



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION CASE NO. 22 OF 2013

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLE 19, 20, 21, 22, 23, 27, 32, 33, 36
& 50**

JACOB MBAU NYAA.....1ST PETITIONER

MONICA MBAU.....2ND PETITIONER

KYALO MALUKI.....3RD PETITIONER

JANET MUTUO KYALO.....4TH PETITIONER

CECILIA DAVID.....5TH PETITIONER

EDWARD MULYUNGI NDULI.....6TH PETITIONER

TABITHA MULYUNGI.....7TH PETITIONER

JONATHAN KIMANZI MBUI.....8TH PETITIONRR

ERIC SYANDA.....9TH PETITIONER

VERSUS

THE ANGLICAN CHURCH OF KENYA

DIOCESE OF KITUI.....RESPONDENT

AND

THE ARCHBISHOP OF THE ANGLICAN

CHURCH OF KENYA.....INTERESTED PARTY

RULING

1. The application herein by way of Notice of Motion is brought pursuant to Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. It seeks an order for stay of proceedings in Civil Case No. 15 of 2013 and Civil Case No. 21 of 2013 at Mwingi Principal Magistrate's Court Pending hearing and determination of this petition.
3. It is premised on grounds that legality of the suit and orders granted in the said suit are pursuant to orders the petitioners are challenging; the applicant stands to suffer if the orders sought are not granted.
4. The application is supported by an affidavit by **Jacob Mbau Nyaa** one of the applicants having been authorised by other petitioners. He states that as members of Anglican Church of Kenya St Joseph's Kyome Parish, they have filed a petition that intends to challenge a decision made by the Respondent contained in letters written by **Ven. Samuel Mbiri** and **Rt Rev. Josephat V. Mule** on behalf of the Anglican Church of Kenya, Kitui Dioceses purporting to ex-communicate them. The decision was *ultravires*, the constitution of the Anglican Church. The Respondents sued them in Mwingi PMCC Numbers 15/2013 and No. 21/2013 and got orders barring them from attending their church and all Anglican Churches worldwide.
5. In a reply thereto the Respondent's opposed the application. The **Ven. Samuel Mbiri**, the Priest incharge of the Anglican Church of Kenya Diocese of Kitui (ACK Kitui) and Vicar incharge of Anglican Church of Kenya St. Josephs Kyome Parish (ACK St Joseph's Kyome) acknowledged the 1st and 8th petitioners as former members of his congregation while the 9th petitioner was a deacon in ACK St. Joseph's Kyome, who had been transferred to Mutito but refused to report for duties. He stated further that while at the vicarage of the St. Joseph's Church where he is housed, the 1st, 3rd, 6th petitioners in company of other persons went and damaged the house which was consecrated in accordance with Church Laws, and also assaulted him. He reported the matter to the police. The assailants were arrested and charged in Criminal Case No. 3 of 2013 at Mwingi Principal Magistrate's Court.
6. Thereafter, the petitioners formally de-linked themselves from the ACK Diocese of Kitui. The petitioners were therefore ex-communicated from the church. They however, continued interfering with the activities at the church. The Respondents opted to seek relief from the court; hence prompting filing of PMCC Case No. 15/2013 and PMCC 21/2013 at Mwingi. Orders were granted but were disobeyed by the petitioners.
7. Rival submissions by both counsels for the applicants/petitioners and respondents have been considered.
8. This application is brought pursuant to section 3A of the Civil Procedure Act which provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court”.

9. The relief sought is stay of proceedings in the civil cases filed at Mwingi Principal Magistrate's Court. Courts will grant stay in a case when it is necessary to secure rights of a party and in doing so it is the duty of the court to weigh the advantage to the applicants and disadvantages to the respondent if the stay is granted. (*see the case of Atlantic star, the owners of the Atlantic Stars vs the Owners of the Bona Spes [1973] 2 All ER 175;*
10. This position was also re-stated in the case of *Yasmin Amirali Sharif & 2 Others versus Kehlife Properties & 2 Others [2006] eKLR Justice Kasango* states thus:-

“The power to stay proceedings is a matter of judicial discretion to be exercised in the interest of justice. I accept that the duty of the court is to weigh the advantage of the plaintiff and disadvantage to the defendant if stay is to be granted.

11.1st – 8th applicants have been sued in Mwingi PMCC No. 15/2013. The relief sought is an

- injunctive order restraining them from interrupting/interfering with worship, church services, and other functions/activities of the church including various facilities therein for worship, fellowship and convenience of the vicar plus bonafide members of the ACK St. Lukes Church of ACK Diocese of Kitui
12. This was consequent to an allegation of their unbecoming conduct whereby they assaulted the vicar, **Ven. Samuel Mbiri**, evicted him from the vicarage and also confiscated his belongings which culminated into their arrest and being arraigned in court in Criminal Case No. 3 /2013.
 13. The 9th Petitioner and another are sued by the respondent. The relief sought is for him as an ex-deacon in ACK Nzaluni to be restrained from interfering with the Respondent's churches without written authority from the Respondent.
 14. *Exparte* injunctive orders were granted in both suits. There was however an anomaly as it was stated that the orders had been granted pending hearing and determination of the suit but the application was nevertheless fixed for *interparte* hearing.
 15. The applicants herein have filed a petition whereby they seek a declaration that the actions of the respondents in purporting to ex-communicate them from the Anglican Church of Kenya are illegal, unconstitutional, null and void.
 16. Civil matters in the lower court were instituted following the applicants action of assaulting the presiding vicar of Kyome Parish, robbing him and evicting him from the vicarage. That culminated into their arrest and being arraigned in court. They have not challenged that fact.
 17. Annexure "JMNI" to the supporting affidavits is a letter from **Ven. Samuel Mbiri** and Vicar of St Joseph's Kyome Parish addressed to the 1st and 8th Respondents in respect of their ex-communication from ACK Church from 13th January, 2013. It is averred in paragraph 4 of the supporting affidavit that the Petitioners/Applicants intend to challenge the decision to ex-communicate them.
 18. Looking at annexures "SMI", "SM2" and "SM3" to the replying affidavit the 1st – 8th petitioners herein (vide "SM3") wrote a letter to **Rt. Rev. Josphat V. Mule**, Lord Bishop ACK Church of Kitui giving a notice of intended de-linkage from the ACK Diocese of Kitui.
 19. In the letter they stated that they had de-linked themselves from the administration of the ACK Church Kitui and reverted to the authority of the Head of Anglican Church of Kenya (i.e *Bishop of All Saints Cathedral Diocese, the Primate and Archbishop of Kenya*). They stated further that they would continue fulfilling their covenant of membership to the Arch Bishop of Kenya but not the Diocese of Kitui.
 20. In a letter dated 11th January, 2013 ("SM3") they notified the Most Revered **Dr. Eliud Wabukala**, that they had formally de-linked themselves from the jurisdiction of the ACK Diocese of Kitui. Further, that they were under the pastoral authority of the **Most Rev. Dr. Eliud Wabukala** and not the authority of Bishop Mule. It was in regard to those letters that the **Rt. Rev. Josphat V. Mule** authorized the **Ven. Samuel Mbiri** to ex-communicate them pending notification to the standing committee of the synod. The committee to the synod met and resolved to ex-communicate them.
 21. The petitioners herein are seeking stay of proceedings. They must establish that the action underway (petition) will affect the case in the lower court and hence their rights. They must also demonstrate that their case has a likelihood of success on merit; as stated in the grounds of their application they must show the irreparable harm that may be caused if the orders sought are denied.
 22. As aforesaid, their prayer in the petition is a declaration that the actions taken to excommunicate them are illegal. The injunctive orders sought in the lower court on the other hand are to deter them from interfering with functions of the church they have declared in their letters they do not want to be associated with.
 23. These are two (2) different reliefs. The applicants have not demonstrated what prejudice they will suffer if they stay away from a church they said they did not want to be party to as it administers its functions without them until the case filed against them is considered.
 24. What is evident is the fact that the applicants have come to this court without good faith. They have failed to demonstrate that their association and conscience has been curtailed by the action of the respondent. In any case they are the ones who propelled the respondents into making the order.
 25. In view of the foregoing it is not appropriate to grant orders sought. The interest of justice would

not call for granting of stay of proceedings in the lower court.
26. Accordingly I dismiss the application with costs to the Respondents.
27. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 11TH day of JUNE, 2013.

L.N. MUTENDE

JUDGE