



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 138 of 2002**

**STEPHEN M'IKUNYUA M'IMATHIU
APPELLANT**

VERSUS

**REV. ELIJA MWIRIGI 1ST
RESPONDENT**

**REV. WILFRED KABURU2ND
RESPONDENT**

METHODIST CHURCH IN KENYA

**REGISTERED TRUSTEES 3RD
RESPONDENT**

(Being an appeal from the ruling of the Senior Principal Magistrate, W.M. Muiruri

read in court on 29th day of November 2002 in Civil Suit No. 831 of 1999)

JUDGMENT OF THE COURT

The appellant was the plaintiff in Meru CMCC No. 831 of 1999. By his amended plaint filed in court on 4.6.2001, the appellant sought a declaration that his suspension from the leadership of the 3rd defendant was illegal, oppressive, arbitrary and unconstitutional. He sought an order that he be paid exemplary damages in addition to costs of the suit. Prior to the filing of the amended plaint on 4.6.2001, there was an earlier amended plaint which was filed in court on 1.12.1999.

Amended defence was filed in court on 17.10.2000. The respondents, who were the original defendants denied the appellant's allegations in general. In the alternative at paragraph 11 of the amended defence, the respondents averred that all the allegations raised by the appellant were domestic and ecclesiastical in nature as pertains to the Methodist Church in Kenya and that the church constitution provided the machinery for resolving such disputes. Further, the respondents averred that the laid down church machinery for dispute resolution had not been exhausted, by the appellant and therefore that the appellant should not have resorted to the court for redress.

In his original plaint, and as later amended and further amended, the appellant complained that he was maliciously suspended from the position of chairman of the All Saint's Methodist Church in Kenya of Kinoru Church, a post to which he had been elected by ballot with effect from 1.1.1996 up to and including 31.12.1999. The appellant also complained that the 1st respondent had been the judge, witness and prosecutor in determining the appellant's dispute, a matter which the appellant argued was an affront to the rules of natural justice. The respondents filed a further amended defence on 25.6.2001 by which it

was averred that the appellant's amended plaint was an abuse of the court process and that it did not disclose any reasonable cause of action. The respondents put the appellant on notice that they would raise a preliminary objection on a point of law. The further amended defence also averred that the appellant's suit was frivolous.

On 11.9.2002, the respondents filed an application under Order 6 Rule 13(1) (b) seeking to strike out the appellant's suit for being otherwise an abuse of the due process of the court. The application sought the following orders:-

(a) That this honourable court be pleased to strike out the plaintiff's suit herein for being otherwise an abuse of the process of the court.

(b) That the costs of this application and the entire suit be borne by the plaintiff.

The application was premised on the grounds that the amended plaint was filed without court's leave since pleadings had already been closed and secondly that the original plaint was defective as the defendants could be sued in the manner purported in the plaint.

In his undated ruling, the learned trial magistrate struck out the amended plaint filed in court on 1.12.1999. He also made a finding that the further amended plaint filed in court on 4.6.2001 could not stand. He however ruled that the original plaint filed on 10.9.1999 would remain on record and was valid.

The reasons given in support of the trial magistrate's ruling were that the amended plaint was found to be scandalous and/or frivolous under Order 6 Rule 13(1) (b) of the Civil procedure Rules. Secondly, the learned trial magistrate found that the said amended plaint was filed without consent of the court since pleadings had, in fact, been closed with the filing of reply to amended defence on 30.10.2000. The learned trial magistrate also found that the appellant's contention that the respondents were time barred from bringing the application to strike out the suit had no basis because such an application can be filed at any stage of the proceedings.

The appellant has appealed against that ruling. The memorandum of appeal contains twenty six (26) grounds of appeal. During the hearing of the appeal, they were reduced to two, namely whether the application dated 10.9.2002 ought to have been struck out for being incompetent and two whether the consent filed in court on 4.6.2001 validated the filing of the amended plaint so that the amended plaint ought not to have been struck out.

The learned trial magistrate had observed that since the said application dated 10.9.2002 was for an order to strike out the plaint for being scandalous, then the applicant ought to have cited Order 6 Rule 13(1) (d). Mr. C. Kariuki for the appellant submitted that the application dated 10.9.2002 ought to have itself been struck out for citing wrong provisions of the law. It was further contended on behalf of the appellant that since the application dated 10.9.2002 sought only to have the suit struck out, then the amended plaint ought not to have been struck out.

The other point put forward by Mr. Kariuki was that since the parties filed a consent order contemporaneously with the amended plaint filed in court on 4.6.2001, then the trial court should have treated that consent as validation of the filing of the amended plaint which had been filed out of time. The consent, which was filed in court on 4.6.2001 read as follows:-

“By CONSENT of the counsel for the defendants and the plaintiff, the further amended plaint be deemed as properly filed and served. The defendant be at liberty to amend his defence if necessary within 14 days.”

The above stated consent was filed by the appellant in person, and Mr. L.K. Ondari advocate for the defendants/respondents. Mr. Kariuki argued that since the said consent has never been set aside, then the learned trial magistrate ought to have found that the same was valid and was binding on both parties.

Mr. Ondari for the respondents submitted that the consent order filed in court on 4.6.2001 did not in any way deal with the propriety or otherwise of the further amended plaintiff which could still be struck out for good cause shown by subsequent applications. Mr. Ondari also contended on behalf of the respondents that the submissions in support of this appeal were at variance with the arguments put forward during the hearing of the application dated 10.9.2001 before the trial court.

I have carefully considered the submissions herein by both parties. I have also perused carefully the record of appeal (though the same is not one of the best records of appeal). From the said record the reason why the learned trial magistrate struck out both the amended and the further amended plaintiff was (a) that the amended plaintiff (filed prior to 4.6.2001) was filed without leave of the court and (b) that the further amended plaintiff was scandalous and vexatious. Thus, whereas the amended plaintiff was struck out for having been filed without leave of the court, the further amended plaintiff was struck out for reasons of being scandalous and vexatious. The learned trial magistrate made that distinction very clear. Infact the trial magistrate did not question the validity of the consent order that gave life to the otherwise lifeless further amended plaintiff which had been filed out of time. I am in agreement that the reasons given for the striking out of the amended and further amended plaintiffs were well founded.

For those same reasons I do not think that the application dated 10.9.2001 should have been struck out. The same was not incompetent. The only reason why the application could have been struck out if it had been made under order 6 rule 13(1) (a) and supported by affidavit. Secondly, the consent filed in court on 4.6.2001 was not an issue. The trial court neither tried to set it aside nor question its validity.

In the result, this appeal is found not to have merit. The same is therefore dismissed with costs to the respondents both in this appeal and for the application in the lower court.

Orders accordingly.

Dated and delivered at Meru this 17th day of November 2005.

RUTH N. SITATI

JUDGE

17.11.2005