



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
Civil Case 107 of 2008

DR. JULIUS OKELLO KUNGU.....1ST PLAINTIFF
HESBORN OTHIENO OMANJO
(Suing on behalf of the members of Evangelical Christ Church of Africa..2ND PLAINTIFF

-VERSUS-

JOHN HENRY TULU & 7 OTHERSDEFENDANTS

Coram:

Ali-Aroni, Judge.

Mr. J. Mwamu for the Plaintiff

Mr. P. J. Otieno for the Defendants

Mr. George Diang'a Court Clerk.

RULING

The application before court is dated 7th November 2008 brought by way of Chamber Summons pursuant to Order 39 Rules 1, 2 and 3 and Order 1 Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is supported by the affidavit and further affidavit of Dr. Julius Okello Kungu, dated 7th November, 2008 and 5th December, 2008 respectively.

The application seeks for the following orders:

1. **That this application be certified as urgent and be heard ex parte in the first instance.**
2. **That the court do grant the plaintiffs/applicants leave to sue on behalf of**

the officials and members so the plaintiffs church.

- 3. That the court be please to grant an injunction restraining the defendants whether by themselves, their agents, servants, representatives from conducting, carrying on, transacting, presiding over, controlling or in any way running business and work of the Evangelical Christ Church of Africa (ECCA) until this application is heard and determined.**
- 4. That the court be pleased to grant an injunction restraining the defendants whether by themselves, their agents, servants, representatives from conducting, carrying on, transacting, pressing on any way running the business and work of Evangelical Christ Church of Africa (ECCA) until this suit is heard and determined.**
- 5. That the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th, defendants be compelled to return the church property to the church office without any further delay.**
- 6. The 1st, 4th and 6th defendants who have reached the age of 80 years be compelled to hand over church property pending their retirement on 1st January 2009.**
- 7. The order to be served upon the O.C.S's in all the branches where the church is situated.**
- 8. The cost of this application be granted.**

The application is opposed. The respondents filed a replying affidavit dated 21st of November 2008 sworn by the 1st defendant.

At the hearing the applicant abandoned prayers 1 and 2. as the same had been dispensed with.

I have considered submissions by learned counsel for the parties. The issue for determination is whether or not to grant the restraining orders sought for and whether or not to compel the defendants to return the church property.

The plaintiff's/applicant's content that they are the registered officials of the church. They contend that the 1st and 2nd defendants have attained the mandatory age of

retirement of 80 years and 75 years ought to retire and vacate the church premises.

The defendant/respondents on their part contend that the church has an internal mechanism of handling disputes and the matter ought not to be in court. They argue that the Constitution relied upon as part of the applicants' exhibit is not the correct version. Further that the orders prayed for amount to expulsion of the defendants/respondents which is not provided for in the church Constitution.

The parties have each produced its version of the Church Constitution albeit with some similarities. The court is required to make a finding as to which of the two Constitutions is the correct Constitution of the Evangelical Christ Church of Africa because only one is correct/genuine.

The court also takes note that this matter was filed on 9th of November 2008, 1 year 3 months ago and although urgent in the mind of plaintiff/applicants the 1st and 2nd respondents have continue to be at the helm of the church.

The orders being sought for are injunctive orders. The Court of Appeal of East Africa in the case of **Giella –vrs- Cassman Brown & Co. Ltd [1969] EA** at 368 set out the standards to be applied when considering an application for an injunction. First the applicant must show a prima facie case with a probability of success, secondly that the applicant may suffer loss and damage that cannot be compensated by way of damages, thirdly where in doubt the court may decide on a balance of convenience.

It is my considered view that prayer 3 has been taken over by events and ought not to be considered at this stage. Prayers 4 and 6 are similar to the prayers being sought for in the plaint and to grant the same would be tantamount to giving final orders. I am also of the view that this matter being a church issue cannot be disposed of at an interlocutory stage. Parties ought to be given an opportunity to ventilate the matter in court and as

observed earlier since the 1st and 2nd defendants are still in office. The balance of convenience lies in their favour. I therefore decline to grant the orders 4 and 6.

I however grant prayer 5 and order that the church property be returned to the church premises forthwith.

Having stated as above orders, I take liberty to allow the plaintiff in line with S. 1 (a) and (b) of the Civil Procedure Act, liberty to amend the pleadings to allow the church serves in the name of its recognized officials.

Dated and delivered on 29.01.2010.

ALI-ARONI
JUDGE

AAA/hao