



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1517 OF 2016

AHLUSUNA WAL JAMA.....PLAINTIFF

=VERSUS=

NAIROBI CITY COUNTY.....DEFENDANT

R U L I N G

1. The plaintiff commenced this suit through a plaint dated 6/12/16, and filed in court on the same day. In the plaint, the plaintiff describes itself as a religious society based in Nairobi, currently developing a mosque on Land Reference Number 209/12250.
2. The defendant has raised a preliminary objection to this suit, seeking to have the suit struck out on the ground that the plaintiff does not have the legal capacity to bring suit in its own name. The preliminary objection was argued before me by counsel for the defendant, Ms Mwai. She argued that the plaintiff being a religious society registered under the Societies Act, Chapter 108 of the Laws of Kenya, lacks the legal capacity to sue in its own name. She contended that this suit having been initiated in the name of the plaintiff, is a nullity and ought to be struck out.
3. In response, counsel for the plaintiff, Ms Naima, opposed the preliminary objection and urged the court to dismiss it. She admitted that the plaintiff is a religious society registered under the Societies Act. She contended that the suit is valid because it was instituted with the consent of the trustees of the plaintiff society. She referred the court to the consent attached to the plaint. She further contended that the anomaly in instituting the society in the name of the plaintiff can be cured through an amendment to the plaint.
4. I have considered the rival submissions and the current law regulating the legal capacity to bring judicial proceedings (*locus standi*). I have also examined and considered the pleadings filed by the plaintiff.
5. The plaintiff has described itself in paragraph 1 of the plaint as a religious society based in Nairobi. Counsel for the plaintiff submitted that the plaintiff is a society registered under the Societies Act. There is therefore no dispute as to the legal framework under which the plaintiff exists.
6. Counsel for the plaintiff contends that the consent attached to the plaint validates the suit. For avoidance of doubt, the consent is framed as follows:-

“CONSENT AND AUTHORITY TO ACT AND PLEAD”

“We Sheikh Abdidaziz Haji Omar, Shariff Abdiwahab Shariff, Sheikh Nuh Mohamed and Ismail Hassan Maalim hereby authorize MOHAMED WARFA a trustee of the Plaintiff

AHLUSUNA WAL JAMA to swear any and all documents and make all documents and do any and all acts in this case and that the same be deemed as if sworn or made by us.

DATED AT NAIROBI THIS.....DAY OF.....2015

SHEIKH ABDIDAZIZ HAJI OMAR

.....

SHARIFF ABDIWAHAB SHARIFF

.....

SHEIKH NUH MOHAMED

.....

ISMAIL HASSAN MAALIM

.....

THE TRUSTEES OF THE PLAINTIFF”

7. The Societies Act, Chapter 108 of the Laws of Kenya, contains abroad framework for the registration and regulation of societies. That framework does not confer upon a society registered under the Act the status of a body corporate or legal person with the legal capacity to sue and be sued in its own name. Indeed, there exist a myriad of authorities clearly indicative that it is trite law that a society registered under the Societies Act is an unincorporated association lacking the legal capacity to sue or be sued in its own name. In **Free Pentecostal Fellowship in Kenya Vs Kenya Commercial Bank (1992) eKLR, Bosire J** (as he then was) reiterated this legal position as follows:-

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provision of Order 1 rule 8 of the Civil Procedure Rules. The suit may also be instituted by or against trustees of the body of persons.

In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its own name.”

This view has been reiterated in numerous decisions, among them, **Republic Vs Registrar of Societies Exparte Narok Muslim Welfare Association (2017) eKLR.**

8. I entirely agree with the above settled legal position. The Constitution of Kenya 2010 did not change this legal position. The present suit was instituted in the name of Ahlusuna Waljama, a religious society registered under the Societies Act. It therefore follows that by dint of the legal framework under which it exists, the said society has no capacity to institute a suit in its own name.

9. The question that remains to be answered is whether this legal anomaly can be cured through an amendment to the plaint by way of substitution of parties. Article 159 2(d) of the Constitution of Kenya 2010 enjoins courts of law to administer justice without undue regard to procedural technicalities. The oxygen rule in the Civil Procedure Act similarly de-emphasize procedural technicalities. The present preliminary objection, however, raises a substantive legal question relating to the fate of legal proceedings brought by a party who, in law, lacks the legal capacity to bring the court proceedings. This question is not a procedural technical question. A suit commenced in the name of a party who lacks legal

capacity to commence legal proceeding is a non-starter and a legal nullity from the moment it is lodged. It is equivalent to a still-birth. It cannot be resuscitated because it is devoid of life. The defect in such a suit cannot be cured by an amendment bringing on board a party who has legal capacity. The suit is destined to be struck out *in limine* because it is a nullity from the moment it is lodged.

10. For the above reasons, I hold that the plaintiff herein lacks legal capacity to institute the present suit. I further hold that the suit herein is a nullity. I accordingly strike out the suit in its entirety. The defendant shall have costs of the suit.

Dated, signed and delivered at Nairobi on this 21st day of July 2017.

B M EBOSO

JUDGE

In the presence of:-

Naima Sheikh Ahmed Advocate for the Plaintiff

Ilako holding brief for Ms Mwari Advocate for the Defendant

Halima Abdi Court clerk