



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO.571 OF 2010

MOSES MUTURI.....1ST PLAINTIFF/RESPONDENT
LUKA MIBEY.....2ND PLAINTIFF/RESPONDENT
NAFTALI KAMAU.....3RD PLAINTIFF/RESPONDENT
SAMUEL SANG.....4TH PLAINTIFF/RESPONDENT
CHARLES GATOTO.....5TH PLAINTIFF/RESPONDENT
JOHN MUSYOKA.....6TH PLAINTIFF/APPLICANT
STEPHEN KIOKO.....7TH PLAINTIFF/APPLICANT

(Suing on behalf of Africa Inland Church, Westlands)

=VERSUS=

PRESIDING BISHOP REV. SILAS YEGO.....1ST DEFENDANT/APPLICANT
ASSISTANT PRESIDING BISHOP
REV. GEOFFREY GICHURE....2ND DEFENDANT/APPLICANT
REV. SIMEON OTIENDE.....3RD DEFENDANT/APPLICANT
REV. DAVID MULWA.....4TH DEFENDANT/APPLICANT

RULING

The Defendants filed an application dated 24th October 2014, seeking orders that the Court be pleased to set aside and/or discharge the consent order dated and filed on 3rd December 2010. The application is premised on grounds that the suit is an abuse of the Court process as the Plaintiffs lack the

locus to institute the suit. Secondly, that the Defendants have been wrongly sued in their individual capacities. Thirdly, that the Defendants in their

individual capacities are in no way capable of holding property, entering into or able to comply with the terms of the consent, and in the circumstances the said order cannot be executed. Further, that entering into the consent was a mistake due to lack of legal representation at the time, thus the order ought to be set aside.

The 1st Plaintiff swore a Replying Affidavit on **5th November 2014** in response to the application. He deposed that the application has no basis as the allegations therein have not been supported by an affidavit thereby the allegations cannot be tested by way of cross-examination. The deponent refuted the grounds of the application deposing that the Plaintiffs had stated in the Plaint the capacity in which they have instituted the suit and in what capacity the Defendants are sued. He deposed further that the 1st and 2nd Defendants implemented the terms of the consent by making payments to the Plaintiffs through cheques as officials of the **African Inland Church**. Consequently, that the Defendants are estopped from bringing this application as they have already acted on the terms of the consent.

The 1st Defendant swore a Further Affidavit on **13th November 2014** wherein he deposed that their application, raising matters of law did not require a supporting affidavit. It was deposed that the **African Inland Church** is a Society registered under the Societies Act and that there is no entity known as the **African Inland Church, Westlands**. It was further deposed that the property in dispute known as L.R. No. 7158/9 is registered in favour of the **African Inland Church Kenya Trustees** and neither in favour of the Plaintiffs nor the Defendants. Secondly, that the Plaintiffs do not have the authority of the Board of Trustees to institute this suit and they therefore lack the locus to sue on behalf the church. Moreover, that the Constitution of the **African Inland Church** mandates the **Presiding Bishop** to deal with all legal matters pertaining to the church. Thirdly, that since the Plaintiffs have not stated in what capacity the Defendants have been sued, execution cannot apply and the said Defendants in their individual capacities cannot enter into a consent and compromise a suit. The deponent reiterated that the signing of the consent amounted a mistake and a misapprehension of the law on the part of the Defendants as they lacked legal representation at the time.

The application was further canvassed by written submissions. Counsel for the Defendants recapped the contents of the application that only the Presiding Bishop, in accordance with the Constitution of the **AIC Church**, has the authority to deal with all the legal matters pertaining to the Church. Secondly, that the Plaintiffs lack locus to commence this suit as they have not established that they are officials of **African Inland Church, Westlands**. In support of this submission, counsel relied on the case of **Voi Jua Kali Association vs Sange & Others (2002) 2 KLR 474** where the Court stated that an *incorporated association can sue or be sued through its officials, which officials have to be named*. Counsel also referred the Court to the case of **Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank HCCC No. 5116 of 1992 (OS)** where the held that

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, 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 provisions of Order 1 Rule 8 Civil Procedure Rules.”

It was submitted that the properties belonging to the **African Inland Church** is held in *trust* by the AIC Board of Trustees specifically known as the **African Inland Church Kenya Trustees** and that the responsibilities and/or powers and limitations of the Board of Trustees in relation to the disposition of property is defined in the Constitution, including that no property may be purchased, sold or transferred except by a specific decision of the Trustees. Consequently, that the Defendants had no capacity to enter to the consent, subject matter of the application.

On setting aside the consent, counsel submitted that the same can be set aside in circumstances where it was entered without sufficient facts or in misapprehension or ignorance of material facts. Further, that a consent judgment derives its legal effect from the agreement of parties, and can only be set aside or rescinded on the same principles and grounds as those of a contract, for example, legal capacity to contract. On this submission, counsel cited several authorities including the cases of **Brooke Bond Liebig v Mallya (1975) EA 266** and **Flora Wasike vs Wamboko (1982 – 1988) 1KAR 625**.

For the Plaintiffs, counsel submitted that the Court was now *functus officio* and cannot set aside the orders for reasons that the Defendants had already complied with the terms of the consent that had been adopted as an order of the Court. It was also submitted the Defendant's claim of misapprehension of the law and lacking locus to enter into the consent is an afterthought and that the Defendants are estopped from bringing this application.

Before delving on the real issue of the application, it would be wise to address some issues brought out by both parties which are preliminary in nature. The Plaintiffs aver that the application is defective for reasons that the same was not supported by an affidavit. In response, the Defendants stated that their application need not be supported by an affidavit since it raises matters of law. They referred the Court to **Order 51 Rule 5 of the Civil Procedure Rules**. On perusal of the rules of procedure, I do note that the correct provision is actually **Rule 4** which reads:

Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served. (Emphasis added)

It is thus evident that not all applications require an affidavit particularly those that raise points of law. It is my considered view that an application of this nature ought to be supported by an affidavit. Be it as it may, the Defendants swore a Further Affidavit further elaborating the grounds in the motion.

The other preliminary issue was raised by the Defendants who state that the 2nd and 3rd Defendants are since deceased and the suit against them has abated. To begin with, this claim was not supported by evidence of Certificate of Death and there is therefore no way that the Court can ascertain the same. Even if they are indeed deceased, **Order 24 of the Civil Procedure Rules** contemplates the death of a party during the pendency of a suit and makes appropriate provisions.

The grounds relied on for seeking to set aside the consent order is that the Plaintiffs lack locus to institute the suit and that the Defendants have been sued in their individual capacities. Contrary to the Defendants' depositions, I have perused the Complaint filed in Court on 24th November 2010 and at Paragraphs 1 and 2, the Plaintiffs clearly describe that AIC Westlands is a local church within AIC - Kenya. They also state that they institute the suit as officials of AIC Westlands and have sued the Defendants, as officials of AIC - Kenya. The Defendant referred the Court to the case of **Voi Jua Kali Association (Supra)** which elaborates on the general rule in filing suit for or against a registered society such as AIC - Kenya. It states that such suit must be brought through the registered association's officials and that the officials must be named. It follows therefore that initiating a suit for or against a registered society in the names of Chairman, Treasurer and in this case, Presiding Bishop, will not suffice. See the case of **Geoffrey Ndirangu & 5 Others V Chairman of Mariakani Jua Kali Association & 2 Others Civil Suit Mombasa 33 of 2004 [2005] eKLR** where Maraga J. (now JA.) held:

The law on suits by or against societies is well settled. A society not being a legal person cannot sue or be sued in its name. It has to sue or be sued through its officials – Voi Jua Kali Association –vs- Sange and others (2002) 2 KLR 474. And the officials have to be named. Titles like Chairman, Secretary and or treasurer cannot be used as those are not legal persons either.

Consequently, the suit as filed is not against the Defendants in their individual capacities but as officials of AIC - Kenya.

The Plaintiffs described themselves as officials of AIC Westlands, a local church within AIC Kenya. The Defendants in their Further Affidavit availed a copy of the AIC Kenya By-laws (2013) which in Chapter II provides for Local Churches. It established a Local Church Council with 3 to 15 elected elders depending on the membership of the church. It also provides that the Pastor shall be the spiritual overseer, the executive officer and chairman of the local church council. I am satisfied that the Plaintiffs have locus to bring the suit on behalf of the Plaintiff, local church.

In the submissions, counsel for Defendant submitted that properties belonging to the **African Inland Church** are held in trust by the AIC Board of

Trustees and that the Constitution restricts any dealings with property may be except by a specific decision of the Trustees. Consequently, that they had no capacity to enter to the consent. I have meticulously perused the AIC Kenya By-laws (2013). Chapter VIII establishes the Board of Trustees and states its responsibility thereunder. It also expressly states that the Board is responsible to the Central Church Council (CCC) for all its actions and must give a written report to the CCC once a year. It however does not give the composition of the Board. Chapter VI establishes the Office of Presiding Bishop and at part 2(2) thereof provides that he shall chair the Board of Trustees Meetings. The said Chapter also provides for the Deputy Presiding Bishop, Administrative Secretary, Treasurer, Accountant, and Office Secretaries who constitute the CCC.

This Court, having found that the Defendants have been sued as officials of AIC – Kenya, rejects the argument that the Defendants had no capacity to enter into the consent particularly in view of the fact that the 1st Defendant chairs the Board Trustees meetings.

On the foregoing therefore, I find that the application lacks merit and I hereby dismiss the same with costs to the Plaintiffs/Respondents.

It is so ordered.

Dated, Signed and Delivered this **29th** day of **April,2016**.

L. GACHERU

JUDGE

In the Presence of:-

M/s Chepngeno holding brief Mr.Kamau for the Plaintiffs/Respondents

None appearance for the Defendants/Applicants

Hilda : Court Clerk

Court:

Ruling read in open Court.

L.GACHERU

JUDGE

Court:

Ruling read in open Court.

L.GACHERU

JUDGE

29/4/2016