



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 144 OF 2016**

**GABRIEL S. IMBALI & 2 OTHERS ----- PLAINTIFFS**

**VERSUS**

**JOHN S. J.CHABUGA -----DEFENDANT**

**RULING**

**INTRODUCTION**

1. The focus of this ruling is on two applications and a preliminary objection. The first application is dated 3/8/2016 and was filed by the plaintiffs – GABRIEL S. IMBALI, JUMA CHESOLI, JACKSON MUNYOLE and JOHN CHACHI – essentially to obtain restraining orders against the defendant -JOHN S. CHABUGA. The second application is dated 11/8/2016 and is meant to counter the first application. When the 1<sup>st</sup> application was filed, a restraining order was granted exparte. The second application seeks to overturn that order. It also seeks other orders including striking out of the entire suit. The preliminary objection was filed contemporaneously with the second application. It seeks dismissal or striking out the entire suit.

**BACKGROUND**

2. The parties are litigating over rights of use or worship at plots Nos. 1 & 2, CHEKALINI TOWNSHIP, with the plaintiffs claiming entitlement to such use or worship and alleging unwarranted obstruction and interference by the defendant and/or his followers. In the suit, the plaintiffs are infact seeking to have the defendant restrained permanently from such obstruction and/or interference. The defendant and his followers are said to be interfering under the guise of purported legality contained in a court order granted in case No. CMCC No. 177 of 2016, Kakamega. That case itself is part of a wider tussle between the parties over use of various worship places in the wider Chekalini area.

3. When the Plaintiff filed this case at Kakamega, the appropriate court to handle the matter was not sitting. They therefore took the matter to Environment & Land Court at Kisii. They obtained restraining orders exparte. It is that order that provoked the filing of the 2<sup>nd</sup> application and the Notice of Preliminary objection. The court at Kisii referred the matter to the court for subsequent handling. That is why the matter is here.

**AN OVERVIEW OF THE TWO APPLICATIONS AND THE PRELIMINARY OBJECTION**

4. In the application dated 3.8.2016 the plaintiffs sought five (5) prayers. Prayers 1 and 2 however were considered at the exparte stage. That left **prayer 3, 4 and 5 for consideration at this stage. The prayers are as follows:**

**Prayer 3: That a temporary injunction do issue against the defendant either by himself, his agents, servants, representatives, followers, worshipers or any other persons acting under his instructions from interfering with prayer meetings, worship or in any other way accessing land parcel Nos. CHEKALINI TOWNSHIP PLOTS 1 and 2 or in any other worship places established by the plaintiffs pending hearing and determining of this suit.**

**Prayer 4: That the OCS Chekalini or an officer (?) to enforce orders in prayer 2 above.**

**Prayer 5: That the costs of this application be provided for.**

5. The plaintiffs averred that they own plots Nos. 1 and 2 Chekalini and have established churches and headquarters of their ministry there. The defendant and his followers are said to have been attending the plaintiffs' church services where they have preached against them and threatened to take over the church. More specifically, the defendant and his followers are said to have issued a notice to hold a gathering there from 7<sup>th</sup> – 14<sup>th</sup> August 2016.

6. The defendant has not responded to the plaintiffs application dated 3/8/2016. He contended himself with filing the 2<sup>nd</sup> application and the preliminary objection.

7. The second application sought to discharge or set aside the restraining order granted by the court at Kisii. That same order was additionally also sought to be stayed. Another prayer in the application sought to strike out the suit while the final prayer asked that costs be paid by the plaintiffs. The orders issued at Kisii was as follows:

**“That an interim injunction and inhibition is granted against the defendant by himself, his agents, servants, representatives, followers, worshippers or any person acting under instructions from interfering with prayer meetings, worship, or in any other way accessing land parcels Nos. CHEKALINI TOWNSHIP PLOT No. 1 and 2 or in any other worship places established by the plaintiffs pending interpartes hearing of the application.”**

8. The grounds advanced in support of the various prayers stipulate, inter alia, that the suit filed was a representative one and there was non-compliance with the procedural law applicable to such suit; that the plaintiffs obtained their orders fraudulently and had misled the court to issue orders which were contrary to the orders issued over the same subject matter in Civil suit No. 177 of 2016 at Kakamega; that the orders undermine the administration of justice and have caused embarrassment and inconveniences; that the orders were issued in gross violation of the court process; that the plaintiffs lack locus standi to institute or prosecute the suit; that the plaintiffs alleged church is not registered; and finally that the suit is premised on untruths and non-disclosure of material facts.

9. The plaintiff responded to the 2<sup>nd</sup> application by filing grounds of opposition. The grounds were filed on 18/8/2016 and allege, inter alia, that the application is an afterthought and an abuse of court process; that it lacks merit and ought to be dismissed with costs; and that the plaintiffs have a good suit that should be considered on merits.

10. The preliminary objection, just like the 2<sup>nd</sup> application, is dated 11/8/2016. It alleges that the suit offends mandatory provisions relating to representative suits; that the suit amounts to appeal and a reversal of orders issued in CMCC No. 177/2016, Kakamega; that the suit is incompetent for being premised on false and misleading averments; that the plaintiffs are bereft of locus standi to prosecute the suit as officials of African Divine Church, Chekalini; that the suit is instituted in the name of a body not known to the law; and finally that the suit is an abuse of the court process.

## **SUBMISSIONS**

11. No hearing took place. Submissions were filed instead. The plaintiffs filed three sets of submissions, one for application dated 3/8/2016, another for application dated 11/8/2016 and yet another for the

preliminary objection. The defendant filed one set of submissions for all the three. An overview of the submissions is necessary, beginning with the plaintiff submissions.

12. For the application dated 3/8/2016 the plaintiffs submitted that they have met the conditions set out in the case of **GIELA VS CASSMAN BROWN & CO. LTD [1973] EA 358**. The conditions require that a prima facie case with a probability of success be demonstrated; that it be shown also that there is likelihood of occurrence of irreparable loss not compensable in damages; and finally that should the court entertain doubts as to these two principles, it should opt for balance of convenience. For the plaintiffs, it was alleged that it was shown that they have been utilizing the disputed plots. It was alleged that they may suffer irreparable loss and that the balance of convenience favours them.

13. For the application dated 11/8/2016, it was submitted, inter alia, that the orders of 5/8/2016 have lapsed and cannot therefore be set aside, discharged, or stayed; that the suit is properly before the court, with the suit at Kakamega being different in that it involves different parties and relate to different subject matter; and that the application is defective; having been filed with an accompanying supporting affidavit contrary to Order 2 rule 15(2) of Civil Procedure Rules 2010.

14. The submissions on the preliminary objection were filed on 5/9/2016. The plaintiffs submitted that leave of court is no longer required to file representative suits. The decided cases of **CHARO DIDA NASORO VS KONDE MALINGI CHAI & others: ELC No. 159 of 2015**, and **HALIMA MOHAMED ABDILE & 2 others vs PETER KINYANJUI 7 38 OTHERS : ELC no. 231 of 2013, NAIROBI**, were cited to buttress the submissions. It was submitted too that this case and the case at Kakamega are different matters. This case, it was stated, relates to PLOT Nos. 1 & 2 at CHEKALINI. The Kakamega case relates to land parcel NOs. **KAKAMEGA/LUGARI/27** and **KAKAMEGA/CHEKALINI/1391**

15. Further the plaintiff denied that they have made any misleading averments. They averred that they are officials of African Divine Church based at Chekalini and are legally operating as such. The court was urged to take the position that no suit should be summarily dismissed unless it is hopeless and cannot be cured by amendment. The suit herein was said not to fall in that category.

16. The defendant submissions were filed on 7.9.2016. According to the defendant, the plaintiffs are wrong to aver that parties have no previous suits between them. The plaintiffs submitted that there exists CMCC No. 177 of 2016, Kakamega, where the parties are disputing over worship places in Chekalini area.

17. The defendant submitted further that the plaintiffs lack legal capacity to bring this suit, having failed to demonstrate that they are bonafide officials of African Divine Church, Chekalini, or that that church itself has authorized them to bring the suit.

18. Issue was also taken with the alleged fact that the plaintiffs church has not been shown to be a registered organization. According to the defendant, the plaintiffs should have availed a certificate to show that their church is a registered organization.

19. So far, I have tried to give a narrative of how things started and the various positions taken by the parties regarding the two applications and the preliminary objection. It is time now for the crunch. And because the preliminary objection has the potential to terminate the whole suit, I propose to start with it. Thereafter, I will deal with the second application because some of the issues raised in it have some similarity with the issues raised in the preliminary objection. The plaintiffs application, which is the first application, will therefore come last.

#### **PRELIMINARY OBJECTION:**

20. It is important to appreciate what a preliminary objection is and then consider the scenario obtaining in this case in order for me to ultimately make a decision that can readily be understood and appreciated.

21. The essence of what a preliminary objection is was captured succinctly in the erudite words of the judicial luminaries who handled the celebrated case of MUKISA BISCUITS CO. LTD Vs WEST END DISTRIBUTORS LTD [1969] EA 696. In that case Law J.A. had this to say

**‘So far as I am aware, a preliminary objection consists of a pure point of law and which has been pleaded, or which arises by clear implication 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, a plea of limitation, or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.’**

Sir Charles Newbold P had this to say in the same case:

**“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”**

From the foregoing, it is clear that a preliminary objection raises a pure point of law. It cannot be raised when facts are contested or if what is being sought involves the exercise of judicial discretion.

22. Our courts have followed this position and reiterated the parameters of preliminary objection. This was for instance done in **MUIRURI VS KIMEMIA [2002] 2 KLR 677** and **SIRMA VS KIPRONO [2005] 1 KLR 197**.

23. What then is the scenario obtaining in this case? The defendant has disputed all the material facts. This alone ought to have dissuaded him from raising a preliminary objection since facts have to be ascertained. In addition, what the plaintiff is seeking is a permanent injunction. An injunction is a discretionary remedy and it is clear that a preliminary objection cannot be raised if what is sought involves the use of discretion. In my view then, the defendant was wrong to raise a preliminary objection.

24. But there is even more that can be said. A look at the preliminary objection shows that the plaintiff is faulted for not seeking leave before filing what the defendant believes is a representative suit. The law is clear that leave is no longer required to file such suit. In the submission of the defendant, it is clear that this legal position had dawned on him. He then tried to be ingenious by leaving out the issue of leave and submitting instead that the plaintiff ought to have sought directions of the court on the issues of service.

25. It is clear also that the objection sought to strike out the suit. The defendant’s second application also sought to strike out the suit. One would wonder why two similar orders are sought by the same party in the same suit in two different instances. Can one suit be struck out twice over? The defendant further avers in the same objection that the suit is instituted in the name of a body not known to the law or operating illegally. This same point is raised in paragraph 12 of the defendant’s defence. In reply to that point contained in a reply to defence filed on 26/8/2016 the plaintiff pleaded that they are a branch of African Divine Church and SHALL PROVIDE PROOF TO THE CONTRARY. I have pointed this out because dismissal or striking out of this case at this stage will achieve the aim of denying plaintiffs a chance to demonstrate what they say they will prove.

26. In **PETER NGUGI KABIRI VS ESTHER WANGARI GITHINJI & Another : [2015] eKLR** and **KUTIMA INVESTMENTS LIMITED VS MUTHONI KIHARA & Another [2015] eKLR**, the Court of Appeal emphasized that it is a fundamental right for parties to be heard on merits.

27. Bearing all this in mind, it is clear that the preliminary objection herein deserves a dismissal. And I dismiss it with costs.

## **SECOND APPLICATION**

28. I now turn to the second application. This too was filed by the defendant seeking various orders. This

application first came before me on 18/8/2016. I did not grant any prayer in it. But it was clear that it was challenging an order dated 5/8/2016 granted *ex parte* at Kisii. That order was expiring at or around the time the application came before me. The order was not extended. The plaintiffs make a crucial point namely: That the order expired because it was not extended. Prayer 2 and 3 in the application are seeking stay, setting aside and striking out of that order. These are prayers that cannot now be granted. And this is so because the order being challenged is non-existent.

29. I do not deem it necessary to delve into the merits or demerits of these two prayers. And the reason for this is that any such exercise would merely be academic or intellectual. What is at hand is a quest for justice, not an academic or intellectual pursuit.

30. The only other crucial prayer in the application is that of striking out the suit. The prayer is sought for precisely the same reasons that it was sought in the preliminary objection. It was in essence considered when the preliminary objection was being considered. I rejected it in the preliminary objection. I reject it now for the same reasons.

31. In essence therefore, the crucial prayers that form the basis for the second application have been rejected. What this means is that the second application cannot stand. The same is hereby dismissed with costs.

### **FIRST APPLICATION**

32. It is now time to consider the application dated 3/8/2016 filed by the plaintiffs. At paragraph 6 of this ruling, I observed that the defendant has not responded to this application. This was a serious omission on the part of the defendant. And in the defendant's submissions, a lot of focus is given to the preliminary objection and the second application. Infact, hardly anything is said about the first application. And all this despite the fact that it was clear that the application was coming up for consideration .

33. Given this state of affairs, it is clear that the application dated 3/8/2016 lacks a clear or credible challenge. Filing an application to challenge an order issued in it cannot be said to be a response. And the preliminary objection filed was mainly targeting the suit, not the application. The application was submitted on by the plaintiffs. These submissions are without a challenge from the defendant. It is necessary then to allow the application and I allow it.

34. But I have a problem with the way the restraining orders sought are formulated. They move from the specific to the general. Prayer 3 in particular, which is the one for consideration at this stage, is specific when it refers to Land Parcel No. CHAKALINI TOWNSHIP PLOT 1 & 2. But it is too general when it talks **“any other worship places established by the plaintiffs.”** One is bound to ask! Which are these places? Cant their details be provided? Are they places owned, rented or gifted to the plaintiffs? This much needs to be appreciated: clarity and specificity are the hallmarks of a good and effective court order. It would be imprudent to give an order that applies to unspecified places.

35. I therefore grant prayer 3 in the application but it will only apply to Land Parcel No. CHEKALINI TOWNSHIP PLOT 1 & 2, not to any other place. Also granted is prayer 4 but not for enforcement of prayer 2 as asked for in the application. It is to ensure enforcement of prayer 3. Costs of the application to be in the cause.

**A.K. KANIARU**

**J U D G E**

**Dated and delivered on 19<sup>TH</sup> day of December 2016**

**In the presence of:**

**Plaintiffs.....PRESENT**

**Defendant .....PRESENT**

**On .....19<sup>TH</sup> December, 2016**