



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

**Civil Suit 238 of 2005**

1. REV. JOSEPH KIMANI GITAU
2. PASTOR SAMMY GATERO
3. ELDER JOSEPH NDIRANGU
4. REV. ELIAS IRUNGU KAMANDE
5. REV. DAVID KABORA
6. REV. BONIFACE GOGO MWAURA
7. PASTOR JOHN OJUKA NYIMORI
8. REV. CHRISPUS M. MWANGUKU

9. REV. JAMES NJIHIA.....  
.....PLAINTIFFS

**VERSUS**

1. REV. SAMUEL MURIITHI NJOGU
2. REV. JOSEPH SAMOEI
3. REV. SAMUEL MBITHI KATHITA
4. REV. ELIJAH CHERUIYOT
5. REV. WILFRED NYAMU
6. REV. ZABEDI MAINA
7. WILSON MURIGI
8. NDUNG'U KARUGA
9. STEPHEN WAINAINA
10. PETER KABUKI

11. WILLIAM KARIUKI

12. RUTH KABERA

13. DAVID MUTUA

14. MOSES KIPTOO

15. DAVID MWANGI.....

DEFENDANTS

### RULING

The dispute in this case relates to wrangles in the top leadership of the Full Gospel Churches of Kenya (the Church) which have given rise to two groups. One group is said to have been in power upto the 12<sup>th</sup> November 2003 when they were allegedly voted out of office and the other is the one which was allegedly voted into the office on that day. Lest anyone thinks I am giving recognition to one group over the other I will hereinafter refer to them as the “First Group” and the “Second Group” respectively. The First Group disputes the validity of those elections hence the wrangles.

The plaintiffs in this case who claim to be ordained leaders of various congregations of the Church in Coast Province are allied to the First Group. They obviously do not recognize the Second Group. They claim in their plaint that on or about the 30<sup>th</sup> October 2005 the defendants attempted to forcibly take over leadership from them but they resisted and thereafter filed this suit. Their main prayer in this suit is a permanent injunction to restrain the Second Group who are the defendants in this case from interfering with their leadership of the Coast Province congregations of the Church until finalization of Nairobi HCCC No. 1236 of 2004 in which the main leadership issue is pending determination. Along with the filing of this suit the plaintiffs filed an application for a temporary injunction to restrain the defendants from interfering with their services until this suit is heard and determined.

Before the application could be heard Mr. Chemwok counsel for the defendants raised a preliminary objection written notice of which he had given.

Several points are raised in the Notice of Preliminary Objection. From the way they are framed I cannot conveniently summarise them. The best thing is to reproduce them verbatim and then deal with them one by one. They are:

**“ (a) That the application is without merit bad in law and a complete abuse of the due process of the court.**

**(b) That the plaintiffs are in counteraction of the mandatory provision of section 36 the church constitution and thus the application and the suit ought to be struck out.**

**(c) That the applications supporting affidavit has been deponed to by a stranger who does not have the locus standi to do so and on behalf of the church.**

**(d) That the suit is a duplication of Nairobi High Court Civil Suit No. 1236 of 2004 among 13 other cases.**

**(e) That the matter before court is res judicata.**

**(f) That injunction orders cannot issue retrospectively.**

**(g) That the prayers (a) (sic) sought is unobtainable in law through this suit for another suit in court of similar jurisdiction.**

- (h) That prayer (b) is unobtainable in law for court orders must be precise.**
- (i) That there are no valid prayers in law or cause of action in the suit thus must fail.**
- (j) That the suit herein is totally incompetent and fatally drawn for want of locus.**
- (k) That the exhibit offend the mandatory provisions of Rule 9 Cap 15 Laws of Kenya and ought to be struck out.**
- (l) That the suit herein is a further duplication of the following cases in court.**
  - a) NRB HCC No. 699 of 2004 (OS) struck out**
  - b) NRB HCC No. 1233 of 2004**
  - c) NRB HCC No. 1236 of 2004**
  - d) NRB HCC No. 664 of 2004 (OS) struck out**
  - e) NRB Constitutional case No. 103 of 2004**
  - f) NRB HCC No. 1573 of 2003**
  - g) NRB HCC No. 9 of 2005**
  - h) NRK HCC No. 174 of 2003 struck out**
  - i) NRK CMC No. 2316 of 2003 struck out**
  - j) NKR CMC No. 2645 of 2003**
  - k) NKR CMC No. 439 of 2005 struck out**
  - l) NKR CMC No. 421 of 2005**
  - m) NKR CMC No. 401 of 2005**

**Among others.**

In the course of hearing the Preliminary Objection I did point out to Mr. Chemwok that some of the points raised do not amount to preliminary objections.

As was stated by the Court of Appeal in the celebrated case of **Mukisa Biscuit Manufacturing Company Limited – Vs – West End Distributors Limited [1969] EA 696 at page 700 paragraph D:**

**“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

This authority has been followed in numerous cases subsequently and I need not bother citing any.

On the first point that the application has no merit and that it is an abuse of the process of court Mr. Chemwok did not say how it is an abuse of the process of court. That it has not merit is not a legal point. I have myself looked at the Application and I cannot see how it is an abuse of the process of court. The

first point therefore fails.

The second point is that this suit contravenes clause 36 of the Church constitution which requires such matters to be first referred to arbitration. Section 6(1) of the Arbitration Act 1995 is quite clear:

**“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds –**

**(a) that the arbitration agreement is null and void, in operative or incapable of being performed;**

**or**

**(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.” (Emphasis supplied)**

In **Corporate Insurance Company Limited – Vs – Wachira [1995] LLR 394** and **Kisumuwalla Oil Industries Limited – Vs – Pan Asiatic Commodities & Another (2) [1995 – 1998] 1 E.A. 153** it was held that a party wishing to refer a matter to arbitration only needs to enter appearance and before filing any pleadings or taking part in the proceedings, apply to have it referred to arbitration. If he files pleadings and or participates in the proceedings he loses that right.

The defendants in this case cannot raise this point at this stage. Besides the fact that they have not applied to have this matter referred to arbitration, they have filed pleadings and participated in the proceedings in this case. They have filed a long defence and a replying affidavit running to 60 paragraphs with 597 pages of exhibits.

This point therefore also fails and is hereby overruled.

The third point raised in the Preliminary Objection is to the effect that this suit is bad in law as the verifying affidavit has been sworn by a stranger who holds no church office and cannot therefore purport to swear an affidavit on behalf of the congregations in Coast Province. This ground has also no merit. This suit is not filed on behalf of the local congregations. It has been filed by the plaintiffs who are complaining that the defendants have purported to terminate their services as pastors and replace them with other people. Their main prayer is for a permanent injunction to restrain the defendants from doing that.

This also disposes of Mr. Chemwok’s argument that that the plaintiffs have not sought directions under Order 1 Rule 8 (2) of the Civil Procedure Rules. That provision applies to representative suits. As I have said this is not a representative suit as contended by Mr. Chemwok. This point is also accordingly overruled.

The fourth point is that “this suit is a duplication of Nairobi HCCC No. 1236 of 2004 among 13 other cases.” I do not understand how that fact becomes a preliminary point. Even if it is correct it cannot be the basis of striking out or dismissing this. All it can do is to stay any further proceedings in this case under section 6 of the Civil Procedure Act until those other cases are heard and disposed of. I find no merit in this point either.

Mr. Chemwok abandoned grounds (g), (h) and (I) which were to the effect that the prayers sought in the application cannot be granted. I do not need to say anything about those grounds except to remark that the decision to withdraw them was wise.

That leaves grounds (e) which is that this matter is res judicata and (k) that the exhibits annexed to the supporting affidavit foul the provisions of Rule 9 of the Oaths and Statutory Declarations Act, Cap 15 of the Laws of Kenya. I would like to start with the latter. The complaint here is that the commissioners full

name was not given on the attached exhibits which he commissioned. I cannot understand the purport of this complaint. Rule 9 requires that:

**“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”**

Where is the requirement that the commissioner's full name be written on the exhibits? This ground is totally unmeritorious and is also accordingly overruled.

Mr. Chemwok's argument on *res judicata* was that the plea for injunction in the Nairobi and other cases by the group to which the plaintiffs in this suit are allied has been heard and refused hence *res judicata*. He did not specify the cases in which injunction was refused. Nor did he provide me with the orders refusing injunctions in those cases. I found this to be a blanket submission without any details at all.

Before a court can rule that a matter is *res judicata* it must be satisfied that the matter was the subject of a previous suit between the same parties as the ones before it or that the parties in the suit before it claim under those in the former suit and that it has been decided by a court of competent jurisdiction. The court can only be able to decide that after perusing the pleadings in both the former and the suit before it and the order in the former suit. In the absence of these documents counsel's argument has no legs to stand on. That apart, I do not think that the matters or issues raised in the former suits could be the same as the ones in this suit. In this case the plaintiffs are complaining that they are being thrown out of their offices in the churches in Coast Province. Surely that cannot be the issue in the cases relating to churches in Rift Valley Province for instance. And even if the issue is fairly similar the parties are not the same or are not cleaning under the same title.

In sum I agree with Mr. Muniyithya that there is absolutely no merit in this preliminary objection and I accordingly overrule it in its entirety with costs to the defendants.

DATED and delivered this 3<sup>rd</sup> day of July 2006.

**D. K. MARAGA**

**JUDGE**