



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Appeal 1 of 2005

DAVID MULI APPELLANT

VERSUS

1. DANIEL NZIOKI MULI

2. SHADRACK NDOLO MUTUA

3. RICHARD MUTUA KAMUMBU RESPONDENT

(Being an application for Injunction)

RULING OF THE COURT

1. The appeal against the ruling of Miss Nyambu, SRM dated 1/12/2004 in Machakos Chief Magistrate's Civil Case Number 330 of 2004 is still pending. That ruling arose out of an application by way of Chamber Summons made under Order 1 Rule 10 of the Civil Procedure Rules seeking to enjoin the Board of Trustees of Ebenezer Church as plaintiff in the suit before the lower court. The application was considered and dismissed.

2. The application that is now before me is a Chamber Summons made under Order 39 Rule 1 (a) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The applicants seek the following orders:

a. That this application be certified as most urgent while dispensing with its service.

b. That this court be pleased to issue a temporary injunction against the Respondents, their servants and or agents from otherwise committing acts of waste and or interfering with the smooth running of Ebenezer Gospel Church at Wangio until this application shall be fully heard and determined.

c. That this Honourable Court be pleased to issue restraining orders of injunction against the Respondents, their agents and or servants from otherwise committing acts of waste and or interfering with the smooth running of the Ebenezer Gospel Church at Wangio until the appeal hearing is fully heard and determined.

d. That the costs of this application be provided for.

3. The application is premised on four grounds that:

i. Respondents have long been suspended to serve as Pastors and or members of the Ebenezer Gospel Church.

ii. The respondents their agents or servants have engaged in wanton destruction of the vegetation with the Ebenezer compound Church especially felling trees without the permission of the working committee and the Bishop.

iii. The church has only one ordained Bishop endowed with the day to day running of the Church and in charge of submitting the annual returns by the name Bishop David Muli.

iv. The respondents have from day to day harassed Church members while claiming that they are the owners of Ebenezer Gospel Churches.

4. The application is also supported by an affidavit dated 21/02/2007 sworn by BISHOP DAVID MULI who has deponed that he is the only ordained bishop of the Ebenezer Gospel Churches, (the church) as per annexure marked "DM1" which is a copy of Certificate of Ordination. He also says that at a duly constituted meeting of the church on the 22/03/2004, the three respondents were expelled from the Ebenezer Gospel Churches. According to annexures marked DM II, III and IV, the respondents were expelled from the church for different reasons. Richard Mutua Kamumbu (3rd respondent) was expelled for reason of undermining the church leadership while Daniel Nzioki Muli (1st respondent) was expelled for reason of polygamy which was said to be contrary to section 6 (a) of the church constitution, and Shadrack Ndolo Mutua (2nd Respondent) was expelled from church for refusing to go on transfer and also embezzling the sum of Kshs. 64,045/=.

5. The deponent also says that the orders of injunction ought to be issued against the respondents who have purported to convert the Church Bible School into a village polytechnic without permission of the committee concerned. In addition the deponent says that the respondents have from time to time harassed church members, laid claim of ownership to the church and have persistently undermined the authority of the Bishop, thereby creating chaos within the church.

6. The application is opposed. The Replying Affidavit is sworn by Richard Mutua Kamumbu, the 3rd Respondent, who says that he has the authority of both the 1st and 2nd Respondents to swear the affidavit on their behalf and also on his own behalf. He says that the three respondents are all faithfuls of the church at Wangio and that the 1st applicant, who was once a bishop with the church suspended on 18/08/2003 as per annexure marked "RM2". This annexure is a copy of a letter dated 18/08/2003 by the General Secretary advising the 1st applicant that he had been suspended as a bishop and that he was not supposed to conduct any service within or outside the church. Kamumbu further deponed that since his suspension on 18/08/2003, the 1st applicant has never attended the church at Wangio but instead he attended church at Yandui.

7. Kamumbu also deponed that the 1st applicant was not recognized by the church constitution following his suspension on 18/08/2003. He also denies allegations by the applicants that they (respondents) have destroyed church trees and further denies that the respondents have converted the church hall into Tuvilani Youth Polytechnic. He also says that the applicants have come to court with duty hands because the allegations of the Supporting Affidavit are all falsehoods.

8. At the hearing of the application the counsels on either side reiterated the averments as contained in the filed affidavits. Miss Katunga also relied on the Supplementary Affidavit filed on 14/03/2007 with the leave of the court. The 1st applicant who swore the said Supplementary Affidavit says that the respondents have forged documents in an effort to show that he (1st applicant) is not a Bishop of the church. He annexed to his Supplementary Affidavit a letter marked "DMM II" which letter authorizes him to open branches of the church anywhere within the Republic. None of the counsels cited any authority to support their case.

9. From the pleadings that is a plain case of orders of prohibitory injunctive orders that are governed by the principles laid down in the case of *GIELLA vs CASSMAN BROWN & CO. LTD (1973) EA 436* which are that in applications of this nature:-

- a. an applicant must show a prima facie case with a probability of success;
- b. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;
- c. when the court is in doubt, it will decide the application on the balance of convenience.

10. The issue that arises for determination is whether the applicants have fulfilled the above conditions. A close look at the pleadings and the submissions has left me in no doubt that the applicants have not fulfilled the conditions for the granting of an injunction. The case for the applicants is the pending appeal in which they complain that that the learned trial magistrate misdirected herself on relevant laws governing joinder of parties. I have carefully studied the application that gave rise to the disputed ruling. I have also carefully read the ruling of the learned trial magistrate and in my view I do not think that the applicants have shown that their case against the respondents is both prima facie, and has a probability of success. Lest I should go into the appeal itself, I will leave the matter to rest there on this particular point.

11. Secondly, nowhere, either by the pleadings themselves or through the submissions have the applicants shown that they are bound to suffer irreparable injury unless the orders sought are granted. The 1st applicant alleges that the respondents are laying claim to the church. I do not think that such claims alone can amount to irreparable damage to the applicants. In any event the 1st applicant says vide the Supplementary Affidavit that he has the authority to open branches of the church anywhere within the Republic. He has not said that the respondents are barring him from opening such branches.

12. The applicants have also annexed to the Supplementary Affidavit some photographs showing destruction of vegetation. The deponent does not say when and by who the pictures were taken. All I can say is that these are mere scraps of paper to which this court has attached no value. It would have helped matters more if the photographer who took the photographs swore an affidavit confirming when, where and upon whose instruction he took the photographs. Even if I were to decide this application on a balance of convenience I would still find and hold that the same tilts in favour of the respondents. The applicants have not proved that the respondents have committed any acts of waste nor have they shown that the respondents are interfering with the smooth running of the church or at all.

13. In the result, I find and hold that the applicants' application lacks merit. The same is dismissed with costs to the respondents.

14. It is so ordered.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE