



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MSC. APPLICATION NO 179 OF 2018

GEORGE KYAKA.....1ST APPLICANT

DR. JOHN JARED ODUOR.....2ND APPLICANT

GERALD ODIWOUR KELLY.....3RD APPLICANT

JULIUS W. KIMANI.....4TH APPLICANT

MOSES TANGARA.....5TH APPLICANT

ZACHARY KIBALIACH.....6TH APPLICANT

Suing in their capacities as office bearers of KINGS OUTREACH CHURCH.

=VERSUS=

HARRISON CHEGE KARIUKI.....1ST RESPONDENT

WATAMU TOURS AND TRAVELS LIMITED.....2ND RESPONDENT

JANE GATHAARA T/A

GATHAARA J N & CO ADVOCATES.....3RD RESPONDENT

RULING

1. This suit was instituted as a miscellaneous civil application under Section 7 of the Arbitration Act, and was brought as a notice of motion. Through it, the applicants sought an interim measure of protection within the framework of Section 7 of the Act, pending the hearing and determination of arbitration proceedings pursuant to an arbitration agreement contained in clause 16.11 of a land sale agreement executed between Harrison Chege Kariuki (as vendor) and the Registered Trustees of Kings Outreach Church (as purchasers).
2. Instructively, the suit was not instituted by the Registered Trustees of Kings Outreach Church. It was instituted by the six applicants herein, suing in their capacities as office bearers of Kings Outreach Church occupying positions of chairman, vice chairman, secretary, treasurer and assistant treasurers respectively.
3. On 5/12/2018, the 3rd respondent brought a notice of preliminary objection contending, *inter alia*, that there was no cause of action against the defendant by the applicants and that the notice of motion was a nullity. She subsequently withdrew the preliminary objection. The 1st respondent filed a replying affidavit dated 7/11/2018.
4. On 24/1/2019, the six applicants brought a chamber summons application dated 23/1/2019 seeking an order joining the Registered Trustees of Kings Outreach Church as “plaintiffs” in the miscellaneous application. That application is the subject of this ruling. The application was supported by the affidavit of Bishop James Kabingu sworn on 23/2/2019. He deposed that unless the trustees are joined in this suit, decisions will be made without them being heard and this will be contrary to the rules of natural justice and contrary to the provisions of Articles 40, 47 and 48 of the Constitution of Kenya.
5. The said application was opposed by the 1st respondent through a replying affidavit sworn by him on 11/2/2019. He deposed that the application was bad in law and lacked merit because it did not conform with the relevant legal principles.
6. The application was canvassed through oral arguments. Ms Kimetto for the applicants submitted that the application was predicated on

the provisions of Articles 40(1), 47(1), 48 and 50(1) of the Constitution and Section 1 of the Societies Act. She argued that the agreement giving rise to this suit was between the registered trustees and the 1st respondent hence it was necessary that the registered trustees be joined as parties to the suit. Secondly, she submitted that under Section 1 of the Societies Act, the office bearers of the Kings Outreach Church are also necessary parties to the suit. She contended that on their own, the trustees cannot maintain a suit against the respondents, hence the need to join them as parties to this suit.

7. Mrs Wambugu, counsel for the 1st and 2nd respondents, opposed the application. She submitted that the jurisdiction of the court stemmed from Sections 6 and 7 of the Arbitration Act because what is before the court is an interlocutory application pending arbitration proceedings, and the ultimate dispute resolution forum will be the arbitral tribunal. Secondly, she submitted that the applicants ought to have brought the application by way of notice of motion as opposed to a chamber summons and contended that the application offended the provisions of Order 51 of the Civil Procedure Rules. Thirdly, she argued that the six applicants who brought the application were already parties to the suit. Mrs Wambugu further submitted that the application was unmerited because the applicants had not exhibited an official search containing the names of the registered trustees. The 3rd respondent supported the application.

8. I have considered the application together with the 1st and 2nd respondents' response and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence. The broad issue for determination in this application is whether the criteria for joinder has been satisfied.

9. This court's jurisdiction to grant an order of joinder is guided by the framework in Order 1 Rule 10 of the Civil Procedure Rule which provides as follows:

1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants

10. Whenever the jurisdiction to grant an order of joinder is exercised in proceedings brought under Section 7 of the Arbitration Act, the court, is required to pay attention to the relevant legal framework and principles governing arbitration. Of legal significance is the requirement that only a party to an arbitration agreement is permitted to initiate proceedings under Section 7 of the Arbitration Act. Secondly, the defendant or respondent to proceedings initiated under Section 7 of the Arbitration Act should be a party who is privy to and bound by the arbitration agreement. This is so because a suit brought under Section 7 of the Arbitration Act does not resolve the dispute; it is an interlocutory process pending the resolution of the dispute by the arbitral tribunal put in motion by the parties to an arbitration agreement. Thirdly, given that the arbitral tribunal would not have jurisdiction over non-parties to the arbitration agreement, the interlocutory proceedings ought to be confined to the parties to the arbitration agreement because, ultimately, they will be the only parties to the arbitration proceedings in the resolution of the dispute.

11. The material arbitration agreement in this suit was between the 1st defendant and the Registered Trustees of Kings Outreach Church. The present suit was not brought by the Registered Trustees of Kings Outreach Church. Secondly, the 2nd and 3rd respondents were not parties to the arbitration agreement yet they are named as parties to the present interlocutory proceedings which were expressly brought under Section 7 of the Arbitration Act.

12. My finding therefore is that a suit under Section 7 of the Arbitration Act can only be brought by a party to the arbitration agreement. Non-parties to the arbitration agreement are not eligible parties to a suit under Section 7 of the Arbitration Act. The intended joinder will therefore not cure the defect which the applicants seek to cure.

13. It was contended by Ms Kimetto that under Section 1 of the Societies Act, the Registered Trustees of Kings Outreach Church lack capacity to initiate legal proceedings. I do not agree with counsel. My understanding of Kenya's legal framework and jurisprudence on trustees is that where the trustees are incorporated under the Trustees (Perpetual Succession) Act, they can sue or be sued in their corporate name. Where they are not incorporated, they can sue and be sued in their individual names as trustees. The contention that the Registered Trustees of Kings Outreach Church cannot, under Kenya's legal system, maintain a suit, is in my view, incorrect.

14. It does appear that the applicants who initiated the present suit did not take time to peruse the sale agreement and the Deed of Trust. Nowhere is Kings Outreach Church mentioned as a party to the agreement. Under the Deed of Trust, the trust is an irrevocable public charitable trust, a distinct entity from the Church. Indeed, Section 2 of the Societies Act takes cognizance of this feature and expressly provides that trustees are not officers of a society.

15. I have deeply reflected on the option of exercising this court's discretion under Order 1 rule 10(1) of the Civil Procedure Rules to *suo motto* bring the trustees on board and expunge the names of the present applicants. I do not think I would be acting properly if I did so.

Firstly, the trustees have not made an application to be joined as parties to the suit. The persons who have made the application are persons who would not be parties to a suit under Section 7 of the Arbitration Act. Secondly, some of the persons named as respondents were not parties to the arbitration agreement. It is therefore upon the trustees to initiate appropriate proceedings in their names against the right respondents.

16. In light of the foregoing, my finding on the broad issue in this application is that the applicants have not satisfied the criteria for joinder. Consequently, the chamber summons dated 23/1/2019 is dismissed for lack of merit. The applicants shall bear the 1st and 2nd respondent's costs of the application. Because the 3rd respondent supported the unsuccessful application, she will bear her own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF MARCH 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Kimetta, Mr Odiwour Kelly & Mr Lituda for the Applicants

Mr Okemwa holding brief for Mr Gathara for the 3rd Respondent

Mr Mugo holding brief for Mrs Mugo for the 1st and 2nd Respondents

June Nafula - Court Clerk