



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 1236 OF 2004**

**REV. JACKSON KIPKEMBOI KOSGEY.....1ST PLAINTIFF/RESPONDENT**

**REV. CHARLES KABIRU NDAIGA.....2ND PLAINTIFF/RESPONDENT**

**REV. STEPHEN MAINA MWANGI.....3RD PLAINTIFF/RESPONDENT**

**REV. JOSEPHAT KAMAU NG'ANG'A.....4TH PLAINTIFF/RESPONDENT**

**REV. ELIUD KARANJA WANYOIKE.....5TH PLAINTIFF/RESPONDENT**

**REV. ENOCK K. KIPLANG'AT.....6TH PLAINTIFF/RESPONDENT**

**REV. STEPHEN KIGURU KAMAU.....7TH PLAINTIFF/RESPONDENT**

**REV. STANLEY WAWERU KAMAU.....8TH PLAINTIFF/RESPONDENT**

**REV. SAMUEL WACHIRA MAINA.....9TH PLAINTIFF/RESPONDENT**

**-VERSUSREV.**

**SAMUEL MURIITHI NJOGU.....1ST DEFENDANT/APPLICANT**

**REV. JOSEPH SAMOEI.....2ND DEFENDANT/APPLICANT**

**REV. SAMUEL MBITHI KATHITA.....3RD DEFENDANT/APPLICANT**

**REV. ELIJAH CHERUIYOT.....4TH DEFENDANT/APPLICANT**

**REV. WILFRED MURIUKI**

**GACHERU NYAMU.....5TH DEFENDANT/APPLICANT**

**RULING**

The defendants came by certificate of urgency and filed on even date the Chamber Summons dated 8th March, 2005. The application was made under Order XXXIX rules 1, 2 and 7 of the Civil Procedure Rules, and sections 3 and 3A of the Civil Procedure Act (Cap. 21).

What was being sought? That, pending the hearing of the defendants' application, an order of temporary injunction be issued restraining the plaintiffs/respondents, by themselves, or their servants, agents,

employees or followers from interfering with the defendants' running of the Full Gospel Churches of Kenya whether at the national, regional or local Church assembly level; and that the plaintiffs/respondents be restrained from preaching, causing any interference or disruption, holding any meetings, or worshipping in any Church where they have not been posted; and that the officers commanding the police stations at Molo, Iten, Mogotio, Buruburu, Naivasha, Kinangop and Bondeni be required to assist in the execution of the orders made by the Court.

It is not necessary at this stage to deal with the merits of the application, as the plaintiffs on 14th March, 2005 filed a notice of preliminary objection of even date. The assertions in the notice of preliminary objection are as follows:

- (a) that, the orders sought are unconstitutional and infringe on the respondents' freedom of worship and association;
- (b) that, the supporting affidavit is fatally defective, as the annexures are wrongly marked and some annexures referred to in the affidavit are missing;
- (c) that, the applicants are relying on evidence that has been disowned by the makers;
- (d) that, the applicants are in contempt of the Court order dated 23rd November, 2004 and they ought to purge their contempt before being heard;
- (e) that, the application bears misleading grounds, as it is the applicants who had attacked the respondents;
- (f) that, the applicants have not come to Court with clean hands as they are the perpetrators of violence in the Church, and in so acting as perpetrators of violence they have been in breach of the Court Order dated 23rd November, 2004;
- (g) that, the applicants' prayers are not foreshadowed by any claims in the pleadings, and so they have no basis in law;
- (h) that, the applicants' prayers seek to deny the respondents their rights of worship in places of their choice;
- (i) that the applicants have their own places of worship;
- (j) that, the applicants are actuated by the desire to secure dominion over the respondents.

This matter came up before me on 15th March, 2005 when the defendants/applicants were represented by learned counsel, **Mr. Chemuok**, while the plaintiffs/respondents were represented by learned counsel, **Mr. Mwaura Waihiga** and **Mr. Mugo Kamau**.

**Mr. Waihiga** submitted that the application was incurably defective and the prayers sought cannot be sustained in law. Counsel submitted that the statement of defence as filed, comprised nothing but bare denials, and that the defence does not, in these circumstances, provide a basis in the pleadings to support the claim now being made in the Chamber Summons of 8th March, 2005. The statement of defence, dated 24th February, 2005 and filed on the following day, learned counsel contended, provided no legal basis for the prayers now being brought before the Court.

The plaint, which was dated and filed on 12th November, 2004 makes claims founded on breaches of Church regulations and violations of the law applicable to the conduct of elections. The statement of defence dated 24th February, 2005 and filed the following day, it is true, substantially consists of denials, but also contains averments that the impugned elections were properly conducted.

While it is true that interlocutory applications are in their nature concerned with questions falling within

the compass of the main pleadings, and therefore such applications must not, as a matter of law, as it were, overreach themselves, I would not accept that the nature of the defence in its general character, disentitles the defendants from filing an interlocutory application in a proper case — so long as the suit itself remains alive and will in the due course of time be heard.

Learned counsel, **Mr. Waihiga** submitted that only within the framework of a suit may a restraining order be sought. It was not however, quite clear whether it was (as it ought to have been) counsel's understanding that the relevant suit must be the one suit which has been brought by the plaintiff; and that within the umbrella of that suit, either party may make a suitable interlocutory application. The question whether or not the application so made is in perfect consonance with the pleadings in the plaint or the statement of defence, as the case may be, I think, is too elaborate an issue for determination to be properly dealt with in a *preliminary objection*. It would be necessary to hear the interlocutory application itself, before the position can be taken that the application fails to tally its claims to the strict formulation of the pleadings. Therefore I would be reluctant to accept the claim, in a *preliminary objection*, that an application is incompetent because it has "overreached itself"; such a contention should be made only at the stage of the hearing of the application itself.

It is to be noted that counsel did not address the multiplicity of points that had been listed in the notice of preliminary objection. The issue as to the unconstitutionality of the orders sought; the point that the applicants were in contempt of Court; the contention that the applicants had not come to Court with clean hands; the claim that the applicants were by their prayers seeking to deny the respondents their right of worship — none of these was taken up any further.

The failure by the plaintiffs to take up those various points would suggest that the preliminary objection may have been raised without true conviction.

A more significant concern to the Court is that at least one aspect of the preliminary objections shows them to be based on a misunderstanding of the governing legal principles. The most questionable components of the preliminary objection, in that regard, are the following:

- (i) the claim that the applicants are relying on evidence that has been disowned by the makers;
- (ii) the assertion that the applicants are in contempt of a Court order, and that they ought to purge their contempt before being heard;
- (iii) the claim that the application bears misleading grounds, as it is the applicants who had attacked the respondents;
- (iv) the claim that the applicants are themselves the perpetrators of violence in Church;
- (v) the assertion that the applicants have alternative places of worship;
- (vi) the claim that the applicants are actuated by the desire to secure dominion over the respondents.

Perhaps it is hardly surprising that learned counsel did not presume to present the above claims in his preliminary objection. The exclusion of those several points, however, would give the impression that the preliminary objection was a rather feeble one. The said six points are definitely matters of controversial fact, in respect of which there was no agreement at all as between the parties. For that reason, they could not, as a matter of legal principle, be taken as issues of preliminary objection. It is now well established that a preliminary objection is a pure point of law which does not depend on any evidence and does not require the taking of any evidence.

Learned counsel, Mr. Chemuok, submitted that the defendants' statement of defence had been filed in response to the pleadings in the plaint, and so it was quite proper, within the framework of the two sets of pleadings, for the defendants to move the Court for interlocutory orders, by their Chamber Summons

of 8th March, 2005. He urged that the preliminary objection be struck out.

On the basis of the analysis already set forth in this ruling, I am unable to say that the plaintiffs/respondents' preliminary objection carries much in terms of merits. I have no doubts at all, that the preliminary objection must be dismissed with costs to the defendants/applicants.

Orders accordingly.

DATED and DELIVERED at Nairobi this 13th day of May, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Defendants/Applicants: Mr. Chemuok, instructed by M/s. Chemuok & Co. Advocates**

**For the Plaintiffs/Respondents: Mr. Mwaura Waihiga; Mr. Mugo Kamau instructed by M/s. Mugo Kamau & Co. Advocates.**