



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 214 OF 2018

**EVANGELISTICE SPONSORS ASSOCIATION (suing through its registered
trustees and officials**

BIGVAE MZAE

LUCAS MWAVITA

HEBRON MAGHANGA PLAINTIFF

VERSUS

GEORGE MICHAEL MBUR. 1ST DEFENDANT

RAHAB WAITHERERO..... 2ND DEFENDANT

RULING

1. This ruling is in respect of defendants' Notice of Preliminary Objection dated 10th July 2018. The objection is on the following grounds:

1. That the suit herein is res judicata as it offends the provisions of Section 7 of the Civil Procedure Act.

2. That the plaintiffs' suit is incurably defective for suing a society without doing it through its registered officials or registered trustees.

Reasons wherefore the suit herein should be struck out with costs.

2. The objection was heard through written submissions. Before venturing into the submissions, it is important to sketch a backdrop of the suit.

3. Proceedings herein commenced through plaint filed on 19th June 2018 wherein it is averred that Evangelistic Sponsors Association (ESA) is a registered association under the Societies Act Cap 108 Laws of Kenya and that it brings this suit through its officials. It is further averred that ESA is the owner of the parcel of land known as LR No. Elburgon Township/562 (the suit property) having been issued with an allotment letter in respect thereof by the County Council of Nakuru on 27th June 1995. That the suit property was registered in the names of the 1st defendant and two other persons who were to hold it in trust for ESA. That records at the county council show that suit property was fraudulently registered in the names of the defendants but no title deed had been issued while records at the lands registry show that the land is registered in the name of ESA. ESA therefore seeks judgment against the defendants for a declaration that ESA is the legal owner of the suit property, cancellation of the title issued in the 1st defendant's name, a permanent injunction, an eviction order and an order directing the 1st defendant to deliver up all the plaintiff's properties in his possession.

4. In a number of the witness statements filed alongside the plaint, the plaintiff's witnesses state that the 1st defendant filed a suit seeking to bar the plaintiff from accessing the suit property. Further, among the documents include in the plaintiff's bundle of documents is a copy of a judgment delivered on 28th March 2017 in **CMCC No. 10 of 2015 (Molo) George Michael Mburu v Bigvae Mzae & 4 Others**.

5. In their submissions the defendants argued that this suit is res judicata in view of the aforesaid judgment of the subordinate court. The defendants relied on the case of **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR**. They further argued that the purported officials are not trustees of ESA and cannot therefore purport to institute the suit on behalf of ESA. They cited the cases of **Andrew Inyolo Abwanza v Board of Trustees of Pentecostal**

Assemblies of God – Kenya & 3 others [2009] eKLR and Margaret Muthoni Kanyuku v Glory Ministry Church & 2 Others [2012] eKLR and urged the court to uphold the preliminary objection.

6. On their part, the plaintiffs argued that while there is no dispute that **CMCC No. 10 of 2015 (Molo) George Michael Mburu v Bigvae Mzae & 4 Others** exists and that a judgment was delivered therein, the prayers in the said case are totally different from those in the present case and the parties are not all the same in both matters. Citing the cases of M W K v A M W [2016] eKLR, Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR and Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another [2018] eKLR the plaintiffs argued that this suit is not res judicata. Regarding the argument that the suit is defective for being brought by a society but not without doing through its registered officials or registered trustees, the plaintiffs argued that this aspect of the objection requires evidence and therefore it does not amount to a valid preliminary objection. They urged the court to dismiss the preliminary objection with costs.

7. I have considered the objection and the arguments advanced thereon by both sides. For a preliminary objection to be valid, it must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

8. The objection is based on two grounds; that the suit is res judicata and that the suit being one brought by a society is defective for not having been instituted by the society's its registered officials or registered trustees. To succeed on the second ground of the objection there will be need to take evidence to determine who the valid officials or trustees of the plaintiff are. That certainly takes the matter out of the realm of valid preliminary objections. See Oraro v Mbaja [2005] eKLR. The second ground of the objection is in the circumstances not a valid preliminary objection and is therefore dismissed.

9. The first ground of the objection invokes res judicata. Statutory guidance on res judicata is found at **Section 7** of the **Civil Procedure Act** which provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court..

10. In John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR the Court of Appeal stated thus:

.... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

11. The plaintiff does not deny that another suit being **CMCC No. 10 of 2015 (Molo) George Michael Mburu v Bigvae Mzae & 4 Others** existed and that it was finally determined in a judgment delivered on 28th March 2017. I have perused the judgment which is included in the plaintiffs' list of documents. I note that the 1st defendant herein was the plaintiff in **CMCC No. 10 of 2015 (Molo)** while the defendant therein was ESA sued through its then trustees and/or executive committee members among whom were Bigvae Mzae, Lucas Masila and Hebron Maghanga who have brought the present suit on behalf of ESA. Thus save for the 2nd defendant, parties to **CMCC No. 10 of 2015 (Molo)** are the same as parties to this suit.

12. The plaintiffs herein seek judgment against the defendants for a declaration that ESA is the legal owner of land parcel number Elburgon Township/562, cancellation of the title issued in the 1st defendant's name, a permanent injunction restraining the defendants from trespassing upon, constructing on or dealing with the said property, eviction of the defendants from the said property and an order directing the 1st defendant to deliver up all the plaintiff's properties in his possession. In **CMCC No. 10 of 2015 (Molo)** the plaintiff therein sought a permanent injunction restraining the defendants therein from interfering with his running of Mwembeni Pentecostal Church on land parcel number Elburgon Township/562. The defendants in **CMCC No. 10 of 2015 (Molo)** denied the allegations in the said suit and counterclaimed for an order directing the plaintiff therein to step aside for a period of 6 months to vacate from land parcel number Elburgon Township/562 and to account for all the church collections from the time of suspension. Having considered the prayer for permanent injunction, the subordinate court concluded that ESA is the owner of land parcel number Elburgon Township/562 and therefore dismissed the said prayer. Regarding the prayer that George Michael Mburu steps aside and accounts for church collections, the subordinate court dismissed the said claims and urged parties to uphold brotherly peace and to embrace alternative dispute resolution mechanisms.

13. It is thus abundantly clear that the issue as to whether a permanent injunction should be granted as regards the use of land parcel number Elburgon Township/562 was determined in **CMCC No. 10 of 2015 (Molo)** and it is therefore not open to this court to revisit the matter unless in an appellate capacity.

14. The plaintiffs herein also seek judgment for a declaration that ESA is the legal owner of land parcel number Elburgon Township/562 and cancellation of the title issued in the 1st defendant's name. While considering the prayer for a permanent injunction, the subordinate court rightly addressed itself as to who owns land parcel number Elburgon Township/562. This court cannot embark on a fresh determination of

that matter. All in all, I am satisfied that the objection on res judicata is well founded and I uphold it.

15. In the end, this suit is struck out with costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 30th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistants: Beatrice & Lotkomoi