



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 201 OF 2014

REGISTERED TRUSTEES OF THE E.A. YEARLY MEETING OF FRIENDS CHURCH KAIMOSI THRO’

LUCAS MUDOGA & 6 OTHERS.....PLAINTIFFS

VERSUS

ANDREW INGANJI & 7 OTHERS.....DEFENDANTS

RULING

The 1st, 2nd, 4th, 7th and 8th defendants raised a Notice of Preliminary Objection on a point of law at the hearing of the Notice of Motion dated 3rd May 2019 on the following grounds that the 3rd and 6th defendants have no locus standi to file and or prosecute the Notice of Motion dated 3rd May 2019 in view of the ruling and the orders issued and or delivered in the pending suit number Kakamega CMCC No. 197 of 2016. That the 3rd and 6th defendants are not officials of the Lirhanda Mission Station Church consequently have no capacity to file or prosecute the application on behalf of the said society and the Notice of Motion dated 3rd May 2017 should be dismissed with costs.

The defendants submitted that, the 3rd, 6th and 8th defendant/applicant have locus standi to prosecute their notice of motion as they are the current registered leaders of Lirhanda Mission Church Station and the said ruling and order in suit No. CMCC No. 197 of 2016 does not affect them at all. The Preliminary Objection does not meet the threshold principles required in a valid preliminary objection. The said ruling and order if it exists in a temporary action in a pending suit yet to be determined. The applicant’s notice of motion is not res-judicata. Further the defendants/applicant’s notice of motion is in ELC No. 201 of 2014 a suit completely separate from the said suit No. CMCC 197 of 2016. In the event that in suit No. CMCC 197 of 2016 a ruling and order is made in it can be used to find the 3rd, 6th defendant/applicants lacking standi in ELC No. 201 of 2014, which is unlikely, the said 3rd and 6th defendants/applicants will equally plead lack of locus standi against the 1st, 2nd, 4th and 7th defendants/respondents as they are not registered office bearers of Lirhanda Mission Station Church and the plaintiffs/respondents lacking locus standi to sue in this suit or suit No. CMCC 197 of 2016 or any other suit because they are not registered trustees of the East African Yearly Meeting of Friends Church. Kaimosi in view of the ruling of the High Court in their Notice of Motion dated 13th January 2014. The said ruling delivered on 12th November 2014 dismissing the said Notice of Motion for the reason that they are not the said registered trustees for which they were suing.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection 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 had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court

should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

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The issue of locus is properly raised as a preliminary objection. Be that as it may, the parties submitted that there was a similar matter in the Chiefs Magistrates Court in Kakamega No. CMCC 197 of 2016 which renders the parties incapable of having locus as per the orders of that court. These are issues of fact of which this court is not privy to. The court needs to investigate the facts in order to make a final determination. For this reason, I find that this preliminary objection is not merited and I strike it out. I further order that this matter be transferred to the Chief’s Magistrate

Court Kakamega for hearing and determination.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE