



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 319 OF 2009

PETER MUIRURI KABIRU & 2 OTHERS PLAINTIFFS

VERSUS

PAUL WANDATI KABUE DEFENDANT

RULING

Before me is a Chamber Summons dated 11th June, 2009 by the Plaintiffs/Applicants filed under certificate of urgency on the 12th of June, 2009. The said Application has been brought under the Provisions of Order XXXIX Rule 2 & 9 of the Civil Procedure Rules, Section 3, 3A & 63 (e) of the Civil Procedure Rules. The same is supported by the affidavit of **PETER MUIRURI KABIRU** one of the Plaintiffs/Applicants.

The application is seeking for injunctive orders against the Defendant/respondent and/his servants or agent from interfering with the Sunday service, administrative running of the Rironi Bethel Church intimidation/disruption of the members & the daily running of the said church.

The Defendant/Respondent has vehemently opposed the application. He filed a Notice of Preliminary Objection on the 15th of June, 2009 and a Replying Affidavit on 17th of June, 2009.

The Notice of Preliminary Objection has three grounds. The 1st ground raised is that the suit is incompetent as the Verifying Affidavit in support of the plaint is defective. The second ground is that the court lacks jurisdiction to hear the matter as the church constitution bars its members from referring their disputes to civil courts, thirdly that the Plaintiffs' lack capacity to institute this suit as they are not officials of the Bethel Church.

The court directed the Preliminary Objection to be argued within the application. I will in my ruling consider first the issues raised within the Preliminary Order.

The first ground :-

“That the suit has no, or no competent, Verifying Affidavit to it, and the same ought to be struck out with costs.”

In his submission Mr. Kinyanjui for the defendant/respondent submitted that the Verifying Affidavit was

sworn & commissioned by the same lawyer which is contrary to the Provisions of Cap 15. The Oaths and Statutory Declarations Act & hence the verifying affidavit violates the provisions of Order 7 of the Civil Procedure Rules.

In response to the first ground the Plaintiffs'/applicants' counsel Miss Kimiti urged the court to apply order 18 Rule 7. She further urged the court to exercise its discretion to allow the Plaintiffs/applicants to regularize their pleadings in light of the defective Verifying Affidavit.

I do agree with Mr. Kinyanjui for the Defendant that the Verifying Affidavit is defective and contrary to section 4(1) of the Oaths and Statutory Declaration Act. Chapter 15 of the Laws of Kenya S.4 of Chapter 15 provides –

“S. 4(1) A Commissioner for Oaths may, by virtue of his Commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act, or otherwise and take any bail or recognizance in or for the purpose of any Civil Proceedings in the High Court or any Subordinate Court.

Provided that a commissioner for oaths shall not exercise any of the powers given by this sections in any proceedings or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

Having found the affidavit wanting, the court's consideration is whether this fact makes the entire suit defective. Order VII Rule I (2) requires that a plaint must be accompanied by a Verifying Affidavit. Rule 1(3) gives the court the power to strike out a plaint that does not comply with sub-rule (2). The provision of Order VII Rule (3) read as follows –

“The court may of its own motion or on the application of the Defendant order to be struck out any Plaint which does not comply with sub rule (2) of this rule.”

I am of the view that the Verifying Affidavit though defective does not go to the merit of the case nor is it prejudicial to the defendant in any fundamental respect. In the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another** (2001) KLR at 470, where the verifying affidavit was found to be defective the court declined to strike off the entire suit. Ringera J (as he then was) had this to say; –

“Rules of Procedure are the hand Maiden and not the Mistresses of Justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but has taken short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form of procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the Legal instruments this affected. In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue.”

Guided by the above authority I will strike out the Verifying Affidavit but I am inclined to save the suit. The preliminary objection therefore succeeds only to the extent that the verifying affidavit is found to be defective and struck off.

The 2nd ground of objection is:-

“That the dispute before the court is barred by the Bethel Church constitution from being instituted before this court by reason of which the suit ought to be struck out.”

Mr. Kinyanjui contends that this matter involves a church. He further submitted that the courts have

consistently held that societies should be left to run their affairs within the confines of their constitutions. That members of a society should be left to solve issues amongst themselves. That the Plaintiffs/Applicants should wait for the Annual General meeting to deliberate on this dispute other than rush to court.

On her part counsel for the Plaintiffs/applicants Miss Kimiti submitted that the courts have held they that, court must step in where there is breach of natural justice or non-observance of set up mechanisms. That the Defendant failed to comply with the church constitution, giving rise to this cause of action.

Both counsels are right in that, the courts have applied the said principles but in different circumstances. In arriving at a decision the court has to consider the facts and surrounding circumstances of a case before it, to see which of the 2 principles is applicable.

It is a fact, that Bethel church, being a registered society, has its own constitution that lays down rules and regulations that ought to guide its members. Indeed both parties have annexed the copies of the said constitution as part of their exhibits. Interestingly each opposing side uses the said constitution to advance its course.

Paragraph 3(5) of the said constitution provides

“We believe that the Bible is the only inspired word of God, and that it shall be the Supreme Authority in the Affairs of the Society.”

Paragraph 4(e) provides

“The Board shall have the power to suspend a member from his membership until the next general meeting of the society following such suspension but notwithstanding such suspension a member whose expulsion is proposed shall have the right to address the general meeting at which his expulsion is to be concluded.”

Paragraph 9 (b) of the said Constitution also provides that the Annual General meeting shall be held not later than 31st December in each year.

Having considered the above provisions of the Bethel Church Constitution relevant to the matter before the court I will now consider the objection in light of the same. In as much as I agree with Mr. Kinyanjui that societies must be left to run their affairs in accordance with their own rules & regulation and this particular society ought to be guided by the bible as deponed in several paragraphs of the Defendants/respondent affidavit. That the courts ought to refrain from interfering with domestic issues unless there is a violation of natural justice. I also do appreciate that the dispute before the court is not about ecclesiastical law. The dispute is about membership of a society, which society is registered under the Society Act, Chapter 108 of the Laws of Kenya. I hold the view that a Society registered as such under the Laws of Kenya and its membership are certainly subject to the jurisdiction of this court, should circumstances of the dispute at hand call for the courts intervention.

I will make reference the following authorities namely:- **Rev Cannon Leonard Mbugua vs. The Most Rev. Dr. Festus Habbakuk Olang** HCCC No. 3338 of 1979 in granting injunctive orders to the applicant Hancox J stated inter alia.

“...there are no ecclesiastical Courts as such in Kenya and, if the Plaintiff cannot get redress within the church organization, as it were. I do not see what else he can do than come to the court for it.

In Gathuma vs. African Orthodox Church of Kenya (1982) KLR at 356 where the church moved to court for an injunctive restraining the appellant from interfering with the affairs of the church and where the respondent claimed to be a bishop, the court held in part

“1. The matter before the court was not concerned with ecclesiastical law. The matter concerned a dispute between and within members of a registered society under the Societies Act (Cap 108). The court has jurisdiction in a suit by such a society Registered under the Laws of Kenya.

3. Whenever a question of jurisdiction is raised,, the court must take into account the issues and make a finding on it.

4. Matters of mixed spiritual and temporal character with temporal consequences affecting the legal rights fall within the High Court’s jurisdiction, but each case depends on its own pleadings and facts. The High Court may exercise its discretion to hear or not to hear the matter.”

Guided by the above authority I am convinced that this court has jurisdiction to hear this matter as the parties have failed to resolve the outstanding issues using the domestic mechanism laid down. The matter has indeed degenerated to the extent that the Local Administration and the police have been called to intervene. Each of the opposing side credits itself for involving the said law enforcing agents. To this extend therefore the preliminary objection fails.

The 3rd Preliminary Objection is

“That the Plaintiffs lack the Legal Capacity as Officials of the society Registered under Cap 108 and known as BETHEL CHURCH” to institute this suit as purported. The suit is grossly incompetent to that extent and should be struck out with costs.”

I do not find the same to be a pure point of law. The ground involve matters of fact which can only be established by way of evidence and therefore do not strictly fall under the ambit of a Preliminary Objection. In the notable case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E. A 696 LAW J. A. stated in part –

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of a pleading, and which if argued as a Preliminary point may dispose of the suit.”

In the same case Sir Charles Newbold P had this to say on Preliminary Objection -

“A Preliminary Objection is in the nature of what used to be a *de murrer*. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial Discretion.”

This ground accordingly fails.

I therefore uphold the preliminary objection only to the extent that the Verifying Affidavit is defective and is accordingly struck out. I preserve the suit and order that a proper verifying affidavit be filed and served within the next 14 days hereof. Having made the findings above I know turn to consider the substantive application on merit.

I have considered the pleadings before me, submissions by both learned counsels and case law cited.

The Plaintiffs/applicants have come to court as the officials of Bethel Church. The Plaintiffs/applicants depone in their Supporting Affidavit that the church has 12 regions in the country which regions are headed by Regional Executive. That the Defendant/respondent is a pastor in one of branches namely the Bethel Church Rironi.

The plaintiffs/applicants contend that the Rironi Church has been having problems for some time culminating in the National Executive Committee of the Church setting up a Commission in accordance with its Constitution to investigate the complaint. The Defendant/respondent was part of the Commission.

The Commission made a report and subsequently the National Executive Committee suspended the Defendant/Respondent from the church. The plaintiffs/Applicants further contend that the suspension was done in accordance with the church constitution. The suspension was communicated to the Defendant/respondent who was to await the Annual General Meeting where he would be given an opportunity to defend himself. A Replacement was appointed to take over the running of the church and as the replacement was conducting the church service on the 7th of June, 2009, youths organized by the Defendant/Respondent disrupted the same whereupon the administration police had to intervene.

The Defendant/Respondent on his part contends that the Applicants/Plaintiffs are not officials of the church, that the constitution of the church bars the plaintiffs/applicants from bringing this matter to a secular court and that the constitution regulates how disputes are to be solved. The Defendant/Respondent denies having organized youths as alleged. The Defendant/Respondent further depones that he is a founder member of the Rironi church and that the Plaintiffs/applicants are imposters. He denies allegation of causing disunity at the said church.

For consideration by court is whether this is a proper case for the court to make injunctive orders, and whether the Plaintiffs/applicants meet the conditions necessary required for the court to grant such orders.

From the facts before the court it is obvious that there is a dispute between the parties before me. The Defendant/respondent has not disputed that has been suspended. Indeed in his pleadings he acknowledges the dispute, the fact that he has been suspended and that the forthcoming Annual General Meeting is expected to discuss his suspension and, as such, I do not find the claim in court to be frivolous or vexatious.

In considering whether or not to grant the orders of injunction I must consider the principles of granting of an injunction as laid down in the Notable case of **Giella vs CassMan Brown & Another (1973) E.A.**

In an application for an injunction the applicant must show that he has in his favour a prima facie case with a reasonable probability of success, or if the injunction is not granted he will suffer irreparable loss that may not be compensatable by damages & if either of the above issues are not in his favour, nevertheless considering the circumstances of the case the balance of convenience tilts in his favour.

I am convinced that having the church under lock and key, and allowing the situation to degenerated to the extend that law enforcers are involved in maintaining law and order at the church will cause injury and loss to the members, which injury and loss may not be compensatable by way of damages, in any event should I be wrong, in so finding, considering the circumstances of case the balance of convenience tilts in favour of the plaintiffs/applicants for the benefit of the wider membership of the church. I accordingly grant prayers 3 & 4 of the application dated 11th, June 2009. I decline at this stage to make any orders as to cost.

Dated and delivered at Nairobi this 17th day of July, 2009.

ALI- ARONI

JUDGE