



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MERU**

**CIVIL SUIT NO.1 OF 2016**

**REV.GEOFFREY MUTHINJA.....1<sup>ST</sup> APPLICANT**

**REV.ROBERT BANDA NGOMBE.....2<sup>ND</sup> APPLICANT**

**REV.DOUGLAS MURIUNGI.....3<sup>RD</sup> APPLICANT**

**REV.JACOB KITHINJI.....4<sup>TH</sup> APPLICANT**

**REV.DANIEL KIRUGI.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**REV. SAMUEL MUGUNA HENRY.....1<sup>ST</sup> RESPONDENT**

**REV. JOHN JEMBE MUMBA.....2<sup>ND</sup> RESPONDENT**

**REV. JOHN MAROO.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By way of history, the applicants herein filed a plaint contemporaneously with an application dated 05/04/2016 seeking injunctive orders against the respondents herein and restraining the said respondents from proceeding with the Annual General Meeting scheduled for 07/04/2016. The court on 08/11/2016 declined to issue the orders sought and dismissed the said application. On 23/01/2018, the applicants filed another application seeking to nullify the church elections conducted on 08/02/2017 and have the officials so elected barred from assuming office. The court on 18/07/2018, once again found the same unmerited and dismissed it with costs to the respondents. The applicants filed yet another application dated 04/04/2018 seeking to compel the respondents to produce all books of accounts and bank statements for inspection. Before the court could determine this application, the applicants filed yet another application dated 25/09/2018 to review the ruling of the court delivered on 18/07/2018 which application was equally dismissed by the court on 13/10/2020.

2. The applicants being dissatisfied with the said ruling lodged a Notice of Appeal lodged as an initiator of an appeal to the Court of Appeal and thereafter filed what is now before this court being the Notice of Motion under certificate of urgency dated 12<sup>th</sup> August 2020 said to be brought pursuant to *Section 5(1) of the Judicature Act, Sections 1A, 1B, 3 & 3B of the Civil Procedure Act, Articles 10(2)(b), 159 & 160 of the constitution*. In it the applicants seek:-

1. Spent

2. Spent

3. That this honourable court be pleased to give interim orders of injunction against the respondents restraining them conducting the election scheduled for 20/08/2020 at E.A.P.C Meru Town Church at 10.00 A.M and in any other Church Districts while this matter is pending in court pending the hearing and determination of this suit.

4. That this honourable court be pleased to grant leave to the applicants to cite the respondents for contempt of court orders and committal to civil jail for the period of six months for disobeying this court orders of maintenance of status quo.

5. That O.C.S Meru Police Station and other O.C.S's of the police stations in the respective all other church districts as follows i.e Meru Central, Abothuguchi, Nkuene, Abogeta Igoji, Chuka, Mwimbi, Embu, Mbeere, Kirinyaga, Kitui North, Kitui Central, Mt. Kenya South, Mt. Kenya, Mombasa North, Mombasa South, Northern Kenya, Tigania, Tigania West, Igembe North, Igembe South, Ntonyiri, Ntonyiri East, Tharaka North & Tharaka District be empowered to ensure compliance with this court order.

6. That this court be pleased to issue any other order in the interest of justice.

7. That the costs of this application be provided for.

3. The grounds upon which the application is premised are set out in the body of the application and in the supporting affidavit of Geoffrey Muthinja, the 1<sup>st</sup> applicant herein, sworn on 13/08/2020.

4. It is contended in that affidavit that the court extended orders for status quo during the last mention in court. He avers that the respondents continue to disobey the said status quo order by disrupting the organization of the church despite having knowledge thereof. He contends that the respondents through a letter dated 25/07/2020 gave notice of elections and subdivision of E.A.P.C Meru Central District into E.A.P.C Meru Central District and E.A.P.C Buuri District through a by-election scheduled for 20/08/2020. That the respondents had subdivided the churches into Meru Central, Abothuguchi, Nkuene, Abogeta Igoji, Chuka, Mwimbi, Embu, Mbeere, Kirinyaga, Kitui North, Kitui Central, Mt. Kenya South, Mt. Kenya, Mombasa North, Mombasa South, Northern Kenya, Tigania, Tigania West, Igembe North, Igembe South, Ntonyiri, Ntonyiri East, Tharaka North & Tharaka Districts. He further avers that the said notice is meant to disrupt the normal structure of the church whereas there are pending orders against the same. He further avers that the respondents are blatantly showing ignorance and total disregard of the law and the orders of this court. That the formation and election of the said church district is against the constitution of the church. It is the deponent's averment that this matter will be rendered nugatory if the orders sought herein are not granted.

5. The respondents opposed and resisted the application through a replying affidavit sworn by Rev Samwel Muguna Henry, the 1<sup>st</sup> Respondent, sworn on 26/08/2020 and yet another Affidavit by Rev. John Jembe Mumba, the 2<sup>nd</sup> respondent herein, on 12<sup>th</sup> October 2020. In the first Affidavit, the 1<sup>st</sup> respondent asserts and takes the position that the suit, as filed, challenged the election of the National Office bearers and that the court did, on the 8/11/2016 order that fresh elections be conducted and in compliance with such orders, the parties agreed by consensus to conduct fresh elections from the district levels culminating in national election held on 8/2/2017. It is asserted that the outcome of the elections was accepted by the applicants who conceded defeat, the respondents took office and have acted so since being taking charge of all the affairs of the church except in those churches where the applicants minister hence the issue of the bona fide officials was brought to rest now for a period of four years. He then enumerated the several applications brought by the applicant all of which failed and that even mediation bore no fruits. To the applicant the status quo agreed on respected the review application and did not extend to the general management of the church by bona fide elected leaders and that since the order of status quo was made no review has been undertaken on the constitution. It was therefore denied that any acts had been undertaken in contempt of the court it being stressed that the division of Meru central district was done in accordance with the regulations applicable to create Buuri district. The deponent then adds that upon creation of the new district the elections of an overseer became axiomatic. The deponent denied any plans to split the church into two nor to split any other district just now and lastly asserted that splitting of the church's districts is not a claim in the plaint, the residue of which now remain the question of audited books of accounts and the reinstatement of the church minister.

6. For the 2<sup>nd</sup> respondent the affidavit alludes to being dumbfounded by the applicants' penchant to bang in application after another merely to procrastinate the determination of this suit. He further contends that pursuant to the peaceful elections conducted on 08/02/2017, the new officials of the church took over and have been running its affairs smoothly. He avers that the church was split into 2 districts following an application by the Meru Central district to the national governing council. That elections were inevitable since every district must be headed by a general overseer as is the case in Ntonyiri and Mbeere Districts. That the creation of new church districts and the subsequent election of new officials does not form the cause of action raised in the plaint. It was the respondent's assertion that this application is the epitome of abuse of court process and ought to be dismissed with costs.

7. The file was placed before Mabeya J on the 21.10.2020 when the judge gave direction on filing of submissions, pursuant to which the applicant and 1<sup>st</sup> respondent filed respective submissions on the 3<sup>rd</sup> and 16<sup>th</sup> November 2020 with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents opting to associate with the position taken by the 1<sup>st</sup> respondent in opposing the application.

8. For the applicants, submissions were made to the effect that they had satisfied the conditions for grant of temporary injunction as set out under order 40(1)(a) and (b) of the Civil Procedure Rules. It is contended that the court while issuing the interim orders for status quo was categorical that the constitution should not be amended by the respondents. In conclusion, the applicants submitted that this matter will be rendered nugatory unless the orders sought are granted. The applicants relied on **Giella v Cassman Brown & Co Ltd(1973) EA358,R.J.R Macdonald v Canada (Attorney General) cited in Paul Gitonga Wanjau v Gathuthi Tea Factory Co Ltd & 2 others(2016) eKLR, Mrao Ltd v First American Bank of Kenya & 2 others(2003)KLR 125 cited in Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi & 5 others(2014) eKLR (2014), Mutitika v Baharini Farm(1982-88) 1 KAR 863, Hadkinson v Hadkinson (1952) ALL ER 567, Johnson v Grant(1923) SC 7890 and Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others(2013) eKLR** in support of their position that both injunction and leave to commit the respondents for contempt was deserved and merited. The gist of the contention by the applicants is that the court had on a date not specified given orders of status quo which the respondents had flouted by subdividing the church districts in the named areas thus distorting the church structure and were arranging for elections. To the applicants such actions were the same being litigated and had been stopped by the court as being against the constitution of the church.

9. For the respondents, submissions were made to the effect that the interim orders stopping the elections were granted on 13/10/2020 but the same lapsed after the applicants failed to attend court on the said date to have the orders extended. They contend that the court declined to extend the interim orders on 21/10/2020. They contend that the applicants by making this application are seeking a short cut to get the only relief that is left in the main suit as the other reliefs were settled by the repeat elections. That the mediation session between the parties herein held on 03/04/2019 did not bear any fruits. It is further contended that after the applicants complained that the process of reviewing the constitution had commenced, the respondents agreed to put the same in abeyance and maintain status quo thereon. It is asserted that the maintenance of status quo by the respondents was only limited to reviewing the constitution and not the general management of the church affairs. It was submitted that the respondents in their administrative functions, subdivided EAPC Meru Central District into EAPC Buuri district following an application by EAPC Meru, with approval of the National Governing Council to have the district restored. It is the respondents' assertion that the applicants have not met the threshold for grant of an order of injunction. It was also contended that the intended elections would not alter the structure of the church and the subdivision of church districts is merely administrative and falls squarely on the shoulders of the church governing council. It is contended that the applicants did not dispute that a similar exercise was

carried out in respect of Ntonyiri and Mbeere districts in 2009. It is contended that this application is pegged on non-existing orders since the interim orders of status quo had lapsed. The court is urged to find that the balance of convenience falls in favour of dismissing the application. The respondents relied on Mrao Ltd v First American Bank of Kenya & 2 others (2003)eKLR, Timothy Njoya v Attorney General &anor (2014)eKLR and Evangeline Kanyua Mwiandi v Gilbert Kinyua (2019) to support their submissions that the prerequisites of a temporary injunction had not been made out.

10. I have read the record of the file and the two sets of submissions by the parties. From that reading I have discerned that even though the applicant gives no date when the order for status quo was made and while the respondent asserts that the same was made on the 13/10/2020, the orders I see in the file to that effect were made on the 7/7/2020 and reiterated on the 19/8/2020. On 13/10/2020, the records reveal, the judge delivered a ruling and no mention was made of the previous orders of status quo. By those orders the court said; -

**“7.7.2020: Ruling on 13.10.2020.**

**Meanwhile status quo be maintained.”**

**19.8.2020: Application dated 12.8.2020 is certified urgent.**

**It be served on all the parties for hearing on 13.10.2020.**

**Meanwhile no one should act in a manner likely to prejudice these proceedings. In the circumstances any elections will be prejudice as I consider the application scheduled for the 13.10.2020. I stay the planned elections of 20.8.2020 until 13.10.2020.”**

11. To move forward, I pose the question as to when the acts complained of were effected. The affidavit filed in support of the application shows, on the annexures, that the decision to subdivide Meru Central district had been made by the 22/7/2020. That was before the current application could be filed and served. Accordingly, therefore, only the orders issued on 7/7/2020 could have been the foundation of the application of 12/8/2020. To establish whether there had been a violation of those orders, one has to find out what was the status quo to be preserved by that date. One clear position is that the judge had an application dated 25/9/2018, seeking review orders pending determination. On that day the parties addressed the court and confirmed that mediation had failed, requested that the pending application for review be determined with Mr Kariuki asking the court to maintain the status quo without much elucidation of what status was to be maintained. My perusal of the file reveal that on that date the plaintiff was seeking to have the orders of 18/7/2018 set aside. Those orders had dismissed an application seeking to declare elections conducted on 8/2/2018, invalid, null and void, the persons so elected be prohibited from assuming office to enable fresh elections be conducted. The orders therefore had the effect of upholding the election without any reservations on what the officials could do qua such officials. That is the status quo that was prevailing and could be maintained.

12. On the question whether that order had been breached, I do find that there could not have been a breach of the order when all the respondents are accused of is performing duties of their office. It could be otherwise if there been an order restraining them from assuming office. I take the view that the order of 7/7/2018 only restrained alteration of the overall status quo then prevailing without specifics. Noting that election was the crux of the plaintiff's case, parties would have been of better assistance to the court by stating to it the then prevailing status in that regard which they did not want to be altered. That would have enabled the court to identify a distinct act that would not be interfered with. In failing to do that, the plaintiff, in particular, failed in its duty to the court. I consider it a failure of obligation to court because the law on contempt remain that a court order that requires compliance must establish to the persons obligated, their distinct duty and even consequences for breach. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

**“In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt”**

13. I do find that the order cannot be construed to have barred the respondents from conducting administrative affairs of the church when their election had been upheld. In the end I do find no basis has been laid before me to find the respondents to have been in contempt of court. That prayer fails and is hereby dismissed.

14. On the prayer for interim injunction pending determination of the suit, I have given due regard to the law on granting of interlocutory injunction is set out under Order 40, Rule 2 of the Civil Procedure Rules 2010 and as additionally enunciated by the courts in innumerable decision and do find the same to be wanting in both merit and stature. The prayer is only to restrain an intended election slated on the 20/08/2020, now passed. I see no purpose of granting such an order for it has no efficacy and may only be good for purposes of superfluity. In addition, when the judge considered the matter ex-parte and gave the orders of 19/08/2020 the prayer 3, as crafted equally became spent. Thirdly, an interim injunction is not the same thing as a temporary injunction. To my mind an interim injunction is that injunction given pending determination of an application for a temporary injunction. But more importantly, Rule 2 of Order 40, ordains that a temporary injunction is only available where the suit seeks a permanent injunction. The suit as it stands today seeks no injunction and it would be moot and in vain to grant any temporary injunction as sought by the plaintiffs. Lastly I have read the Constitution of the church and its provisions on dispute resolution and I get the impression, even before parties address the court on that aspect, that the church has a chosen way of resolving its disputes away from the court. That persuades me that the church invites no intervention by the court before it exhausts its internal mechanisms. For all those reasons I find it not tenable to grant the injunction sought with the consequence that the entire application fails and is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MERU, ONLINE, THIS 19<sup>TH</sup> DAY OF MARCH, 2021**

**Patrick J O Otieno**

**Judge**