**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MERU**

**Civil Case 80 of 2005**

**JEREMIAH MUKU ……..…….....……..**
**PLAINTIFF**

**VERSUS**

**METHODIST CHURCH OF KENYAREGISTERED TRUSTEES.....…1ST**
**DEFENDANT**

**REV. DR. STEPHEN KANYARU M'IMPWI …….....…… 2ND**
**DEFENDANT**

**RULING**

The matter before me is a classic example of how parties and their counsel can venture into endless and wasteful litigation that not only add to unnecessary increase of costs of litigation and confuse issues but also waste the precious judicial time. The case also demonstrates the extend to which parties and their counsel will go to abuse the process of the court.

I will demonstrate shortly. The respondent in this petition instituted an action against the petitioners in the year 2003, in which he sought, *inter alia*, declaratory orders to the effect that his suspension by the petitioners was malicious, null and void and that he was entitled to payment of Kshs.406,579/- plus interest thereon.

The petitioners filed their defence and counterclaim. Subsequently the plaint was amended and the petitioners similarly amended the defence and counterclaim.

What followed were myriad of applications before finally the suit was transferred to the High Court on the ground of pecuniary jurisdiction. In one of the many applications in this suit, the subordinate court delivered a ruling on 19th March, 2004 in which it ordered the respondent to "be remunerated for the work he was doing as the chaplain of Meru Hospital at half pay to wit, Kshs.15,400/-(Fifteen Thousand Four Hundred) only per month with effect from 13.6.2003"

That ruling was based on an application by the respondent for judgment on admission. A preliminary decree was then issued. That is the decree at the centre of many other applications and this petition.

Before I consider the petition I will highlight some of the applications filed by the petitioner both in the subordinate court and in this court in respect of the aforesaid decree of 19th March, 2004. Three days (on 22nd March, 2004), after the delivery of the above ruling the petitioner filed an application for stay of

further proceedings and execution of those orders pending appeal.

That application was dismissed by the court below. A week after the dismissal(on 31st March, 2004) the petitioner moved to the High Court at Nairobi with another application seeking leave to accept an appeal from the decision of 19th March, 2004 and leave to appeal from that decision. The High Court (Nyamu,J) referred the matter back to Meru High Court.

On 28th June, 2004 an auctioneer proclaimed the petitioners' motor vehicle pursuant to warrants of attachment issued under the decree in question. This prompted the petitioners to file yet another application for stay of execution on 5th July, 2004. The earlier application for stay of execution dated 22nd March, 2004 was heard on 15th October, 2004 and dismissed on 22nd October, 2004.

Meanwhile the respondent also brought an application to amend the plaint on 14th October, 2004 which application was allowed. On 17th November, 2004, the petitioners moved the court seeking an early hearing date of their application of 31st March, 2004 which had been transferred from Nairobi.

A date was allocated but it was not heard. On 1st February, 2005 the petitioners applied for leave to amend their defence and counterclaim, which application was granted on 25th February, 2005. Before that the petitioners were served on 4th February, 2005 with a proclamation for the attachment of the their movable property pursuant to the said preliminary decree of 19th March, 2004.

By Chamber Summons of 10th February, 2005 the petitioners moved the court for orders of stay of execution of the said preliminary decree and the setting aside of the same. That application was granted by the Chief Magistrate on a temporary basis pending *interpartes* hearing.

On 4th March, 2005 the Chief Magistrate declared, following the amendments, that he had no pecuniary jurisdiction to entertain the matter anymore. He also for the same reason, declined to extend the interim order of stay. Following these developments the respondent proceeded to attach the petitioners' goods. The same were only released after the petitioner's paid Kshs.227,284/=.

The respondent applied for and obtained fresh warrants of attachment on 6th May, 2005 from the Chief Magistrate's court and subsequently instructed auctioneers to proclaim the petitioners' goods which they did on 9th May, 2005.

Being apprehensive that the auctioneers intended to attach their goods on 11th May, 2005 the petitioners brought yet another application for stay on 12th May, 2005 in the High Court.

Orders sought were granted in terms of Prayers 5,6 and 7 of the Notice of Motion, namely, an order of stay of further execution of the preliminary decree, an order lifting and/or vacating the warrant of attachment and stay of further proceedings in CMCC No.412 of 2003(Meru). The orders were to remain in force until the *interpartes* hearing and determination of that application, which was slated for 14th June,2005.

Some other application was dealt with in period before the 6th July, 2005, when counsel for the parties recorded a consent. Of immediate relevance to this matter is a consent that CMCC No.412/2003 be transferred to the High Court and be consolidated with HCCC No.80 of 2005; that hearing of the main suit be fixed on 6th October, 2005 and that discovery of documents and drawing up of issues be effected within 45 days.

Hearing date was finally taken and the matter listed on 18th January, 2006. Indeed the hearing commenced with the respondent testifying at great length.

Hearing was adjourned to 17th May, 2006 – but somehow it proceeded again on 16th May, 2006 with the respondent being cross-examined by counsel for the petitioners.

In the course of that cross-examination learned counsel for the petitioner applied for the amendment to the counterclaim which was granted in the following terms;

"*(v) The first defendant prays that the plaintiff be ordered to refund to the first defendant all the monies paid to him pursuant to the preliminary decree issued on 19th March, 2004"*

The hearing with the respondent being cross-examined continued even on the 17th May, 2005(the following day) when it was adjourned to 21st and 22nd June, 2006. On 21st June, 2006 counsel for the petitioner's brought an application for conservatory orders under Rule 20 of the Constitution of Kenya(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. Filed simultaneously with the application was a petition, to which this ruling relates.

The turn of events surprised counsel for the respondent. The application was argued on two occasions. The court (Sitati,J) granted the conservatory orders on 5th October, 2006, stating that there shall be a stay of execution of the preliminary decree in question

"Until this suit is heard and determined or further orders of this honourable court".

I have deliberately set out the foregoing background to demonstrate how so much time has been spent on one application after the other for a period of over three(3) years – all based on the decree of 19th March, 2004.

I have cited no less than five applications for stay of execution of the same decree of 19th March, 2004. There is the application of 22nd March,2004; of 31st March,2004; of 5th July,2004; of 10th February,2005 and of 11th May,2005. Two of these applications were heard *interpartes* and dismissed yet the petitioners proceeded to file others seeking the same reliefs as those dismissed.

Apart from these applications the petitioners also filed a Memorandum of Appeal on 22nd March,2004, challenging the very decree of 19th March,2004. According to the proceedings of 16th May,2006 learned counsel for the petitioners addressed the court as follows;

"*To the best of my recollection all attempts to appeal against that decree were abandoned by the defendants so as to pave way for the hearing of the main suit. If there is any doubt in that regard, I do now formally abandon each and every appeal touching on that preliminary decree"*

These remarks were made when counsel applied to amend the counter-claim to provide for a refund of funds paid to the respondent pursuant to the preliminary decree. With that amendment and with counsel's assurance, one would have expected the hearing of the main suit to proceed smoothly to conclusion as the funds which caused concern to the petitioners were now taken care of by the amendment to the counterclaim. But that was not to be.

There is this petition dated 15th May,2006 brought pursuant to Sections 72,73,75,78,80 and 84 of the Constitution as well as Rules 11,12 and 23 of the Constitution of Kenya(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.

The petitioners allege that their rights under the Constitution have been violated by the Judiciary in the ruling of the subordinate court of 19th March,2004. That the ruling had the effect of compelling a party to enter into a contract with a person he does not wish to do business with and compels him to pay for services not requested and consumed. That the ruling contravenes Sections 72 and 73 of the Constitution.

It is further averred that to the extent that the ruling orders the petitioners to pay the respondent for services not requested and consumed, it violates Section 75 of the Constitution which guarantees the enjoyment of the right not to be deprived of one's property.

The petitioners, in the result, seek a declaration that the ruling of the Chief Magistrate in CMCC No.412/2003 and the preliminary decree issued on 19th March, 2004 contravene the 1st petitioner's rights to liberty, not to be held to servitude, to property, freedom of conscience and of association under Sections 72,73, 75, 78 and 80 of the Constitution.

They seek orders of certiorari to bring the said ruling and preliminary decree of the Chief Magistrate to this court for quashing, and in the alternative that the ruling and the preliminary decree in question be reviewed, set aside or vacated.

They also pray that the respondent be ordered to pay or refund Kshs.676,968/- and further that there be a stay of execution of the decree. I wish to make some preliminary observations. This is a petition – a constitutional reference, which should seek only declaratory orders whether or not the petitioners' rights and freedoms have been violated by the State (read the Judiciary). It is incompetent to bring in the same petition prayers for prerogative orders as well as reliefs under the Civil Procedure Rules (such as stay of execution and setting aside of orders).

Different rules and procedure apply to each of these reliefs and cannot therefore be brought in an omnibus fashion as in this case. It is clear that the petitioners would like to obtain what they had attempted and failed to obtain in very many applications; what they ought to have sought by way of appeal but abandoned. I turn to the petition. Section 84 of the Constitution gives the High Court pride of place in the scheme of enforcement of the fundamental rights and freedoms of individuals within the borders of Kenya. Any person who alleges an actual or apprehended breach of his fundamental rights and freedoms may apply directly to the High Court for redress.

But it must be remembered that constitutional references are not a panacea for resolution of all types of legal disputes. Invocation of constitutional remedies should only be reserved for serious breaches of the constitution and not for correction of errors either of substantive laws or procedure committed by courts in the course of litigation. The fact that a judgment or a ruling of the court is wrong does not mean that any fundamental rights of the party aggrieved by it has been breached.

The remedies for such errors are many. They include review, setting aside, stay of execution or even appeal. It has been held in Chokolingo V A.G of Trinidad and Tobago(1981) U.L.R 108 at P.112 and Maharaj V A.G of Trinidad and Tobago(No.2) (1979) AC 385 that a collateral attack of judgment (or ruling) through appeal(or through other means) and later through a constitutional reference would be subversive of the rule of law entrenched in the Constitution itself.

On the other hand, it has been held that if a remedy is available to an applicant/petitioner under some other legislative provision, the court will decline to determine if the applicants/petitioner's constitutional rights have been violated.

See Ministry of Home Affairs V Bickle and Others(1985) LRC 755 at P.758 Para.f. See also Harrison V A.G of Trinidad and Tobago(1980) AC 265. In the latter decision the Privy Council delivered itself this;

"The notion that whenever there is a failure of any organ of a government, a public authority or public officer to comply with the law, this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals under Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those significant freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke

the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexation or an abuse of the process of the court as being more solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom"

The foregoing statement is the most accurate description of what the petitioners have attempted to achieve in this petition. I say no more save to hold that this petition is not only frivolous but is also a gross abuse of the process of the court.

Finally I wish to observe that counsel for the respondent did not respond to or canvass this application.

For the reasons stated this application is dismissed with costs to the respondent.

Dated and delivered at Meru this 28th day of September, 2007

W. OUKO

JUDGE