REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1540 OF 2013

THE REGISTERED TRUSTEES OF

CHRIST CO-WORKERS FELLOWSHIP…….…..…….. PLAINTIFF

VERSUS

JOHN ABUKO DIANGA…….....1ST DEFENDANT

TITUS MWAI KARIUKI….……...2ND DEFENDANT

CITY COUNCIL OF NAIROBI …….……3RD DEFENDANT

RULING

The Preliminary Objection

The Plaintiff filed a Notice of Motion dated 20th December 2013 seeking a temporary injunction to restrain the Defendant from demolishing trespassing encroaching, selling, digging a foundation, evicting, building, pouring any materials and or in any manner dealing and or interfering with the Plaintiff's possession and ownership of the plot known as Church Plot-Komarock East, situate in Komarock estate, Nairobi County, pending the hearing and determination of the case filed herein.

The main grounds for the Notice of Motion are that the Plaintiff was lawfully allocated the aforesaid plot by the predecessor of the 3rd Defendant on 27th October, 1992, and fulfilled the conditions of allotment, upon which it took actual possession and erected a church building on the plot. However, that the 1st and 2nd Defendants have trespassed on the plot and now claim ownership of the same in collusion with some officers of the 3rd Defendant.

The 1st Defendant subsequently filed a notice of preliminary objection dated 9th January 2014 and raised two grounds of objection namely:-

1. That the suit is fatally defective as drawn and taken out, for want of *locus standi*.

2. That the same conflicts with the mandatory provision of the following statute law:

a. The Civil Procedure Act
b. The Physical Planning Act
c. The Urban Areas and Cities Act
d. The County Government Act

The Submissions

The preliminary objection was canvassed by way of written submissions. The 1st Defendant in submissions dated 4th March 2014 and filed in court on the same date, argued that the Plaintiff herein has no legal capacity to bring the application and suit herein. The counsel submitted that the Societies Act (Cap 108 of the Laws of Kenya) is the statute governing the registration and control of societies in Kenya. Further, that the said Act does not make provision for, and does not mandate societies to sue in their own name, and that a society only has capacity to sue in the name of its registered trustee.

The 1st Defendant contended that the Plaintiff herein has sued as "the Registered Trustees of Christ Co-workers Fellowship", and it was his submission that such an entity has no capacity to sue and as such. Further, that the only way of bringing forth such a suit is if the individual trustees of Christ Co-Workers Fellowship bring the suit on behalf of themselves and on all members of the Church pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules, 2010, which provides for institution of representative suits. The 1st Defendant relied on various judicial decisions in this respect, including in the cases of **Eritrea Orthodox Church vs. Wariwax Generation Limited (2007) eKLR**, **Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank**, **Nairobi HCCC No. 5116 (OS)** and **Simu Vendors Association v. Town Clerk, City of Nairobi and Another, Nairobi HCCC Miscellaneous Application 427 of 2005**.

The 1st Defendant also submitted that the dispute herein does not relate to the environment and the use and occupation of, and title to land, and does not fall within the jurisdiction of this court as envisaged under Article 162 (2) (b) of the Constitution. He submitted in this regard that the proper forum for presenting the 1st Defendant's grievances is the Liaison Committees established under Section 8 of the Physical Planning Act (Cap 286 Laws of Kenya), since the dispute herein emanates from issuance of an Enforcement Notice, pursuant to the provisions of sections 10(2) (a) and 13 (2) of the Physical Planning Act. The 1st Defendant relied on the holding in **Hasman vs. National Bank (1937) 4 E.A.C.A 55**, **Sanjay Solanki & 8 Others vs Hirji Kanji Patel & 5 Others (2013) eKLR** and **Owners of the Motor Vessel "Lillians –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1** in this regard.

Lastly, the 1st Defendant argued that that there is no such entity as City Council of Nairobi in Kenya, and that the Urban Areas and Cities Act and the County Government Act only recognizes an entity known as Nairobi City County. Further, that the Plaintiff has already conceded on the issue in its Amended Plaint dated 11th February, 2014 which was filed without leave of the court. The 1st Defendant submitted that since the suit herein as it stands does not exist, it cannot therefore be amended as it is fatally defective. He averred that that the suit and the application herein having been brought by a non-entity in law is null and void *ab initio*, and as such, should be struck out.

The Plaintiff's counsel filed submissions dated 24th February 2014 which were filed in court on 27th February 2014. The counsel submitted that the 1st Defendant's preliminary objection lacks merit, as the same is based on the wrong belief that the Plaintiff is not a registered trustee. Further, that the description of the Plaintiff as a registered trustee has not been challenged in any of the 1st Defendant's pleadings.

The Plaintiff further submitted that in exercise of its rights as provided in the Order 8 Rule 1 of the Civil Procedure Rules, it amended the description of the 3rd Defendant without leave of the court because pleadings had not yet closed as the Defendant had not filed its defence. Further, that the amended plaint has been duly filed and served upon all the Defendants, and the error regarding the 3rd Defendant had thereby been rectified.

The Plaintiff's counsel also urged the court to also consider the definition of a Preliminary objection as consisting of a point of law which has been pleaded or which arises by clear implication from pleadings.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided in this preliminary objection are firstly, whether the 1st Defendant's preliminary objection raises a pure point of law, and if so, whether the said preliminary objection has merit and should be upheld. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. The circumstance in which a preliminary objection may be raised was also explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

> ***"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."***

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the present objection, the arguments raised by the 1st Defendant require ascertainment of certain facts, particularly as to the legal status of the Plaintiff, and particularly as to whether it is a society or trustee as pleaded by the parties. In addition the objection raised as to the jurisdiction of this court will also require ascertainment of the facts of the dispute before the court, and whether it arises from an enforcement notice issued by the 3rd Defendant as alleged or not.

The court also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion. The *locus standi* of the Plaintiff and description of the 3rd Defendant are amenable to the exercise of the court's discretion to order the necessary amendment of the Plaintiff's pleadings, and cannot therefore be raised as a preliminary objection.

It is thus the finding of this Court that the 1st Defendant's preliminary objection does not raise pure points of law for the foregoing reasons. The Defendants' preliminary objection dated 9th January 2014 therefore fails, and the costs of the said Preliminary Objection shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of _____April____, 2014.

P. NYAMWEYA

JUDGE