



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS CIVIL NO 631 OF 2016

GODFREY SIMIYU.....1ST PLAINTIFF
MATHEW KABURU2ND PLAINTIFF
KOBIA MICHUBU.....3RD PLAINTIFF
CHARLES KINOTI.....4TH PLAINTIFF

VERSUS

REV JOSEPH NTOMBURA.....1ST DEFENDANT
METHODIST CHURCH IN KENYA
REGISTERED TRUSTEES.....2ND DEFENDANT(sic)

RULING

INTRODUCTION

1. The Plaintiff’s Notice of Motion application dated and filed on 15th December 2016 was brought pursuant to the provisions of Section 5 of the Judicature Act Cap 8 Laws of Kenya, Sections 3A, 63 (e) of the Civil Procedure Act, Order 51 Rule (1) & (3) of the Civil Procedure Rules (2010) (sic) and all other enabling provisions of the law. It sought the following orders:-

1. THAT the Respondent be committed to prison for a period of six (6) months or for such period as this Honourable court may deem necessary for being in contempt of court by disobeying and breaching Orders granted on 22nd July 2016 by an Order dated 26th July 2016 in Milimani HCC (sic) No 360 of 2015.

2. THAT the costs of this application be borne by the Respondent.

2. The 1st Defendant filed two (2) Notices of Preliminary Objection. The first one was dated 8th December 2017 on even date while the second one was dated and filed on 18th December 2017. This latter Notice had incorporated all the grounds in the former Notice of Preliminary Objection which is what the court opted to deal with for completeness of record.

3. On 28th June 2018, this court directed that both the Plaintiffs Notice of Motion application and the 1st Defendant’s Preliminary Objections would be heard together.

4. The Plaintiffs’ Written Submissions were dated 7th August 2018 and filed on 9th August 2018 while those of the 1st Defendant were dated 1st October 2018 and filed on 2nd October 2018.

5. When the matter came up on 11th October 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFFS’ CASE

6. The Plaintiffs' application was supported by the Affidavit of the 1st Plaintiff.

7. Their case was that the 1st Defendant had breached and disobeyed the court orders granted on 22nd July 2016 in **HCCC No 361 of 2015** in which he had been ordered not to hold or preside as the Presiding Bishop of the Methodist Church of Kenya.

8. They stated that the said Order had been personally served upon him and that it appeared that the 1st Defendant would not obey the same unless he was punished.

9. They therefore urged this court to allow their application and commit the 1st Defendant to six (6) months in prison for contempt of court orders.

THE 1ST DEFENDANT'S CASE

10. In response to the said application the 1st Defendant also swore a Replying Affidavit on 18th December 2017. The same was filed on the same date.

11. He stated that the Plaintiffs had on 18th July 2017 filed an application seeking to have the Methodist Annual Conference suspended but that their application was dismissed. The 2nd Defendant had also filed a related application. He added that an oral application by the Plaintiffs for stay of execution was also dismissed.

12. It was his contention that the court had found that the Plaintiffs had been excommunicated by the Church and that since the said excommunication had not been challenged to date, they had no *locus standi* to file the present application.

13. He also pointed out that his term as the Presiding Bishop came to an end during the Conference they had wanted to stop and that he obtained a new mandate from 4th August 2017 to be a Presiding Bishop. He contended that he had never been served with any notice.

14. The grounds in his Notice of Preliminary Objection dated and filed on 8th December 2017 were as follows:

- 1. THAT the Plaintiffs did not have locus to bring and/or maintain the Application or the suit.**
- 2. THAT the application was premised on orders irregularly extracted and therefore null and void.**
- 3. THAT the application had been overtaken by events.**
- 4. THAT the substratum of the suit and/or the proceedings was no longer existent.**

15. In his Notice of Preliminary Objection dated and filed on 18th December 2017, he added the following grounds:-

- 1. THAT the application was incompetent, flawed in procedure and incurably defective.**
- 2. THAT the application was not made in the proceedings in which the order the subject of contempt was made.**

16. He therefore urged this court to dismiss the Plaintiffs' present application.

LEGAL ANALYSIS

17. The Plaintiffs had contended that the 1st Defendant had disobeyed the court orders of 22nd July 2016 and that the same had not been set aside and/or challenged in any way. It was their averment that the 1st Defendant orchestrated a shambolic election after the suspension orders were lifted on 4th August 2017 and that no subsequent notice of another annual conference was issued as per the Church Standing Orders after the conference that was to run from 31st July 2017 to 3rd August 2017 was suspended.

18. They referred this court to the cases of **Awadh vs Marumbu (No 2) 2014 1 KLR** and **National Lottery Limited vs Betting Control & Licensing Board [2001]e KLR** where the common thread was that courts must guard and protect their dignity by ensuring that their orders are obeyed and when not obeyed, the contemnors should be punished.

19. They were emphatic that they had *locus standi* to institute the proceedings herein because the purported excommunication came through Minutes dated 13th August 2016 after the court had issued the orders of 22nd July 2016 and not any other subsequent orders.

20. They stated that there were no disciplinary proceedings against them and that the said Minutes of 13th August 2016 were an afterthought of the 1st Defendant who chaired the meeting. It was their argument that disciplinary cases of laity members were dealt with by the Local Church.

21. On his part the 1st Defendant submitted that the Supporting Affidavit contained blanket allegations with no particulars and therefore lacked clarity. He relied on the case of **Kyoga Hauliers Limited vs Long Distance Truck Drivers & Allied Workers Union [2015] eKLR**.

Further, he stated that the Plaintiffs had not exhibited the orders he was purported to have disobeyed and that he was not served with the same.

22. He stated that the Plaintiffs ought to have served him with the order with an endorsement of the penal consequences for its disobedience. He placed reliance on the case of **Ochieng & Another vs Pamela Apondi Omino [2015] eKLR** in this regard where it was held that procedural steps set out in Rules for contempt proceedings must be strictly adhered to.

23. He added that the contempt of court proceedings ought to be done in the proceedings where the order is said to have been disobeyed.

24. It was his further averment that the present application had been overtaken by events as he was no longer the Presiding Bishop of the Methodist Church and hence the substratum of the suit and the very essence of the order had been overtaken by events.

25. He further contended that the orders were only in respect of this first term of office and not the second term when he was elected as the Presiding Bishop of the Methodist Church

26. A careful perusal of his Replying Affidavit showed that the Plaintiffs had filed the proceedings herein in their personal capacities. They were the applicants in **HCCC No 360 of 2015** while the Defendants herein were still the Defendants in that case. In her Ruling of 4th August 2017, Njuguna J found that the Plaintiffs herein had been excommunicated from being members of the Methodist Church of Kenya and that they had no *locus standi* to bring the application that was before her.

27. As was rightly observed by the 1st Defendant, the Plaintiffs did not exhibit any communication to demonstrate that their excommunication had been set aside and/or reviewed. Whilst this court did not have the pleadings in **HCCC No 360 of 2015** to ascertain the position, the Plaintiffs did not rebut the 1st Defendant's assertion that they had been excommunicated by the Methodist Church of Kenya.

28. It therefore followed that if they had been excommunicated, they had no business meddling with the affairs of Methodist Church of Kenya. Whereas they were at liberty to file suit against any party they wished to seek relief from, they had to demonstrate that there was some sort of relationship or privity between them. If that were not the criteria of bringing matters to court, it would be a jungle out there with people being slapped with suits from people they did not know.

29. Notably, unless the proceedings herein were public interest litigation or brought pursuant to the provisions of Article 22 or 258 of the Constitution of Kenya, 2010, the Plaintiffs could not purport to seek reliefs against the Defendants herein in particular against the 1st Defendant herein if they had no connection, their relationship having been severed through excommunication. The question of whether or not the process excommunication was legal not that was before this court for hearing and determination.

30. Going further, this court also agreed with the 1st Defendant that the order he was purported to have breached was not annexed to the Plaintiffs' Supporting Affidavit. Indeed, this court had no way of knowing which order he was purported to have breached. The Plaintiffs ought to have exhibited the same in their present application and demonstrated that the same had an endorsement of the penal notice showing the consequences of disobedience and proof of service upon the 1st Respondent. Indeed, proof of service is a critical prerequisite in an application for contempt of court proceedings as a court must be satisfied that the order in question has already been served on a contemnour.

31. The fact that they were issued with an order on 9th December 2016 granting them leave to take out contempt proceedings against the 1st Defendant was not proof that there was any contempt on his part. It was a matter of evidence. It was in this application that the Plaintiffs ought to have demonstrated how the 1st Defendant breached the order of 22nd July 2016, if at all.

32. The Plaintiffs failed to demonstrate that the orders they were granted on 22nd July 2016 had barred the 1st Respondent from carrying himself as a Presiding Bishop of Methodist Church of Kenya and if at all the same were final orders. As the said order was also not placed before this court, it would not therefore have known the period the said order was in force.

33. This court also agreed with the 1st Defendant that the correct procedure of instituting contempt of court proceedings must be adhered to. The said proceedings must be lodged in the matter the alleged breach is said to have occurred. It should never be in a separate file. This is because the entire record must be placed before the court hearing the application for contempt of court.

34. Accordingly, having considered the Affidavit evidence, the Written Submissions and the case law that was relied upon by the respective parties, this court was not satisfied that the Plaintiffs had demonstrated that the 1st Defendant had been in breach of any court order. Notably, courts must jealously guard their integrity and stamp their authority by ensuring that court orders are complied with. They must never shy away from punishing contemnours because failing to do so has the risk of making a mockery of the entire judicial system.

35. Having said so, courts should not be so overzealous to punish parties merely because their opponents have alleged that they have breached court orders. They must be satisfied that such contempt exists. In the absence of such proof, they must decline to grant such drastic orders because they have the potential of restraining a person's freedom as enshrined in Article 29 of the Constitution of Kenya, 2010.

36. Article 29(a) of the Constitution of Kenya provides as follows:-

“Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without unjust cause.”

DISPOSITION

37. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated and filed on 15th December 2016 was not merited and the same is hereby dismissed with costs to the 1st Defendant. The 1st Defendant's Preliminary Objection dated and filed on 18th December 2017 is allowed in terms of Ground Nos (1), (2) and (3) therein. This court was unable to pronounce itself on Ground Nos (4), (5) and (6) of the said Notice of Preliminary Objection because it did not have the benefit of seeing **Milimani HCCC 360 of 2015**.

38. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of December 2018

J. KAMAU

JUDGE