



Africa Christian Church & Schools Registered Trustees v Macharia & 2 others (Environment & Land Case 162 of 2017) [2023] KEELC 120 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEELC 120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 162 OF 2017
FM NJOROGE, J
JANUARY 20, 2023**

BETWEEN

**AFRICA CHRISTIAN CHURCH & SCHOOLS REGISTERED
TRUSTEES PLAINTIFF**

AND

**RHODA N MACHARIA 1ST DEFENDANT
PHILIP THUKU GITHAIGA 2ND DEFENDANT
LAND REGISTRAR, NAKURU COUNTY 3RD DEFENDANT**

RULING

1. This ruling is in respect of the 2nd defendant's notice of preliminary objection dated September 16, 2019 on the following grounds:
 1. That the application dated April 11, 2017 together with the entire suit upon which it is grounded is bad in law, incompetent, non-starter, inept and an abuse of the court process and the same ought to be struck out.
 2. That the plaintiff suit is incurably defective and unsustainable for clear breach of the *Civil Procedure Rules, 2010* and the same ought to be struck out.
 3. That the plaintiff herein being a registered unincorporated society lacks legal personality with the capacity to sue and to be sued.
 4. That entertaining the suit herein is a waste of judicial time.
2. The preliminary objection was canvassed by way of written submissions. The 2nd defendant filed his written submissions dated November 14, 2022 on November 15, 2022 while the plaintiff filed its submissions dated November 16, 2022 on November 18, 2022.



3. The 2nd defendant in his submissions stated that unincorporated societies cannot commence an action and sustain it in its own name but can only sue and be sued through its registered officials or trustees and in the present matter, the names of the registered trustees are unknown. He also submitted that the annexed certificate of exemption from registration cannot be a panacea to the fatally defective plaint and cannot clothe the plaintiff with a legal personality to be able to sue competently.
4. The 2nd defendant relied on order 1 rule 8 of the *Civil Procedure Rules*, the cases of *Trustees Kenya Redeemed Church & another v Samuel M'obiya & 5 others* [2011], *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank Nairobi* HCC No 4116 of 1992, *African Orthodox Church of Kenya v Rev Charles Omuroka & another* [2014] eKLR and submitted that the law on suits by or against unincorporated societies are well settled that they have no locus standi and are struck off.
5. The plaintiff in its submissions identified the following issues for determination;
 - a. Whether the said preliminary objection is a pure preliminary objection on a point of law as provided for by law.
 - b. Whether the plaintiff is unincorporated society and lacks legal personality with capacity to sue and be sued.
6. On the first issue, the plaintiff submitted that a preliminary objection should meet the standards set out in the case of *Gladys Pereruam v Betty Chepkorir* [2020] eKLR. The plaintiff submitted that the preliminary objection as framed presupposes that the plaintiff is an unincorporated society which lacks legal personality to sue and be sued. That this means that the same requires the plaintiff to provide evidence that it has legal capacity to sue and be sued and is therefore a clear indication that the facts are not settled and the respondents do not solely rely on the pleadings as they are and so the preliminary objection fails test laid in the cases.
7. On the second issue, the plaintiff submitted that no pleadings have been filed by the 1st and 2nd defendants to rebut that the plaintiff is a registered trustee in the republic of Kenya. The plaintiff also submitted that it has attached to its further list of documents dated November 23, 2021 a copy of the certificate of the registered trustees of the plaintiff under the *Trustees (Perpetual Succession) Act* Chapter 164 Laws of Kenya which shows that Daniel Maina Ndirangu as one of the registered trustees who had testified in court as one of the trustees.
8. It was its submissions that section 33 of the *Trustees (Perpetual Succession) Act* provides that the trustees appointed in office become a body corporate with power to sue and be sued which is contrary to the assertions of the 1st and 2nd defendants. The Plaintiff relied on the case of *Trustees of the Agricultural Society of Kenya v James Gitonga* [2017] eKLR and sought that the preliminary objection be dismissed.

Analysis and Determination

9. After considering the preliminary objection and the submissions, the only issue that arises for determination is whether the 2nd defendant's preliminary objection has merit and should be allowed.
10. The court in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* 1969 1EA 696 held 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.”



11. The 2nd defendant's preliminary objection is that the plaintiff is a registered unincorporated society which lacks a legal personality to sue and to be sued. The plaintiff alleges that the 2nd defendant's preliminary objection does not raise a pure point of law as the 2nd defendant is not solely relying on the pleadings as they are.
12. As was held in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (Supra)*, a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It is my view that the 2nd defendant's preliminary objection raises a pure point of law as it is challenging the locus standi of the plaintiff to institute legal proceedings.
13. *Halsburys Laws of England 3rd Edition Vol 18* at paragraph 239 states as follows:

“The trustees of a registered society or branch or officers authorised by its rules, may bring or defend actual or legal proceedings with respect to any property, right or claim of the society or the branch and may sue and be sued in their proper names without other description than the title of their office. The liability of trustees to be sued in proceedings with respect to a right or claim of the society or branch is restricted to cases in which the right or claim concerns the property of a society or branch...”
14. As pointed out before, the 2nd defendant is challenging the plaintiff's locus standi in instituting the present matter. As per the plaint, the plaintiff is “African Christian Church & Schools Registered Trustees”. It has attached to its list of documents a certificate of exemption from registration issued under The Societies Rules 1968. It is my view therefore that the plaintiff is an incorporated body.
15. The court in the case of HCCC No 5116 of 1992 (0S) – [*Free Pentecostal Fellowship In Kenya v Kenya Commercial Bank*](#) held as follows:

“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. 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.”
16. As was held in the above case, an unincorporated body can only sue or be sued through its members and cannot sue in its own name. The plaintiff relied on section 3(3) of the [*Trustees \(Perpetual Succession\) Act*](#) and argued that it is a registered body corporate which has power to sue and be sued. The section provides as follows:
 - (3) The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.
17. It is my view that section 3(3) of the [*Trustees \(Perpetual Succession\) Act*](#) implies that it is the trustees who have been appointed by a body or association that become a body corporate that can sue and be sued and not an unincorporated society by itself.



18. The plaintiff being unincorporated lacked the capacity to institute the present proceedings as it is not a legal person or a corporate body. In conclusion therefore, it is my view that the plaintiff ought to have instituted the suit in the name of its trustees and not in its own name. The 2nd defendant's preliminary objection has merit.
19. However, I consider the flaw in the plaint to be capable of correction and I hereby order that the plaintiff shall within 30 days hereof amend his plaint to include the registered trustees' individual names in the title and describe them as "as suing on behalf" of the body named. That plaint shall be served on the other parties within 7 days of its filing and the suit shall be mentioned on February 28, 2023 to ascertain compliance and for further directions as to hearing.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

