



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 34 OF 2015

REV. CAROL ALOIS OSOSO,

REV. DANIEL WANJAU NYAMBURA (Suing as officials

of Nakuru United Methodist Church).....**PLAINTIFFS**

VERSUS

DIANE QUATTLEBAUM HAMRICK.....1ST DEFENDANT

PARTNERS IN CHILDREN AND FAMILY

SUPPORT ORGANIZATION.....2ND DEFENDANT

RULING

(Application to strike out suit for being an abuse of the court process; suit filed by persons stating that they sue on behalf of a church; the said church not being registered as a society or under other law; argument that suit may be amended but no application to amend and no deposition by respondents that they would wish to amend; suit unmaintainable and struck out).

1. The application before me is that dated 23 October 2017 filed by the defendants. It is an application said to be brought pursuant to the provisions inter alia of Order 2 Rule 15, and seeks the following orders :-

(i) That the suit herein be struck out for want of capacity or existence by the plaintiff/respondent.

(ii) That costs of the application and the suit, be visited upon Rev. Carol Alois Ososo, Rev. Daniel Wanjau Nyambura and/or Waiganjo Mwangi Advocate.

2. The application is opposed and before I go to the gist of it, I think it is best that I set down a little background on this suit.

3. The case herein was commenced through a plaint which was filed on 11 February 2015 through the law firm of M/s Waiganjo & Company Advocates, of whom Mr. Waiganjo Mwangi, the person on whom the applicant also wants to visit costs, is proprietor. The plaintiffs are noted to be Rev. Carol Alois Osoro (should read Ososo) and Rev. Daniel Wanjau Nyambura, suing as the officials of the Nakuru United Methodist Church. In the plaint, it is pleaded that the plaintiffs are the officials of United Methodist Church Nakuru and that they bring the case in their capacity as officials of the said church and on behalf of United Methodist Church Nakuru. It is pleaded in the plaint that the plaintiff is the lawful owner of the land parcels Nakuru LR Nos. 6295/15; 7 acres to be excised from the land parcel LR No. 11739/R, Dundori/Lanet Block 5/20290 (New Gakoe); Dundori/Lanet Block 5/2084 (New Gakoe) and Residential Plot No. 7 at Ngecha 'A' Trading Centre (the suit properties). It is pleaded that on 15 May 2006, through one Rev. Josam Kariuki, the plaintiff entered into an agreement with Wesley Memorial United Methodist Church, USA, vide which the latter was to fund the plaintiff's projects in Kenya and it is averred that using the said funds, the suit properties were purchased. It is claimed in the plaint, that the 1st defendant, who it is pleaded was sent by the Wesley Memorial United Methodist Church as a volunteer missionary, fraudulently caused the suit properties to be transferred to the 2nd defendant. In the suit, the plaintiff (meaning Nakuru United Methodist Church) sought orders that it be declared the owner of the suit properties; orders of cancellation of title of the 2nd defendant; and orders of permanent injunction against the defendants.

4. The defendants entered appearance and filed defence whereby the claims of the plaintiff were refuted.

5. After some preliminary matters, including an application for injunction, which was settled with orders of status quo being put in place

pending conclusion of the case, the hearing of the matter commenced on 21 June 2017, when Rev. Carol Aloise Osoo, testified. He did state inter alia that he is the Secretary of United Methodist Church in Kenya, and Dean of Superintendents of Kenya, Ethiopia, Annual Conference of the United Methodist Church East Africa Episcopal Area. He did testify that there was a covenant in writing between United Methodist Church, Nakuru, and Wesley Memorial Church, through which the latter gave funds to the former, for purchase of certain properties, and the suit properties were purchased. During cross-examination, he did state inter alia that what is registered is United Methodist Church, and he displayed the Certificate of Registration, which showed that United Methodist Church was registered under the Societies Rules, 1968, on 7 September 1993. He did state that Nakuru United Methodist Church is one of its branches but that branches are not registered. This position was affirmed by PW-3 (Rev. Daniel Wanjau Nyambura) who testified on 9 October 2017 at the further hearing of the case. Another witness did testify and the plaintiff closed its case.

6. Upon close of the plaintiff's case, Mr. Kipkoech, learned counsel for the defendants, did mention that he had written to the Registrar of Societies on the existence of the plaintiff, and following the response received, he had instructions to file an application to strike out the suit, since the plaintiff is not in existence. This application was later filed.

7. The main ground upon which this application is premised is that the plaintiff, "The Nakuru United Methodist Church" does not exist and the suit should therefore be struck out. The application is supported by the affidavit of the 1st defendant, who has deposed inter alia that on 22 June 2017, her advocates did write to the Registrar of Societies, inquiring whether "Nakuru United Methodist Church" does exist and a response was received on 28 June 2017. The said letters are annexed to her affidavit. She has deposed that the plaintiff is a non-legal entity which is not capable of suing or being sued, and does not deserve another day in court as the suit is an abuse of the court process.

8. Rev. Carol Aloise Osoo, swore a Replying Affidavit to oppose the motion. He has deposed inter alia that he is the Secretary of United Methodist Church in Kenya. He has stated that United Methodist Church in Kenya was registered on 7 September 1993 and has displayed the Certificate of Registration. He has pointed out that United Methodist Church is registered under Section 108 of the Societies Act. He has mentioned that they have 8 branches including "Nakuru United Methodist Church," and has explained that all their branches operate under the registration issued by the Registrar of Societies on 7 September 1993. He has referred to the evidence that he gave and stated that he did explain that Nakuru United Methodist Church is a branch of United Methodist Church. He has stated that the applicants have always known that Nakuru United Methodist Church and United Methodist Church are one and the same entity and that the action of one binds the other. He has contended that it is not true that Nakuru United Methodist Church does not exist as it operates as a branch of the mother society which is United Methodist Church. He has averred that the plaintiff, being a branch of United Methodist Church, does not require a separate registration.

9. I invited counsel to file written submissions, and they both did. In his submissions, Mr. Kipkoech, learned counsel for the applicants, has submitted inter alia that the plaint does not mention under what system of law United Methodist Church Nakuru, is registered. He has pointed out that there is no record in the Register of Societies which suggests that the plaintiff has been registered and has submitted that it is an unlawful society pursuant to Section 4(1) of the Societies Act. He submitted that an unlawful society has no locus standi. To support his arguments, he relied on the cases of *Trustees Chrisco Church Nakuru vs Samwel Kibowen Towett & 4 Others (2017) eKLR*; *Universities Academic Staff Union (UASU) - JKUAT Chapter vs Jomo Kenyatta University of Agriculture and Technology (JKUAT) (2006) eKLR*; *Living Water Church International vs City Council of Nairobi (2008) eKLR*; *Robwa C. Kimkung & 4 Others vs Redeemed Gospel Church Inc & 15 Others (2015) eKLR*; and *Santaben Premchand Shah & 2 Others vs Meya Agri Traders Limited (2017) eKLR*.

10. On the part of the respondents, Mr. Waiganjo, learned counsel, submitted inter alia that the witnesses who testified, confirmed that Nakuru United Methodist Church is a branch of United Methodist Church and did not claim to have an independent registration. He submitted that at no time did the plaintiffs create an impression that Nakuru United Methodist Church was an independent church. He submitted that Nakuru United Methodist Church is a branch of United Methodist Church and thus covered under Section 2(2) of the Societies Act. He submitted that the plaintiffs are pursuing the interests of a registered society known in law. He submitted that a society includes a branch of it and referred me to the case of *Kenya Power & Lighting Company Limited vs Julius Ole Sunkuli & Others, Nairobi HCCC No. 14 of 2004 (ruling of 17 November 2016)*. He was of the view that the authorities relied upon by the applicants are distinguishable. He submitted that the plaintiffs are natural persons who have sued on behalf of a branch of a registered society and are therefore properly before this court. He submitted that if the court finds that the suit ought to have been filed by the United Methodist Church, this can be cured by amendment, which will not affect the evidence on record. He urged the court to exercise its discretion and order amendment of the pleadings if found to be necessary.

11. I have gone through the application, the reply and submissions of the parties.

12. The application is premised upon the provisions of Order 2 Rule 15 which provides as follows :-

15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on

which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

13. The main reason why the applicant believes that this suit is liable to be struck out under the above provision of the law is that there does not exist an entity known as Nakuru United Methodist Church.

14. I have already, at the beginning of this ruling, pointed out that the suit has been brought by the two individuals, as officials of Nakuru United Methodist Church. There is no doubt, and it is not denied by the respondents, that there is no such entity known as Nakuru United Methodist Church. What exists as a society is the United Methodist Church. It is trite law, and it has been held time without number, that an entity without legal capacity cannot sue or be sued. The authorities of **Trustees Chrisco Church Nakuru vs Samwel Kibowen Towett & 4 Others, UASU-JKUAT Chapter vs JKUAT, and Living Water Church International vs City Council of Nairobi**, cited by counsel for the applicants are among such decisions. In fact, in the case of **Trustees Chrisco Church Nakuru vs Samwel Kibowen Towett**, of which ironically, Mr. Waiganjo was acting for the defendants who had attacked the capacity of the plaintiff, I did state as follows, and I wish to reiterate these words, because they are important, that :-

"I want to seize this moment to advise any advocate, before filing suit, to confirm the legal capacity of the person who has given him/her instructions, so that the issue of capacity does not derail the hearing of the case. It is a fundamental threshold, for legal suits and indeed rights and obligations, can only be maintained by entities which have legal capacity."

15. I cannot put it better than I did in the above dictum. Any advocate, must first confirm, the issue of capacity before filing suit, for you can only appear in court if you have capacity, or through a person or entity who, or which, has capacity to sue and to be sued.

16. In our case, this suit is said to have been filed on behalf of Nakuru United Methodist Church. There is no such entity in existence. It follows that this suit has been filed for, and on behalf of, a non-existent entity. It has been argued that the registered society and its branch are one and the same thing. That argument cannot hold any water when it comes to determining which entity has capacity to sue. I was referred to the case of **Kenya Power & Lighting vs Julius Ole Sunkuli & Others**, but to me that case is clearly distinguishable to this one. In the said case, the plaintiff, Kenya Power & Lighting, sued the officials of Kenyan African National Union (KANU) for some monies due on account of electricity supplied to it. Judgment was entered on behalf of the plaintiff and execution proceedings taken out against a property registered in the name of KANU- Nakuru Branch. Objection proceedings were filed to argue that this is a separate entity. The argument was dismissed with the court holding that the property vested in KANU-Nakuru branch could not be said not to vest in the registered society, which was KANU. Of course, the property could only be of KANU, as it was the registered entity. The branch could not hide by saying that they are separate, as this would be a mischief, so as to defeat execution of the decretal sum. That decision cannot help the respondents in this case and indeed does not depart from the established principle that only a legal entity can present itself before court.

17. The only issue left for me to determine is whether the anomaly is curable by amendment. I have looked up at the law on amendments, generally contained in Order 12 of the Civil Procedure Rules. I have specifically looked at the provisions of Order 12 Rule 3 which may be relevant to us. 18. The said law is drawn as follows :-

3. Amendment of pleading with leave [Order 8, rule 3.]

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

19. Looking at sub-rule 3, it does appear that it is possible for an amendment to be effected to correct the name of a party, even if that amendment will occasion a substitution, so long as the mistake is shown to be a genuine mistake and does not inter alia lead to any doubt as to the identity of the person intending to sue. It would thus be possible to amend the name of the plaintiff if the court is satisfied that the test under subrule 3 has been met. The only problem is that I do not have any application for amendment, or indeed any deposition by the respondents, saying, "look, we misdescribed ourselves and now want to regularize our description, give us an opportunity to amend." I cannot assume that this is what the respondents want, merely on the submissions of counsel. I in fact do not know whether United Methodist Church, want to be part of this litigation at all. Why would I move to make them parties when they have not applied to be so substituted for the named plaintiff? What if I order that they be made parties in place of the named plaintiffs and they come and say, "hey, who told you to

make us plaintiff, yet we are not interested in this case ?" There is certainly potential for embarrassment which I would not wish to involve the court.

20. I really need not say much. I am sympathetic to the plaintiffs but my hands are tied in this one. The suit before me cannot be maintained as filed, for it has been filed by, or on behalf of, an entity which does not exist in law. Neither do I have any application before me seeking leave to amend. It follows that this suit is not maintainable and cannot be continued as filed. It is hereby struck out with costs. The costs will be paid by Rev. Carol Alois Osoo and Rev. Daniel Wanjau Nyambura. I do not see any reason why I should visit the costs personally upon Mr. Waiganjo Advocate, and no reason was indeed given to me as to why he should be liable to costs.

21. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 28th day of February 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In the presence of:

Mr. Bosire holding brief for Mr. Kipkoech instructed by M/s Gordon Ogola & Kipkoech Advocates, for the applicants.

Ms. B. Wangari holding brief for Mr. Waiganjo instructed by M/s Waiganjo & Company Advocates, for the respondents.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU