



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 423 of 2012

WILLIAM CHARLES FRYDA..... PLAINTIFF

VERSUS

1. JOHN CARDINAL NJUE

2. MARIE THERESE GACAMBI.....DEFENDANTS

RULING

1. The Plaintiff seeks the following main reliefs in his Complaint dated 28th August 2012 –
 - a. A perpetual injunction restraining the 1st and 2nd Defendants from interfering with the Plaintiff's activities and personal liberties including the Plaintiff's membership of the Maryknoll fathers and brothers society and the Plaintiff's continued peaceable stay in the country;
 - b. A declaration that the 1st and 2nd Defendants are not entitled to interfere in the resolution of the existing dispute regarding the ownership and running of St. Mary's Mission Hospitals Nairobi and Elementaita other than through the already filed court cases or other recognized judicial process;
 - c. General damages for wrongful interference with the Plaintiff's trade occupation and business.
2. It is however clear from the body of the complaint that the quarrel between the Plaintiff and the Defendants relates to ownership of some pieces of land in Nairobi County and in Nakuru County upon which two hospitals have been built. The quarrel also relates to the management of the two hospitals. These major issues over the ownership of those no doubt valuable properties and the management of the hospitals built thereon appear to be the main issues in at least two other suits between the parties, which suits may include other parties. These other suits are **Nakuru HCCC No. 224 of 2010** and **Nakuru HCCC No. 65B of 2012 (formerly Nairobi HCCC No. 9 of 2011)**.
3. The Defendants duly entered appearance and filed defence.
4. The 1st Defendant then filed notice of motion dated 28th November 2012 which is the subject of this ruling. It is brought under **sections 59B and 59C of the Civil Procedure Act, Cap 21, Orders 46 rule 19 & 51 rule 1 of the Civil Procedure Rules and Article 159(2) (a) & (c) of the Constitution of Kenya**. He seeks three main orders as follows -

“(a) That the court do refer the matter to arbitration, a statutory duty conferred on the judiciary/court to refer suitable cases to alternative dispute resolution.

(b) That the applicant as the head of the catholic church in Kenya be allowed to constitute and/or establish a competent committee/tribunal to hear and determine the dispute in question in accordance with the provisions of canon law 1288 and 1427.

© That the media be kept out of this matter and be stopped and barred from making any comments/reports in the print and electronic media.”

5. The Plaintiff has opposed the application, mainly upon the ground that the same is not legally sustainable.

6. I have considered the submissions of learned counsels appearing, including the cases cited.

7. There are two main legal issues to be determined in this application. The first one is whether the court has jurisdiction in law to refer this suit to arbitration without the consent of the parties. The second issue is whether the court can lawfully bar the media from commenting or reporting on this case.

8. Regarding arbitration, Article 159(2)(c) of the Constitution provides as follows –

“159. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted....”

9. The Constitution merely imposes upon the court the obligation to promote arbitration and other alternative forms of dispute resolution. That means that such alternative dispute resolution mechanisms must otherwise be provided for by law.

10. **Section 59** of the Civil Procedure Act provides as follows –

“59. All references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.”

11. Rules relating to arbitration are to be found in **Order 46** of the Civil Procedure Rules. Rule 1 of that order provides as follows –

"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced apply to the court for an order of reference"

12. The wording of this rule is clear. The court has no jurisdiction to refer any matter in difference between the parties to arbitration except by consent of all the parties.

13. **Sections 59B** and **59C** of the Civil Procedure Act provide as follows –

"59B. (1) The Court may–

(a) on the request of the parties concerned; or

(b) where it deems it appropriate to do so; or

(c) where the law so requires, direct that any dispute presented before it be referred to mediation."

"59C. (1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral."

14. Under these provisions, the court has jurisdiction to refer any matter in dispute to alternative dispute resolution mechanisms other than arbitration without the consent of the parties. But as already

observed, the dispute in this suit appears to be intimately connected with the dispute in at least two other suits already quoted. It is doubtful that resolution of one of the suits without resolution of the disputes in the other suits will serve any useful purpose. It may be necessary at some point to consolidate all these suits in order to effectively and finally resolve the dispute between the parties. I therefore do not consider it appropriate to promote mediation or other form of dispute resolution at this stage of the proceedings.

15. With regard to barring the media from reporting on this case, no compelling reason has been demonstrated why this is necessary. There is no allegation that any media house has misrepresented any aspect of this suit or that they are likely to so misreport to the detriment of any party. It must be remembered that access to information as provided for in **Article 35** of the Constitution is one of the rights and fundamental freedoms in our **Bill of Rights**. Whereas the court no doubt has jurisdiction to limit reporting on its proceedings or impose conditionality for such reportage, it has not been demonstrated that there is any need at this stage of the proceedings to invoke that jurisdiction.

16. In the event I find no merit in this application. Accordingly the same is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF APRIL 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2013