



**REPUBLIC OF KENYA**

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

**PETITION NO. 681 OF 2006**

**IN THE MATTER OF: SECTION 84(1) & (2) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS OF THE INDIVIDUAL**

**BETWEEN**

**SAMUEL MURIITHI NJGO.....1<sup>ST</sup> PETITIONER**

**JOSEPH KIPTANUI SAMOEL.....2<sup>ND</sup> PETITIONER**

**SAMUEL MBITHI KATHITTA.....3<sup>RD</sup> PETITIONER**

**EPHRAHIM WAIGANJO KARIANJAHIL.....4<sup>TH</sup> PETITIONER**

**GEOFRFREY MUTHECHA GITAU.....5<sup>TH</sup> PETITIONER**

**DOMINIC WAGORO ..... 6<sup>TH</sup> PETITIONER**

**AND**

**JOHN NJOROGE MICHUKI MINISTER OF STATE FOR PROVINCIAL**

**ADMINISTRATION & INTERNAL SECURITY ..... 1<sup>ST</sup> RESPONENT**

**MOHAMMED HUSSEIN ALI COMMISSIONER**

**OF POLICE ..... 2<sup>ND</sup> RESPONENT**

**AMOS WAKO ATTORNEY GENERAL.....3<sup>RD</sup> RESPONENT**

**JACKSON KIPKEMBOI KOSGEY ..... 4<sup>TH</sup> RESPONENT**

**STEPHEN KIGURU KAMAU ..... 5<sup>TH</sup> RESPONENT**

**RULING**

The application before me is dated 30<sup>th</sup> April 2007 and filed on 2<sup>nd</sup> May 2007. It is a Notice of Motion.

The first two orders sought namely 1 and 2 are spent in that certification of urgency and a temporary stay until the hearing interpartes were given.

The substantive prayer seeks an order that the consent order entered into between the Petitioners and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and filed in this Court on 11<sup>th</sup> April, 2007 be set aside.

The grounds in support of the application are set out in the body of the application and include:

- (a) The court order affects parties who are not parties to it.
- (b) The alleged consent order is not a consent order in law
- (c) The consent affects parties who are neither parties, nor to the Constitutional petition nor to HCCC No. 1236/2004
- (d) The Petitioners have used the consent order to procure the police assistance to harass intimidate and try to evict from their respective churches, the 4<sup>th</sup> and 5<sup>th</sup> respondents and their church members
- (e) The consent order purports to bring into force orders of Hon Ransley J of 9<sup>th</sup> March 2005 in HCCC No 1236 of 2004 which order lapsed and Hon Ojwang J expressly declined to extend them.
- (f) The Gicheru Rules of 2006 do not provide for filing of consent orders before the Deputy Registrar
- (g) That the case is on all fours with ***HC Misc 1133.2002 R v REGISTRAR OF SOCIETIES Ex parte JUSTUS NYANGAYA & OTHERS Misc Civil Application No. 113 of 2002.***

Affidavit of Reverend Samuel Mbithi Kathitta filed on 7<sup>th</sup> May 2007 by respondents did respond to the application. The highlights are:

- (1) That the consent order/letter is in pursuance of orders made by Hon Justice Ransley on 9<sup>th</sup> March 2005 in *HCCC 1226 of 2004* and a ruling made in this matter by my brother, Hon Justice Emukule on 21<sup>st</sup> November, 2006 and also a judgment by my sister, Lady Justice Wendoh on 30<sup>th</sup> March 2007 in *HC Misc Application No. 388 of 2006*
- (2) That the consent letter/order relates to issues of security, law, and order and that the court should not interfere in such matters
- (3) That the consent letter/order is a contract between the signatories to it and the court has not been furnished with any evidence of fraud, mistake or misrepresentation which are the only grounds upon which that consent order may be challenged
- (4) Consent letter/order is in relation to only one aspect of the application for conservatory orders namely the maintenance of law and order.
- (5) That the applicants had been excommunicated as observed by Wendo J, a fact they have repeatedly kept away from the court therefore their authority to be involved in the negotiations is non-existent. Their non involvement cannot therefore vitiate the contract entered into by the other competent parties in the suit

I have considered the grounds raised, the objections raised the authorities cited and submissions of Counsel. It is important to observe that the substance of the Petition includes issues of law and order and security in the Full Gospel Church in Kenya due to the alleged infighting of its leaders and the followers of the excommunicants.

At the outset, I wish to state that my holdings in the **NYANGAYA** case cited above are not relevant to

the matters raised in this application for the following reasons:

- (i) **NYANGAYA** case dealt with final order that purported to finally determine the judicial review application whereas the matter before me is an application arising from a Chamber application seeking conservatory orders in a Constitutional matter
- (ii) In the matter before me all the issues arising from the Constitutional reference would have to be heard and a final judgment given and the conservatory orders given reviewed, rejected or affirmed by the Court on merit at the final hearing
- (iii) In the **NYANGAYA** case there was evidence of deceit and collusion and a suspect role by the Deputy Registrar of the Court whereas in this matter no evidence has been offered in this regard
- (iv) Civil Procedure Rules do not apply to Judicial Review matters since they are sui generis whereas Civil Procedure Rules do apply to constitutional matters except where they are expressly excluded or where they are inconsistent with the provisions of the Constitution or its spirit
- (v) What some of the parties purported to consent to in the **NYANGAYA** case was the subject matter of the suit whereas in this matter the consent letters are in relation to only one aspect of the conservatory orders sought in the chamber application i.e. the enforcement of orders of Justice Ransley and Justice Emukule and to some extent the effect of excommunication on the status of the 4<sup>th</sup> and 5<sup>th</sup> respondent.
- (vi) The applicants in the **NYANGAYA** case were candid to the court and did not camouflage any past suits or orders including their status whereas in this case the applicant/respondents have concealed to the court their status as excommunicants, a matter which under common law affects their authority to represent the Church or deal with its property or affairs
- (vii) In the **NYANGAYA** case everything was being taken away from the court – to avoid a final determination whereas in this matter all issues shall be canvassed in the Petition regardless of the content of the consent letter. And there is no benefit to the Petitioners in this matter except the preservation of the status quo and the enforcement of law and order.

From the above it is clear to my mind that although I do reiterate all the findings in the **NYANGAYA** case they have no direct application here.

- (1) Firstly, the consent letter is giving effect to a past court order namely that of Justice Ransley and it is also as a result of Hon Justice Emukule ruling that challenged the 1<sup>st</sup> respondents to enforce law and order and as such the 4<sup>th</sup> and 5<sup>th</sup> respondents had no role in the matter although there are parties to the Constitutional matter. The proper parties were the first to third respondents
- (2) Security matters are largely non justiciable and the court cannot therefore stop any of the parties to the suit entering into a consent with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Consent can in law be entered into even in matters not arising from the subject matter.

According to MULLA on Civil Procedure 13 Edition pg 1292 the scope of the compromise is that the compromise in a pending suit may:

- (i) relate to the whole suit or
  - (ii) it may relate only to a part thereof or
  - (iii) it may also compromise matters that do not relate to the suit
- (3) Since the compromise or consent letter only related to law and order or security matters it cannot be specifically enforced and therefore the consent is not a contract as such. The state is under a

constitutional responsibility to enforce law and order and offer to all the protection of law. Nothing can vitiate such a contract unlike the ordinary contracts touching on other matters in a pending suit. It would be against the policy of the law and the public interest for a court to set aside such compromise. Similarly the fact that some of the parties to the suit are not parties to a compromise touching on law and order would not vitiate the compromise.

(4) The Judiciary itself is subject to the Bill of rights provision of the Constitution and it cannot properly be asked to unravel a compromise that purports to preserve law and order. This would be unconstitutional and a serious abdication of the Judiciary's responsibility under the Bill of Rights provisions. On the contrary the court has a positive obligation to uphold and to enforce such a compromise

(5) Prima facie in view of the ruling on the applicant/respondents status as excommunicants they lack the capacity to enter into any such consent or compromise (a fact they failed to disclose to this court when they obtained a stay on the consent letter – thereby revealing bad faith on their part. See the judgment of my sister, Lady Justice Wendoh of 3<sup>rd</sup> March 2007. In any event the elements which vitiate contracts are absent in respect of the consent letter – fraud, mistake misrepresentation

(6) All issues shall be determined in the main petition and the respondents cannot demonstrate any prejudice. Issues of law and order touch on all people including those not in the suit itself. Their inclusion cannot vitiate the compromise

(7) Disclosure of the applicant/respondents status was a material fact – and had this been disclosed the court it could not have on this ground alone given a stay. The application must fail as well.

(8) Although Chapter 5 protective provisions of our Constitution mention securing guaranteeing and protecting fundamental rights the International instruments which Kenya has ratified, including the relevant international law and, the notion of the universality of human rights do compliment the provisions in defining the extent of the State responsibility. I am therefore in agreement as I have held in another matter that “protection of law” on the part of the State encompasses a three fold duty to.

- (a) Avoid breaching legal rights of citizens
- (b) Protect the said citizens rights from being breached by others; and
- (c) To assist citizens whose rights have been or are being breached.

And as regards breaches of rights the State has an inscapable duty to:

- (d) Prevent
- (e) Investigate,
- (f) Punish
- (g) Restore and
- (h) Redress

This definition is of course subject to the unique wording of s 84 of the Constitution. There are restrictions on standing and who is aggrieved. A holistic view of translating human rights into practice will remain the biggest challenge to the courts.

It is with the above view of State responsibility on security for example, that I decline to set aside a consent order on security because in entering into the consent the State is only performing its core duty of maintaining law and order and of securing fundamental rights as outlined above.

Human rights have their origin in the concept of human dignity and anything that has the potential of interfering, disfiguring, diminishing or extinguishing human right or law and order must be dealt with promptly.

Every order, ruling or judgment under the Bill of Rights provisions must constitute a building block towards justice and peace. The application is dismissed with costs.

DATED and delivered at Nairobi this 18<sup>th</sup> day of May 2007.

J.G. NYAMU

JUDGE