



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CIVIL CASE NO. 3 OF 2017**

**THE REGISTERED TRUSTEES OF EBENEZER**

**GOSPEL CHURCH.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SHADRACK NDOLO MUTUA**

**DANIEL NZIOKI MULI.....DEFENDANTS/RESPONDENTS**

**RULING**

**Introduction**

1. The application dated 19<sup>th</sup> December 2017 filed under certificate of urgency is brought under Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 40 Rule 2, Order 51 Rule (1) of the Civil Procedure Rules 2010, Article 159 of the Constitution of Kenya and all other enabling provisions of the law. It seeks.

a) *Spent*

b) *Spent*

c) **THAT** an order of injunction do issue restraining the defendants/respondents and anyone working under them from presenting themselves as officials and/or trustees and/or pastors of Ebenezer Gospel Church and from controlling and or managing any affairs and properties of Ebenezer Gospel church until the hearing and determination of this suit.

d) **THAT** costs of the application be borne by the defendants/respondents.

2. The application is supported by the grounds on the face of it, a supporting affidavit of David Mwiwa Kasyoki sworn on the same day and a supplementary affidavit sworn on 1<sup>st</sup> October 2018.

3. The principal grounds are that;

a) The applicant is the legal entity charged with managing and controlling the places of worship and other establishments of the Ebenezer Gospel Church.

b) The respondents are not elected either as officials or trustees of Ebenezer Gospel Church and are therefore not part of the applicant.

c) The respondents have unlawfully taken over the management and control of affairs and church premises occupied by eight branches of the church, Bible school for the church and other facilities.

d) The respondents have usurped the mandate of the plaintiff and other officials and have continued to treat the lawful leadership of Ebenezer Gospel Church with contempt.

4. The application is opposed through a replying affidavit of the 1<sup>st</sup> respondent sworn on his behalf and on behalf of the 2<sup>nd</sup> respondent on

08/01/2018. There is also a supplementary affidavit sworn by him on 10/12/2018.

5. The gist of the opposition is that the applicant is not legitimate and is therefore unknown to the respondents. They depose that they are the genuine officials of the church having followed the legal procedure as dictated by the law. The 1<sup>st</sup> respondent further deposes that he is an official and trustee of Ebenezer Gospel Church (*herein after 'the church'*) according to the relevant provisions of the church's amended constitution. He also deposes that the 2<sup>nd</sup> witness of the applicant, one David Mulwa Muli, had no capacity to dismiss the respondents as he had been suspended when he purported to do that.

6. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

7. I have considered the application and the rival affidavits together with the annexures. I have also considered the rival submissions.

8. The *locus classicus* **Giella –vs- Cassman Brown & Co. Ltd**{1973}{EA358 provides that an applicant for a temporary injunction, such as the one before Court, has to establish that;

a) He/she/it has a prima facie case with high chances of success.

b) He/she/it will suffer irreparable harm which cannot be compensated by an award of damages.

c) If the Court is in doubt, it will decide on a balance of convenience.

9. I am aware that at this juncture, the Court is not required to make final findings of contested facts and law but to only weigh the relative strength of the parties' cases.

#### **Prima facie case**

10. The applicant maintains that the respondents are not it's members and that the meeting where they claim to have been elected was misleading and done unprocedurally. They rely on the case of **Silas Misoi Yego & 2 others –vs- Minister of State, Provincial Administration and Internal Security & 8 others** where it was held that a prima facie case had been established as non-officials cannot derive any benefit of the law.

11. On the other hand, the respondents submit that their status as leaders and officials of the church cannot be challenged as they were elected procedurally in the manner dictated by the law. They also rely on the **Silas Misoi Yego case (supra)** to submit that the trustees/applicant are not officials.

12. Anyone reading the application for the first time will be quickly convinced that the respondents are total strangers to the church and have no colour of right to deal with it's affairs. The response paints a totally different picture. What is clear is that there has been a long standing leadership dispute between the parties herein.

13. Each is claiming legitimacy and accusing the other of intermeddling. The processes that both parties claim to have followed to ascend to leadership are highly contested and the true position can only be established after hearing the case on merits.

14. The applicant has exhibited a letter, from the deputy registrar general, dated 27/07/2015 (*DMK4*) indicating the office bearers as Bishop David Mulwa Muli, Elizabeth Kamutu Kioko and Jones Mwaluko Nzingi. The trustees are indicated as David Mwiwa Kasyoki, Nicholas Mwangela Mithoka, Patrick Musyoka Ngove and Sammy Nzomo Muthuku.

15. The respondents have criticized the letter and submit that it's a mixture of issues. They contend that the certificate of incorporation showing the registered trustees should come from the lands office and not the office of the Attorney General

16. The respondents have also exhibited a letter dated 19/10/2017 (*RM15*) from the Assistant Registrar of Societies confirming the church's office bearers as Shadrack Ndolo Mutua, Daniel Ndunda Musau and Samuel Kyule Mbondo. Evidently, the letter from the respondent is the most recent and reflects the current position from the relevant Government office.

17. There is however another letter dated 15/02/2018 from the assistant registrar of societies. It has been exhibited as DMK 3A in the applicant's supplementary affidavit. It admits that indeed the office of the registrar of societies has conflicting records of the church's office bearers.

18. From the rival correspondences, it is clear that the applicant's claim of legitimacy has been challenged and is an issue for determination after hearing of the suit. The applicant has not demonstrated that it has a *prima facie* case with high chances of success.

#### **Irreparable harm**

19. The applicant submits that the management and control of the places of worship interferes and affects the rights of members to worship and once this right is interfered with, it cannot be compensated.

20. From the materials before Court, even the relevant Government office does not seem to be certain on who the legitimate office bearers

are. Likewise, the Court is not in a position to confidently conclude that the respondents are dealing with the church affairs illegally hence interfering with the right of members to worship. Infact, if the minutes of the AGM exhibited by the respondents are anything to go by, they seem to command a substantial membership of the church.

21. Further, the materials before Court show that the leadership wrangles have been there for more than 15 years. The respondents have been in the picture this whole time and I do not think that injuncting them now will serve any useful purpose.

**Balance of convenience**

22. The circumstances of this case are such that the balance of convenience lies in not granting the injunction.

**Conclusion**

The court therefore finds that, the application has no merit and thus makes the following orders;

- a) **Application is dismissed.**
- b) **Costs in the main cause.**

**SIGNED, DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF MAY, 2019, IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**