



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1050 OF 2003

REGISTERED TRUSTEES OF DELIVERANCE CHURCH.....PLAINTIFF

VERSUS

PASTOR SIMON MUCHOKI..... 1ST DEFENDANT

DANIEL MWANGIRU KARICHU..... 2ND DEFENDANT

RULING

The Plaintiff's suit against the two Defendants was commenced by Plaint dated 13th October, 2003 and filed on the same date. The suit related to a contract for the sale of land, L.R. No. 8469/11. By a Notice of Withdrawal/Discontinuance of suit dated 24th January, 2004 the Plaintiff withdrew and discontinued the suit against the second Defendant. This Notice was formally presented in Court at the hearing of the present application, on 26th January, 2004; and hence the only parties now on record are the Plaintiff and the first Defendant, who shall hereafter be referred to as the Defendant.

The application was made by Chamber Summons, dated 22nd August, 2003 and filed on 24th November, 2003. The application, brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, and under Section 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), was in prayer for Orders as follows:

- (a) that an interim injunction do issue to restrain the Defendants by themselves, their servants, agents and/or other persons acting through them howsoever, from interfering, wasting, disposing, alienating and/or continuing or remaining in possession or in any way whatsoever with the suit property, L.R. No. 8469/11 until final determination of the suit;
- (b) that the costs of the application be provided for.

The grounds of the application are stated as follows:

- (i) by a contract dated 5th November, 1999 the second Defendant agreed to sell to the Plaintiff a portion of land, L.R. 8469/11 for the sum of Kshs.500,000 which purchase price was paid in full by the Plaintiff who took possession of the premises;
- (ii) the first Defendant was serving as a pastor in the Plaintiff's Mwiki branch;
- (iii) the first Defendant later formed an association called Apostolic Affirmation Church, and in the management of the association the first Defendant wrongfully entered the suit property, thereby trespassing, which act of trespass is continuing to-date;
- (iv) the Plaintiff has been deprived of the use of the suit property and has suffered loss and damage

and continues to suffer the same.

The application is supported by the affidavit of Bishop Mark Kariuki, sworn on 22nd August, 2003.

The Supporting Affidavit was challenged by counsel for the Defendant, who made an application under Order XVIII Rule 2 of the Civil Procedure Rules for the attendance of the deponent, for the purpose of being cross-examined on his averments. Mr. Kahiga for the Defendant stated that Bishop Mark Kariuki's affidavit differed in material respects from the statements in the Replying Affidavit of Pastor Simon Muchoki, and this made it necessary that the deponent of the Supporting Affidavit should be subjected to cross-examination.

Ms Kahiga for the Applicant opposed the Respondents' application for the deponent to be examined. She submitted that the application to call the deponent was not being made in good faith, in view of the fact that the Applicants' application was seeking no more than an injunction to restrain the Defendant from disposing of the suit property until the determination of the main suit. She submitted that the content of the deponent's affidavit was only matters of fact, and that if the Respondent had valid objection to any of the averments, then by Order XVIII an application can be made for the offending statements to be struck out. She further submitted that it was unlikely that the Defendant would suffer any harm if the application was determined on the basis of the affidavits.

Generally, interlocutory applications such as the present one are disposed of through averments made in affidavits. However, the Court has a discretion, in certain circumstances, to allow the cross-examination of deponents on their sworn statements in an affidavit. With regard to the present application, the question is whether it is one of those exceptional cases requiring the exercise of the Court's discretion to require the appearance in Court of a deponent.

The fundamental aspects of the supporting affidavit of Bishop Mark Kariuki may be set out as follows:

- (a) that he is the chairman of the Board of Trustees of the Plaintiff;
- (b) that on or about 5th November, 1999 the second Defendant entered into an agreement with the Plaintiff, for the sale of L.R. No. 8469/11 (Exh. BMK 1);
- (c) that at the material time, the second Defendant was the beneficial owner of the suit property, having purchased it from one Kahuhu Kuogathoka;
- (d) that the purchase price was fixed at Kshs.500,000/-;
- (e) that it was a term of the agreement that the purchaser was already in possession;
- (f) that the Plaintiff paid the full purchase price and took possession of the suit property;
- (g) that at all material times the first Defendant was serving as a pastor at one of the Plaintiff's branches, the Mwiki branch;
- (h) that subsequently, the first Defendant promoted and formed an association known as the Apostolic Affirmation Church;
- (i) that the first Defendant, in conducting the functions of the Apostolic Affirmation Church, wrongfully entered the suit property and has remained in possession thereof;
- (j) that the first Defendant has been promoting the purposes of the Apostolic Affirmation Church, rather than those of the Plaintiff;
- (k) that the Plaintiff has been deprived of the use and enjoyment of land after fully paying up for the same, and consequently harm has been caused to the Plaintiff;

(l) that the Plaintiff apprehends that the suit property may be transferred to the first Defendant and/or a third party;

(m) that the Plaintiff would suffer damage if the orders, sought are not granted;

(n) that the suit has reasonable probability of success.

These are straight, factual statements which, on the face of it, appear reasonable in all aspects. However, they are contested in the replying affidavit sworn by Pastor Simon Muchoki. The critical elements in this affidavit are as follows:

(i) the deponent is unaware as to whether Bishop Mark Kariuki is indeed the chairman of the Board of Trustees of Deliverance Church;

(ii) paragraph 2 of the supporting affidavit is denied;

(iii) paragraphs 3,4,5,6,9,12,13 and 14 are denied; (iv) it is asserted that “the entire affidavit and suit contains serious contradictions and are [sic] incapable of persuading the Court.”

(v) It is stated that the deponent has “no intention of selling our Church property.”

(vi) The deponent asserts that he “would like....the said Bishop Kariuki (to) be cross-examined on oath on the contents of the averments and all contents of the affidavit.”

The fundamental principle behind reliance on affidavits, in interlocutory applications, is that they provide essential facts in short form and thus help to expedite the determination of the matters in dispute. To serve this purpose, however, an affidavit is expected to be truthful.

While this test is not always achieved, it is easy to identify an affidavit that is in bad form: for example, if it is a replying affidavit it fails to address the clear averments in the original affidavit to which it is responding; it may be evasive, vague, argumentative and wholly unhelpful in terms of the need to ascertain the relevant matters of fact.

Using these criteria, I expected the replying affidavit of Pastor Simon Muchoki to do the following:

(i) Make a positive statement regarding the identity of Bishop Mark Kariuki;

(ii) Avoid bald denials of certain paragraphs of Bishop Mark Kariuki’s affidavit, and instead set out what the deponent knew to be the true position as distinct from the averments in that affidavits;

(iii) Avoid broad statements such as: “the entire affidavit and suit contains serious contradictions and [is] incapable of persuading the Court.”

I have to conclude that Pastor Simon Muchoki’s affidavit has not been helpful to the Court. It tends to be evasive and argumentative and makes inappropriate assertions regarding the deponent’s expectations as to the likely position of the Court with regard to matters asserted. The Defendant’s counsel appeared to take an approach quite consistent with the general mode and tone of Pastor Simon Muchoki’s affidavit, disputing the most basic aspects of Bishop Mark Kariuki’s affidavit and demanding, without any apparent justification, that Bishop Mark Kariuki be summoned for cross-examination on his own affidavit. In my finding, arrived at after reading the two affidavits carefully, there is no justification for calling Bishop Mark Kariuki to be cross-examined, and the Plaintiff’s Chamber summons application can be disposed of on the basis of the affidavits as filed.

I have been able to consider the Chamber Summons application on its face, to assess the grounds offered in support, to read and consider the supporting affidavit of Bishop Mark Kariuki and the replying affidavit of Pastor Simon Muchoki; I have considered the annexures attached to the supporting affidavit;

and I have had the benefit of listening to the submissions of counsel on both sides. On this basis I have formed clear impressions on the merits of the applications made, and I now make the following Orders:

1. The application by counsel for the Defendant, that the deponent of the supporting affidavit, Bishop Mark Kariuki, be called to be examined on his affidavit, is refused.
2. The first prayer in the Plaintiff/Applicant's Chamber Summons application of 22nd August, 2003 is granted.
3. The costs of this application shall be in the cause.

DATED and DELIVERED at Nairobi this 6th day of February, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Ms. Kiama, instructed by M/s. Kamotho & Maiyo Advocates

For the Defendant/Respondent: Mr. P.K. Njoroge, instructed by M/s. P.K. Njoroge & Co Advocates