



REPUBLIC OF KENYA
IN THE HIGHCOURT OF KENYA AT KAKAMEGA
CONSTITUTIONAL PETITION NO. 13 OF 2015

BETWEEN

AINEA W. KARANJA & 3 OTHERS -----APPLICANTS

AND

REV. PETER INUANI & 3 OTHERSRESPONDENTS

RULING

Introduction

1. The applicants herein filed their Notice of Motion dated 03/06/2015 under certificate of Urgency seeking injunctive orders against the Respondents whether acting in person and through their agents and or other parties restraining them from arresting and preventing the petitioners and other church members to worship at Ivona Assembly Church P.A.G Kenya. The applicants also asked for provision of costs for the application.
2. The application was premised on four grounds set out on the face of the application and supported by the affidavit sworn by the 1st applicant. The affidavit though duly signed and commissioned by a commissioner for oaths is not dated. From the grounds, it is alleged that the applicants are among other church members of Ivona Assembly Church P.A.G(K) who have been arbitrarily and unlawfully locked from accessing their church premises and prevented from worshipping therein by the Respondents. The applicants contend that such arbitrariness on the part of the Respondents in an affront to the applicants' constitutional right to assembly and worship. The applicants also allege that they have been threatened with arrest if they dare step in the church premises.
3. At the exparte appearance on 11.06.2015 prayer 2 of the application was allowed for a period of 14 days. The applicants were ordered to serve the application upon the respondents in readiness for interparties hearing on 23.06.2015.

The submissions

4. Though the matter did not proceed to hearing on 23/06/2015 the parties agreed to canvass the application by way of written submissions for highlightin of the submissions on 02/07/2015. The matter did not proceed on 02/07/2015 for reasons that the respondents served their replying affidavits late. The matter was rescheduled for interparties hearing on 14/07/2015 during which Mr. Athung'a advocate for the respondents submitted that the applicants herein do not belong to Ivona Assembly Church (P.A.G (K) and that infact all the applicants are members of Chavagami District where the District overseer is from Chavugami P.A.G District. It was the contention of the Respondents that it is the applicants who are interfering with the smooth running of the church.

5. It was further submitted that the applicants have not adhered to the church constitution in bringing this matter to Court and in particular Articles 9 and 22 thereof which provide the mechanism for resolving disputes within the church. Counsel urged the court to find that the applicants have not come to court with clean hands and to dismiss their application.

6. It was also contended on behalf of the respondents that as a result of the 1st applicant's unruly conduct, he was arraigned before the Vihiga SPMC in Criminal case No. 359 of 2015 wherein he is charged with the offence of assault causing actual bodily harm Contrary to Section 251 of the Penal Code. He is alleged to have assaulted Japhet Agaye on the 10/05/2015 at Kidundu Sub-Location within Vihiga County.

7. Because Mr. Amasakha for the applicants came to court after Mr. Athung'a for the respondents was already on his feet he made his submissions later. He submitted that there was no doubt that the applicants' right to worship had been violated and that this being the case the provisions of the church constitution could not over ride the provisions of the Bill of Rights – chapter four of the constitution. It was also submitted that the dispute herein has been fuelled by the respondents who have planted their own pastor on a church where the said pastor has no authority to serve

8. While admitting that the 2nd – 4th petitioner/applicants are not members of the Chavungami District Mr. Amasakha submitted that they were still members of the PAG Church Kenya. Counsel also submitted that the church constitution was silent on what happens when an application for a district is pending. It was counsel's view that in such circumstances, there should be a temporary membership under the rules. Counsel pointed to the provisions of article 6(4) of the Church Constitution which does not provide for membership cards.

9. Regarding the criminal case against the 1st applicant counsel submitted that until proved guilty by a competent court the 1st applicant enjoys the presumption that he is innocent and thereafter that such charges should not be used against the said 1st applicant in these proceedings. Counsel also urged the court to note that these allegations were made against the 1st applicant after the petition herein was filed.

10. Finally counsel submitted that it would be premature to strike out the petition at this stage.

11. In reply Mr. Athung'a submitted that since the applicants have confirmed that they belong to Chavungami District of the P.A.G then their instant case has no basis. He urged this court to dismiss not only the application but the petition as well and to find that the applicants are simply vexing the court.

The petition

12. The petition which was filed contemporaneously with the instant application seeks the following orders;-

a) A declaration that the action of the respondents of limiting the petitioners' right to worship at Ivona Assembly P.A.G (k) Premises and closing of the church premises is unconstitutional, null and void.

b) A permanent injunction be issued against the respondents jointly and severally whether acting in person or through their agents and or servants from intimidating, harassing by threats of arrest and or in any way stopping the petitioners and other church members of Ivona Assembly PAG (k) from worship at their church premises.

The law

13. The principles governing the grants of injunctions are those set out in the famous case of **Giella – vrs – Cassman Brown & Co. Ltd (1973) EA 358**. These principles are as follows;-

i) The applicant must show a prima facie with a probability of success

ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury

iii) When the court is in doubt, it will decide the application on the balance of convenience.

Analysis and findings

14. In the instant application the applicants have admitted that they are not members of the church which they allege they are being prevented from using by the respondents. If that be the case, there is no injury that they are likely to suffer if the orders sought herein are not granted. Further this court is of the considered view that they do not have a prima facie case because that case is premised on facts that do not exist. In any event, I have read through the church constitution and I find as rightly submitted by counsel for the respondents that in bringing this application to court the applicants are in total disregard of their own church constitution. The application before court is thereof premature.

15. More fundamentally the affidavit filed in support of the application does not meet the requirements of section 5 of the Oaths and Statutory Declarations Act, Cap 15 of the Laws of Kenya for the same does not contain the date on which it was made. Such an affidavit being a mere piece of paper is liable to being struck out and I proceed to do so. What this means is that the application is not supported by the facts referred to in the affidavit that has been struck out.

Conclusion.

16. In the premises, I find and hold that the Notice of Motion dated 03/06/2015 does not have any merit and the same is hereby dismissed with costs to the respondents. The interim Order of injunction issued on 11/06/2015 be and is hereby set aside.

17. As for the petition, I am of the considered view that the petitioners/Applicants should have an opportunity to be heard on it. Whether or not they succeed is a matter for the court that will be seized of the matter when the time for hearing comes.

Orders accordingly

Ruling delivered, dated and signed in open court at Kakamega this...31st day of July.....2015

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Amasakha.....for the Petitioner/Applicants

Mr. Ombaye for Athung'a.....for the Respondents

N/Afor 3rd and 4th respondents

Mr. OkoitCourt Assistants