without any alteration whatsoever:

PLAINTIFFS SUBMISSIONS IN OPPOSING THE NOTICE OF PRELIMINARY OBJECTION DATED 19TH JUNE 2020.

May it please you my Lord,

The plaintiff will be submitting that the Notice of Preliminary Objection before this court ; is incurably defective as the same is not based on any pure point of law; that it is based on an unknown legal principle and the same ought to be dismissed.

We have framed two issues for determination by this honourable court in respect of the preliminary objection raised by the defendants in this suit.

1. Whether the Notice of Preliminary Objection meets the threshold required in Law.

2. Whether the Plaintiff herein has locus standi to institute this suit.

WHETHER THE NOTICE OF PRELIMINARY OBJECTION MEETS THE THRESHOLD REQUIRED IN LAW.

The Facts

My Lord, 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 office holders.

The 1st, 4th, 5th and 6th defendants have put before you a Preliminary Objection premised on the allegation that the Plaintiff, a registered trustee of the Baptist Convention of Kenya, lacks locus standi to institute this suit on behalf of the Baptist Convention of Kenya, a church registered under the societies Act.

They further allege that the Church secretary has responsibility for all legal matters affecting the convention, and is therefore the correct person to sue or be sued on behalf of the church. With tremendous respect, that is a very shallow interpretation of the law.

It is the plaintiff's case that the trustees of a registered society or branch or officers authorized by its rules, may bring or defend actual or legal proceedings with respect to any property, right or claim of the society.

The plaintiff relies on the decision of Nyamu J as he then was in in the matter of **Nairobi Civil Suit No. 2824 of 1997(OS) Jane Nyambura Joshua versus Apostolic Faith Church** where he held that the Church could only be sued through its registered trustees.

The Law

My Lord, a Notice of Preliminary Objection must be based on pure points of law with no facts to be ascertained.

Order 2 Rule 9 of the Civil Procedure Rules provides;

A party may by his pleading raise any point of law.

A preliminary objection should be raised on a **pure point of law** which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.

The plaintiff has indicated in his plaint that he has brought this suit on behalf of the Baptist Convention of Kenya, in his capacity as a trustee of the Baptist Convention of Kenya, a church registered under the societies Act.

My Lord we refer this court to **Halsburys Laws of England 3rd Edition Vol 18 at paragraph 239** on legal proceedings where it was stated:

“The trustees of a registered society or branch or officers authorised by its rules, may bring or defend actual or legal proceedings with respect to any property, right or claim of the society or the branch and may sue and be sued in their proper names without other description than the title of their office. The liability of trustees to be sued in proceedings with respect to a right or claim of the society or branch is restricted to cases in which the right or claim concerns the property of a society or branch...”

In the case of; **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; the Court defined a Notice of preliminary Objection that ;

“...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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

In AVTAR SINGH BHAMRA & ANOTHER –VS- ORIENTAL COMMERCIAL BANK – Civil Suit No. 53 of 2004, the High Court sitting

at Kisumu held that **“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.”**

Based on the facts and the law placed before you my Lord, we humbly submit that the said Notice of Preliminary Objection before this court does not meet the threshold required in law and is therefore incurably defective.

WHETHER THE PLAINTIFF HEREIN HAS LOCUS STANDI TO INSTITUTE THIS SUIT.

My Lord, it is trite that a church registered under the Societies Act can only sue or be sued through its registered trustees.

In the matter of **Nairobi Civil Suit No. 2824 of 1997(OS) Jane Nyambura Joshua versus Apostolic Faith Church in** (Nyamu J, as he then was) held that the Church could only be sued through its registered trustees.

The AMENDED CONSTITUTION OF THE BAPTIST CONVENTION OF KENYA -2015, provides at part 1.5 (xxvii) that the secretary general of the church shall be;

“Responsible for all legal matters affecting the convention”

Does the term responsibility for legal matters amount to capacity to sue and be sued? The answer is No. What the secretary general of the church is required to do under the responsibility for legal affairs is coordinate to get Advocates to represent the church where it has been sued or where it wants to institute a suit for the reason that the secretary general is always present at the head office and is therefore better placed to coordinate such affairs. However the capacity to sue or be sued on behalf of the church rests with the trustees.

An example my Lord is a company under Kenyan law. The company secretary is usually responsible for legal matters affecting the company. However, the company secretary is not the right person in law to sue or be sued on behalf of the company.

In **TRUSTEES KENYA REDEEMED CHURCH & another v SAMUEL M’OBUYA MORARA & 5 others [2011] eKLR**, it was held that 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 office holders.

In **African Orthodox Church of Kenya v Charles Omuroka & another [2014] eKLR** court held that “There is no doubt therefore, that both the Plaintiff and the 2nd Defendant as societies or Associations registered under the Societies Act are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. **They can only sue through Trustees, if they have one or in the names of their officials in a representative capacity**”

In sum my Lord, it is our submission that the Notice of preliminary Objection before you is unmerited, an abuse of the court process and we pray that the same be dismissed with costs to the plaintiff.

Dated at Chuka thisof2020

MUTHOMI GITARI & CO

ADVOCATES FOR THE PLAINTIFF

5. I have considered the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. For the authorities, I opine that no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. In coming to my decision in this matter I have taken into account the principles enunciated in those authorities. I need not regurgitate those authorities as the principles they espouse are contained in the parties’ submissions which I have reproduced in full in the first part of this ruling.

6. I agree with the assertion by the plaintiff’s advocate that a society such as a church, not being a legal person, can only sue or be sued through legally designated persons such as trustees.

7. This suit was filed by way of plaint by one PIUS WATENE D. MAINA who said that he was a trustee who was suing for and on behalf of the Baptist Convention of Kenya. Before I move to any other issues, it is pellucid that he is not suing on behalf of the trustees and he does not provide any evidence that the trustees had authorized him to institute this suit.

Surely, one person can never constitute trustees.

8. Although churches and other societies can sue through trustees, they do so where their constitutions allow trustees to do so.

9. Where a society’s constitution stipulates that suits can only be instituted or defended by another person or body, the constitution being the supreme law of a society, any other person or body, be they trustees or anything else, cannot operate ultra vires the constitution.

10. In this case I have perused the Constitution of the Baptist Convention of Kenya (BCOK) which at Article 1.5(xxvii) gives responsibility for all legal matters pertaining to the convention to the Secretary General. This being the case PIUS WATENE D. MAINA has acted ultra vires the constitution of the Baptist Convention of Kenya (BCOK).

He, therefore, does not have any business to file this suit.

11. In the circumstances, I uphold the objection filed by the 1st, 4th, 5th and 6th defendants.

12. The following orders are issued:

a) This suit is dismissed in its entirety.

b) Costs are awarded to the 1st, 4th, 5th and 6th defendants and are to be borne by the plaintiff, PIUS WATENE D. MAINA.

c) The orders granted on 26th June, 2020 are hereby automatically vacated.

13. It is hereby clarified that the above orders do not grant the defendants a carte blanche to illegally enter into or encroach upon private land.

Delivered in open Court at Chuka this **24th day of November, 2020** in the presence of;

CA: Ndegwa

Muthomi Gitari present for the Plaintiff.

Muthomi h/b Murithi Kithinji for 3rd defendant.

Other defendants absent.

P. M. NJOROGÉ

JUDGE