



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CIVIL CASE NO. 73 OF 2010**

**FRANCIS MWASHI**  
**MATHEW TSIMBANGI .....PLAINTIFFS/**  
**APPLICANTS**  
**SAMUEL OMUGA**  
**ALFRED AGEVI (suing as the Registered Trustees of the East Africa**  
**Yearly Meeting of Friends)**

**V E R S U S**

**LUCAS MUDOGA**  
**MICHAEL SAMBWA**  
**DAN AGEVI .....DEFENDANTS/**  
**RESPONDENTS**  
**DAVID MAJANI**  
**JOSEPHAT KILUMA**

**R U L I N G**

1. The Chamber Summons dated 26.7.2010 is premised on the provisions of **section 3A** of the Civil Procedure Act and, Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and the prayers are that;

“(a) .....

**(b) *The Defendants acting by themselves or their agents be and are hereby restrained by way of a temporary injunction from interfering with the society’s assets, property and affairs and/or convening any meetings purportedly on behalf of the board of trustees of the society pending the hearing and determination of this application.***

**(c) *The Defendants acting by themselves or their agents be and hereby restrained by way of a temporary injunction from interfering with the society’s assets, property and affairs and/or convening any meeting purportedly on behalf of the board of trustees of the society pending the hearing and***

**determination of this suit.**

**(d) Costs of this application be provided for.”**

2. The Grounds in support are the following;

**“(i) The plaintiffs are the registered trustees of the East Africa Yearly Meeting of Friends.**

**(ii) The Defendants have unlawfully, unprocedurally and unconstitutionally caused their names to be lodged with the registrar’s office as the society’s office bearers.**

**(iii) The Defendants illegally extended their term in office.**

**(iv) The Defendants have over the years failed to file returns with the registrar of societies.**

**(v) The Defendants have mismanaged and continue to mismanage the society’s welfare, assets and affairs.**

**(vi) The society’s assets are in danger of being depleted and its accounts is being wasted.”**

3. In his Supporting Affidavit sworn on 26.7.2010, Francis Mwashu has deponed that;

i) he is a registered trustee of the entity known as East Africa Yearly Meeting of Friends which is otherwise known as “*the Quakers*” and who practice the Quaker faith.

ii) the society has acquired several properties over the years and has undertaken a number of charitable activities in Kenya and that the Board of Trustees is the organ mandated to manage all land and property belonging to the society.

iii) the society is empowered by the Society’s Constitution to elect officials to manage its affairs and that the Respondents were elected as members of the Society’s Executive Committee.

iv) in February 2010, an enquiry established that the Respondents had failed to submit returns and statements of accounts to the Registrar of Societies for a period of over 5 years.

v) the Registrar of Societies as a result thereof had threatened to cancel the Society’s certificate of registration.

vi) the Respondents have been in office illegally because the amendments to the Society’s Constitution in April 2009 was illegal.

vii) the Respondents, in office unlawfully, have mismanaged the affairs of the Society and destroyed its assets in a wanton manner, hence the need for the interlocutory injunctive relief.

4. The Respondents filed a Replying Affidavit sworn on 3.8.2010 by Lucas Mudoga on his behalf and on behalf of the other Respondents and their response is that Mudoga aforesaid is the Presiding Clerk of the Society and a member of the Board of Trustees aforesaid. That the Respondents are lawfully in office once their election was ratified by the General Assembly.

5. Further, that the Board of Trustees comprises six (6) members and not all of them consented to the suit being filed.

6. That the Applicants ought to have resolved the matter by mechanisms known to the Society's Constitution including calling a Special Annual General Meeting of Friends as well as the Annual General Meeting slated for 11<sup>th</sup> – 15<sup>th</sup> August, 2010.

7. Regarding alleged improprieties, it is argued that no audited Report of Accounts of the Society have been exhibited and it is unclear what alternative the Applicants have offered should the Respondents be stopped from conducting the affairs of the Society.

8. It is added that the 1<sup>st</sup> Applicant is the only one who is pursuing the removal of the Respondents for selfish reasons and that the 2<sup>nd</sup> Applicant, Mathew Tsimbagi had been in office for 13 years and should explain the records for the period 1991 to 2002 when he was in office.

9. As for the alleged unlawful amendment of the Constitution, it is the case for the Respondents that it was the 1<sup>st</sup> Applicant who chaired the Constitutional Committee that was entrusted with amendments to the Constitution and he cannot now deny his creation.

10. Further that two trustees, Samuel Amuka and Alfred Agevi, are gravely ill and John Amalemba is deceased and so attempts at having them replaced is reasonable and is not driven by any ill-will.

11. Lastly, that the Application for injunction should be dismissed with costs.

12. I have taken into account the submissions by the advocates for the parties and I have perused the oft quoted decision of Giella vs Cassman Brown & Co. Ltd. [1973] E.A. 358 as well as the decision of Ringera J. (as he then was) in Muigai vs Housing Finance Co. of Kenya Ltd. [2002] KLR 332 where in the latter case, the learned judge stated that it is not an inexorable rule of law that where damages may be an appropriate remedy, an interlocutory injunction should never issue. I agree wholly with that position because the cornerstone of any application for an injunction is that an applicant "must show a prima facie case with a probability of success" and "that an injunction will not normally be granted unless the applicant might otherwise suffer irreparably injury." Where doubt, especially as regards a prima facie case is created, then the court "will decide the application on a balance of convenience." That is the law in our realm and I adopt it in the circumstances of this case.

13. As regards the present Application, I have seen a letter dated 16.4.2010 from the Registrar of Societies indicating who the Society's office bearers are, i.e.;

<b>“Presiding Clerk</b>	-	<b>Rev. Lucas Mudoga</b>
<b>V/Presiding Clerk</b>	-	<b>Michael Sabwa</b>
<b>Recording Clerk</b>	-	<b>Dan Agevi</b>
<b>Reading Clerk</b>	-	<b>David Majani</b>
<b>Treasurer</b>	-	<b>Josephat Kiluma”</b>

14. I have also seen the Society’s Constitution and I note that although **Article IX(1)** provides that members of the General Board shall serve for three (3) years and eligible for “*re-appointment*” for more than six (6) years, **Article XIV** allows for amendment of the Constitution and from the facts presented by the Applicant, I am not satisfied that a case has been made out that the amendment to increase the term of office was patently done in contravention of the same constitution. How can what is done pursuant to the constitution be said to be unconstitutional unless it can be shown that the process leading to the action was itself unconstitutional? In the present case, the facts are merely stated without explanation and moreover, it was the 1<sup>st</sup> Applicant who was Chairman of the Society’s Committee on the Constitution and the result of his work were amendments to the Constitution. He has not shown at what point his Committee’s proposals became unconstitutional and he has not denied that the amendments were properly handled by the General Board or the Yearly Meeting pursuant to **Article XIV** aforesaid.

15. The Applicants have also argued that an inquiry was conducted in February 2010 and it unveiled a number of malpractices. Neither the nature of the inquiry, persons who conducted it nor the results thereof have been given. All I have seen is a letter dated 4.5.2005 from 1<sup>st</sup> Applicant to the Executive Board. It relates to “*mismanagement of our church General office, Kaimosi.*” A number of issues are raised but they relate to the conduct of one Ephraim Konzolo, the General Secretary. The said Konzolo is not a party to the present suit and in any event, that letter cannot qualify as a basis for stating than an “*inquiry was conducted in February, 2010.*”

16. Lastly, I have above stated that the Registrar of Societies clarified the office bearers. I have seen no letter threatening cancellation of the Society’s certificate of registration and in the end, a lot of what is contained in the Application is no more than the protestations of Francis Mwashu, which may appear genuine but is unbacked by any serious evidence.

17. What I am saying is that the Application before me is less than serious, is probably driven, and with respect, by Francis Mwashu’s attempts at gaining some advantage in the management of the Church. I see no case in any event, with a probability of success and the balance of convenience favours the Respondents who are in office and therefore I shall order that the Application be and is hereby dismissed with costs.

18. Orders accordingly.

***Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of April, 2011***

**ISAAC LENAOLA**

**J U D G E**