



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Suit 107 of 2008

DR. JULIUS OKELLO KUNGU.....1st PLAINTIFF

HSEBON OTHIENO OMANJO (Suing on behalf of the members of

Evangelical Christ Church of Africa.....2nd PLAINTIFF

VERSUS

JOHN HENRY TULU1st DEFENDANT

MESHACK TUJU ROCHE2nd DEFENDANT

MARGARET ADHIAMBO MBASA.....3rd DEFENDANT

CLERKSON ODHING JIENDA4th DEFENDANT

MAURICE OKELLO5th DEFENDANT

NELSON OCHIENG MARIMU.....6th DEFENDANT

ANDIEGO ODHIAMBO.....7th DEFENDANT

PAULA ABUTO MAINA.....8th DEFENDANT

RULING

The plaintiffs / respondents have sued the defendants/applicants seeking the following substantive orders:-

(i) A declaration that the first, fourth and sixth defendants have reached a retirement age and must retire by 1st January 2009 and further a permanent injunction restraining them from acting or holding themselves as clergy and officials over Evangelical Christ Church of Africa (ECCA).

(ii) That the actions of the first defendant with the connivance of the second, third, fourth, fifth, sixth, seventh and eight defendants are ultra-vires the constitution and that the first defendant together with all the defendants be compelled to return all the property of the church they have converted into personal property.

The plaint giving rise to the suit was filed in court on the 10th November 2008, alongside a chamber

summons undated and unsigned (i.e. the copy available herein).

The Chamber summons was placed before the court for hearing ex-parte in the first instance on the same 10th November 2008 whereupon the court certified the application urgent and fixed it for inter-partes hearing on 24th November 2008.

Interim orders were granted in terms of prayers (2) and (3) of the chamber – summons to the extent that the plaintiffs / respondents were granted leave to sue on behalf of the officials and members of the plaintiffs church and that the defendants/applicants were restrained from conducting, carrying on, transacting, presiding over, controlling or in any way running the business and works of the Evangelical Christ Church of Africa (ECCA) until the application was heard and determined.

The said application was made “inter –alia” under Order 39 Rules (1) (2) and (3) of the Civil Procedure Code.

To date, all most one year down the line, the application has never been heard inter-partes. In between, there has been several intervening applications made by both the plaintiffs and the defendants. When the matter came up for inter-partes hearing on the scheduled 24th November 2008, it was adjourned to the 8th December 2008. The interim orders in place were extended upto that date but the court directed that the defendant’s preliminary objection to the application be heard and determined first.

On the 8th December 2008, neither the application nor the preliminary objection were heard. The parties were given twenty eight (28) days after the court’s vacation to have the preliminary objection listed for hearing since it was based on the court’s jurisdiction to deal with the matter in as much as it involved a religious body. The court went on to order that the existing “status quo” be maintained.

The defendant’s / applicants preliminary objection was heard on the 19th January 2009 and a ruling dismissing the same was delivered on the 23rd January 2009 after which the court extended the existing interim orders issued on the 10th November 2008.

On the 13th May 2009, the defendants filed the present application dated 11th May 2009 and made under Order 39 Rule 4 of the Civil Procedure Rules.

The application seeks primarily to have the extension of the existing interim orders particularly the extension made by the court on the 23rd January 2009 set – aside on grounds that:-

- (i) On the 8th December 2008 the Court declined to extend the interim orders and the same thus lapsed.
- (ii) Once the orders so lapsed, there remained nothing to be extended unless the court on its discretion judiciously decided to grant fresh orders but no such decision was ever made.
- (iii) The orders now in force have the effect of granting to the plaintiffs the substantive prayers on the plaint interlocutorily and without awarding the applicant the right to be heard.
- (iv) The orders were thus granted contrary to the interest of substantial justice and ought to be set aside “ex-debito justitiae”
- (v) The Respondents/plaintiffs are currently using the orders oppressively thus totally disrupting not only the calling of the clergy defendants, but the operation of the church and further for purposes of pushing the defendant by way of contempt.

The grounds are supported by the facts contained in the affidavit of the first defendant/applicant Bishop John Henry Tulu dated the 12th May 2009.

In his arguments, Mr. P. J. Otieno, learned Counsel for the defendants/applicants indicated that they are at this juncture in pursuit of prayer (c) of the application i.e. to have the interim orders extended on the 23rd January 2009 set aside. He contended that the said interim orders lapsed on the 8th December 2008 and therefore a fresh application for the same ought to have been made on the 23rd January 2009 but this was not done. He further contended and implied that the plaintiffs have misused and abused the orders after having obtained them in the first instance. He therefore urged this court to set aside the ex-parte interim orders which were extended on the 23rd January 2009.

Mr. Mwamu, learned Counsel for the plaintiff/respondents vehemently opposed the application and contended that it is a challenge on the court's exercise of discretion to grant and/or extend an order already given and therefore on invitation for the court to sit on appeal against its own discretion.

He further contended that the issues provided for by Order 39 of the Civil Procedure Rules were not addressed and instead the defendants have raised irrelevant matters which should be raised under Order 44 of the Civil Procedure Rules. He went on to contend that the matter ceased to be ex-parte upon extension of the interim orders by the court of its own discretion. He urged this court to dismiss the application with costs.

Basically, the bone of contention is whether the interim orders granted on the 10th November 2008, by this court elapsed or lapsed on the 8th December 2008, such that the extension made on 23rd January 2009 was invalid.

Under Order 39 Rule 4 of the Civil Procedure Rules, a party dissatisfied with any order of injunction may apply to the court to have it discharged, varied or set aside. This is exactly what the defendants/applicants have done by way of this present application.

However, the main reason for the application (i.e. the interim orders issued herein lapsed on the 8th December 2008) is far from convincing as borne out by the record.

Although an ex-parte injunction order may be granted only once within a period of fourteen (14) days, the court may extend the same if there is good reason.

As indicated earlier, the delay in having the application filed on 10th November 2008 heard inter-parties has been occasioned by the parties themselves by introducing intervening applications in between. As a result, the application remains pending to date.

The ex-parte interim orders have neither been confirmed nor discharged. It is as if that application of the 10th November 2008, has been forgotten and instead the parties have resorted to engage in side-shows.

It is this side –shows which have caused the extension of the ex-parte interim orders on several occasions including the extension made on the 23rd January 2009 at the court's discretion. It was only fair and just that existing interim orders be extended after the court had heard and determined the defendant's preliminary objection raised on the 19th January 2009.

The objection having been dismissed it was incumbent upon the court to extend the interim orders which were in existence at the time and had not lapsed as alleged by the defendants on the 8th December 2008. The extension of the 23rd January 2009 was merely to maintain the existing "status quo" as from the 10th November 2008 pending the hearing inter –partes and determination of the relevant application.

If the defendant's preliminary objection had been allowed then the suit would have been disposed off at once thereby rendering all pending applications obsolete.

On the 8th December 2008 the court ordered that the "status –quo" be maintained pending the hearing of the application filed by the plaintiffs on 10th November 2008 and/or the preliminary objection raised by

the defendants.

The “status quo” meant that which came into existence on the 10th November 2008 when the ex-parte interim orders were granted. If the court meant the “status quo” existing prior to the 10th November 2008 then it would have stated as much.

By maintaining the “status quo” the court in effect extended the existing interim orders. It cannot therefore be alleged that the interim orders lapsed on 8th December 2008 such that there was nothing to extend on the 23rd January 2009.

There was something to be extended on that 23rd January 2009 and by extending the existing interim orders the court merely exercised its discretion so as to be fair and just to all the parties.

It would be in the interest of all the parties to have the application dated 10th November 2008 heard and determined prior to any other pending application.

To that extent, the said application is hereby fixed for hearing on the 5th November 2009 as a matter of urgency and priority.

Otherwise, the present application by the defendants is dismissed with costs.

Dated, signed and delivered at Kisumu this 9th day of October 2009.

J. R. KARANJA

JUDGE

JRK/aao