



REPUBLIC OF KENYA



**Ochieng & 19 others v Owaga & 6 others (Civil Case 13 of 2020)
[2022] KEHC 16960 (KLR) (29 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE 13 OF 2020
RE ABURILI, J
DECEMBER 29, 2022**

BETWEEN

ELD JOHN JOHNSON OCHIENG	1ST APPLICANT
ELD MICHAEL ORUKO	2ND APPLICANT
ELD WALTER ODINGO	3RD APPLICANT
ELD BENARD ONYANGO	4TH APPLICANT
ELD ANNE AKOKO	5TH APPLICANT
ELD ABRAHAM GWADA	6TH APPLICANT
ELD GEORGE OMBORO OWUOTH	7TH APPLICANT
CALEB OUMA OWITI	8TH APPLICANT
JOHN JONYO APEPO	9TH APPLICANT
MRS MARREN OKUMU	10TH APPLICANT
ELD CHARLES OCHUKA	11TH APPLICANT
ELD CHARLES KADU MOSES	12TH APPLICANT
ELD JOEL WALULA	13TH APPLICANT
ELD TOM OMUNGO	14TH APPLICANT
MRS PENINA OUMA	15TH APPLICANT
ELD ELIAKIM ODERA JIMBO	16TH APPLICANT
MRS FLORENCE RANDA	17TH APPLICANT
MR SETH ALAI	18TH APPLICANT
MR DAN ONYANGO	19TH APPLICANT



MR JORIM ODADA 20TH APPLICANT

AND

REV WELLINGTON KUTHE OWAGA 1ST RESPONDENT

REV ALEX OWINO 2ND RESPONDENT

REV GABRIEL OCHUKA 3RD RESPONDENT

ELD AMOS NYAIGA OGADA 4TH RESPONDENT

ELD MARTIN ORWA OBUYA 5TH RESPONDENT

ELD JOSEPH DUME AYIECHO 6TH RESPONDENT

ELD DAVID OUKO ANYANGO 7TH RESPONDENT

RULING

1. The 1st -6th defendants filed a notice of motion application dated December 7, 2020 seeking the following reliefs:
 - a. That the injunction orders herein be set aside.
 - b. That the case be struck off and dismissed for being an abuse of the process of the court.
 - c. That Kshs 500,000/= deposited in court be released to the defendants.
 - d. Costs of the suit.
2. Amos Nyaiga Ogada the 4th respondent swore an affidavit on his own behalf and that of the AIC members from the 4 regions namely: Kisumu, Central Lake; Kisumu City and Muhoroni. He deposes that there has been a long-standing dispute between the regions and the AIC Nyanza Area Church Council. He further deposes that there have been several disputes between the regions and the Central cChurch and the instant suit therefore creates a duplicity of suits.
3. He deposes that the plaintiffs are busy-bodies being used by the Executive Council and have all along been represented by the Rev Silas Yego in the earlier litigations who was then a member of the Executive Council that had negotiated a settlement with the respondents. It is his disposition that the subject matter herein has been concluded and the only outstanding issue is the committal of the said Rev Silas Yego to prison for contempt of court orders.
4. The deponent further asserts that the called-off elections cost a lot of money and the same should be released to them to aid in settlement of debts incurred in the preparation of the elections. That the presence of the plaintiffs in the suit will introduce new issues and convolute the case which is already concluded and in any event is calculated to advance their personal interests.
5. In opposing the application, elder John Johnson Ochieng filed a replying affidavit deposing inter alia that the issue in the suit is not about the formation of the greater central lake region area but the unfair installation of the respondents as leaders of the region without an election in compliance with the constitution of the Church.
6. On the issue of elections, it was deposed in contention that no elections were ever planned since the same had been declared illegal and criminal and therefore no expenses were incurred. He deposes that



- the elections which were stopped were calculated to install the 1st -3rd defendants in a non-existent region.
7. He further deposes that they are not members of any Executive Council but elders in their respective churches and the suit is brought on behalf of the members interested in taking part in the elections. That in any event, their grievance is on the formation of the Great Central Lake Area until the formation is acknowledged by the Central Church Council.
 8. The application was disposed of by way of written submissions.
 9. The applicants on the issue of whether the orders of injunction should be set aside submitted that the respondents obtained the orders through concealment of material facts and this fact entitles the court to set aside the order pursuant to the provisions of Order 40 Rule 7 of the *Civil procedure Rules*. In support of this, counsel cited the authorities in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & anor* (1990) eKLR and *Ochola Kamili Holdings Limited v Guardian Bank Limited* (2018) eKLR.
 10. It was submitted that the respondents instituted the application knowing very well of the existence of the consent order and all through the proceedings, they had been represented by Rev Dr. Silas Yego and had accepted the formation of the Greater Central Lake Area. That pursuant to the consent, the elections were conducted and the area formed and the suit therefore constitutes an abuse of the court process. On this point, the authorities in *Benl Development Limited v First Community Bank Limited* (2021) eKLR, *St Patricks Hill School Ltd v Bank Of Africa Kenya Ltd* (2018) eKLR and *Kenya Church of Christ v Wilmore Kiplagat & 2 others* (2009) eKLR were relied on.
 11. On their part, the respondents submitted and raised the following issues; whether the suit is an abuse of the court process, whether the defendants were right to organize their inauguration as leaders of the area without elections, and, who should bear the costs.
 12. On the first issue, it was submitted that the intended election was unlawful and not permitted by the Central Church Council as well and was in violation of the Church constitution. That the suit sought to stop the elections and the suit cannot therefore be termed an abuse of the court process. The case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others* (2009) eKLR was relied on.
 13. On the second issue, it was submitted that the intention of the inauguration by the applicants was a gross violation of the Church constitution.
 14. On the issue of costs, the respondents submitted that they are entitled to costs and the sum deposited in court.

Analysis and determination.

15. Having considered the rival positions taken by the parties in the matter, I am of the view that the issue commending for determination is whether the applicants are entitled to the orders sought.
16. The first prayer sought is that of setting aside of the injunctive orders granted on the basis that the same was obtained through material non-disclosure of the fact that there was an earlier suit which was compromised by way of consent. The said non-disclosure relates to existence of civil Suit No. 555 of 2018 in the Kisumu Chief Magistrate's Court and the fact that the respondents had all long been represented in the suit by Rev Silas Yego.
17. The respondents vehemently deny this position. They aver that their suit is based on the conduct of the elections which they allege was planned to take place despite running afoul the Church constitution.



18. The issue then is what constitutes material non-disclosure of a fact in the circumstances. Order 40 Rule 7 of the civil Procedure Rules provides that:

“Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.”

19. My reading of the order issued in the subordinate court is to the effect that the parties therein agreed to conduct the elections pursuant to some conditions set out therein. Upon the conduct of the elections, the Great Central Lake Area was to be created thereafter. The plaintiffs in that matter are the defendants/applicants in the instant application. The plaintiffs in the instant suit were not parties even though the applicants herein allege that they were represented by Rev.Dr. Silas Yego. I find this contention not correct.

20. The consent subject herein was entered into by parties who were not active parties in the case before the subordinate court. None of the parties to the instant application has enlightened the court on the status of the elections and the status of compliance with the order issued therein albeit there was a mention of contempt proceedings that has been allegedly committed and taken out against Rev. Dr. Silas Yego.

21. I therefore find that the applicants have not given sufficient reasons to warrant the setting aside of the injunctive orders issued by this court. In any event, the order issued by the court was very categorical that the orders did not validate the elections. The sum deposited in court was to act as security for costs.

22. Furthermore, Order 40 Rule 7 does not indicate the parameters within which the court can set aside interim orders and therefore the burden of establishing the grounds for setting aside lies upon the party seeking such setting aside which have not been established in the instant application.

23. The applicants similarly seek an order for the dismissal of the suit for being an abuse of the court process. It is trite law that striking out of a suit is a draconian exercise with the effect of driving away a litigant from the seat of justice. The court is therefore invited as a custodian of justice to balance the rights of the parties to be fairly treated by the court.

24. Order 2 Rule 15 of the [Civil Procedure Rules](#) provides that:

“15(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-

(a) ...;

(b) ...; or

(c) ...; or

(d) It is otherwise an abuse of the process of the Court and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.”



25. The Civil Procedure Rules similarly do not define what constitutes an abuse of the court process. However, by judicial invention, the term was defined in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where the court stated that:
- “The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party”.
26. In that case, the court guided on what constitutes an abuse of court process and the following scenarios were given: -
- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
 - d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
 - f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.
27. I have carefully subjected the instant application to the above guidelines and I am inclined to find that this suit does not meet the criteria above stated for the reason that the instant suit is instituted by different parties on the issue of installation and the election of the officials to head an area that has not been formally created. The consent in the subordinate court dealt with the conduct of elections upon certain terms being met. It is not clear whether those conditions were met.
28. I also find that the objective of litigation is a just resolution of disputes as mandated by the overriding objectives under the *Civil Procedure Act*. The dismissal of a suit at an interlocutory stage is oppressive to the party against whom the order is made. Every party ought to be given a day in court to ventilate his or her case fully before an impartial court, unless the court is satisfied that such suit is frivolous.
29. There is no dispute that money has been deposited in court as security for costs. The money will ultimately compensate the party who has been unfairly prejudiced by the case. It is therefore my holding that in any event, the successful party will be compensated at the end of the day from the money so deposited.



30. The upshot of my above analysis therefore is that I find the application dated December 7, 2020 lacking in merit and is hereby dismissed with an order that each party shall bear their own costs of the application. The sum of Kshs 500,000/- deposited into court shall not be released until this matter is finalized.
31. I further direct that the plaintiff complies with Order 11 of the Civil Procedure Rules within 21 days of today. The defendants too to comply within 21 days of the date of service. Mention on February 14, 2023 to confirm compliance and for certification/ pretrial directions.
32. Parties are also implored by this court to pursue ADR and to endeavor to resolve the dispute amicably being members of the same church and congregation.
33. I so order.

Dated, Signed and Delivered at Kisumu this 29th Day of December, 2022

R.E. ABURILI

JUDGE

