



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 808 OF 2007

ERICK LUMOSI ASILIGWA &

ANO.....PLAINTIFFS

VERSUS

PETER

FELIX BAUMGARTNER.....DEFENDANT

**Coram Mwera J
Rading plaintiff
Ligunya for defendant
Njoroge court clerk**

RULING

The defendant's chamber summons dated 18/11/10 was brought under the now repealed Order VI rule 13 (b) (c) and order XXX VI rule 1 of the Civil procedure Rules. It was therein contended that

- i) the suit herein be dismissed for being scandalous, frivolous and vexatious;
- ii) the suit was fatally defective and offensive to the Civil Procedure Rules;
- iii) the suit was an abuse to the court process.

It was stated in the grounds that the suit was wrongly instituted by trustees of a certain trust against a fellow trustee concerning the affairs of that trust. That the plaintiffs lacked capacity to sue since they did not show that they were the registered trustees of Gentiana Self Help Centre or that that Centre was a registered TRUST. As such that entity had no legal capacity to come to court, and the plaintiffs could not purport to be its trustees.

The defendant swore a supporting affidavit to the effect that he and the plaintiffs were intended trustees of Gentiana Self Help Centre (Gentiana). At the centre of things was a dispute relating to the property for the intended trust and so the plaintiffs ought not have sued by filing a plaint.

That Gentiana was an entity registered with the Ministry of Sports, Gender and Culture and that did not profer on it legal capacity to sue as if it was a corporate personality (PF B-2). The litigants had put in place a constitution which they titled a trust deed, but the trust was never registered at all. So the plaintiffs could not style and term themselves as trustees with the capacity to bring valid court proceedings. Thus the suit was embarrassing, and fatally defective. It should be struck out. What looked like a copy of a trust

deed was annexed (PF B-3). It appeared that that “deed” was lodged at the lands registry on 27.9.07 and rubber – stamped. But it appears that that rubber stamp has a cancellation line through it.

On 15.2.11 some 7 grounds of opposition were filed claiming that this application was filed too late in the day. Therefore the defendant/applicant was guilty of laches. That this was the applicant’s way of delaying the final disposal of the suit. The applicant had submitted to the jurisdiction of this court by filing pleadings and affidavits. He cannot turn round now and impeach that very jurisdiction. Further, that the plaintiffs’ names were clearly stated in the plaint. They exist with locus in law to sue. The trust deed exhibited by the applicant was duly lodged and stamped. Duty was collected. It is a valid deed and so because Gentiana was neither a trust nor a company, the plaintiffs were in order to sue as individuals. This was a suit between trustees ie. trustees inter se in their individual names and Order 31 Civil Procedure Rules permitted suing in individual names. The applicant had not complied with the court orders of 20/7/10. He was thus in contempt and this court cannot hear him until and unless he complies. And that the applicant had wrongly invoked the powers of Order 31 Civil Procedure Rules. Then submissions were filed.

The defendant/applicant went over the background of this application and stated that even as he had filed applications in the past, that did not debar him from bringing the present proceedings. The court should in exercise of the overriding objective intended by the Civil Procedure Act and Civil Procedure Rules proceed to resolve the dispute of parties justly, expeditiously and at affordable costs both in money and time aspects.

Order 37 Civil Procedure Rules mandated that trustees can only litigate by way of originating summons – not a plaint and the trustees Act (Cap. 167) rule 2 of the Rules provided for the same mode. At this point and on rereading Order 37 Civil Procedure Rules touching on suing, the court was left wondering whether that provision of law is meant for litigation among/between trustees inter se over a trust property or what. However the court was asked to dismiss the suit herein because it was instituted by plaint rather than by originating summons. And the capacities of the parties ought not be ignored.

Moving to registration of Gentiana Self-Help Centre, the court was told that it was never at any time registered so the plaintiffs cannot describe themselves in the suit as trustees of this centre since they lack capacity to sue in such a manner. They have not shown that they are registered trustees. They have not put forth a certificate of incorporation of the “Trust”. Accordingly as per section 3 (1) of the Trustees (Perpetual Succession) Act (Cap 164), there is no body corporate known as Gentiana Self-Help Centre to transact/carry out the various purposes set out in the “trust”. And in the event that the trust was registered at the land registry, it was only a document evidencing certain land transactions, not that they were valid.

Those to benefit were not expressly designated in the trust and so could not be ascertained and no specific property was in issue. All in all Gentiana is neither a registered society nor company to sue and be sued. It cannot hold property either.

The plaintiff’s position was in essence what was stated in the grounds of opposition, albeit with a little more elaboration in the submission: that the defendant had taken out and participated in proceedings in the cause so much so that he cannot now disown the jurisdiction of the court; the plaintiffs have been clearly identified by their names and are litigating the interest of beneficiaries as per Order 31 Civil Procedure Rules. By the trust deed annexed by the applicant the plaintiffs were therein shown as trustees. They had legal capacity to sue. The court should proceed to do justice in the matter and according to the plaint filed – not by originating summons as claimed by the applicant. No technical objection need be raised in litigation on the ground of want of form.

Essentially arguments for and against this application centered round existence or non-existence of a trust; capacity to sue and whether the proceedings should have been instituted by way of plaint or originating summons. Then of other aspects attending these main ones. The parties referred to the Trustee Act (Cap. 1676), the Trustees (Perpetual Succession) Act (Cap. 164) and Orders 31, 37 of the Civil Procedure Rules.

Mindful of the prayers in the chamber summons, it may be prudent to acquaint ourselves with the pleadings, specifically the plaint itself first.

The plaintiffs filed the suit as registered trustees of Gentiana Self-Help Centre mandated to manage the day-today affairs of that entity. It was not pleaded whether the defendant was also one of those trustees but it was averred that he had sidelined the plaintiffs and by his acts, he tried to fire them and or disrupt the activities of the group. So a permanent injunction should issue against the defendant so that he should not assume control of Gentiana and interfere with its activities, including the running of Gentiana Primary School. And by a further order the defendant be evicted from all establishments and assets of Gentiana Self-Help Centre.

A chamber summons of the 3.12.07 was filed seeking injunction orders as stated in the plaint. It was therein disclosed that the centre had a bank account at Kawangare, and a primary school standing on plot number DAGORETTI/WAITHAKA/1460. Annexed to the supporting affidavit were inter alia, a certificate of registration of Gentiana Self-Help Centre issued by the Ministry of Gender, Sports and Social Services dated 25.5.04. Also annexed was a title deed to Plot No. 1460 bearing the names of Eric Asiligwa (1st plaintiff) Richard Salat – (2nd plaintiff) with the defendant – all styled the “registered trustees” of Gentiana. The plaint has the 3rd plaintiff, one Agrey Muhadi Arap Sawe who is not in the title deed, but described in the plaint as one of the registered trustees. However, the 3rd plaintiff, Aggrey Muhadi appears on the face of the Trust Deed lodged with the Registrar of Documents at the lands registry on 27.9.07 (ELA 4). Two things observed as at this point are that, first the date stamp of 27.9.07 on the face of the deed, at the lands office appears to have a line across it. No party has told the court the meaning of it or if the lodging of the trust Deed was cancelled. Quite probably the latter. But then there are stamps to collect duty. And, secondly the defendant does not appear to have signed that deed. Seeing and noting the signatures of the other 3 duly witnessed, there appears to be none by the defendant or any witness to it. However, on the last page of the Deed is a date of 19.10.07 at 11.30 hrs when the Registrar of Documents one J. W. Kamuyu entertained the deed. In clause 1 of this deed it is stated, inter alia,

“ The Trust is not a society nor is it incorporated under the Companies Act.”

It has wide ranging objects including capacity – building in the community to enable (them) to manage projects; to conduct advocacy programmes; to promote environmental conservation programmes etc. The centre has a common seal wef 6.9.05, vesting the property in the trustees. Then the deed went on to set out other matters eg acquiring additional properties, investment, purchase of real property, powers to borrow up to dissolution of the trust. Nothing all through, touched on resolution of any disputes arising among the trustees inter se. And that appears to be the basis of this suit – squabbling amount the trustees.

Having noted that the trust here in question is neither a registered society nor an incorporated limited liability company, then what legal status does it have to sue through its registered trustees? First the plaintiffs who claim to be the registers trustees of Gentiana, have their capacity challenged/impeached.

They claim that once they filed a trust deed with the Registrar of Documents. That is all. That cannot be, despite lodging that it is. It says clearly that Gentiana is neither a society nor an incorporated company.

As noted above there was reference to Trustee Act Cap. 167). But this Act deals with estates of deceased persons and not registered trustees handling day today affairs of an entity concerning itself with activities in the society. The plaintiffs claimed that the defendant was trying to sideline them against their constitution and he was interfering in their objects including running a primary school. Then the trust deed which the court finds was lodged at the registry of documents, set out the objects the trust is to perform among communities (see above). So the court concludes that Gentiana Self-Help Centre, as a trust must fall under the Trustees (Perpetual Succession) Act (Cap. 164). It has been set up to promote activities in society that run for ever and ever. And under this Act its constitution is the set of rules, regulations, terms and documents relating to the objects of the trust and regulating the affairs thereof and the appointment of trustees and other officers thereof.

Although at this stage the constitution which the plaintiffs claim the defendant is breaching need not come into focus, yet under this Act:

“3.(1) The trustees who have been appointed by anybody or association of persons established for any religious, educational, literary, scientific, social athletic or charitable purpose, may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body.”

And to apply for a certificate of incorporation is as per FORM A in the schedule to Cap.164. As is well known, when a body acquires a corporate entity it can sue and be sued. All we have here is the certificate of registration from the Ministry, describing Gentiana as a self help group dated 25/5/04. On 4.7.07 the same ministry wrote “To Whomever it May Concern” that Gentiana was a self help group that serves the needy. It was not made clear but from the sheafs of papers filed in court there is one registering Gentiana Development Network as a non-governmental organization on 11.8.05. Perhaps the two are not related.

All said and done there is no evidence placed before this court, that by applying using Form A (Schedule to Cap. 164) the Registrar of Documents did issue a certificate of incorporation to Gentiana to become a corporate body with registered trustees. Accordingly no such a body exists and the plaintiffs cannot sue on its behalf as the registered trustees. Invoking Order 31, 37 of Civil Procedure Rules is thus beside the point.

It has been noted above that the objects of the trust did not allude to resolution of internal disputes by those calling themselves trustees of Gentiana. Probably that is in their constitution.

In sum Gentiana Self-Help Centre is not a trust in terms of Cap 164. It is not a corporate body. It cannot sue and nobody can sue on its behalf as its registered trustees. The suit herein is incompetent and misconceived. It is struck out with costs.

However what appears to be is that the so-called trustees are squabbling among themselves for this or other reason – usually insincere or selfish in such situations. They formed that entity on trust. It appears the trust is wearing fast to the detriment of the objects intended or programmes undertaken and therefore to the detriment of the intended beneficiaries. In that regard court cases are not the most prudent way to settle such disputes. The parties would do well to consider the course of mediation reconciliation or arbitration. The sooner that path is taken the better. And to begin with even as this suit is struck out, each party will bear its own costs.

Delivered on 29.3.11.

J. W. MWERA

JUDGE

