



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Petition 2 of 2009**

IN THE MATTER OF SECTIONS 70, 75, 77, 78 AND 80 OF THE CONSTITUTION

OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER S. 70, 75, 77, 78 AND 80 OF THE CONSTITUTION**

AND

**IN THE MATTER OF CLOSURE OF MAKUTANO CHURCH, KITHOKA
CIUMBIRU CHURCH, THEMBA CHURCH AND KIENDERU CHURCH**

AND

**IN THE MATTER OF E.A.P.C. CLAIMING TO ENFORCE INJUNCTION TO
RESTRAIN LIVING WATER EAPC IN MERU CMCC 727/04**

AND

**IN THE MATTER OF INTERPRETATION OF THE CONSTITUTION IN RESPECT
OF THE ORDERS IN CMCC NO. 727/04**

BETWEEN

- 1. JACOB MBUI**
- 2. CHARITY NTARA**
- 3. ANDREW NKUNJIRI**
- 4. JOSPHAT KIRIMANIA AND 431 OTHERS.. PETITIONERS**

VERSUS

- 1. REV. JUSTUS KINOTI**

2. SOSPETER NJERU

3. ANDREW KINYAMU RESPONDENT

RULING

The petitioners filed this petition against the respondents praying for the determination of the following questions:-

1. *Whether the petitioners who acquired the subject matter herein through their efforts by way of fundraising, contribution, tithing, donations are entitled to the protection of properties therein under Section 70 and Section 75 of the Constitution.*
2. *Whether the petitioner's rights of worship in this particular churches is being violated by the respondent's closure of the same arbitrary.*
3. *Whether the enforcements of orders of CMCC 727 of 2004 and especially in closing the churches subject herein infringes on the petitioner's freedom of worship and movement as inscribed in the constitution.*
4. *Whether the respondent in purporting to own the subject matter herein to the exclusion of the petitioners breaches the petitioner's rights over the same properties under Section 70 and 75 of the Constitution of Kenya.*

The petitioners then prayed for declaration to be issued by the court declaring that they have beneficial interest in the properties the subject of this action. They also seek a declaration that the respondents' act of closure of the church at Makutano, Kithoka Ciumbiru, Themba and Kienderu breaches the petitioner's Constitutional Rights. They seek a declaration that CMCC No. 727 of 2004 in its implementation would be detrimental and would breach their freedom of worship and movement. Finally, they prayed for a declaration that the respondents should not close the churches and should not impede the petitioner's access of those churches. By an interlocutory application by way of chamber summons brought under S. 84 of the Constitution and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction, Rights and Freedoms of Individual) High Court Practice and Procedure Rules 2006 dated 22nd September 2009, the petitioners sought conservatory orders to stop the respondents interfering with their access to the aforesaid churches and to stop them from interfering with the petitioner's worship therein pending the determination of the petition. Further, they seek conservatory orders to restrain the respondents from selling or transferring those properties. The affidavit in support of that application is sworn by Jacob Mbui who has sworn that affidavit on his own behalf and on behalf of the 431 other applicants. He begun by stating that he and his co-applicants are *bona fide* owners and beneficiaries of the subject churches. That they begun to worship in those churches from the time the buildings were constructed. Initially, they were meeting under the label of East Africa Pentecostal Churches (EAPC). After a leadership disagreement two groups were formed one being EAPC and EAPC Living Waters. Those two groups went to court whereby EAPC Trustees sued EAPC Living Waters (L.W) The dispute before the court related to parcels of land where those churches that are the subject of this action were involved. That suit was CMCC No. 727 of 2007. At the conclusion of the case before the Chief Magistrate Court in Meru an injunction was issued against L. W. restraining them from accessing those churches. A further order of the court gave possession of those churches to the respondents herein. The respondents through the use of the assistance of the police closed those churches. The applicants in this petition stated that they were not parties to that action before the Chief Magistrate Court. They however are of the view that they are beneficiaries of those churches and that they should not be stopped from their freedom of worship. The churches which are the subject of the present application are:-

- Makutano on parcel No. NTIMA/IGOKI/2885
- Themba on parcel No. NYAKI/KITHOKA/1713

- Kithoka Ciumburu on parcel No. NYAKI/KITHOKA/576
- Kienderu on parcel No. NYAKI/CHUGU/462

The applicants by the present application are seeking the protection of this court to enable them continue worshipping in those churches. It was deponed that at present these premises are guarded by security of the respondents. The respondents responded to that application by a replying affidavit sworn by the chairman of the trustee of EAPC. He deponed that the property in question are registered in the respondents' name. He annexed to his affidavit copies of the green card to show their ownership of the same. To that end, the deponent stated that the respondents' rights to those properties was protected by the law. That the applicants were strangers to the properties not being members of EAPC. He drew the court's attention to the fact that the applicants' documents had the stamp of L.W. showing that they were members of that church. That the dispute now determined by the lower court between the respondents and L.W. also involved the applicants in this matter. For that reason, he was of the view that the applicants had no right to make the present application. He was of the view that if orders were granted as sought it would render the pending appeals nugatory, and would essentially be overturning the judgment of the lower court. The deponent was of the view that no constitutional issue had been raised by the applicants in the matter. Learned counsel for the applicants in submissions before court stated that the applicants had demonstrated that the acts of the respondents had breached Sections 70(b) (c), 79, 80 of the Constitution in respect of the applicants. He further argued that by excluding the applicants from worshipping in the churches, their rights under Section 75(1) has also been breached. Learned counsel relied on the case **Njoya and others Vs. Attorney General and others** [2004] 1 EA 194 and urged the court to adopt the interpretation of the constitution as in that case. He ended by saying that the applicants had demonstrated that their application was not frivolous and stated that the objection raised by the respondents that this matter had finally been heard and concluded cannot stand against the applicants who had now approached the court as individuals. He finally submitted that the present matter was not *res judicata*. Learned counsel for the respondents in submission stated that L.W. had split from the mother church, that is, EAPC in the year 2002. They obtained registration under L.W. in the year 2003. By that registration, he argued, they had acquired a different personality with its own membership. By virtue also that registration they had their own right to own property as per their constitution. He submitted that L.W. had engaged in violent take-over of the churches of EAPC. That was the reason why the respondents filed the lower court matter and the court granted judgment as sought by injuncting L.W. and its members from its properties. That both parties had filed appeals against the lower court's judgment being Civil Appeal No. 96 of 2008 and 111 of 2008. Those appeals had been consolidated. He reiterated that the applicants before court were parties in the lower court action. What they are now seeking is to challenge a competent judgment of the lower court by raising a constitutional issue. He also argued that the issues now raised by the applicants were issues that can only be resolved in private law and not by constitutional reference. To that end, he relied on the case **Kenya Bus Services Ltd and Others Vs. Attorney General and Others** High Court case No. 413 of 2005 where the court had this to say:-

“I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another or individual under the fundamental rights provisions of the constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me and I so hold.”

It is clear that the Judge in making that comment was conscious that his comment related more to the case that was before him. In the case before him, the Kenya bus Services Ltd had sued the Attorney General in respect of rules that had been made regarding public transport vehicles. At interlocutory stage, the Kenya Bus Company obtained an order to stay any execution of judgment against it. That essentially froze all the cases that it was facing and those orders affected parties were not parties in that action. That case can be distinguished from the present case in my view and I find that authority of no assistance to me as I consider the present application. What is before me is an interlocutory application for the issue of

conservatory orders to allow the applicants to use the churches that they had been using until the hearing of the petition before court. The respondents vehemently have argued that in bringing the present petition the same was *res judicata* and, if I got the argument of counsel for the respondents correctly, he was alluding to the principal that there must be an end of litigation. That principal along with the principal that justice must be done and seem to be done were considered in the case **Jusbir Singh Rai & Others Vs. Tarlochan Singh Rai & Others** Civil Application No. NAI 307 of 2003 (154/2003UR). To be enlightened on what the Court of Appeal commented in that case I will quote the following portion:-

“In Taylor & Another Vs. Lawrence & Another [2002] 2 ALL E.R. 353, the Lord Chief Justice Woolf, tracing the origins of the two principles, cited the speech of Lord Wilberforce in Amphill Peerage Case [1976] 2 ALL E.R. 411 and there Lord Wilberforce is recorded as saying:-

English law, and it is safe to say, all comparable systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to open or to reopen disputes. The principle which we find in the (Legitimacy Declaration Act 1858) is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognizes, be imperfect; the law aims at providing the best and safest solution compatible with human fallability and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so; these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: So the law allows appeals; so the law, exceptionally, allows appeals out of time; so the law still more exceptionally allows judgments to be attacked on the ground of fraud; so limitation periods may, exceptionally be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases where the facts justifying them can be strictly proved.”

Whether the present petition is going against the principle that there must be an end to Litigation is, in my view, best determined at the full hearing of the petition. At this stage the consideration that I should have is to determine whether or not the applicants have shown a *prima facie* case in their petition. In the case of **Mrao Ltd V. First American Bank of Kenya Ltd & 2 others** [2003] KLR 125 the Court of Appeal held amongst other things that a *prima facie* case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicants' case at the trial. In considering the applicants' application, I am persuaded to interpret the constitution as was held in the case of **Njoya and others Vs. Attorney General and others** (supra) in the judgment of Justice Ringera, as the then was. He stated as follows:-

“I shall accordingly approach constitutional interpretation in this case on the premise that the constitution is not an Act of parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.”

I will therefore not limit the interpretation of the Constitution as, ably argued by counsel for the respondents. What I understand to be the argument of the applicants is that they were at one time members of EAPC. They admit that they later joined the membership of L.W. They however state that during their time as members of EAPC they contributed tithes and offering which enable the respondents to acquire and develop the churches which are at the centre of this dispute. The respondents does admit that the applicants until of late had the possession of those churches. Indeed that is the reason why they had to obtain an order from the lower court to be given security to evict the applicants. The properties were being used by the applicants as places of worship. As a consequence of that eviction they have been displaced and are now being forced to worship outside. If I got the depositions of the chairman of the

EAPC trustees correctly in his affidavit after obtaining possession of those churches EAPC now intends to renovate them and to carry out religious ceremonies of cleansing in view of violence that has been experienced during the eviction. At this interlocutory stage, I do find that the applicants have proved a *prima facie* case with the probability of success of their petition. This is because Section 75(1) of the Constitution does recognize the rights of possession being protected by the Constitution. I believe that at the hearing of the petition evidence will be led for the court to inquire apart from possession what other rights the applicants have in view of their allegations that the churches were developed with the tithes and offerings that they made. The respondents as can be seen from title of this case are trustees. Were they trustees of the applicants? That shall be determined at the hearing of the petition. I am aware that the respondents denied that applicants' money developed those churches but I think it is a matter that can only be resolved at the full hearing. At this juncture, I am persuaded to grant the prayers that are sought by the applicants. I grant the following orders:-

- 1. That the conservatory orders be and are hereby issued to the effect that the respondents by themselves or anybody acting on their behalf be restrained from closing churches in Makutano on parcel No. NTIMA/IGOKI/2885, Themba on NYAKI/KITHOKA/1713, Kithomba Ciomburu on NYAKI/KITHOKA/576 and Kienderu on NYAKI/CHUGU/462 or in any way interfering with the applicant's access and worship in the said churches until this petition is heard and determined.***
- 2. That conservatory orders be and are hereby issued to the effect that the respondents are restrained from alienating, selling, transferring or in whatever way interfering with the parcels of land in number 1 above.***
- 3. The Officer in-charge of the police close by to those churches in number 1 above are directed to give assistance to the realization of the orders number 1 and 2 above and to ensure peace is maintained..***
- 4. The costs of the chamber summons dated 22nd September 2009 shall be in the cause.***

Dated and delivered at Meru this 26th day of November 2009.

MARY KASANGO

JUDGE