



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 24 of 2008

BISHOP TIMOTHY NZIOKI NDAMBUKI 1ST PLAINTIFF

DANIEL MUNYAO YUMBYA 2ND PLAINTIFF

NASON NDANGILI KIMONDIU (*Suing on behalf of a Society known as*

the AFRICA BROTHERHOOD CHURCH 3RD PLAINTIFF

VERSUS

JOSEPH KIMANZI MITAU &1ST DEFENDANT

MOSES MUTIA KATHULI 2ND DEFENDANT

CEDRICK MWANIKI MUSEMBI 3RD DEFENDANT

GRACE MUTHILI KOLI 4TH DEFENDANT

REBECCA ANNE MUTIA 5TH DEFENDANT

TABITHA MUYANI MWANIKI 6TH DEFENDANT

BELITA KASYOKA MUINDE 7TH DEFENDANT

PASTOR JOHN NGAVA NGIE 8TH DEFENDANT

RULING

1. The Chamber Summons dated 17/12/2007 seeks orders under Order XXXIX Rules 1 (a) (b), 7 (a) and (b) of the Civil Procedure Rules, Section 3, Section 3A and Section 63 (c) of the Civil Procedure Act.

1. “THAT this matter be certified as urgent and that it be heard ex-parte in the first instance.

2. THAT this Honourable Court be pleased to issue an order of injunction to restrain the Defendants jointly and severally by themselves or by their collective or several agents or servants or otherwise howsoever, from trespassing into or interfering with the A.B.C. Makaani, or any other constituent churches of the plaintiff society or from interfering with or stopping the plaintiffs members, employees or clergy from performing their functions at A.B.C. Makaani or elsewhere pending the hearing and determination of the suit.

3. THAT FURTHER AND WITHOUT PREJUDICE to the foregoing this Honourable Court be pleased to Order the Defendants to deliver up and surrender to the plaintiffs all membership books and cards, books and accounts, Bank documents and cash in hand in their possession pending further orders of this Court.

4. THAT the costs of this Application be borne by the Defendant.”

2. The grounds relied upon are that:-

- a. “The Defendant/Respondents have persistently been in breach of the Plaintiff Canon Law and its Constitution.
- b. The Defendant/Respondents have defied the authority of the Bishop (the 1st Plaintiff/Applicant) and all the Church Governing Councils, further, the Defendant/Respondents, have also openly refused to recognize the authority of the 1st Plaintiff/Applicant or any of the Governing Councils.
- c. The Defendant/Respondents willingly resigned from the membership of the Plaintiff Church on the 7th day of October 2007 and jointed a new society known as the Africa Beulah Church.
- d. The Defendant/Respondents have also unlawfully converted and forcefully taken over A.B.C. Makaani a constituent church of the Plaintiff society located at Nzeluni location of Mwingi District and proceeded to eject all Church members who worship at the said church.
- e. The Defendant/Respondents have deposed and disbanded lawful church committees at A.B.C Migwani and they have without lawful authority interfered with the Plaintiffs property, withheld monies and/or used it for purposes not sanctioned by the Plaintiff’s Governing Council.
- f. The Defendant/Respondents are determined to cause a division within the Plaintiffs church and in so doing are endangering the unity and interests or approximately two (2) million members of the Plaintiff society.
- g. The interest of justice mitigates that the Defendants be restrained by this Court as the Plaintiff property stands to be alienated, damaged or destroyed by the Defendants, leading to a loss which cannot be compensated by damages.
- h. The Defendant/Respondents will suffer no prejudice if these orders are granted since in any event they are no longer members of the Plaintiff Society and therefore they can exercise their constitutional rights of association or worship at other venues of their individual or collective choice.”

3. I have read the Supporting Affidavit sworn on 17/12/2007 by Timothy Nzyoki Ndambuki and his Further Affidavit sworn on 20/12/2007 together with the annexures thereto. I have similarly perused his Affidavit sworn on 2/1/2008 and the detailed submissions filed on his behalf. The summary of the case for the Plaintiffs/Applicants is as follows:-

The African Brotherhood Church was founded sometime in 1945 and developed to have an extensive network in East and Central Africa. The Plaintiffs are the registered officials of the Church and there is exhibited a letter dated 12/4/2007 from the Registrar of Societies confirming that fact. The dispute before me relates to the African Brotherhood Church at Makaani in Kitui District which the Plaintiffs claim belongs to them and not to the break-away faction of the church which in 2007 was named African Beulah Church.

I also note that the Plaintiffs admit that the Defendants were at one time its members and that Pastor John Ngava Ngie was appointed to preside over the church at Makaani on 4/9/2006 and Moses Mutia Kathuli was that church’s Chairman of the Development Committee until they both resigned in July 2007. Apparently, the Defendants then took over the church at Makaani in their new name of Africa Beulah Church and refused to hand over the church premises, cash and furniture to Pastor Joseph Ndivo who had been appointed in place of the 9th Defendant.

4. It is the Plaintiffs’ further case that one Martha Kakulu Maluki, a member of the church donated the ½ acre of land on which stands Makaani Church aforesaid and the Defendants have no lawful claim to it or on any development on it and that their conduct in relation thereto is against the Church’s Constitution, Cannon Law and dictates of the Bible. Certain orders are sought in the Plaint dated 17/12/2007 and in the interim, an interlocutory injunction as elsewhere set out above is sought.

5. The Defendants’ response to the Application is contained in Grounds of Opposition dated 28/2/2008 and in Submissions on record, their case is that the Plaintiffs have no locus standi as they are not the registered trustees of the African Brotherhood Church to which the property of the church vests. That the suit should be struck out for that purpose.

6. Secondly, that there is no clear evidence before this court that the land on which the Church at Makaani is situated was properly acquired by the African Brotherhood Church and that without that evidence, the claim to the land must fail.
7. Thirdly, that the dispute between the parties is an ecclesiastical one and the court has no business to enter it and attempt a resolution because internal mechanisms of resolving such a dispute have not been exhausted.
8. Fourthly, that the land in dispute is not properly identified and without evidence of proprietorship, the whole claim as set out in the Complaint must fail.
9. I am grateful for the diligence exhibited by advocates for the parties and I have perused the authorities submitted. To my mind however, the Application does not portend any difficulty. The facts as set out in all the Affidavits sworn by the 1st Plaintiff have not been disputed and I take it therefore that the Defendants were originally members of the African Brotherhood Church but due to a schism in July 2007, moved away to set up their own church, African Beulah Church. As matters stand now, they are not members of the African Brotherhood Church and all submissions that they are bound by that Church's Constitution and the dispute is one to be settled under that Constitution cannot be sustained. I say so because if indeed they are still members of the African Brotherhood Church, then they cannot at the same time in their submissions doubt and debate the church's claim to the land on which Makaani A.B.C. Church stands.
10. Having so said, the law is clear that a party seeking an interlocutory injunction must show that the property in dispute is in danger of being wasted, damaged or alienated (Order XXXIX Rule 1 (a) of the Civil Procedure Rules) and that it has a prima facie case with a probability of success; that it will otherwise suffer loss that cannot be compensated in damages and this court in addressing the question, if in doubt, will determine it on a balance of convenience – See **Giella vs Cassman Brown & Co. Ltd (1997) E.A. 358**. I heard arguments from counsel for the Respondents that ecclesiastical law should be invoked but as was said by the Court of Appeal in **Gathuma vs African Orthodox Church of Kenya (1982) KLR 358** in a case with mixed spiritual and temporal characters where matters affecting legal rights are in issue, this court can properly determine those issues. That is the position I have taken in this matter.
11. Have the Applicants shown that they have a prima facie case with a probability of success? I think so because I have seen no evidence to rebut their position that Martha Kakulu Maluki, a member of the church donated the land on which Makaani Church stands. I have also seen no evidence to dislodge the position that the Respondents are deserters of the African Brotherhood Church and if that be the case, they have no right to convert any property belonging to, or in the possession of the African Brotherhood Church, to themselves whatever their new congregation may be. Even if they have not been formally excommunicated, their admitted conduct speaks for itself and they cannot hide behind their amorphous and unclear position to defeat the rights of their mother church.
12. On the question of irreparable loss, the status of the breakaway African Beulah Church is unclear to me. What is clear is that it is attempting to set itself up by taking up structures that properly belong to, or are in the possession of the African Brotherhood Church. To do so would cause spiritual turmoil and I am certain that no damages can compensate that loss. I should distinguish my decision in **Christian Brotherhood Nkibwe Church Trustees vs Brotherhood Gospel Church & Another, H.C.C.A 75/2005 (Meru)** by saying that I dismissed the Application for injunction because in that case, the party seeking the injunction was a break-away church faction similar to the present Respondents and I took the view, as I have taken in this matter, that break-away factions have no right to claim property belonging to the parent church.
13. Lastly, on a balance of convenience, the Respondents have shown me nothing to warrant discretion being given in their favour.
14. The Application dated 17/12/2007 is wholly merited and is allowed as prayed with costs to the Plaintiffs.
15. Orders accordingly.

Dated and delivered at Machakos this 30th day of October 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Kamanda h/b for Mr Kitulu for Applicant

N/A for Respondent

ISAAC LENAOLA

JUDGE