



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 24 OF 2017(OS)

MICHAEL MUSEMBI NDUVA.....1ST PLAINTIFF/APPLICANT

MARY GORETTI GITARI MUNYI.....2ND PLAINTIFF/APPLICANT

URBANUS MUTHAI KINUTHIA.....3RD PLAINTIFF/APPLICANT

SR. CATHERINE MULLIGAN.....4TH PLAINTIFF/APPLICANT

VERSUS

JOHN NDAR.....1ST DEFENDANT/RESPONDENT

SUSAN NJERU.....2ND DEFENDANT/RESPONDENT

ISAYA NYABERA.....3RD DEFENDANT/RESPONDENT

REGISTRAR OF DOCUMENTS.....4TH DEFENDANT/RESPONDENT

RULING

1. The Appellant filed a Notice of Motion dated 24th January, 2017 under the provisions of Order 40 Rules 1, 2 and 7 of the Civil Procedure Rules and sections 1A, 1B, 3A and 63 C of the Civil Procedure Act seeking the following Orders :-

1. ...spent

2. THAT the 1st, 2nd and 3rd Defendants/Respondents by themselves and/or through their employees, servants and/or agents be and are hereby restrained by way of a temporary injunction from further carrying out the Trusteeship or in any way whatsoever interfering with the operations and dealings of the trust.

3. THAT the Defendants/Respondents by themselves and/or through their employees, servants and/or agents be and are hereby restrained by way of a temporary injunction from selling, transferring, charging, mortgaging, disposing of or wasting in any way whatsoever any of the immovable properties managed and held under the Trust.

4. ...Spent

5. THAT the costs of this Application be provided for.

2. The Application is premised on the grounds on the body of the same and on the Supporting Affidavit of **MICHAEL MUSEMBI NDUVA** the 1st Plaintiff/Applicant. The grounds are that, the Society of St. Vincent De Paul is registered dually as an incorporated Trust and as a Society and is an affiliate of Confederation of the Society of Saint Vincent De Paul, the International Office. That the 1st, 2nd and 3rd Defendants/Respondents are strangers to the Trust having ceased membership and Trusteeship following decision of the International Office and notwithstanding notice to vacate office, they have continued to hold in their possession the original Certificate of Incorporation and Official Seal and still taking office duties. The Applicant further deponed that the said persons have attempted to dispose of a Trust's property known as Mombasa/Block XXI/93 without knowledge and approval of the Trustees.

3. The 1st Respondent filed a Replying Affidavit dated 12th May, 2017 in which he deponed that he is a registered trustee of St. Vincent De Paul Society having been appointed as such on 7/3/2006. That the constitutive instrument governing the holding of the office of trustees is

the Trust Deed and that the trusteeship has no affiliation to any international office. The 1st Respondent further deponed that the Trusteeship has no term limit. It was also deponed that the 1st Respondent is not aware of any incident of wastage, destruction, damage or prejudicial dealings with the Trust Properties. The deponent is also unaware of the documents annexed as MMN3 and MMN4 and that he does not have an intention of disposing of the Trust Property.

4. The 2nd Respondent filed Grounds of Opposition dated 13th October, 2017 on the grounds that the applicants are strangers to the affairs of the Society and that the Suit is misconceived since the trust has been operated as required in the Trust Deed that there is no pending danger on any of the society's properties to necessitate issuance of any interrim orders as sought by the applicants and the suit is ill-conceived and premature.

5. A Further Affidavit dated 12th June, 2017 was filed by the Applicants deponing that the suit against Isaya Nyabera was withdrawn on 23rd March, 2017. That, besides the Trust Deed, the trust and the trustees are bound by the rules, regulations and terms relating to the objects of the trust and regulating the affairs and the appointment of trustees and other officers. That the rules of the International Confederation are also binding to the Trust and that the Trust and the Society are not Mutually exclusive. It was further averred that since the 1st defendant was expelled from the Society, he cannot act in administration of the properties of the Society.

6. The Application was canvassed by way of written submissions. The Applicants filed their submissions dated 9th November, 2017. The 1st and 2nd Respondents did not file their submissions while the 3rd Respondent is deceased and the suit against him was withdrawn. The 4th Respondent did not enter appearance.

7. It was submitted by the Applicants that they have a prima facie case and they relied on the case of **Mrao Ltd – Vs - First American Bank of Kenya Ltd & 2 others (2003) KLR 125** that was adopted with approval in **Board of Trustees of African Independent Pentecostal Church of Africa v Peter Mungai Kimani & 12 others [2014] eKLR** where the court held that,

“the applicant must show a prima facie case, which is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

8. The Plaintiff further submitted that although the case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358** settled the conditions for grant of an injunction, the same are said to be unsettled. The Applicant relied on the case of **Ian Bolden Nielsen – Vs - Herman Phillips Steyn & 2 Others (2012) eKLR** as cited in the case of **Peter Mungai** (Supra) where the Court of Appeal held that *“... I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound by the three principles set out in the **Giella – Vs - Cassman Brown** case. The court may look at the circumstances of the case generally and the overriding objective of the law.”*

9. In support of their case, the Applicants submitted that they have demonstrated that the 1st and 2nd Respondents were the registered trustees of the Trust but their appointment was revoked vide an expulsion letter of 24th January, 2011 addressed to the 1st Respondent and a meeting of 22nd October, 2016 removed the 2nd Respondent from the membership of the Trust. The applicants also submitted that Courts have intervened in disputes involving religious factions and granted interlocutory orders. They relied on **HCC 513 of 2007 Bishop Rev. Silas Yego & 3 others – Vs - Daniel Mulei Mburu and 5 others** cited in **Peter Mungai case (supra)** in which there were opposing factions of the AIC church with each faction claiming to be the rightful officials, the court held that there was a triable issue hence, a cause of action for determination by the court to ensure the rules for natural justice are not breached or threatened to be breached. The Court granted an injunction restraining the respondent from interfering in the church activities.

10. I have considered the Application, the Affidavits and grounds of opposition as well as the Applicants' submissions. The law applicable to temporary injunctions is as provided for under the provisions of Order 40 Rules 1 of the Civil Procedure Rule 2010 which provides:-

“2 (1) in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) the court may by order grant such injunction on such terms as to an inquiry into damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit”.

11. Order 40 Rule 1 has been interpreted and applied in many cases as was settled in the **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358** case thus;

“first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”

12. As it has also been submitted by the Applicants, the principles have been modified with time such that courts are now able to consider not only whether the Applicant has established a prima facie case but also look at the circumstances of each case in general and the principles of law.

13. Even where damages could be adequate compensation, the court can as well grant interlocutory orders depending on the circumstance of the case. The Court in **Peter Mungai case (supra)** quoting the case of **Waithaka – Vs - Industrial & Commercial Development**

Corporation 2001 KLR (Ringera J) “held that even where damages would be an adequate remedy, an injunction can issue where the opponent has acted in a high handed and oppressive manner.”

14. It is not in contention that there is a dispute as to whether 1st and 2nd Respondents are bonafide Trustees of the Trust. From the evidence tabled before the Court, the said Respondents are the registered Trustees. However, there is a letter dated 24th January, 2011 expelling the 1st Respondent from the membership of the Trust for non accountability. This raises the legal question as to whether an expelled member of a Trustee can still hold office as such. The 2nd Respondent was allegedly removed from office by virtue of a resolution passed on 16/04/2016. A subsequent meeting was held on 22nd October, 2016 and a resolution was passed confirming the removal of the 1st and 2nd Respondents and appointment of new trustees, the Applicants herein. However, the applicants contend that they are a bonafide trustees.

15. The 1st and 2nd Respondents have custody of the Trust’s Certificate of Incorporation as well as the Seal of the Trust. The Applicants argue that their failure to surrender the said documents has frustrated the affairs of the Trust. It is apparent that the disagreement between the Applicants and the Respondents is likely to affect the smooth running of the trust.

16. Justice Aburili in Peter Mungai case (supra) held that *“The issue herein being leadership in the church, the alleged misrepresentation and/or adorning by the defendants as such church leaders while on suspension is in my view, likely to cause confusion, chaos and or breach of peace in the church which cannot be compensated in terms of money. I am equally persuaded by the holding in Waitthaka – Vs - Industrial & Commercial Development Corporation (2001) KLR p.381 that*

“... by the court in the case of Giella – Vs - Cassman Brown (supra) using the term normally very carefully in instances where an injunction can issue even if damages would be an adequate remedy for injury, the applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind is the strength or otherwise of the applicants case for a violation or a violation threatened or its legal rights and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant, this may move a court of equity to say “money is not everything at all times and in all circumstances and don’t think you can violate another citizen’s right only at the pain of damages.”

17. It has been stated by the Applicants that the Respondents have attempted to dispose of the Trust’s property known as Mombasa/Block XXI/93 without knowledge and approval of the Trustees and this is a basis for the prayers sought. An application to lodge caution on the property has been annexed by the applicants and though no evidence has been tabled to prove the attempted sale, it is important that the properties be preserved and in any event, the Respondents have pleaded that they have not attempted to dispose the said property neither are they disposing any other property of the Trust and therefore the respondents will suffer no prejudice if the orders preserving the properties of the trust are made.

18. Having considered the Application, I find that the Applicants have established an arguable case and on a balance of probability with regard to prayer 3 of the application.

19. With regard to prayer 2, the court may not be in a position to determine who the bonafide trustees of the Trust are, at this stage, on the basis of the documents exhibited. The Court shall have to take viva voce evidence to determine that particular issue. In the premises, I find that the Applicants have not established a prima facie case in that respect.

20. In the end, the court allows prayer 3 of the application while prayer 2 is disallowed. Costs shall be in the cause.

Dated, Signed and Delivered at Nairobi this 12th Day of April, 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....For the Applicant

.....For the Respondent