



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**Civil Suit 39 of 2007**

- 1. ARTHUR NJENGA**
- 2. FRANCIS NJOGU**
- 3. DANIEL RARUI**
- 4. DANIEL NJEGA ..... PLAINTIFFS**

**VERSUS**

- 1. ARCH BISHOP SHANSON M. GAITHO**
- 2. BISHOPS SYNOD OF AIP OF AFRICA**
- 3. REVEREND HENRY MUGO..... DEFENDANTS**

**R U L I N G**

The Four Plaintiffs who claim to be members and worshippers in African Independent Pentecostal Church of Africa filed this suit on 12<sup>th</sup> March, 2007. They at the same time filed an application under certificate of urgency seeking inter alia, the following orders:-

- 1. ....
- 2. That an interim injunction do issue restraining all the respondents jointly and severally more specifically the First and Second Defendants from the elevation, installation and ordination of the 3<sup>rd</sup> Defendant as Bishop of Eldoret Diocese scheduled to be held on 18<sup>th</sup> March, 2007 at Central Primary School or any other place or venue in Kenya or elsewhere and or on vessel on water or space pending the hearing and final disposal of this application.
- 3. That a mandatory injunction do issue restraining the Defendants jointly and severally and more specifically the First and Second Defendants from elevation, installation and ordination of the 3<sup>rd</sup> Defendant as Bishop of A.I.P.C.A designated for posting to Eldoret Diocese or any other province of AIPCA within the Republic of Kenya

.....

- 5. ....

The Plaintiffs' Counsel Mr. Ngigi Mbugua appeared before this Court on 13<sup>th</sup> March, 2007 to prosecute

the application ex parte. However, the Defendants having gotten wind of the impending application appeared in Court through their Advocate, Mr. Limo. The Application could no longer proceed ex parte as the Defendants had to be heard. I directed that the Defendants file their responses and the matter be heard on its merits today, Friday, 16.03.07. The consecration and/or ordination of the 3<sup>rd</sup> Defendant as a Bishop is scheduled to take place on Sunday, 18<sup>th</sup> March, 2007.

In view of the urgency, I gave notice to Counsel and the parties that I would most likely make a decision but reserve the reasons due to the short period given to the Court. This Court as a Court of Equity and Justice can make considered decisions and give its reasons subsequently to meet the demands of justice.

The application was heard between 10.30 a.m. upto 3.45 p.m. with a lunch break in between.

After considering the application, the Replying Affidavit and the submissions by Counsel, I do render hereunder this Court's decision with some brief elaboration and reasons. This Court in exercise of its discretion and to meet the exigencies of the situation does hereby reserve the reasons for the decision:-

1. I do hereby hold that the provisions of Order 39, is not restricted to suits where the subject-matter is property. Rule 2 of the Order provides for the grant of restraining Order, against a Defendant from committing a breach of contract or other injury of any kind whether compensation is claimed in the suit or not. This Court has the jurisdiction to grant the reliefs sought in the Plaint and the application herein.
2. I do hereby find and hold that the Plaintiffs/Applicants in this suit are members of the African Independent Pentecostal Church of Africa and they have the locus standi to institute these proceedings.
3. As decided in the Court of Appeal decision in TANUI & 4 OTHERS –VS- BIRECH & 11 OTHERS (1991) KLR 510 at 511 –

“..... we would agree that while it is not the business of the High Court or this Court to involve itself in the day to day running of institutions such as the Church, Colleges, Clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and this Court would not only be entitled to but under a duty to compel it either by injunction or otherwise to obey its Constitution.”

I believe that I am bound by this decision of our Court of Appeal. It is also my view that once a member of a Church is allowed to join the Church then at that point is created a contractual relationship that he shall submit himself to the provisions of the Church Constitution and be bound by them. Equally, the Church is bound to respect, comply with, enforce and protect the said Constitution the basis upon which it was established and exists in law.

I have carefully studied the relevant provisions of the Constitution of the Church, and I do hereby find that the Plaintiffs/Applicants have shown a prima facie case with a probability of success that the Third Defendant's election or nomination as a Bishop designate of the Eldoret Diocese and his proposed consecration an ordination are in violation of the Constitution of the Church. There appears to have been no due process and the Defendants have not been able to rebut the allegations by satisfying the Court even to a limited extent that the Constitution has been complied with and that the Bishop-elect is qualified to be a Bishop of Eldoret Diocese.

I do not think that the Plaintiff and other members of the Church will be adequately compensated by damages if they are successful in this suit. In my view the desecration and blatant violation of the Constitution of a Church is an illegality and sacrilegious. The likely injury to the Plaintiffs would be irreparable to the beliefs and religious rights of the Plaintiffs. The right of religion is a constitutional right. Many constitutional rights if violated cannot be adequately compensated by damages. Receiving compensation or money is not everything in life. There are values, aspirations and expectations that are beyond monetary consideration. This is one of them.

I do find that the conditions set in the GIELLA –V- CASSMAN BROWN CASE has been met. I also think that the grant of a mandatory injunction is appropriate.

I do hereby grant Prayers 2 and 3 of the Application PENDING the hearing of this suit. This Orders are granted on condition that the Plaintiffs shall lodge within seven (7) days from today, into this Court a written undertaking that they shall bear and be responsible for all the costs, expenses and damages which may arise and incurred by the Defendants as a result of the grant of the Order and cancellation of the intended installation/consecration of the Bishop of the Eldoret Diocese. Costs of the Application shall be in the cause.

DATED AND DELIVERED AT ELDORET ON THIS 16<sup>TH</sup> MARCH, 2007.

M. K. IBRAHIM

JUDGE