



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Appeal 85 of 2006**

**ARCH BISHOP SAMSON GAITHO.....APPELLANT**

**VERSUS**

**JOSEPH LENAILEIYO.....RESPONDENT**

*(Appeal against the Ruling and Orders dated 9<sup>th</sup> November, 2006 of the Senior Resident Magistrate's Court at Nanyuki in SRM.CC No.173 of 2006 by*

***E.G. MBAYA (MRS) – SRM)***

**J U D G M E N T**

By an application dated 3<sup>rd</sup> November, 2006 **Bishop Joseph Lenaleiyo** hereinafter referred to as “*the respondent*” purporting to act on behalf of Samburu A.I.P.C.A Diocese filed an application against **Arch Bishop Samson Gaitho** trustee A.I.P.C.A and two others hereinafter referred to as “*the appellant*” seeking the following prayers:

- “1. The Honourable court do grant leave to Bishop Joseph Lenaleiyo to represent himself and the congregation of Samburu Diocese and in specific (sic) Maralal A.I.P.C.A Church.**
- 2. The respondents be restrained by the orders of this court from interfering with plaintiff (sic) freedom of worship and in specific be restrained from harassing the members of Maralal A.I.P.C.A Church and also the 2<sup>nd</sup> defendant do return all the music instrument (sic) he took until further orders of this court.**
- 3.The O.C.S Maralal police station and O.C.P.D Samburu District be served for compliance.**
- 4. Cost be paid by the respondents.”**

The application was anchored on the grounds that:

- “1. The defendants have no right to interfere with the plaintiff (sic) freedom of worship.**
- 2.The Samburu A.I.P.C.A Diocese it's (sic) autonomous and it's (sic) make decision independently like any other diocese in Kenya.**
- 3. The church and all it's property is owned by the members and nobody has a right to interfere.”**

In support of the application, the respondent swore as follows:

**“1. That I am the Bishop of A.I.P.C.A Samburu diocese and competent to swear this affidavit on my behalf and on behalf of the entire congregation of the said Diocese.**

**2. That on 22<sup>nd</sup> and 29<sup>th</sup> October the O.C.S Maralal police station a Mr. Okongo came to the church compound while I was conducting service which was peacefully (sic) and called me in the vestry and told me that, he had instructions from the church and with consultation of the 2<sup>nd</sup> defendant he had decided to close the same.**

**3. That I told him that, the church does not belong to me, but to the members who were peacefully seated inside and they have contributed to it’s building and even a primary school which has up to class 5 in the same compound and sponsored by my church.**

**4. ....**

**5. That he allowed me to conclude the service on 22<sup>nd</sup> October, 2006 but since that time, he usually come (sic) very early in the church compound and order us not to congregate.**

**6. That on that material date, he took away all the choir music instrument which up to date are in his custody, yet the youth bought the said instrument (sic) through an Harambee.**

**7. That the entire congregation has suffered spiritually despite guarantees of freedom of worship in the Kenya constitution.”**

By the time the application came up for hearing on 9<sup>th</sup> November, 2006, though served the appellant had not deemed it necessary to file any papers in response to the application. **Mr. Kirima**, learned advocate for the respondent was however allowed by **Mr. E.G. Mbaya**, SRM to prosecute the application exparte. That done, the learned Magistrate then proceeded to craft a short and terse ruling in these terms:-

**“Upon perusing the proceedings herein, the application, supporting affidavit and the annexures and upon listening to the submissions by the counsel for the applicant, my opinion is that the application has merit. The defendants despite being served have refused or neglected to file replying affidavit. The application is therefore not opposed. The respondents/defendant are hereby restrained from harassing, or interfering with the freedom of worship of members of Maralal A.I.P.C.A Church. The 1<sup>st</sup> defendant is also ordered to return Music instruments he took from the church. The defendants will pay costs of this application.”**

Pursuant to that ruling, the respondent proceeded to extract the formal order. The order so extracted was in these terms:

**“1. That Bishop Joseph Lenaleiyio be granted leave to represent Samburu A.I.P.C.A Diocese and its congregation.**

**2. That the 1<sup>st</sup> respondent Arch-bishop Samson Gaitho and the O.C.P.D Samburu District be restrained from interfering, and harassing the members of Maralal A.I.P.C.A Church.**

**3. The O.C.S Maralal police station and the O.C.P.D Samburu District do return the music instruments they confiscated from Maralal A.I.P.C.A on 22/10/2006 immediately.**

**4. The O.C.S Maralal police station and the O.C.P.D Samburu District be served with this orders for strict compliance.”**

That order as extracted is in my respectful opinion erroneous in some material aspects. First it is extracted pursuant to a Civil Suit number 137 of 2006. It could not therefore have been in relation to this

suit which was Civil Suit number 173 of 2006. Secondly, the learned magistrate never granted prayers 1 and 4 as indicated in the order. Actually the only prayers granted were 2 and 3 of the application. Accordingly the extracted order did not comply and was not in conformity with the orders issued by the court. There is a growing practice of late where litigants are deliberately extracting orders that are not in consonance with those issued by court. They have developed a habit of importing and or sneaking into an extracted orders extraneous prayers, not asked for and not granted by court for their own selfish gains. This practice ought to be nibbed in the bud for if it is allowed to take root, then there would be judicial chaos which may in turn lead to the consumers of justice having little or no respect at all for court orders and decrees. It is important therefore for those charged with the responsibility of extracting, approving and sealing of court orders and decrees to be vigilant and bear this in mind so that the order so extracted does not amount to a misrepresentation of the exact order issued by court. This ground alone ought to be sufficient to dispose of this appeal. However there are other issues raised in the memorandum of appeal that also require my consideration.

The appellant was aggrieved by the aforesaid order nonetheless. Through **Messrs Wahome Gikonyo & Co. Advocates**, he filed the instant appeal setting out 8 grounds of appeal to wit:

**“1. The learned Senior Resident Magistrate erred in law and fact in not finding and holding that in so far as the church in question is in Samburu district and the cause of action occurred in Samburu District where there is a court of competent jurisdiction in Maralal, the Nanyuki Court did not have jurisdiction to entertain the suit. A miscarriage of justice was thereby occasioned.**

**2. The learned Senior Resident Magistrate’s orders and all proceedings therein are a nullity for want of jurisdiction. A miscarriage of justice was thereby occasioned.**

**3. The learned Senior Resident Magistrate erred in law and fact in not finding and holding that since this was a representative suit, she could not issue any mandatory injunction before compliance with the mandatory provisions of Order 1, Rule 8, Civil Procedure Rules. A miscarriage of justice was thereby occasioned.**

**4. The learned Senior Resident Magistrate erred in law and fact in not finding and holding that the application was incompetent, fatally and incurably defective and also an abuse of the process of the court for invoking section 3, 3A and 63e, Civil Procedure Act, Cap 21 while seeking an injunction and purporting the same to be by way of Chamber Summons. A miscarriage of justice was thereby occasioned.**

**5. The learned Senior Resident Magistrate erred in law and fact in not finding and holding that no injunction can issue against the Attorney General and his officers and that section 13A, Government Proceedings Act, Cap 40, Laws of Kenya had not been complied with and as such the suit was untenable and incompetent. A miscarriage of justice was thereby occasioned.**

**6. The learned senior resident magistrate erred in not finding and holding that the affidavit of service does not comply with Order V, rule 15 and form 8, Appendix A and that the time of alleged service was in any case too short (3 days) as to be in compliance with the requirements of law. A miscarriage of justice was thereby occasioned.**

**7. The learned Senior Resident Magistrate erred in law and fact in granting an absolute mandatory order at an interlocutory stage and as such there will be nothing to be heard in evidence. A miscarriage of justice was thereby occasioned.**

**8. The learned senior Resident Magistrate’s orders are against the rules of natural justice as the appellant has been condemned unheard.”**

When the appeal came up for directions on 6<sup>th</sup> March, 2009, **Kasango J** directed that the same be heard by way of written submissions. Those directions were however given in the absence of the respondent and or his counsel. The judge therefore directed that the respondent be served with the necessary notice.

On 22<sup>nd</sup> May, 2009 the appeal came before me for hearing. By then the appellant had already filed his submissions. However the respondent had not and was absent. He had been served with the submissions notice though through registered post. However since the appellant had not obtained leave of court to serve the respondent with submissions notice in the manner aforesaid, I held that the respondent had not been properly served. I therefore stood over the matter to 5<sup>th</sup> June, 2009 so that the respondent could be properly served. This time around, I allowed the appellant to serve him in any event by way of registered post.

On 5<sup>th</sup> June, 2009, again the respondent and or his counsel failed to turn up nor were their written submissions on record. They had been duly served with the mention notice by way of registered post. There being no explanation as to their absence, I decided to proceed with the matter, their absence notwithstanding. Accordingly this judgment has been crafted on the strength of the record of appeal as well as the written submissions of the appellant alone.

The fundamental question that arises in this appeal is whether the SRM's court at Nanyuki had the territorial jurisdiction to entertain the application leave alone the suit. From the record, it would appear that the cause of action arose at Maralal in Samburu District. That being the case why did the respondent deem it necessary to come all the way to Nanyuki to file this suit. Was he for instance shopping for a favourable court! There is no suggestion that there was no Senior Resident Magistrate's Court in Maralal. As a matter of fact I am aware and I take judicial notice of the fact that indeed there is one such a court. This matter could easily have been handled in the SRM's Court Maralal just as it was with the SRM's Court at Nanyuki. On his way to Nanyuki SRM's court, the respondent went past an a SPM's Court at Isiolo. If indeed the respondent's argument is that he went to Nanyuki because he was looking for a senior court, why then couldn't he have filed his claim in the SPM's court at Isiolo?

*Section 11 and 12* of the Civil Procedure Act provides in mandatory terms that suits must be instituted in the court of the lowest grade competent to try it within the local limits in whose jurisdiction the property is situate, the cause of action arose or even where the defendant actually and voluntarily resides or carries on business, or personally works for gain. Nowhere in the pleadings is it evident that the appellant or indeed any of the appellant's co-defendants were residents of Nanyuki or work in Nanyuki. If the respondent was spoiled for choice as to where to sue, then perhaps he should have been well advised to try his luck at Nairobi for that is where the appellant and 3<sup>rd</sup> co-defendant, the Attorney General ordinarily reside and carry on business. It may be argued that since the application proceeded ex-parte, the issue was not raised and accordingly, the learned Magistrate had no business considering it. Jurisdiction is everything and goes to the root of the suit. It is the duty of the court before it embarks on a matter to acquit itself of jurisdictional issues. Even if it is not raised, the court can raise the issue *Suo Moto*. As clearly, the learned magistrate had no jurisdiction to hear this suit, he ought to have rejected the suit and indeed the application on this ground. He should then have returned the suit to the SRM's Court, Maralal for hearing and determination.

From the plaint filed, the suit was brought as a representative suit. Order 1 rule 8 of the civil procedure rules make provisions as to how a representative suit can be instituted and entertained. To the extent that, the suit was filed and entertained in violation of clear provisions of *order 1 rule 8* of the Civil Procedure Rules, it was together with the application fatally defective and ought to have been struck out. The court again on its own motion should have taken up this issue with the respondent and or his counsel.

Finally I note that the injunction issued was even to apply to the attorney general. No injunction can issue against the Attorney General and or his officers and this is trite law. In other words no injunction can issue against the government.

For all the foregoing reasons, I am satisfied that the appeal is merited. Accordingly it is allowed with costs. The ruling and order of the learned Senior Resident Magistrate dated 9<sup>th</sup> November, 2006 is hereby set aside. In substitution therefor I order that the application dated 3<sup>rd</sup> November, 2006 be and is hereby dismissed with costs to the appellant as well.

*Dated and delivered at Nyeri this 30<sup>th</sup> day of June, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**