



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 19 OF 2016

RICHARD OWINO.....1ST PLAINTIFF/APPLICANT

PASTIOR CHARLES OPIYO.....2ND PLAINTIFF/APPLICANT

SYLVANUS MILURE.....3RD PLAINTIFF/APPLICANT

VERSUS

ARCHBISHOP RICHARD ABWAO.....1ST DEFENDANT/RESPONDENT

BISHOP ANJELIUS OCHIEW.....2ND DEFENDANT/RESPONDENT

JARED POLA.....3RD DEFENDANT/RESPONDENT

GEORGE OMONDI OSUMA.....4TH DEFENDANT/RESPONDENT

DING'O LANG'O.....5TH DEFENDANT/RESPONDENT

DAVID OUKO.....6TH DEFENDANT/RESPONDENT

DAVID ONYACH.....7TH DEFENDANT/RESPONDENT

JOHN ODHIAMBO ODIRE.....8TH DEFENDANT/RESPONDENT

CHARLES OCHIENG.....9TH DEFENDANT/RESPONDENT

MUSANDA CHRISTIAN CHURCH OF KENYA....10TH DEFENDANT/RESPONDENT

RULING

By a notice of motion filed on 9th December 2016; the plaintiffs/applicants claim against defendants/respondents is for orders:-

1) THAT this application be certified urgent and service thereof be dispensed with at the first instance and matter be heard on priority basis

2) THAT pending the hearing and determination of this application *inter partes*, a stay order be issued against all intended activities, functions, seminars, meetings and gatherings allegedly organized by the respondents as official of Musanda Christian Church Of Kenya

3) **THAT pending the hearing and determination of this suit, a stay order be issued against all intended activities, functions, seminars, meetings and gatherings allegedly organized by the respondents as official of Musanda Christian Church Of Kenya**

4) **THAT pending the hearing and determination of this application *inter partes*, the 1st and 2nd respondents be compelled to vacate office to pave way for investigations into their conduct as officials of Musanda Christian Church Of Kenya.**

5) **THAT pending the hearing and determination of this suit, the 1st and 2nd respondents be compelled to vacate office to pave way for investigations into their conduct as officials of Musanda Christian Church Of Kenya.**

6) **THAT pending the hearing and determination of this application *inter partes*, there be a temporary injunction restraining the respondents acting by themselves or by their agents from interfering with the management affairs of Musanda Christian Church Of Kenya.**

7) **THAT pending the hearing and determination of this suit, there be a temporary injunction restraining the respondents acting by themselves or by their agents from interfering with the management affairs of Musanda Christian Church Of Kenya.**

8) **Costs be provided for**

The application is based on the grounds among others:-

- i. That the defendants/respondents among other persons were suspended following a resolution of a meeting held on 9th October 2016
- ii. That the defendants/respondents are yet to leave office to give room for investigations of the allegations leveled against them as required by the society's constitution
- iii. That the 1st and 2nd defendants/respondents are defiant to leave office and still participate on the day to day running of the Society
- iv. That the society has a constitution which provides clear guidelines on how to run the affairs of the same procedurally and the defendants/respondents are out to destroy the organization and peaceful co-existence of the church

The application is also supported by 1st plaintiff/applicant's affidavit sworn on 6.12.16 in which he reiterates the grounds on the face of the application. He describes himself as the secretary of the 10th defendant/respondent and avers that he has the authority of the 2nd and 3rd applicants to swear the affidavit in support of this application. He avers that the defendants/respondents among other persons were suspended following a resolution of a meeting held on 9th October 2016 whose minutes are attached and marked **RO-1**. He furthers that the suspension was based among other accusations on the defendants/respondents failure to attend meetings including the meeting held on 9th October 2016. Attached thereto are notifications dated 1.5.16; 18.7.16 and 12.9.16 marked **RO-2**. He further avers that the defendants/respondents have failed to observe the Society's Constitution and that the Registrar of Society was by a letter dated 11.10.16 marked **RO-3** requested to confirm their suspension but the confirmation has not been received.

The application is opposed on the grounds set out in a replying affidavit sworn on 15.12.16 by the 1st defendant/respondent. He denies that the defendants/respondents were invited to any of the alleged meetings and especially the meeting of 9.10.16 where they were allegedly suspended. He avers that the applicants/plaintiffs have breached the constitution insofar as the procedure for calling of meetings is concerned. He avers that the applicants/plaintiffs left the church and the defendants/respondents have appointed other leaders to fill the voids left by the applicants/plaintiffs.

I have considered the notice of motion, the affidavits and annexures on record and submissions filed on behalf of the parties. Prayers 1, 2, 4 and 6 have already been spent. The main ground upon this application is based is that the defendants/respondents among other persons were suspended following a resolution of a meeting held on 9th October 2016.

Issues for determination

1. Whether the defendants/respondents were suspended following a resolution of a meeting held on 9th October 2016.
2. Whether the 1st and 2nd respondents should be compelled to vacate office to pave way for investigations into their conduct as officials of Musanda Christian Church Of Kenya.
3. Whether a temporary injunction should issue restraining the respondents acting by themselves or by their agents from interfering with the management affairs of Musanda Christian Church Of Kenya.

There is no denying that the activities of Musanda Christian Church Of Kenya (**hereinafter referred to as the Society**) are guided by the Society's constitution of 2007. I will therefore consider each of the grounds insofar as they relate to the constitution as set out herein below.

1. Were the defendants/respondents suspended following a resolution of a meeting held on 9th October 2016?

It is on record that the 1st and 2nd defendants/respondents are chairman and assistant chairman of the Society.

Article 5 (c) of the constitution of the Society provides that:-

“The secretary shall deal with the correspondence of the church under the general supervision of the committee.

He issues notices covering all meetings of eth committee and all general meetings and the preservation of all records of proceedings of the church and the committee”.

The article mandates the 1st plaintiff/applicant who is the secretary of the society to issue notices of all meetings. He avers that notices dated 1.5.16; 18.7.16 and 12.9.16 marked **RO-2** calling the office bearers and committee members for meetings on 22.5.16, 4.8.16 and 9.10.16 respectively were served on the defendants/respondents. The 1st defendant/respondent in his affidavit sworn on 15.12.16 denies that the defendants/respondents were invited to any of the alleged meetings and especially the meeting of 9.10.16 where they were allegedly suspended.

It is trite law that he who alleges must prove it and this is well stated in the Evidence Act, Cap 80 of the Laws of Kenya and specifically Sections 107 and 109 thereof which provide that;

Section 107.

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 109.

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The plaintiff/applicants have failed to demonstrate that the defendants/respondents were invited to any of the alleged meetings and particularly the meeting of 9.10.16 where they were allegedly suspended. Procedural fairness has embedded in it the age old natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done. (See **Kanda vs. Government of Malay {1962} AC 322,337 (per Denning LJ)**). Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. There is no doubt that the defendants/applicants were not given a chance to respond to the accusations leveled against them and the alleged suspension is therefore inappropriate.

Further to the foregoing; I have considered the provisions of Article 5 (a) of the constitution of the Society which provides that:-

“The chairman shall unless prevented by illness or other sufficient cause preside over all meetings of the committee and at all general meetings.

The minutes marked **R0-1** clearly show that the meeting of 9.10.16 in which the defendants/respondents were allegedly suspended was not chaired by the chairman. As stated hereinabove; the chairman was not invited to that meeting.

Consequently; this court finds that the meeting of 9.10.16 did not comply with the provisions of the Constitution of the society and the purported suspension is therefore null and void.

2. Whether the 1st and 2nd respondents should be compelled to vacate office?

I have found that the purported suspension of the 1st and 2nd respondents is null and void. They therefore cannot be compelled to vacate office on the basis of an invalid resolution.

3. Whether a temporary injunction should issue restraining the respondents acting by themselves or by their agents from interfering with the management affairs of Musanda Christian Church Of Kenya.

The conditions for the grant of an interlocutory injunction were settled in the case of **Giella v Cassman Brown [1973] EA 358**. The applicant must

- i. Show a prima facie case with a probability of success
- ii. That if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award of damages
- iii. If in doubt the court shall decide the application on the balance of convenience.

In this case, what would happen if the injunction sought is granted in the interim and remains in force until this suit is heard and determined on its merits? The answer is obvious. That the church officials will remain ousted from office yet they have not been given a chance to ventilate their case, simply because some Society members have without authority purported to suspend them. On the other hand, the court will also be restraining those church officials who were elected from continuing to discharge their authorized duties, the main one being to preach the word of God to all people and believers. The law frowns on high handed oppressive orders that are only intended to bring chaos. The orders sought if granted, will in my view, not meet the ends of justice and neither will they serve the purpose of resolving the dispute and /or achieving justice for the parties, but might escalate the dispute to greater levels. It would also result in an injustice to the elected officials who have not been given an opportunity to be heard thereby condemning them unheard, thus going against the rules of natural justice. A court of law has no jurisdiction to do injustice. As was held in the case of **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** (supra), ***there would be a much larger risk of injustice if the court found in favour of the applicants, than if it determined this application in favour of the respondent.***

From the above exposition, I find that the balance of convenience tilts in favour of the respondents whose mandate as church leaders is to ensure that the legitimate spiritual expectations of the church congregants are met and the institution of the church continue to run as designed without any interruptions. As no prejudice will be suffered by the applicants herein if the orders sought are denied, and which prejudice or loss has not been demonstrated, this court finds that there is no equitable reality basis established for the exercise of its discretion in favour of the applicants and no court of equity ought to allow it.

In conclusion I decline to grant any of the reliefs sought in the notice of motion filed on 9th December 2016. As costs do follow the event, there is no reason why the defendants should be deprived of the *costs of this application. It is so ordered.*

DATED AND DELIVERED THIS 22nd DAY OF June 2017

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Plaintiffs/Applicants - Mr. Dome

Defendants/Respondents - Mr. Mung'ao