



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 11 OF 2015

DAVID NYANTAR.....1ST PLAINTIFF
JEREMIAAH MOMANYI.....2ND PLAINTIFF
FREDRICK NYAMONGO OCHANGA.....3RD PLAINTIFF
EUNICE OBONYO OSORO.....4TH PLAINTIFF
FLORENCE KEMUNTO NYABERA.....5TH PLAINTIFF

-VERSUS-

CHURCH OF GOD IN EAST AFRICA (KENYA)

REGISTERED TRUSTEES.....1ST DEFENDANT

RT, REV JAMES OBUNDE (*sued on his own personal capacity*)

and as an official Deputy Archbishop an administrator of and on

behalf of the church of God in East Africa Kenya.....2ND DEFENDANT

REV. JAMES MONYENYE MOGIRE (*sued on his own*)

capacity as a pastor, representative of and on behalf

of Getembe Church of God Kenya).....3RD DEFENDANT

EXECUTIVE COUNCIL CHURCH OF GOD IN EAST AFRICA.....4TH DEFENDANT

ONGERA ROGERS MOTURI.....5TH DEFENDANT

RULING

1. The application dated 13th May 2015 is made under Order 40 Rules (1) and (3) and Order 51 Rule (1)

of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act.

The plaintiffs/applicants essentially seek temporary injunction orders to restrain the defendants/respondents from using, referring, circulating, publishing or causing to be published or circulated unreferenced letter dated 11/2014 signed by Rt. Rev. James Obunde, Deputy Archbishop-Administration Church of God in East Africa (Kenya) or print or circulate any new and/or similar defamatory letter, words and/or contents against the plaintiffs until this suit is heard and determined and from restraining, blocking, denying. Preventing and limiting the plaintiff's worshipping rights, ingress, egress, entering and or accessing Getembe Church of God situated at Kisii Municipality/Block III/567 until this suit is heard and determined.

2. The grounds in support of the application are contained in the appropriate notice of motion dated 13th May 2015 and are fortified by the averments contained in the supporting affidavit deposed by the first plaintiff **David Nyantari**, dated 13th May 2015.

Replying affidavits dated 19th September 2015 and 7th October 2015 deposed by the fourth defendant, **Rt. Rev. Monyenye Mogire**, and the second defendant, **Rt. Rev. James Obunde**, respectively were filed by the first to the fourth defendants in opposition to the application.

The fifth defendant **Ong'era Rogers Moturi** also filed a replying affidavit dated 15th July 2015, in opposition to the application. With the consent of all the parties, the application was argued by way of written submissions.

In that regard, submissions were filed on behalf of the plaintiffs by **Messrs Osoro Omwoyo & Co. Advocates** and on behalf of the first, second, third and fourth defendants by **Messrs. Mutonyi, Mbiyu & Co. Advocates** and on behalf of the fifth defendant by **Messrs Mose Nyambega & Co. Advocates**. These have all been given due consideration by this court.

3. At this juncture, the basic issue for determination is whether the plaintiffs are entitled to temporary injunction orders against the defendants. The present application is made under Order 40 Rules (1) of the CPR, which basically provides for temporary injunction for purposes of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of property.

From the plaintiffs statement of claim dated 13th May 2015, it is clear that this suit had nothing to do with preservation of any property in danger of being wasted, damaged or alienated by any party to the suit. Instead, the suit has everything to do with worshipping rights, ingress and egress to Getembe Church of God premises within Kisii Municipality as well as publication, circulation and distribution of a letter deemed to be defamatory to the plaintiffs.

Therefore, the application is misconceived in as much as it is brought under Order 40 Rule (1) instead of Order 40 Rule (2) of the CPR.

Nonetheless, the court is more inclined to consider the substance of the claim rather than procedural rules.

4. A temporary injunction may be granted on the basis of the principles set out in the famous case of **Giella VS Cassman Brown & Co. Ltd (1973) EA 358**, to wit:-

- i. An applicant must show a "*prima facie*" case with a probability of success.
- ii. A temporary 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.
- iii. If the court is in doubt, it will decide an application on the balance of convenience.

However, in cases of defamation, the court's jurisdiction to grant a temporary injunction is exercised with

the greatest care so that an injunction is granted only in the clearest possible cases. This was held by the High Court in the case of ***Cheserem .vs. Immediate Media Services & 4 Others [2000] KLR 187.*** The court went on to state that a court must be satisfied that the words or matters complained of are libellous and that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Further, the court held that actions on cases of defamation bring out a conflict between private interest and public interest and this is particularly so in a country with a constitution that enshrines fundamental rights and freedom of the individual.

5. Herein, it is presupposed that the plaintiff's worshipping rights have been violated by the defendants and that the contents or words or images contained in a letter by the defendants dated 11/2014 are defamatory to the plaintiffs. Without going into the details and merits or demerits of the dispute and with regard to the first condition for grant of a temporary injunction i.e whether the plaintiffs have shown a "*prima – facie*" with a probability of success particularly in relation to the aspect of defamation, it is evident from the averments in the supporting affidavit by the plaintiffs dated 13th May 2015, that the source of the entire dispute is the unreferenced letter dated 11/2014 said to have been signed by the second defendant. The plaintiffs alleged that the defendants acted on the strength of that letter to block, refuse, deny, present and limit them from exercising their worshipping rights including partaking the holy communion, participating in the church elections, worshipping, singing and praising God in church, attending morning glory and evening prayers, participating in the construction of their Church and other general developments and participating in decision making of the church activities and functions.

6. However, the averments contained in the replying affidavits by the second and fourth defendants dated 7th October 2015, and 19th September 2015, respectively indicate that despite the problems emerging at the Getembe Church of God, the plaintiffs continued to attend church services up to the time that they stopped doing so on that own volition. That, they (plaintiffs) were eventually ex-communicated from the church for breaching the church's Constitution and for causing disruptions at the church while demanding the transfer of the fourth defendant. This action taken against them effectively removed them from the membership of the Church of God in East Africa (Kenya). It is therefore doubtful whether they would have a good case against the defendants based on the alleged violation of their rights of worship as members of the church.

7. With regard to the unreferenced letter dated 11/2014 the plaintiffs allege that it was defamatory in the sense that it contained allegations against them to the effect that they had misappropriated church funds, had told blatant lies aimed at maligning and slandering the senior pastor and area overseer of the church, had incited a section of church members to unprocedurally lock the church and had masqueraded as bona-fide officials of the Getembe Church of God.

In his replying affidavit, the second defendant indicated that the plaintiffs were ex-communicated for breach of the church's constitution and causing problems at Getembe Church and only after a report against them was made to the Executive Council of the Church of God in East Africa (Kenya). It was thus resolved by the church on the 9th September 2014 that the plaintiffs do cease to be members of the Getembe Church of God. A letter dated 11th September 2014 was thereafter served upon the plaintiffs who opted not to appeal but continued to attend church services.

8. The plaintiffs indicated that the offensive letter was that dated 11/2014 signed by the second defendant and annexed in the affidavit dated 29th December 2014 in a previous suit i.e. EIC suit No. 484 of 2014.

The said affidavit was deponed by the fifth defendant **Ong'era Rogers Moturi**, and this explains why he was enjoined in this suit together with the rest of the defendants. He produced the material letter which the plaintiffs rely on herein to show that they were defamed by the defendants.

A perusal of the letter indicates that it was addressed to the plaintiffs informing them of the decision of Executive Committee of the Executive Council of the Church of God in East Africa (Kenya) to exclude them from membership of Getembe Church of God for specified reasons.

The letter was copied to the Archbishop, all executive committee members, the chairman-urban ministries and the overseer, Getembe area.

9. Being the official communication of the decision taken against the plaintiffs by the church and the reasons thereof it is doubtful whether the contents of the letter would be defamatory especially given the limited number of persons it was circulated to officially. Besides, the circulation of the letter by the fifth defendant was effected in the course of judicial proceedings to establish the fact that the plaintiffs were no longer members of the material church at Getembe.

From all the foregoing, this court is not satisfied that the plaintiffs have fulfilled the first condition for grant of a temporary injunction.

10. With regard to the second condition i.e. a temporary 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, it is apparent that this suit is essentially a defamation suit for which damages are a readily available remedy. It is for that reason that the plaintiffs pray for general damages for defamation together with punitive and exemplary damages against the defendants. They shall therefore not suffer irreparable damage or injury in the absence of a temporary injunction pending the hearing and determination of this suit.

11. In sum, the present application is devoid of merit. It must and is hereby dismissed with costs to the defendants.

Ordered accordingly.

J.R. Karanja

Judge

[Delivered and signed this 28th day January 2016].