



**Nyamai & 2 others v Kituva & 2 others (Miscellaneous Civil Application
E007 of 2022) [2023] KEHC 628 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS CIVIL APPLICATION E007 OF 2022
GMA DULU, J
FEBRUARY 2, 2023**

BETWEEN

**DENIS NYAMAI 1ST PLAINTIFF
PAUL MWANIKI NZUNGA 2ND PLAINTIFF
PATRICK MUSYIMI NZINI 3RD PLAINTIFF**

AND

**RAPHAEL NZUKI KITUVA 1ST DEFENDANT
BONFACE MBITHI MBWANGA 2ND DEFENDANT
WILLIAM MUSYOKA MAILU 3RD DEFENDANT**

RULING

1. Before me is an application dated July 07, 2022 brought by way of Notice of Motion under section 1A, 1B, 3A, 63(e) of the [Civil Procedure Act](#) (Cap 21) and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#).
2. The prayers in the application are as follows:
 1. (Spent)
 2. (Spent)
 3. The court be pleased to grant an order of temporary injunction restraining the defendants/respondents whether by themselves, their agents, servants and or any other person (s) working under the defendants/respondents instructions and authority from conducting and or holding an election pending hearing and determination of the main suit.
 4. That the costs of this application be awarded to the plaintiffs/applicants.



3. The application has grounds on the face of the Notice of Motion explaining that exists a dispute regarding election of officials in Good News Church of Africa (GNCA), thus the filing of the present court proceedings.
4. The application was filed with a supporting affidavit sworn on September 07, 2022 by the three applicants Denis Nyamai, Paul Mwaniki Ngunga, and Patrick Musyimi Nzini, as members of the GNCA church amplifying the grounds of the application.
5. The application has been opposed by the respondents through a replying affidavit sworn on July 19, 2022 by the 1st respondent Archbishop Raphael Kituva who deponed that there were pending various disputes and court suits in respect of election of officials and expenditure of the GNCA church. He listed a number of pending cases and stated that decisions regarding elections and expenditure in the church are by virtue of the Constitution, made by the Central Church Council.
6. The respondents also filed through counsel Muma & Kanjama, a Notice of Preliminary Objection dated July 15, 2022, in the following terms –
 - a. That the plaint and application fall short of the doctrine of subjudice as there are other suits on the same subject matter pending determination in Machakos HCCC No 15 of 2019, Milimani Civil Suit No E3984 of 2020, and Nairobi HCCA No E136 of 2021.
 - b. That the plaint and application offends the doctrine of exhaustion since the petitioner has not utilized the internal dispute mechanism provided by the church Constitution.
 - c. That based on the aforesaid reason the jurisdiction of this court has been improperly and prematurely involved.
 - d. That in the premises, the application and the plaint dated July 7, 2022 respectively and as filed and supported by the plaintiff is an abuse of the process of the court and the same should be dismissed with costs to the defendants.
7. The plaintiffs/applicants counsel filed Grounds of Opposition to the Preliminary Objection.
8. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by Kilonzo Muli & Associates advocates for the plaintiffs/applicants, as well as the submissions filed by Muma & Kanjama advocates for the defendants/respondents.
9. Having considered the application, documents filed and the submissions of the parties, in my view the issues for this court's consideration are two. First, whether the application and plaint are incompetent. Second, whether the court should grant orders of interlocutory injunction sought by the plaintiffs/applicants.
10. On whether the application and plaint herein are incompetent, I have been informed by respondents through the Preliminary Objection that this matter is subjudice as there are other pending court cases on the same subject both in Machakos and Nairobi. The plaintiffs/applicants on the other hand, state that what the defendants/respondents have filed is not a proper Preliminary Objection.
11. In my view, the Notice of Preliminary Objection herein filed is a proper Preliminary Objection, as the facts are agreed that there are other pending court cases on the same subject matter of elections.
12. Thus in my view, the Preliminary Objection herein, falls within the parameters explained in the case of *Mukisa Biscuit Manufacturing Company Ltd –vs- West End Distributors Ltd* (1969) E A 698.



13. Coming now to the elements of subjudice raised in the objection, in my view this case is not incompetent as, the fact that several other related cases are pending, does not make any of those cases incompetent. Such situation can only be reason for consolidation or asking for stay of one or the other of those cases, pending hearing of one or the other of those cases.
14. For now therefore, I am not in a position to say that any of the cases so far filed herein, is incompetent on the doctrine of subjudice.
15. I now turn to the second issue of grant of temporary injunction. The principles to be applied by courts are well stated in the case of *Giella vs Cassman Brown Ltd* (1973 E A 358, in which the court listed the following considerations:-
 - a. The applicant has established a prima facie case with probability of success.
 - b. The applicant is likely to suffer irreparable loss which cannot be adequately compensated by an award of damages; and
 - c. If the court is in doubt, the application will be determined by the court on the balance of convenience.
16. In the present case, have the applicants demonstrated a prima facie case with probability of success? In my view, from the facts disclosed to me at this preliminary stage, the applicants have shown a prima facie case with probability success, as the matter could go either way. A prima facie case being one which may succeed, and not one that must succeed, I find that the applicants have demonstrated in the application that they have a prima facie case.
17. With regard to irreparable loss, which cannot be compensated adequately in the form of damages. I find that the applicants have not established that they stand to suffer irreparable loss if the temporary injunctive orders sought are not granted. The first reason is that none of them has claimed to be contesting elections in the church. Thus they cannot claim to have a special personal interest in the matter. Secondly, the plaintiffs/applicants being ordinary members of the church congregation and not coming as representatives of other members, they cannot claim to have general special interest or loss to be suffered. Thirdly, they have not explained to this court why they have not joined and sought the injunctive orders in the other pending court cases.
18. I thus find that the applicants have not satisfied the requirement that they stand to suffer irreparable loss if the temporary injunctive orders sought are not granted.
19. With regard to the balance of convenience, I will not delve into that as I have already found that the plaintiffs/applicants have not satisfied the requirement that they will suffer irreparable loss.
20. I thus find that the application of the plaintiffs herein lacks merits. I dismiss the application, but costs will follow the determination of the main suit.

DELIVERED, SIGNED & DATED THIS 2ND DAY OF FEBRUARY, 2023, VIRTUALLY IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

