



Registered Trustees Christ Dominion Church & 3 others v Ekwee (Civil Suit E008 of 2023) [2024] KEHC 1182 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL SUIT E008 OF 2023
RN NYAKUNDI, J
FEBRUARY 14, 2024**

BETWEEN

**REGISTERED TRUSTEES CHRIST DOMINION CHURCH 1ST APPLICANT
REV. WILLIAM EKAI 2ND APPLICANT
LORE LOKITAUNG' LOKORITA ADARA 3RD APPLICANT
ALEXANDER REIMER 4TH APPLICANT**

AND

BISHOP MICHAEL PEIKAI EKWEE RESPONDENT

RULING

1. The application before this court is a Notice of Motion dated 22/01/2024 seeking the following orders;
 1. That, for reasons to be recorded, the service of this application be dispensed with and the application herein be certified urgent and be heard ex-parte in the first instance for purposes of prayer 2, and
 2. That, this Honourable Court be pleased to grant an Order to compel the 1st Defendant to open the mission centre, return the keys to the Mission Landcruiser KBY 989G for the use of the 4th Plaintiff/Applicant during their mission trip in February and March, 2024 having been acquired by the 4th Plaintiff/Applicant for the very purpose of mission for which they are coming to Lodwar commencing on 23rd February, 2024.
 3. That, the Honourable Court be pleased to grant an Order f(or the quiet enjoyment of the mission premises by the 4th Plaintiff/Applicant and his mission team for the period they shall be in Lodwar and this Order be supervised and enforced by the Officer Commanding Station, Lodwar.



4. That, the Orders granted-herein for access and use subsist each time the 4th Plaintiff/Applicant visit the Kenya pending the hearing and determination of the hearing and main suit herein.
 5. That, upon the departure of the 4th Plaintiff/Applicant and team, and to protect the substratum of the suit, the Court be pleased to grant an Order to barricade and close the premises and the Motor Vehicle KBY 989G against use, abuse, exploitation by any other person including the 1st Defendant/respondent pending the outcome of the outcome of the application and suit interparties.
 6. That upon granting of the interim orders, the court be pleased to subsume the Application in the main Petition to allow the matter to be heard on merit to its conclusion.
2. The application is premised on the grounds on the face of the record and the averments in the affidavit in support of the application.
 3. The applicant's case is that they have been coming for missions since 2011 and they constructed the mission center to provide for accommodation and enable movement when conducting said missions. A dispute arose where the 1st defendant despite having resigned and becoming a village administrator at Nakurio unit, has forcefully made his comeback to the mission and denied the plaintiff access to the missionaries albeit being members of the mission group. There is a scheduled visit to the county commencing on 23rd February 2024 for two weeks and the 4th Applicant and his team seek the protection of the court to use the motor vehicle to reduce the cost of operation which advertently will free up resources for the work of the ministry.
 4. The respondent opposed the application urging that such an application has to satisfy the triple requirements of (a) establishing a *prima facie* case; (b) demonstrating irreparable injury if the reliefs sought are not granted and all any doubts as to (b) by showing that the balance of convenience lies in favour of the Plaintiff. Our contention is that it has not. Further, that while the Applicants claim ownership and desire quiet possession and enjoyment of the suit property, they have not provided any ownership documents in their name upon which such a claim may be founded. All the ownership documents on record are in the name of the Respondent and/or Turkana Mission Fellowship Outreach Ministry, an affiliate of Turkana Mission Fellowship (TMF) which is a registered society headed by the Respondent.
 5. Additionally, that the 4th Applicant, as the primary beneficiary of the orders sought in the Application, has not provided any documents that would make him out to be a member or an official of Turkana Mission Fellowship Outreach Ministry so as to enjoy a beneficial interest in any of its facilities. Conversely, not only do all parties agree that the Respondent is a founder member of Turkana Mission Fellowship Outreach Ministry, he has also tabled documents indicating him to be its bona fide head (we refer you to paragraphs 3, 4 and 6 of the Applicant's Supporting Affidavit as well as paragraphs 8,19, 22 and 23 of the Replying Affidavit.
 6. Counsel urged that an irreparable injury is one that cannot be adequately compensated for in damages. The anticipated injury in this matter is anything but should the court refuse their request, the Applicant is only likely to incur costs in finding alternative accommodation. And that in our view, is a pecuniary loss which can always be made good. Suffice to note, the Applicant has carried on their activities in the past even when the suit property was not available to them. The respondent urged that there is no evidence that the suit property is in danger of being lost or wasted. In the absence of imminent demonstrable risk, the Court should guard against granting the prayers sought. He stated that granting these reliefs will only hamper the activities of the TMF organization which, by the admission both parties, plays a critical role in the lives of many locals.



7. The Respondent is the founder of Turkana Mission Fellowship Ministry. That he would destroy it just to spite the Applicant is far-fetched. On the Balance of Convenience counsel urged that in determining in whose favour it lies, the Court must consider the cost of making a mistake and ask itself, who, between the parties is likely to suffer the greatest harm in the unlikely event that that happens. It is the respondent's case that what is before this court is a dispute between the Plaintiff/ Applicant whose only claim to the suit property is their donation which has not been demonstrated and the Defendant/ Respondent who has tabled ownership documents in his name and that of the TMR By dint of the TMF Constitution, Minutes referencing the impugned election and his own academic qualifications which place him comfortably within the minimum requirements of *inter alia* Rule 6 of the Societies (Religious Societies) Rules, 2015, the Respondent has also made a case for being the *bona fide* leader of TMF.
8. Granting the prayers would have the net effect of transferring the control and ownership of TMF and its assets to the 4th Applicant who has no demonstrable beneficial interest in them whatsoever and closing it out to public which relies on its ministry for spiritual and physical nourishment.

Decision

9. In my view the following issues arise for determination;

Whether the prayers sought should be granted

10. The application is expressed to have been brought under Order 40 which provides as follows;
Where in any suit it is proved by affidavit or otherwise:-
 - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;
 - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
11. The Principles guiding courts in determining an application for injunction have been discussed over time. The principles for considering stay of execution were set out in the case of *Giella v Cassman Brown & Co Ltd and another* (1973) EA. 358 being that, first the applicant must show a *prima facie* case with a probability of success at the trial. Secondly an interlocutory injunction will not be granted unless the applicant would suffer an injury, which cannot be compensated in damages. Thirdly if the court is in doubt, it should decide the application on a balance of convenience.
12. The house of Lords in the *American Cyanamid Co. Vs Ethicon Ltd* (1975) 1 ALL ER 504 set the threshold for an application similar to the one set by the applicant as can be appreciated from the following extracts;

“It is no part of the Court’s function at this stage of the litigation to try to resolve conflicts of evidence of affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”



“...it is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not do something else, but such restrictions on the defendant’s freedom of action will have consequences, for him and for others, which a court has to take into account the purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the house of Lords pointed out in *American Cyanamid Co Vs Ethicon Ltd (1975) AC 396*, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant’s freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other this is an assessment in which, as Lord Diplock said in the *American Cyanamid case (1975) AC 396, 408*

“it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.”

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is the likelihood of such prejudice actually occurring, the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking, the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court’s opinion of the relative strength of the parties cases.”

Whether the applicants have a prima facie case

13. In my assessment of the application, the applicant has not raised a prima facie case. Reason being that they have failed to show the nexus between the applicants and the claimed suit motor vehicle and the premises. There is no evidence as to the whereabouts and ownership of the vehicle. Further the said premises the applicants seek to have the court barricade and prevent access to is not clearly stated. The prayers are vague and therefore there is no prima facie case presented at this juncture.

Whether the applicant shall suffer substantial loss

14. The applicants want access to the premises and motor vehicle for purposes of reducing their operational costs. They have not laid out the amounts of money that will be spent on these expenses to illustrate the loss that shall be suffered. As it is apparent that they have been operating on missions even before the vehicle was purchased, I am of the view that the costs that they will incur are not colossal to the extent that they cannot be compensated by way of damages. Therefore, it is my finding that they will not suffer substantial loss which cannot be compensated by way of damages.



Balance of convenience

- 15. Considering the sequence of events that have culminated in this application, it is clear that there is a long-standing dispute at what would be considered a religious installation. These things are often emotive and therefore, directing that the premises be barricaded and the motor vehicle, whose whereabouts are not known, be produced would worsen the conflict on the ground. It is more convenient to avert any further conflict than to create more opportunities for conflicts to get worse between the parties. In my assessment, it is more convenient not to grant the orders. It will also be in the interest of preventing an escalation of the conflict.
- 16. The granting of provisional or protective measures on the basis of order 40 rule (1) & (2) of the Civil Procedure Rule is conditional on *interalia* the existence of a real connecting link between the subject matter of the measures sought and the effect of such measures in the overall outcome of the pending suit. If the facts are not fairly stated in the affidavit as it's in the instant case the court would find it difficult to assist the plaintiff in granting the equitable remedies of injunction. In formulating the application, it is appropriate to include all matters which could reasonably be regarded as capable of being relevant to the assessment of the application, including what undertaking should be sought from the application and the precise terms of any order which might be made. In my considered view from the affidavit evidence should this order of injunction be granted there may be non-parties to this proceeding who are likely to be affected by the order sought by the applicant. I do not think all the relevant information has been given to the court to enable it access what undertakings should be sought from the applicant at this interlocutory stage of the proceedings. There are matters here which even go to the jurisdiction of the court on exercising injunctive orders of barricading the suit property and further to remove the motor vehicle currently stated to be in possession of the respondent. I am not sure whether the pending suit will be rendered nugatory in the event this application is lost.
- 17. Having considered the application, responses and submissions, it is my considered view that the prayers as phrased cannot crystallize into an order capable of enforcement. Given the nature of the dispute, the enforceability of the prayers sought, if granted as prayed, will occasion a scenario where court orders are issued in vain as there is no specificity with regards to the location of the premises and the suit motor vehicle.
- 18. In the premises, I decline to grant the orders as prayed and the application is dismissed. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT LODWAR ON THIS 14TH DAY OF FEBRUARY 2024

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R. NYAKUNDI
JUDGE

