



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1349 of 2004

REV. SAMUEL OTINGA OMAGWA.....PLAINTIFF

VERSUS

REV.PETER NDUNG’U & 3 OTHERS..... DEFENDANT

RULING

The Plaintiff came to this Court vide a plaint dated 10th December, 2004. Among the key averments is that, vide paragraph 4 of the plaint, him plaintiff is a pastor in charge of Kawangware congregation, Nairobi Parish, Nairobi District having been elected as a Parish leader in the Parish Council meeting held on 31st May 2003 for a period of two (2) years, that the Plaintiff with the express permission, approval and or consent of the defendants enrolled in a masters of Arts degree in Theology at Nairobi Evangelical Graduate School of Theology, part time programme, August 2004 for a period of three years in pursuance of the evangelical Lutheran Church in Kenya’s Church in Kenya’s By laws, that the defendants on 2nd November 2004 through the Diocesan Secretary Centrol Diocese, purported to transfer the Plaintiff from Kawangware congregation Nairobi Parish, Nairobi District to Bomet Pioneering Parish, Central Rift District with effect from 1st January 2005, that by a letter dated 17th November, 2004 the 4th defendant without any authority whatsoever purported to usurp the powers and functions of other organs of the church by denying the plaintiff the opportunity to appeal against the alleged transfer to the established organs of the Evangelical Lutheran Church in Kenya.

Contended that the defendants had no power to transfer him from his elective office to another parish and consequently the purported transfer is null and void.

In consequence therefore, the Plaintiff sought a permanent injunction restraining the defendants jointly and severally by themselves, their agents, servants and or employees from transferring and or effecting the transfer, interdicting, suspending, removing, expelling, seeking and or interfering in any manner whatsoever with the Plaintiffs duties and responsibilities as a parish leader of Kawangware Congregation, Nairobi Parish Nairobi. A declaration that the Defendants purported transfer of the Plaintiff to Bomet pioneering Parish, Central Rift District with effect form 1st January 2005, that by a letter dated 17th November 2004 the 4th defendant without any authority whatsoever purported so usurping the powers and functions of other organs of the church by denying the Plaintiff the opportunity to appeal against the alleged transfer to the established organs of the Evangelical Lutheran Church in Kenya, contend that the defendants had no power to transfer him from his elective office to another Parish and consequently the purported transfer is null and void.

In consequence thereof, the Plaintiff sought a permanent injunction restraining the defendants jointly and severally by themselves, their agents, servants and or effecting the transfer, interdicting, suspending, removing, expelling, seeking and or interfering in any manner whatsoever with the Plaintiffs duties and responsibilities as a parish leader of Kawangware Congregation, Nairobi Parish Nairobi. A declaration that the Defendants purported transfer of the Plaintiff to Bomet pioneering Parish central Rift District contravenes the Evangelical Lutheran Church in Kenya's constitution and by law and consequently the same is null and void. The Plaintiff also sought costs and interest.

The Plaintiff had an accompanying chamber summons dated and filed the same date, brought under Order 39 rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules seeking an injunctive relief. The injunctive relief sought by the Plaintiff was declined by J.B. Ojwang on 31st March 2006.

The courts attention has been drawn to the concluding remarks of the said learned judge found at page 19 line 4 up to page 20 and these read "the work of a pastor is to give pastoral and spiritual services. No doubt the defendant expects the plaintiff to provide such services to a certain standard which would not necessarily be knowable to this court. The defendants consider that the Plaintiff will deliver such services better at Bomet and so they have dispatched him there. If this court were to restrain the defendants from transferring the Plaintiff, it would be improper, for the court cannot guarantee that the Plaintiff will provide the expected standards of service at the Station where he served in the past. By forcing the hand of the defendants to retain the Plaintiff at Kawangware, much harm will be occasioned to the proper running of the church, the amount of harm that can come the plaintiffs', way at Bomet, will not be so much, and more over, it can be compensated by an award of damages in the event the plaintiff wins in the main suit.

The defendants, put in a defence, and counterclaim dated 26th June 2006 and filed on the 27th June 2006. The salient features of the same are that they, defendants, deny giving permission, approval and or consent to the plaintiff to enroll for a masters of Art degree in Theology at Nairobi Evangelical Graduate School of Theology, part time program in August 2004, that the transfer of the plaintiff to Bomet was in accordance with the Church's Constitution and By Laws, they deny that the 4th defendant usurped the powers and the functions of other organs as alleged or at all and put the Plaintiff to strict proof, the defendants have power bestowed upon them by the Church's Constitution and by Laws to transfer a pastor, that the Plaintiffs transfer was legal, lawful and does not contravene the churches Constitution and by Laws.

In their counter claim the defendants averred that the Plaintiff resides in their premises in the Kawangware Church compound and has refused, failed and or neglected to move to Bomet pioneering parish where he was posited, that the defendants claim from the plaintiff vacant possession of the Kawangware church premises, mesne profits, costs of the counter claim and such further or other relief as this Honorable Court may deem just.

The counter claim was accompanied by an interim application by way of chamber summons brought under order 39 rules 1(a) 2, 3 and 9 of the Civil Procedure Rules, Section 3 (a) and 63 (c) and (e) of the Civil Procedure Act. It is dated 26th day of June 2006 and filed on 27th June 2006, the said application is the subject of this ruling. The prayers sought are:-

- (1)** That the Plaintiff/Respondent, his servants and/or agents or anyone claiming under him howsoever be restrained pending the hearing and final determination of this application from entering, upon and or interfering with the administrative, religious functions final and/or accounts and property at Kawangware congregation church, Nairobi parish of Nairobi.
- (2)** That the Plaintiff/Respondent vacate from Kawangware congregation church, Nairobi Parish, Nairobi.
- (3)** The OCPD Muthangari Division do supervise the enforcement of these orders.

The grounds are set out in the body of the application, supporting affidavit, skeleton written arguments

and case law.

The main point's relied upon by them are mainly.

- (a)** A reiteration of the salient features of either sides pleadings as set out earlier on in this ruling.
- (b)** That the plaintiff was constitutionally transferred to Bomet in the exercise of the powers conferred to the defendants by the church constitution.
- (c)** That him Plaintiff, not only refused to move from the church on transfer, but he has also refused to move from the official residence of the pastor for the Kawangware church, causing untold hardship, the incoming pastor who has already been installed.
- (d)** That in addition to move, the Plaintiff is inciting members of the Kawangware church against the church leadership in general and the incumbent pastor in particular.
- (e)** That by reason of matters aforesaid, the defendant has found it imperative to seek the injunctive relief being sought.
- (f)** In addition to refuse to honour the transfer, the plaintiff has failed to honour requests for him to attend organized meetings to try and resolve the matter amicably. He also broke the church gate.
- (g)** The Plaintiff attempted to appeal against the decision to dismiss, his prayer for injunctive relief, but apart from lodging a notice of appeal, no other steps have been taken in the matter to prosecute the intended appeal, nor steps taken to prosecute an application for an interim injunction pending the hearing of an intended appeal.

The plaintiff respondent has opposed the application on the grounds set out in the replying affidavit, written skeleton arguments and oral submission in court and the major ones are that:-

- (1)** If eviction orders sought are granted then nothing will be left to go to trial for the counter claims.
- (2)** The applicant should have come under order 35(1) Civil Procedure Rules by way of summary judgment since they are seeking summary judgment.
- (3)** Their prayer 4 which sought the relief pending hearing and the determination of the application is spend and cannot vest any relief in favour of the defendant beyond the hearing inter parties of this application.
- (4)** Prayer amounts to excommunication and it should not be entertained.

In response Counsel for the defendant submits that prayer 2 lasts up to the ruling stage, that all they are asking for in prayer 3 is that the plaintiff respondent do vacate both the residential premises and the church premises at Kawangware, that even if vacant possession is given at this interlocutory stage, the counter claim will not be defeated as there are other issues for trial besides vacant possession.

The court was referred to the case law as per the defendants list of authorities dated 17th July 2006 and, filed on 17th July 2006. The Court has gone through them and finds that authority number 1 - 3 dealt with stay of execution pending appeal. While case number 4 and 5 dealt with breach of contracts of employment. None of these two issues are subject of inquiry herein. The Plaintiffs contract of employment has not been terminated. All that the employer has done is to deploy him in another station which deployment the plaintiff resisted necessitating these proceedings. Upon resistance to move to a new station, and since his application to injunct the employer from moving him from the premises failed, is when the defendant came to court by way of defence in response to his claim and in addition to the

defence, put in a counter claim on the basis of which the employer has put in an application for restraint orders the subject of this ruling.

Turning back to the assessment of the points for and against the application, it is clear that the opposition to it is on two fronts, namely the technical front and the merit front. The technical front arises because of the Plaintiffs/respondents counsel assertion that the application is doomed to fail because:-

- (1) Prayer 2 which is the main prayer is sought to last pending hearing inter parties and so it is spent.
- (2) Since the defendant applicant is seeking vacant possession, they should have come by way of summary judgment procedure.
- (3) That if prayer 3 is granted there will be nothing left to go to the trial on the counter claim.
- (4) Further if prayer 3 is granted then it will amount to ex-communication, a power which the court has no power to exercise.

On the courts assessment of the facts herein, in line with the technical issues raised, by the Plaintiffs counsel herein, the court agrees that indeed prayers 2 which is the main injunctive prayer is framed to last the inter parties hearing. Line 2 of Prayer 2 reads in part *“be restrained pending the hearing and final determination of this application”*.

The phrase and *“thereafter pending hearing and determination of the suit”* are missing. As submitted by the Plaintiffs Counsel, applicant is bound and there is no way the Court can stretch that relief for it to last till the determination of the suit though the court has no doubt, that was the intention of the defendant/applicant.

As for prayer 3 in ordinary circumstances where the Plaintiff seeks recovery of land, even by way of a counter claim, the order 35 Civil Procedure Rules, procedure is ideal. However where the vacant possession is being sought as part of an injunctive, equitable relief then the best mode of availing oneself of the same is by way of presenting a mandatory injunction. Though the court has no doubt that this is what the defendant had in mind, and not the order 35 Civil Procedure Rules, without them praying for a mandatory injunction, and addressing the court on the same, the court cannot of its own motion move to grant the same. More so when there is no prayer in the same application asking the court for any other alternative remedy that the court may deem fit to grant.

Having faulted the main prayers on points of technicality, there is no need to endeavour setting out and making a determination on the merits as this might prejudice the outcome of a similar application should the defendant applicant choose to present one, since faulting of a pleading on a point of technicality does not make it a proper candidate for Resjudicata under Section 7 of the Civil Procedure Act.

The application by the defendant dated 26th June 2006 and filed on 27th June 2006 be and is hereby dismissed on points of technicality specified above.

- (2) The Plaintiff who was a respondent to it will have costs of the said application from the defendant/applicant.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL 2008.

R. N. NAMBUYE

JUDGE