Chairman AIPCA Church Isiolo v Mugambi (Environment and Land Appeal 16 of 2023) [2025] KEELC 775 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 775 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL 16 OF 2023

JO MBOYA, J

FEBRUARY 13, 2025

BETWEEN

CHAIRMAN AIPCA CHURCH ISIOLO ..... APPELLANT

AND

GIKUNDA ELIAS MUGAMBI ..... RESPONDENT

(An Appeal from the Judgment and Decree of the Principal Magistrate E. Ngigi delivered on 24th May 2022 in Isiolo ELC Case No. 83 of 2014 formerly Meru ELC No. 167 of 201)

JUDGMENT

1. The Respondent herein [who was the Plaintiff in the subordinate court] filed a Plaint dated 27th June 2013; and which was subsequently amended on the 21st September 2015; and wherein the Respondent sought for various reliefs.
2. The reliefs that were sought for vide the amended Plaint dated 21st September 2015; were as hereunder;
    a. Declaration that the Plaintiff is the rightful owner of the entire plot known as Zone B commercial/104 Isiolo township.
    b. Permanent injunction restraining the defendant, his agents or servants from interfering with the suit plot.
    c. Costs of the suit plus interests.
3. The suit under reference was heard and determined vide Judgment rendered on 24th May 2022; and wherein the learned Chief Magistrate [the Trial Court] found and held that the suit plot lawfully belonged to and is registered in the name of the Respondent herein.

4. Pursuant to and arising from the foregoing, the Learned trial court ventured forward and granted the reliefs that had been sought at the foot of the amended Plaint [details whereof have been alluded to hereinbefore].

5. The Appellant herein [who was the Defendant] felt aggrieved and dissatisfied with the Judgment under reference. In this regard, the Appellant approached this court vide Memorandum of Appeal [sic] dated 21st December 2023; and wherein the Appellant has raised the following grounds;

   i. The learned trial magistrate erred in law and fact in failing to accord the appellant the opportunity to present and defend his case.

   ii. The learned trial magistrate court erred in law and in fact to hear and determine the trial dispute ex-parte without according opportunity for the defence hearing.

   iii. The learned magistrate erred in law and in fact in failing to take judicial notice of the appellant's documents and defence in its entirety.

   iv. The entire judgment of the trial court is against the weight of evidence and bad in law.

6. The subject appeal came up for directions vide the provisions of Order 42 Rule 13 of the Civil Procedure Rules 2010. During the directions, the advocate for the parties covenanted to canvass the appeal vide written submissions.

7. Pursuant to the foregoing, the court proceeded to and circumscribe the timelines for the filing and exchange of written submissions. Suffice it to state that the Appellant filed written submissions dated 16th May 2024, whereas the Respondent filed written submissions dated 15th April 2024. Both sets of written submissions form part of the record of the Court.

8. According to the Appellant, the learned trial magistrate failed to afford and/grant to the Appellant reasonable opportunity to be heard in the matter. In this regard, the Appellant has contended that despite the provisions of Article 50 of *the Constitution*, 2010, which underpins the right to fair hearing; the learned chief magistrate denied and or deprived the Appellant of the opportunity to be heard.

9. Moreover, it was submitted that even though the Appellant had filed its statement of defence, lists of witnesses, witness statement and bundle of documents, same [documents filed by the Appellant] were neither taken into account nor considered by the trial court.

10. It was the submission by learned counsel for the Appellant that the manner in which the learned trial magistrate conducted the proceedings offends the right to fair hearing, fair trial, due process of the law and the rule of natural justice. Consequently, and in this regard, it was posited that the Judgment of the learned trial magistrate has occasioned a miscarriage of justice and thus ought to be varied and or set aside.

11. To buttress the foregoing submissions, the Appellant cited and referenced various decisions including J.M.K vs MW.M and another (2015) eKLR; Onyango vs Attorney General (1987) eKLR; Mbaki & others vs Macharia & another (2005) 2 E.A 2006., respectively.

12. The Respondent also filed written submissions dated 15th April 2024; and wherein the Respondent provided a snapshot of what transpired before the trial court. In particular, the Respondent contended that the suit before the trial court was fixed for hearing in the presence of the appellant herein. However, it was contended that despite being knowledgeable of the settled hearing date, the Appellant and [sic] its legal counsel failed and or neglected to attend court. In this regard, it was posited that the learned trial magistrate was therefore at liberty to proceed with the scheduled hearing.

13. Additionally, it was submitted that when the matter in the subordinate court came up for mention to confirm filing of written submissions on the 8th of February 2022, the Appellant herein duly attended court and sought for more time to file and serve the written submissions. Nevertheless, it was posited that despite having sought for and obtained time to file and serve written submissions, the Appellant failed to do so.

14. Furthermore, it was submitted that owing to the manner in which the Appellant was behaving, the learned trial magistrate was at liberty to set down and indeed set down, the matter for Judgment. In this regard, it was submitted that the Appellant herein cannot be heard to complain that same [Appellant] was denied the opportunity to be heard. On the contrary, it has been submitted that the Appellant is the author of its misfortunes and thus ought not to lay any blame on the court.

15. Secondly, it has been submitted that even though the Appellant duly entered appearance and filed a statement of defence together with the list and bundle of documents as well as witness statements, the said documents were neither tendered nor produced before the court. To this end, it was submitted that the documents referenced by the Appellants were therefore not part of the exhibits to be considered by the trial court or at all.

16. Thirdly, the Respondent has submitted that the Appellant herein cannot be heard to complain that the Judgment of the court was contrary to the weight of evidence on record yet the Respondent's evidence was not controverted. In any event, the Respondent has submitted that the Appellant herein tendered and or produced no evidence that could have been considered by the trial magistrate.

17. Arising from the foregoing, the Respondent has invited the court to find and hold that the Appeal beforehand, is not only misconceived but legally untenable. In this regard, the court has been implored to dismiss the appeal with costs to the Respondent.

18. Having reviewed the pleadings that were filed before the court [the Trial Court]; the proceedings before the trial court, the evidence tendered and the submissions rendered on behalf of the parties herein, I come to the conclusion that the determination of the subject appeal turns on two [2] salient issues, namely; whether the suit that was filed before the lower court was competent taking into account the fact that the Defendant is a society and thus not capable of being sued in its own name or otherwise. The incidental, nay, second issue and which flows from the first one, is whether the appeal before hand is competent.

19. I beg to start with the 1st issue, namely; whether the suit that was filed by the Respondent before the subordinate court was competent and valid. Instructively, it is evident that the suit was filed against the Appellant herein who was described vide paragraph two [2] of the amended Plaint.

20. For ease of appreciation, paragraph two [2] of the amended Plaint states thus;

> The Defendant is a Christian organization duly registered as an association/society under the *Societies Act*, Cap 108 laws of Kenya.

21. It is evident that the Plaintiff [who is the Respondent herein] was alive to the fact that the Appellant [who was the Defendant] was/is a society registered under the *Societies Act*, Chapter 108, Laws of Kenya. In this regard, there is no gainsaying that if the Respondent was keen to implead and or sue the Appellant, then it behooved the Respondent herein to ascertain/authenticate the names of the registered trustees or officials of the Appellant organization/ Church.

22. Pertinently, where a suit is to be commenced by and or against an organization/association registered under the *Societies Act* cap 108, Laws of Kenya, then such a suit can only be commenced by and or against the registered trustees/officials of the society and not otherwise.

23. In this regard, it is worthy to cite and reference the decision in the case of Geoffrey Ndirangu versus Chairman Mariakani Jua Kali Association & 2 Others (2005) eKLR, where the court held as hereunder;

> '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.'

24. The position of the law [supra] was re-visited and reaffirmed in the case of Ngati & 3 others v Mutie & 7 others (Environment and Land Case Civil Suit 63 of 2018) [2023] KEELC 17878 (KLR) (18 May 2023) (Judgment), where the court [Oguttu Mboya, Judge] observed as hereunder;

> 100. Recently, this court in the case of The Executive Committee of Ngei Estate Phase II versus Eric Mureith Waweru Milimani ELC No. E013 of 2020 (unreported), stated and held as hereunder;
>
> > "To my mind, a Society and/or an Association, is devoid of the requisite legal personality, which inheres In incorporated bodies, for Example, Companies, Co-operative societies and Political Parties, the latter which is registered under the *Political Parties Act*, 2011.
> >
> > Whereas duly incorporated bodies, are vested with legal capacity and/or personality to sue and/or be sued in their own names, the converse obtains in respect of Unincorporated bodies, inter-alia, Societies registered under the *Societies Act*, Chapter 108 Laws of Kenya.
> >
> > At any rate, it is common ground and worthy of repetition that a society or un association, which is not a body corporate, can only sue through her Registered Trustees or Officials, but not in her own name.
> >
> > On the other hand, it is also worth mentioning that where the Society or Association is suing in the names of her officials, it is imperative that the names of the Officials as opposed to the Titles be used. For clarity, no legal suit can be filed under the guise of chairman, secretary and treasurer of some society/association.
> >
> > Notwithstanding the foregoing, it also bears repetition that there is no legal capacity that inheres in a body known as the Executive committee, in the manner that has been used by the Plaintiff/Respondent herein. For the avoidance of doubt, the said purported Executive committee, comprises of known persons whose names ought to have been used, subject to the impugned organization being registered in accordance with the law."

25. Suffice it to state that while suing an organization/association registered under the *Societies Act*, [Chapter 108, Laws of Kenya], it is not enough to reference the offices for example the chairman, secretary and or treasurer. Similarly, it is also not enough to say that the organization has been sued through the registered trustees without disclosing the identities/names of [sic] the registered trustees.

26. Notwithstanding the foregoing, it is not lost on this court that the Respondent herein was content on prosecuting the suit without endeavoring to discern whether or not the Appellant had any registered trustees. The failure to ascertain the existence of the registered trustees, if any; and the failure to implead the said registered trustees by name rendered the suit incompetent and invalid in the eyes of the law.

27. At any rate, it is apposite to state and clarify that the only time an organization can be sued through its registered trustees without disclosing and or capturing the names thereof is where the organization is registered under the Perpetual Trust Act, Cap 57 Laws of Kenya and wherein the registered trustees are constituted as a body corporate and thus same becomes a Legal entity in the eyes of the law.

28. In my humble, albeit considered view, the suit that was filed before the subordinate court was void for all intents and purposes. In fact, there was no suit before the subordinate court capable of being heard and or prosecuted whatsoever. Notably, the entirety of the proceedings that were undertaken before the trial court including the Judgment that arose therefrom, were nullities and thus void.

29. As pertains to the legal import and consequences of what is void, it suffices to cite and reference the decision in Benjamin Leonard Mcfoy vs United Africa (1961) All ER 1169 where Lord Denning MR [while delivering the opinion of the privy council] stated thus;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

30. Finally, a debate may ensue or arise that the suit before the subordinate court could be remedied vide an amendment and thus become sustainable. However, it is imperative to underscore that the identity of a party is a critical ingredient in a suit and hence where a suit is commenced against a non – existent party/entity in the eyes of the law, the claimant and in this case the Respondent becomes non-suited. The defect in question is beyond redemption by any amount of amendments. Instructively, the defect under reference goes to the root of the suit and by extension the jurisdiction of the court. Such a suit is dead in the eyes of the law.

31. To this end, it suffices to adopt and reiterate the position vide the holding of the Court of Appeal in the case of Euro Bank in liquidation through the Deposit Protection Fund Board v Rosaline Njeri Macharia [2016] eKLR where the Court dealt with a similar situation.

32. For coherence, the court stated and held as hereunder;

> (29) Clearly, a suit not by or against a person or a body corporate is incompetent. It is a nullity. That answers the first question. If more authority was required, the philosophy in the sagacious words of Madan, JA as he then was in *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another, (Civil Appeal No. 37 of 1978*) that "a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal...", show that only there is a suit, however poorly drafted, is amendment possible to save it. Where, as here, the suit is a nullity, there is no litigation in being in law and the issue of amendment does not arise. Madan, JA as he then was alluded to litigation which is akin to a patient who can be treated and healed. Here, the patient is in the morgue. He is dead.
>
> (30) In D.T. Dobie's case (supra), there was a suit in being and the issue was whether to strike it out or not. Not so in the instant case which can be distinguished on the ground that in the instant appeal, there was no suit before trial judge. In light of this, the learned judge was correct in

striking out the plaint as it had no plaintiff known to law, the Deposit Protection Fund not being a body corporate.

33. Flowing from the foregoing, there is no gainsaying that the suit before the subordinate court and which birthed the current appeal was a nullity. In this regard, there was no suit and by extension, there can be no appeal.

34. Next, is the issue as to whether the appellant herein is capable of commencing and or maintaining the subject appeal. There is no gainsaying that if the appellant could not be sued in its own name by dint of the provisions of the *Societies Act*, Chapter 108, Laws of Kenya; then the appellant herein cannot metamorphosis and become a legal entity [sic] for purposes of filing and prosecuting the appeal.

35. By parity of reasoning, the Appellant herein was and is incapable of filing, mounting and or sustaining the instant appeal. For good measure, there is no gainsaying that the appeal beforehand has been filed by a non-existent body. In short, the appeal just as the suit which was filed in the subordinate court was dead before arrival. In the words of the Court of Appeal in Eurobank in Liquidation vs Rosaline Njeri Macharia [supra], the appeal belongs to the morgue.

36. In my humble, albeit considered view, the proceedings and the resultant Judgment arose from an invalid suit and same are equally invalid. Consequently, and in this regard, nothing legal can arise and/or ensue therefrom.

Final Disposition:

37. Arising from the foregoing analysis it must have become evident and apparent that the entire appeal beforehand is not only incompetent and a nullity, but same is incapable of being sustained [read, countenanced] in the eyes of the law.

38. Owing to the various reasons, [which have been highlighted in the body of the Judgment], it is not apposite to venture forward and interrogate the merits of the appeal.

39. Nevertheless, it is not lost on the court that the Appellant herein was afforded the requisite opportunity to canvass and ventilate its case before the subordinate court. However, for reasons known to the Appellant, same [Appellant] did not appropriate the opportunity granted. In this regard, the Appellant cannot be heard to implead and invoke the right to fair hearing. [See Gladys Boss Shollei vs Judicial Service Commission (2022) KESC [Supreme Court Judgment at paragraph 257 thereof].

40. In the premises, the orders that commend themselves to the court are as hereunder;

    i. The Appeal herein be and is hereby struck out.

    ii. The suit in the subordinate court be and is hereby struck out.

    iii. The Judgment rendered on the May 24, 2022 be and is hereby quashed and or invalidated.

    iv. Each party shall bear own costs of the proceedings before the subordinate court.

    v. Each party shall also bear own costs of the appeal.

    vi. The parties are at liberty to take appropriate steps, where necessary subject to the law.

41. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 13TH DAY OF FEBRUARY, 2025

OGUTTU MBOYA

JUDGE.

In the presence of

Mr. Mutuma – Court Assistant

Mr. Mwenda Kirera for the Appellant

Ms. Githinji for the Respondent