REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 1236 OF 2004

REV. JACKSON KIPKEMBOI KOSGEY

REV. CHARLES KABIRU NDAIGA

REV. STEPHEN MAINA MWANGI

REV. JOSEPHATE KAMAU NG'ANG'A

REV. ELIUD KARANJA WANYOIKE

REV. ENOCK K. KIPLANGAT

REV. STEPHEN KIGURU KAMAU

REV. STANLEY WAWERU KAMAU

REV. SAMUEL WACHIRA …….....……..
……. PLAINTIFFS

-VERSUS-

REV. SAMUEL MURIITHI NJOGU

REV. JOSEPH SAMOEI

REV. SAMUEL MBITHI KATHITA

REV. ELIJAH CHERUIYOT

REV. WILFRED NYAMU …….....
…….. DEFENDANTS

RULING

The applicant herein Revered Jackson Kipkemboi Kosgei and eight other Plaintiffs filed this suit on 12th November, 2004 under a Plaint of even date. They have sued one Revered Samuel Muriithi and four others claiming inter alia, to be the bona fide officials of the Full Gospel Churches of Kenya

at the National and Regional level. They claim also to be employees of the said church. Their grievances against Defendant/Respondents emanate from certain elections said to have taken place on the 12th November, 2003 and 13th November, 2003 in which they were removed from office at a time when, according to them, their terms of office had not expired. They have therefore sought this court's intervention and pray that the court makes certain declarations finding that their removal from office was null void, and ultra vires the Constitution of the Full Gospel Churches of Kenya; that elections of 12th and 13th November, 2005 were illegal unlawful and contrary to the Church Constitution and ought to be repeated, and that this court should issue a permanent injunction against the Defendants restraining them from interfering with the Plaintiff/Applicants official position in the Church.

As it clearly evident from the court file before me the wrangle between the plaintiff's camp and the Defendants camp appear be quite convoluted. Parties have previously attended before several other Judges without getting closer to resolving their dispute.

In the course of the proceedings, the Defendant/Respondents through Mr. Chemwok, Advocate filed a Notice of Preliminary Objection dated 14th March, 2005 challenging the Applicants locus standi and/or capacity to institute these proceedings in their names or against the Defendants, also in their names, in a matter that involves a church organization and its leadership. Arguments on the Notice of Preliminary Objection commenced before me on 11th July, 2006 the court having allocated the parties 20 minutes to argue and dispose of the same. As is the unfortunate practice by counsel to prolong their arguments beyond the time allocated, counsel for the objecting parties took 35 minutes to present his submissions, thereby exceeding the time allowed by 15 minutes. The court graciously offered the Applicant's counsel time to respond if his response could be contained in 5 minutes, but counsel intimated that he would require more than 15 minutes to reply. There being other matters awaiting to be heard, the Preliminary Objection was adjourned and parties directed to take (a) fresh date(s) at the Registry. This court went out of its way and directed further that the matter be listed as a part heard application inorder that it may have priority on the cause list of the day. Accordingly, parties attended the Civil Registry on 31st July, 2006 and fixed the Preliminary Objection for hearing on 18th September, 2006. In the meantime the present applicant Jackson Kipkemnoi Kosgei had changed advocates and on 26th July, 2006 filed an application by way of a Notice of Motion asking that I disqualify myself from hearing this suit, alleging that he, along with others whom he did not name, were apprehensive that they would not be accorded a fair hearing on the grounds of assumed bias on my part. In support of the Notice of Motion the applicant has sworn an affidavit containing 30 paragraphs of which according to his new counsel, Mr. Ongoya paragraphs, 6,7,8,17 and 18 are the mainstay.

He cited the case of **METROPOLITAN PROPERTIES LTD** –vs- **LANNON [1968] 3 AII E.R. 304** in support of his submissions in which he argued that the bias alleged herein was not actual but one of impression created in his client's mind as he observed the way the preliminary objection was conducted.

Counsel for the Defendants, Mr. Chemwok submitted at length in opposition to this application for my disqualification. I regret I am unable to consider the said submissions owing to the fact that whilst this Ruling was pending it became apparent that Mr. Chemwok did not hold a valid Practicing Certificate when he appeared before me and ought not to have been granted audience by the Court not being qualified at the time to represent any person in a Court of law. For this he is hereby reprimanded, the court having noted that he has since taken out his practicing certificate. In the circumstances my Ruling in this application is delivered on the basis of the application itself, the supporting affidavit, the facts of the case and submission by counsel for the applicant in light of the Court record.

The prayers sought in the Notice of Motion of 26th July, 2006 are:

"That the Honuorable Lady Justice Mugo disqualifies herself from further hearing of this case and that costs be in the cause."

No grounds for the disqualification are set out in the application itself which is said to be based on the

affidavit of the 1st Plaintiff who alleges to have instructions from other Plaintiffs to swear the same on their behalf. On the whole, the Affidavit and the depositions therein are nothing more than a criticism of Court Process and the role of a presiding Judge by a litigant, who obviously does not understand how this Honorable Court conducts its business. Not being an advocate or officer of the court, the deponent is not expected to understand how judicial discretion is exercised or that it extends not only to the conduct of the proceedings themselves but also to the manner in which cases are called out and allocated time for hearing, a process known as case management and which is entirely in the control of the presiding Judge. The Applicants' supporting Affidavit of 30 paragraphs raises no issues worthy of any consideration by this court. I find that the application is merely an affront to this court and the presiding Judge in particular. It surprises this court that the advocates retained to file and argue the present application would comfortably draw and file papers in support of an application based on matters of hearsay and untruths and which are not at all supported by the record, in a situation where the instructing client has appointed himself the devil's advocate, allegedly by for Mr. Mugo, previously acting for the plaintiffs and who appeared before me on the 11th July, 2006. For avoidance of doubt and confusion the expression "***devils advocate***" used herein is as defined in the Chambers Dictionary 1999 Edition which inter alia defines a devils' advocate as

"A person who states a case against a proposal, course of action etc usually for the sake of argument."

I find it worthy of note to mention that this court's impression of Mr. Mugo as an Officer of the Court is one of an advocate who conducts himself with due decorum, honour and respect expected of his calling. His non involvement in the filing and pursuing of this application is understood in that light. As earlier indicated the same cannot be said of the advocates who have taken over the case from him, as will became apparent hereinafter.

Mr. Ongoya for the applicants submitted that he was relying on paragraph 6, 7,8,17, and 18 of the Supporting Affidavit. Paragraphs 6,7,and 8 have to do with the calling out of cases and allocation of cases listed for the day which I have already stated are non-issues. Paragraph 17,18, 19 and 20 are outright lies as can be proved from the court file, which I am surprised Mr. Ongoya did not brother to consult inorder to verify the truth of the depositions his client was making. As an officer of the Court Mr. Ongoya needs to search his conscience and remind himself of his oath and calling.

Reading the depositions made in paragraphs 5,12, and 27 of the Affidavit, it is quite clear that the applicants can not be said to be litigants who desire that the dispute before court be resolved with expediency. Yet their real intention in filing this application is not clear considering what is said in paragraph 29 of the affidavit and their counsel's submissions that the application is neither based on allegations of pecuniary interest or actual bias but impressions

"**Created or given to other right minded persons."**

The Deponent says in paragraph 3 that he and his co-plaintiffs have an application that has been pending since 12th November, 2004. He dopones in paragraph 4,and 5 that whilst the same was pending the 2nd and 6th Plaintiffs applied to represent themselves and to withdraw the suit but that when the application came up for hearing on 27th March, 2006 before the Honourable Lady Justice Aluoch, the same was adjourned as the applicants were not in court to canvass the same. Without casting any aspersion on my sister Judge who must have exercised her own discretion in adjourning the matter, I am of the view that a bona fide litigant in the Deponent's position would have been disappointed that an application in which he is a Respondent was adjourned rather than be dismissed for non attendance. In the same vein the applicants' complaint in paragraph 12 of the Supporting Affidavit appears illogical, since this court's clear intention in hearing the Preliminary Objection was to accord the applicants expedient justice. The said deposition reads as follows:

"**THAT the Honourable Judge (myself) said that this case has been pending for so long and that she intended to look at the Preliminary Objection dated 17th December, 2004 so that … If I find a ground for doing so then I can dismiss the entire suit."**

Counsel appearing presently for the applicants ought to know and should have advised his clients that the position taken by the Court in the circumstances constitutes the very essence of a preliminary objection.

A person who attempts to deliberately pervert the cause of justice by committing perjury and outright contempt cannot be said to be right minded person. I find this to be so of the 1st Respondent who even finds it appropriate to depone in paragraph 25 of his affidavit that.

" **I am personally ready and willing to stand in the dock in any court and give oral evidence on all that I have deponed hereinabove and be crossed examined on the same."**

Such a scenario, no doubt, presupposes that myself as the presiding Judge herein would be the accused and the deponent(s) the accusers (s). And what a scenario that would be!

A judicial officer operates in the public domain as an administrator of justice. When one takes the oath of office, as I have, to dispense justice without fear or favour, affection or ill will, one enters into unspoken covenant not only with the appointing authority but also with the beneficiaries, who in my considered view include the general public, litigants and their representatives, that the discharge of the duty to administer justice will be conducted in a conducive environment. To provide the necessary enabling environment, Parliament has enacted Statutory Provisions which empower a Judicial Officer when subjected to unwarranted attacks to deal with and punish those who by their conduct, during judicial proceedings, are bent on polluting that environment to the extent that the judicial officer finds it difficult or impossible to carry out the honourable duty to dispense justice in accordance with the oath taken. By virtue of Section 5 of the Judicature Act, Cap 8 of the Laws of Kenya, this court has the power as the High Court of Justice in England to punish any person for contempt of court. The punishment may take the form of an order for committal to prison, a fine or security for good behaviour. Also under the Penal Code (Chapter 63 of the Laws of Kenya) Parliament has enacted provisions under section 121, which creates offences relating to Judicial proceedings as follows:

"**121(1) Any person who –**

(a) Within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding or any person before whom such proceedings is being had or taken; or

(b) Having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed refuses, without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after the witnesses have been ordered to leave such room; or

(c) Causes an obstruction or disturbance in the course of a judicial proceeding; or

(d) While a judicial proceeding is pending makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding or calculated to lower the authority of any person before whom such proceeding is being had or taken; or

(e) Publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private; or

(f) Attempts wrongful to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence in connection with such evidence; or

(g) Dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; or

(h) Wrongful retakes possession of land from any person who has recently obtained possession by a writ of court; or

(i) Commits any other intentional disrespect to any judicial proceeding or to any person before whom such proceeding is being had to taken, is guilty of an offence and is liable to imprisonment for three years."

Subsection (2) of section 121 further provides that:

"When any offence under any of paragraphs (a) (b) (c) (d) and (i) of subsection (i) is committed in view of the court, the court may cause the offender to be detained in custody and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding one thousand four hundred shillings or in default of payment to imprisonment for a term not exceeding 1 month."

More importantly and most relevant for our purposes, subsection (3) of section 121 provides that

"The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the High Court to punish for contempt of court."

For reasons already stated earlier in this Ruling the application for my disqualification is not genuine but male fide, highly contemptuous and merely calculated to disparage my position as a judicial officer and to demean the authority, integrity, honour and respect due to this Honourable court without any apparent cause or intention save perhaps a desire by the applicant(s) and their present counsel to derail the proceedings or to delay the same for as long as possible, for reasons only known to themselves. I find that the conduct of the 1st plaintiff/Applicant and Mr. Ongoya, his advocate, in filing the application dated 26th July, 2006 alongside the perjurious Supporting Affidavit and submitting on the same whilst being fully aware (or in the case of counsel not caring either way) that the same is a clear misrepresentation of the proceedings of 11th July, 2006 falls squarely within the provisions of Section 121 (a) (c) (d) and (i) of the Penal Code. I single out the 1st Plaintiff/Applicants in this manner, given the fact that some of the plaintiffs in this case have filed applications to withdraw their suit and the affidavit of 26th July, 2006 does not disclose on whose behalf the application is made stating merely that the same is sworn:

"**on my (1st Plaintiff's) behalf and on behalf of other Plaintiffs who have expressly instructed me to swear this affidavit on their behalf."**

The 1st Plaintiffs' mischief is trumpeted further in paragraph 27 of his affidavit where he swears that::

"…nevertheless, even if any orders would be given in favour of the Plaintiff I would still not appreciate the treatment accorded to the Plaintiffs by the learned Judge since I believe that the process of getting justice is equally important."

I find that the entire affidavit of Jackson Kipkemboi Kosgei is not only scandalous, frivolous and vexatious but also a grave abuse of the process of court. The same is hereby struck out.

Taking into consideration the application, submissions made in support thereof and all the circumstances of the case I do find that contempt on the face of the court is so glaring that I have no hesitation in finding the 1st Plaintiff/Applicant and Mr. Ongoya guilty of contempt of court. In exercise of the powers vested in me to punish for such contempt and as a clear warning to other beneficiaries of the justice system who have made it their ambition to tarnish the names of judicial officers and pervert the course of justice by any means possible, as has been demonstrated herein I hereby commit the said Reverend Jackson Kipkemboi Kosgei and Zebedee Elisha Ongoya, advocates to prison for a period of one month, having refused to disqualify myself from these proceedings for reasons already stated.

In passing may I reiterate what has been emphasized by courts the world over that Litigants and their

legal representatives must always bear in mind that the Court's time is precious and is not to be wasted on unmerited, frivolous and vexatious applications or other proceedings at the expense of other parties who genuinely wish to move the court in pursuit of justice. As is always repeated, litigants must therefore never come before the court with dirty hands and with malicious intent. Those who chose to do so particularly under the misconceived notion that they can intimidate the court, do so at their own risk. Previously in these proceedings, I was compelled by the twists and turns that this case was taking to declare that this court, being the seat of Justice is indeed Holy Ground, citing no other authority than the Holy Bible which the parties to these proceedings preach, to wit that Righteousness and Justice are the foundations of [***God's***] throne, [***Psalm 97.2***]. The same Book in Deuteronomy 17:12 provides [***albeit that the words were then written for the Israelites***] that:

"The man who shows contempt for the Judge or for the priest who stands ministering … to the Lord must be put to death."

It is this court's hope that the contemnors herein will reflect on these words whilst serving their term, examine their conscience and thank God that they now live not under the Law of the Old Testament but under Grace.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of December 2006

M. MUGO

JUDGE

Ruling delivered in the presence of:

For the Plaintiffs:

For the Defendants: