



REPUBLIC OF KENYA



**Methodist Church in Kenya Trustees Registered & 4 others v M'impwii  
& 14 others (Civil Case E315, E311 & 10 of 2021 (Consolidated))  
[2023] KEHC 18491 (KLR) (Civ) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18491 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E315, E311 & 10 OF 2021 (CONSOLIDATED)**

**CW MEOLI, J**

**JUNE 12, 2023**

**BETWEEN**

**METHODIST CHURCH IN KENYA TRUSTEES REGISTERED ..... PLAINTIFF**

**AND**

**DR. STEPHEN KANYARU M'IMPWII ..... 1<sup>ST</sup> DEFENDANT**  
**ISAIAH DEYE ..... 2<sup>ND</sup> DEFENDANT**  
**MISHECK KANAKE ..... 3<sup>RD</sup> DEFENDANT**  
**DR. GERISHON MWITI ..... 4<sup>TH</sup> DEFENDANT**  
**GEOFFREY KINOTI KATHURIMA ..... 5<sup>TH</sup> DEFENDANT**  
**KOBIA MICHUBU ..... 6<sup>TH</sup> DEFENDANT**  
**MARTIN BAARIU MURIUKI ..... 7<sup>TH</sup> DEFENDANT**  
**MATHEWS AGERI KABURU ..... 8<sup>TH</sup> DEFENDANT**  
**EMMANUEL MAINGI RUKARIA ..... 9<sup>TH</sup> DEFENDANT**  
**HELLEN KAMENCHU ..... 10<sup>TH</sup> DEFENDANT**  
**JACOB GITUMA IBUATHU ..... 11<sup>TH</sup> DEFENDANT**  
**RICHARD YARO ABIO ..... 12<sup>TH</sup> DEFENDANT**  
**DR. GLADYS MWITI ..... 13<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**CIVIL CASE E311 OF 2021**



**BETWEEN**

**GODFREY SIMIYU ..... 1<sup>ST</sup> PLAINTIFF**  
**MATHEW KABURU ..... 2<sup>ND</sup> PLAINTIFF**  
**KOBIA MISHEK MICHUBU ..... 3<sup>RD</sup> PLAINTIFF**  
**MARTIN BAARIU MURIUKI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**METHODIST CHURCH IN KENYA ..... 1<sup>ST</sup> DEFENDANT**  
**PRESIDING BISHOP OF THE METHODIST CHURCH IN**  
**KENYA ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH**  
**CIVIL CASE 10 OF 2021**

**BETWEEN**

**GODFREY SIMIYU ..... 1<sup>ST</sup> PLAINTIFF**  
**MATHEW KABURU ..... 2<sup>ND</sup> PLAINTIFF**  
**KOBIA MISHEK MICHUBU ..... 3<sup>RD</sup> PLAINTIFF**  
**MARTIN BAARIU MURIUKI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**METHODIST CHURCH IN KENYA ..... 1<sup>ST</sup> DEFENDANT**  
**PRESIDING BISHOP OF THE METHODIST CHURCH IN**  
**KENYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling arises from three (3) applications dated 17.12.2021, 26.08.2022 and 12.09.2022 (hereafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> application respectively). On 18.07.2022, the court had upon hearing the parties' respective advocates before it directed that Nairobi Milimani HCCC. No. 10 of 2021, Nairobi Milimani HCCC. No. E311 of 2021 (the two which essentially involve the same parties and subject matter and will hereafter be referred to as the constituent suits) and Nairobi Milimani HCCC. No. E315 of 2021 be consolidated under the latter suit that was appointed the lead file for purposes of hearing.
2. Save for Godfrey Simiyu whose name does not appear in the lead file, all other parties in the constituent suits are listed as defendants in the lead file where, in addition, the Rev. Joseph Ntombura Mwaine (sued and described as the Presiding Bishop of the Methodist Church in Kenya in the constituent suits) is named as the 2<sup>nd</sup> Defendant in the counterclaim. For ease of reference therefore the court will hereafter proceed to refer to the parties as they appear and in the order set out in lead file, namely



Nairobi Milimani HCCC. No. E315 of 2021, while reference to the Presiding Bishop of the Methodist Church in Kenya will interchangeably be reference to the Rev. Joseph Ntombura Mwaine.

3. It is instructive at the outset to capture the key events surrounding the three applications for determination. Kobia Misheck Michubu, (hereafter the 6<sup>th</sup> Defendant), Martin Baariu Muriuki (hereafter the 7<sup>th</sup> Defendant), Mathew Kaburu (hereafter the 8<sup>th</sup> Defendant) and Godfrey Simiyu filed under certificate of urgency a petition dated 10.12.2021 being Nairobi Milimani Constitutional Petition No. E531 of 2021 (hereafter the Petition) seeking various mandatory injunctive orders against the Methodist Church in Kenya (MCK) and the Presiding Bishop of the Methodist Church in Kenya. On 14.12.2021 Mrima, J. upon perusing both the certificate and Petition, transferred the Petition to the Civil Division of the High Court in Nairobi. In the Civil Division, the matter was redesignated as Nairobi Milimani HCCC. No. 10 of 2021 (the 1<sup>st</sup> suit)
4. Thereafter, Godfrey Simiyu, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendant proceeded to institute the 2<sup>nd</sup> suit vide a plaint dated 17.12.2021 that was accompanied by the 1<sup>st</sup> application. The suit was designated as Nairobi Milimani HCCC No. 311 of 2021.
5. The Methodist Church in Kenya Trustees Registered (hereafter the Plaintiff) instituted the 3<sup>rd</sup> suit namely Nairobi Milimani HCCC No. 315 of 2021 through a plaint dated 27.12.2021 which was equally accompanied by an application under urgency of even date. The application sought various injunctive reliefs against Dr. Stephen Kanyaru M'impwii, Isaiah Deye, Misheck Kanake, Dr. Grishon Mwiti, Geoffrey Kathurima, Kobia Michubu, Martin Baariu Muriuki, Mathews Ageri Kaburu, Emmanuel Rukaria, Hellen Kamenchu, Jacob Gituma Ibuathu, Richard Yaro Abio and Dr. Gladys Mwiti (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12, and 13<sup>th</sup> Defendant/Defendants).
6. In opposition to the application dated 27.12.2021, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendant filed a preliminary objection dated 06.01.2022, based on grounds that the Plaintiff's application was sub judice and premature as the Plaintiff has not complied with the standing order No. 116 of the Methodist Church in Kenya (MCK) Standing Orders (S.O) 2011 requiring the Plaintiff to seek reconciliation prior to seeking legal redress; and that the application was not properly before the court, having been brought by the Plaintiff, an entity that is separate from the Methodist Church in Kenya (MCK) , contrary to Order 1 Rule 1 of the Civil Procedure Rules. The preliminary objection was later abandoned.
7. The Plaintiff thereafter moved the court vide another application under certificate of urgency dated 23.01.2022 seeking joinder of the Consolidated Bank Limited as the 14<sup>th</sup> Defendant; the furnishing of statement of accounts; and to restrain the 1<sup>st</sup> to 13<sup>th</sup> Defendants from accessing, transacting or in any other way dealing with the accounts held in the name of the Plaintiff. This application was subsequently withdrawn. The Plaintiff also moved the court by an application under certificate of urgency dated 17.05.2022 seeking inter alia that pending hearing and determination of its suit, an order issues directing Consolidated Bank Limited to unfreeze, grant access to account number [particulars withheld] in the name and title of the Plaintiff and to cease unlawful dealings in relation to the said account. It seems that with the withdrawal of the joinder motion, this latter motion was equally abandoned.
8. On their part , the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12th, and 13<sup>th</sup> Defendants filed an application under certificate of urgency dated 03.02.2022 by which they sought to stay proceedings herein pending exhaustion of the internal dispute resolution mechanism provided for in the standing orders of the Methodist Church in Kenya (MCK) and thereafter, arbitration if the internal dispute resolution mechanism was unsuccessful; and that the parties be referred to the internal dispute resolution mechanism provided for in the standing orders of the Methodist Church in Kenya (MCK) and



thereafter, arbitration if the internal dispute resolution mechanism was unsuccessful. This application too was abandoned as the dispute evolved.

9. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12, and 13<sup>th</sup> Defendants subsequently moved the court vide the 2<sup>nd</sup> application subject of this ruling dated 26.08.2022 under certificate of urgency. Accompanying the said application was the said Defendants' statement of defence and counterclaim against the Plaintiff and Joseph Ntombura Mwaine, therein named as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, respectively. On her part, the 10<sup>th</sup> Defendant filed the 3<sup>rd</sup> application subject of this ruling dated 12.09.2022, seeking several interim reliefs which are now spent, including the temporary stay of all resolutions passed during the "purported" Annual Conference of the Methodist Church in Kenya held on 3<sup>rd</sup> to 6<sup>th</sup> August 2022 and temporary injunctive orders to restrain Rev. Joseph Ntombura Mwaine from effecting the said resolutions or adversely dealing with church assets.
10. Having set out the respective applications filed, the court will now proceed to highlight the gist of the three applications falling to be determined in this ruling. The 1<sup>st</sup> application was supported by the grounds laid out on the face thereof and the facts stated in the affidavit of Kobia Michubu the 6<sup>th</sup> Defendant and seeks the orders below: -

- “(a) (a) Spent.
- (b) A temporary injunction against the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from executing and/or effecting their excommunication and notice issued on 17<sup>th</sup> December, 2021 pending the hearing and determination of the application and suit.
- (c) A temporary injunction against the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from interfering with the normal programme, member, staff and/or clergy of the Methodist Church in Kenya in Kawangware pending the hearing and determination of the application and suit.
- (d) A temporary injunction prohibiting the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from interfering with the Applicants'/Plaintiffs' membership and allow them to fully participate in the affairs of the Methodist Church in Kenya pending the hearing and determination of the application and suit.
- (e) A temporary injunction prohibiting the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from interfering with the right of worship of the Applicants/Plaintiffs or any member of the Methodist Church in Kenya in Kawangware pending the hearing and determination of the application and suit.
- (f) A temporary injunction prohibiting the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from removing the Applicants/Plaintiffs from office or interfering with their positions in office and performance of their



duties as leaders at Kawangware Methodist Church pending the hearing and determination of the application and suit.

- g. A temporary injunction restraining the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from making public utterances or issuing statements concerning the Applicants/Plaintiffs on matters touching on their worship in Methodist Church of Kenya pending the hearing and determination of the application and suit.
- h. A temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Defendants either through the 2<sup>nd</sup> Respondent/Defendant or via his agent or proxy from firing workers in Kawangware Methodist Church of the Academy, interfere with the occupation/stay/service of the clergy men in Kawangware MCK or other activities of Methodist Church pending the hearing and determination of the application and suit.
- i. Costs of the suit; and
- j. Any other orders that the Honourable Court may deem just and fit to grant.”

11. In his supporting affidavit, the 6<sup>th</sup> Defendant states that he, Godfrey Simiyu, the 7<sup>th</sup> and 8<sup>th</sup> Defendant are lifelong members of the MCK but that the Presiding Bishop of the Methodist Church in Kenya had threatened to excommunicate them and to restrain them from accessing the Kawangware Methodist Church where they fellowship and serve in various leadership capacities. He goes on to state that the parties sought to be restrained had, by way of the publication made in the Daily Nation Newspaper dated 17.12.2021, issued a notice excommunicating him, Godfrey Simiyu, the 7<sup>th</sup> and 8<sup>th</sup> Defendants from the MCK and which notice was not only illegal, but also defamatory and misleading; that the said parties had in retribution for Defendants’ lawful role in a previous suit brought against the MCK and the Presiding Bishop, subjected him and his co-applicants to psychological torture and have further infringed upon their constitutional rights as well as violating the Standing Orders of the MCK.
12. The Plaintiff and the Presiding Bishop MCK did not file any response in opposition to the 1<sup>st</sup> application.
13. The 2<sup>nd</sup> application is against the Plaintiff and Rev. Joseph Ntombura Mwaine and is supported by the grounds laid out on its face and the facts stated in the affidavit of Dr. Gerishon Mwititi, the 4<sup>th</sup> Defendant. The 2<sup>nd</sup> application sought a total of 23 orders: -

- “(a) Spent.
- (b) Spent
- (c) A temporary injunction restraining the 2<sup>nd</sup> Respondent by himself, his agents, servants or employees from appointing the next Presiding Bishop of the Methodist Church in Kenya pending the hearing and determination of the suit.
- (d) A declaration that the notice published on the Daily Nation of 17<sup>th</sup> December, 2021 by the Defendants in the counterclaim purporting to excommunicate the Plaintiffs in the counterclaim is irregular, null and void, and contrary to Article 27 of *the Constitution*.



- (e) A declaration that the excommunication and defrocking of the Applicants was unconstitutional and an infringement of the Applicants' rights contrary to Articles 27, 32, 33, 36 and 47 of *the Constitution* of Kenya.
- f. A declaration that the invitation letter dated 25<sup>th</sup> of July, 2022 to the Synod Bishops to apply for the position of Presiding Bishop of the MCK was irregular, unprocedural, illegal, and null and void.
- g. A declaration that the Notice dated 27<sup>th</sup> July, 2022 convening the 57<sup>th</sup> Annual Conference of MCK was irregular, unprocedural, illegal, and null and void.
- h. A declaration that the 57<sup>th</sup> Annual Conference held on 1<sup>st</sup> to 3<sup>rd</sup> August, 2022 or thereabouts was unlawful, illegal and unprocedural.
- i. A declaration that the elections held on 3<sup>rd</sup> of August, 2022 or thereabouts during the 57<sup>th</sup> Annual MCK Annual Conference were irregular, null and void ab-initio.
- j. A declaration that all the resolutions and decisions passed during the 57<sup>th</sup> MCK Annual Conference were unlawful, irregular, null and void ab-initio.
- k. A declaration that the term of Reverend Joseph Ntombura Mwaine expired on 4<sup>th</sup> of August, 2022.
- l. A declaration that the extension of term of Reverend Joseph Ntombura Mwaine by a further two years is unlawful, illegal, irregular, null and void ab-initio.
- m. A declaration that the Reverend Joseph Ntombura Mwaine is unfit to act as the Presiding Bishop of the Methodist Church in Kenya.
- n. Spent.
- o. That pending the hearing and determination of the suit, the Honourable Court be pleased to stay orders barring the 2<sup>nd</sup> Respondent, Reverend Joseph Ntombura Mwaine from assuming office and/or discharging duties as the Presiding Bishop of the Methodist Church in Kenya.
- p. Spent.
- q. That pending the hearing and determination of the suit, the Honourable Court be pleased to issue a temporary injunction restraining the 2<sup>nd</sup> Respondent, Reverend Joseph Ntombura Mwaine from presenting or referring himself as the Presiding Bishop of the Methodist Church in Kenya.
- (r) Spent.
- s. That pending the hearing and determination of the suit interparties, the Honourable Court be pleased to issue a temporary injunction restraining the 2<sup>nd</sup> Respondent either by himself, his agents, servants and/or personal representatives from moving, performing, operating, governing, borrowing loans, preaching, convening meetings, conducting activities and programs of the Methodist Church in Kenya.
- t. Spent.



- u. That pending the hearing and determination of the suit interparties, the Honourable Court be pleased to issue a temporary mandatory injunction to remove the 2<sup>nd</sup> Respondent from the office of the Presiding Bishop of the Methodist Church in Kenya.
  - v. Any other relief the Honourable Court may deem fit and just to grant.
  - w. Costs of the suit. “
14. The 4<sup>th</sup> Defendant deposed that he, together with the other Defendants were at all material times active members of the MCK. That under Standing Order (S.O) 11 of the MCK Standing Orders 2011, the MCK Standing Committee was mandated to make preparations and to issue notices for the MCK Annual Conference; that in its meeting held on 9<sup>th</sup> July 2022, the Standing Committee had resolved inter alia that the 57<sup>th</sup> Annual Conference of the MCK and election of the new Presiding Bishop be held on 25<sup>th</sup> November 2022; that however, by a notice issued by Rev. Joseph Ntombura Mwaine on 27.07.2022, the date of the conference was changed to take place between 03.08.2022 to 06.08.2022.
15. According to the 4<sup>th</sup> Defendant, the said notice contravened the Standing Orders of MCK, particularly Standing Order Nos. 11(3) and 22(3) of the Standing Orders of 2011 and 2015 respectively, which stipulate that a 14-day notice be issued in respect of the Annual Conference. He therefore averred that the 57<sup>th</sup> Annual Conference held secretly between 01.08.2022 to 03.08.2022 was illegal.
16. He further challenged the re-election of the Presiding Bishop of MCK, Reverend Joseph Ntombura Mwaine, whose second term in office was set to expire on 04.08.2022 upon serving a maximum period of 2 terms of 5 years each, as being contrary to the S.O 18(3) and 33(4) of the MCK Standing Orders of 2011 and 2015 respectively. Which provided that the Presiding Bishop shall hold office for a period of 2 terms of 5 years each and shall not be eligible for re-election for a further term without an intervening period of 5 years in which he is not the Presiding Bishop. The deponent asserted that Rev. Joseph Ntombura Mwaine illegally and un-procedurally extended his term of office, and that he has further purported to undertake various transactions on behalf of MCK.
17. The 2<sup>nd</sup> application was equally unopposed, as no responses were filed by the Plaintiff or Rev. Joseph Ntombura Mwaine. Indeed, no defence had been filed in respect of the counterclaim and the constituent suits as of 16<sup>th</sup> March 2023.
18. The 3<sup>rd</sup> application, which was brought by Hellen Kamenchu, the 10<sup>th</sup> Defendant, is supported by the grounds presented on its face and the facts stated in her affidavit. The following are the orders sought therein:-
- a. Spent.
  - b. Spent.
  - c. Spent.
  - d. Spent.
  - e. Spent.
  - f. That the proceedings of the purported Annual Conference of the Methodist Church in Kenya held on 3<sup>rd</sup> to 6<sup>th</sup> August, 2022 be deemed invalid on account of:



- i. Irregularities (failure to issue appropriate notice) in the convening of the same;
  - ii. Irregularities occasioned during its proceedings including the extension of term or Reverend Joseph Ntombura Mwaine; and
  - iii. Being in contempt of the directions of the High Court of 18<sup>th</sup> July, 2022 (Lady Justice Christine Meoli) directing the parties to explore an amicable resolution.
- g. That the matter of filling the vacancy in the office of Presiding Bishop be committed to a transitional committee comprising the following who will make recommendations to the Conference to be held on 26<sup>th</sup> – 30<sup>th</sup> November, 2022:
- i. The Synod Bishops in office on 2<sup>nd</sup> August, 2022;
  - ii. Bishop Johana Mbogori, Bishop Lawi Imathiu, Bishop Zablon Nthamburi being previous presiding bishops of the Methodist Church in Kenya;
  - iii. Three (3) representatives of the Defendants in the instant matter; and
  - iv. One (1) representative nominated in writing by the National Council of Churches of Kenya (NCCCK) from members of the Methodist Church in Kenya who shall be the chairperson.
- h. That the matter known as Milimani Commercial Court Case No. Mcommsu/E009 OF 2022 be transferred to the High Court and consolidated with HCCC E315 of 2021, HCCC E311 OF 2021 and HCCC 10 OF 2021.
- i. ....”.

19. In her affidavit, the 10<sup>th</sup> Defendant echoed the sentiments of the 4<sup>th</sup> Defendant regarding the irregular and unprocedural issuance of the notice of 27.07.2022 to the effect that the Annual Conference be held from 03.08.2022 to 06.08.2022, contrary to the MCK Standing Orders. The deponent complained that during the alleged illegal Annual Conference the term of Presiding Bishop Rev. Joseph Ntombura Mwaine was irregularly extended, despite his ineligibility for such extension.
20. The 10<sup>th</sup> Defendant expressed apprehension that the assets belonging to MCK were at risk of adverse or illegal alienation, as Rev. Joseph Ntombura Mwaine was the signatory to the MCK bank accounts. It was further averred that the said Reverend had failed to comply with the directions given by the court on 18.07.2022 for the parties to explore an amicable settlement of the dispute, engaging instead in further litigation against the Defendants before the Magistrate’s Courts. She therefore urged the court to intervene in the interest of justice.
21. Similarly, no response was filed by the Plaintiff or Rev. Joseph Ntombura Mwaine in respect of the 3<sup>rd</sup> application.
22. Although directions had been issued for the canvassing of the three applications through written submissions, only the Defendant applicants complied. On the morning of 16.03.2023, the date set for the highlighting of submissions, the Plaintiff’s suit was withdrawn, taking with it the slew of



applications by the Plaintiff dated 27.12.2021, 23.01.2022 and 17.05.2022. And rendering otiose the Preliminary Objection dated 05.01.2022.

23. It is important to highlight that from the onset; the Court has repeated entreaties to the parties to seek an amicable way to resolve the dispute. However, despite time allowed for this purpose, as of 16<sup>th</sup> March 2023 there was no evidence of progress in that direction, the disputants seemingly unmoved, and the Defendant applicants evincing every intention of proceeding to prosecute the three pending applications. Meanwhile, it was brought to the Court's attention that Dr. Gerishon Mwiti (the 4<sup>th</sup> Defendant) had passed away in what appeared from the parties' exchanges at the time, to be controversial circumstances. Thus, it appears that the motion dated 03.02.2022 seeking referral of the matter to the MCK internal dispute resolution mechanism was abandoned despite submissions thereon having been filed by the applicants therein.
24. As earlier indicated, on the morning of 16.03.2023, the date slated for highlighting of the parties' respective submissions, counsel for the Plaintiff informed the court that he had filed a notice to withdraw the suit in its entirety, with no orders as to costs and that in the circumstances, the counterclaim of the Defendants could not proceed. As the said notice of withdrawal was not on the file, the court placed the matter aside, resuming about an hour later. In the intervening period a copy of the notice of withdrawal of the suit under Order 25 Rule 1 of the Civil Procedure Rules, and dated 14<sup>th</sup> March 2023 was furnished.
25. The withdrawal notice was not opposed by the Defendant applicants, but their respective counsel asked for costs. In addition, it was pointed out by the said counsels that pursuant to the provisions of Order 7 Rule 25 of the Civil Procedure Rules, the counterclaim and consolidated suits survived the withdrawal of the suit. In response to these submissions, counsel for the Plaintiff asserted that a counterclaim was a form of defence and could not survive the withdrawal of the main suit, said to have been done here in good faith.
26. In a brief ruling, the Court allowed the withdrawal of the suit by the Plaintiff but agreed with the Defendant applicants that the counterclaim and constituent consolidated suits survived the withdrawal, reserving its reasons and decision on the matter of costs. The Court thereafter called upon the parties to highlight their written submissions on the three applications.
27. On the part of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants, counsel began by contending that the purported ex-communication and defrocking of the Defendants, was null and void, as it was not provided for in the regulating documents of the Methodist Church in Kenya which comprise of the Deed of Foundation and the Deed of Church Order and the Standing Orders. It was contended that the Standing Orders of the church set out the disciplinary process that ought to be followed where there was any infraction by a member, lay leader or clergy of the MCK and that the procedure includes the right to be heard. While calling to aid the English decision in *Al- Mehdawi v Secretary of State for the Home Department* (1990) AC 876 it was submitted that the Plaintiff failed to follow due process and its decision to defrock and excommunicate the Defendants was not only marred by procedural impropriety but also infringed upon their rights under to Article 26, 32, 33, 36 and 47 of *the Constitution* of Kenya. Hence the decision ought to be declared null and void.
28. Counsel went on to submit that the Plaintiff and Rev. Joseph Ntombura Mwaine usurped the church's constitutional offices and organs and acted ultra vires by hand-picking the delegates to the 57<sup>th</sup> Annual Conference. Thereby violating the Standing Orders in the attempt to limit participation of congregants and to ensure that the hand-picked delegates would support his agenda. It was particularly contended that the actions of the Plaintiff and Rev. Joseph Ntombura Mwaine of issuing a shorter notice than stipulated concerning the annual conference, changing the dates of the conference without



- informing the membership, failing to include the agenda in the notice and misleading members on the dates of the conference amounted to illegal, irregular, un-procedural and irrational conduct.
29. As a result of which, the purported annual conference was null and void. The English decision in *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2 and Ugandan case of *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous application number 643 of 2005 (UR) were called to aid in the foregoing regard.
  30. Concerning the extension of the term of Rev. Joseph Ntombura Mwaine and the election held during the purported 57<sup>th</sup> annual conference, it was argued that the former was unlawful, illegal and irregular whereas the latter was tainted with irregularities, illegalities, procedural malpractices, manipulation of delegates, impartiality and opacity and was null and void ab-initio. Counsel relied on the provisions of the Standing Orders 2011 and 2015 prescribing the tenure of the Presiding Bishop.
  31. Addressing the court on the prayer seeking a mandatory injunction, counsel relied on the decisions in *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR and *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR to submit that the motion dated 26.08.2022 has sufficiently demonstrated that there are special and exceptional circumstances that warrant the granting of such injunction. In urging the Court to intervene, it was asserted that the Reverend Joseph Ntombura Mwaine is illegally in office whereas the Standing Orders of the church provide that the presiding bishop of the church is mandated to oversee the pastoral, administrative, financial, and operational activities of the MCK. In conclusion, it was asserted that the motions were unopposed as such the court ought to allow the motions as prayed.
  32. Counsel for the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants, reiterated the church's Standing Orders, the Deed of Foundation and Deed of Church Order, and the respective affidavit material by the Defendants as part of his submissions. Addressing the 1<sup>st</sup> application, counsel cited the English decision in *Benjamin Leonard Macfoy v. United Africa Company*, Privy Council Appeal No. 67 of 1960 to contend that the Plaintiff had no authority or jurisdiction to excommunicate or defrock the Defendants; that such an action would mean that that the Defendants would no longer be allowed to participate and engage in the affairs of the church or even attend services in accordance with their constitutional rights.
  33. Further that the church's Standing Orders spells out the procedure for any disciplinary action against a member or minister of the church and that no complaint or disciplinary call was made against the Defendants prior to the purported excommunication or defrocking. It was further submitted that the Plaintiff's actions infringed on the Defendants' fundamental rights and freedoms under Articles 10, 19, 20, 27, 28, 29, 32 & 36 of *the Constitution* and *the Constitution* of the Methodist Church in Kenya. Counsel urged the court to allow the 1<sup>st</sup> motion.
  34. Concerning the 2<sup>nd</sup> and 3<sup>rd</sup> application, it was argued that the purported 57<sup>th</sup> Annual Conference conducted by the Plaintiff was irregular, un-procedural and illegal and therefore any resolution passed therein cannot be enforced. Further, while restating the reasons advanced by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants, counsel submitted that while the conference was not procedurally convened, the Rev. Joseph Ntombura Mwaine having already served two terms pursuant to the Church's Standing Orders was illegally in office and without authority to convene the purported annual conference.
  35. It was further asserted that allowing the Defendants' motions would not occasion prejudice to the Plaintiff as the motions seek to protect the wellbeing of the Plaintiff and the church at large. Thus, the balance of convenience heavily tilts in favor of the Defendants. In conclusion, counsel cited the



- decision in *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR to submit that the court ought to allow the Defendants' motions with costs.
36. Counsel for the 10<sup>th</sup> Defendant did not file any written submission but opted to rely on the submissions made by counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Defendants.
  37. Counsel for the Plaintiff despite being given ample opportunity did not file any written submissions but was allowed to make oral submissions. Firstly, it was his contention that the motions are defective, as the law does not envisage interim reliefs based on counterclaims. That the Plaintiff's suit having been withdrawn, the Defendants ought to have amended the reliefs in their respective motions to reflect that the reliefs were to last "pending determination of the counterclaim". He further contended that as things stood, there was no pending suit, therefore the interim reliefs were untenable, have no nexus to the consolidated suits, and or relate to matters that fall outside the jurisdiction of this court.
  38. Secondly, it was argued that the orders sought in the motions are in respect of a person who is not a party to the proceedings in the lead file, which has since been withdrawn. That it is trite law that orders cannot issue against person who is not party to the proceedings. The decision in *Adrian Kamotho v JSC* [2019] eKLR was called to aid on the foregoing. Thirdly, counsel contended that, it is settled that, issues for adjudication before a court are those raised by the party who has instigated the said proceedings. That the Defendants' latitude is limited to addressing issues in response to the instigated proceedings and therefore cannot 'hijack' the proceedings towards their own end.
  39. Counsel thus urged the court not to be swayed by the said peripheral issues to the initial claim that has since been withdrawn. He asserted that the Defendants have the liberty of initiating their own proceedings and cannot use the withdrawn lead suit to ventilate their own issues. In summation, he submitted that alternative dispute resolution mechanism had not been attempted in respect of the new issues raised by the Defendants, applicants.
  40. In a quick rejoinder, counsel for the Defendants applicants pointed out that the Presiding Bishop and Rev. Joseph Ntombura Mwaine were named as a defendant in the constituent consolidated suits and in the counterclaim in the lead suit. Further that, the counterclaim herein was brought in order to obviate a multiplicity of suits, and that the counterclaim comprises a separate and independent suit.
  41. The court has considered the material canvassed in respect of the first, second and third applications respectively. Two broad issues fall for determination by the court. These are:
    - a. What is the effect of the withdrawal of the Plaintiff's suit on the Defendants' counterclaim, the constituent suits, and applications now before the court for determination?
    - b. Have the Defendant applicants satisfied the requirements for the grant of the prayers sought in their motions?
  42. On the first issue, the Plaintiff exercised its right under Order 25 Rule 1 of the Civil Procedure Rules which provides:

"At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action".
  43. It was the Plaintiff's counsel's contention that upon such withdrawal, the counterclaim could not proceed. However, as rightly pointed out by the Defendants, a counterclaim being a separate suit



allowed by the provisions of Order 7 Rule 3 of the Civil Procedure Rules is not defeated by withdrawal of the main suit. Indeed, Order 7 Rule 13 of the Civil Procedure Rules provides that:

“If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with”.

44. The law treats a counterclaim as a separate suit or as a cross-suit. Section 35 of the [Limitation of Actions Act](#) stating as follows:

“For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”

45. In the case of *County Government of Kilifi v Mombasa Cement Limited* (2017) eKLR, the Court of Appeal discussed at some length the nature of a counterclaim as envisaged under the law. The Court pronounced itself as follows:

“The core issue in this appeal... was .... whether the appellant’s counterclaim amounts to a cross-suit. Counterclaims are provided for under order 7 rule 3 of the Civil Procedure Rules which is in terms:-

“A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.” [Emphasis added]

46. The Court of Appeal proceeded to state that:

“In our view, a plain reading of the above provision allows or gives a defendant in a suit permission or a carte blanche, to raise a counterclaim based on any right or claim against a plaintiff. That provision says nothing to the effect that such counterclaim must be related to the original subject matter of the suit and neither does it attract such an implication. That position is supported by Halsbury’s Laws of England, Fourth Edition, vol. 42, which defines a counterclaim as follows:-

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”[Emphasis added].

Further that,

“Any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff’s claim. Thus, not only claims for money but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim.”



47. On the question whether a counterclaim amounts to a cross-suit, the Court of Appeal cited with approval a passage in the case of *Sh. Jag Mohan Chawla & Another v Dera Radha Swami Satsang & Ors* CA No.008275-008275/1996 in which the Indian Supreme Court grappled with the interpretation of the Indian equivalent of Order 7 rule 3 of the Civil Procedure Rules of Kenya that was couched in similar terms. To the following effect:-

“...The counterclaim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counterclaim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counterclaim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.....”

48. In conclusion, the Kenyan Court of Appeal held that -

“In view of the foregoing, it is safe to conclude that a defendant is permitted to raise a counterclaim against a plaintiff on any right and claim he may have against the plaintiff even where the subject matter or cause of action maybe different from the original suit. The rationale is to avoid multiplicity of proceedings and claims based on same or different cause of action between parties to the suit to enable a court to pronounce a final judgment in the suit both on the original claim and on the counter claim. However, Order 7 rule 3 of the Civil Procedure Rules gives court a wide discretion such that, on the application of the plaintiff, the court may reject a counterclaim where it would not be convenient or where in the opinion of the court, the counterclaim ought not to be allowed. No doubt, that is a wide discretion and the reasons as to why a court would disallow a counterclaim would be many and varied to be decided on a case-by-case basis”.

49. It follows therefore that contrary to the assertions by counsel for the Plaintiff and Rev. Joseph Ntombura Mwaine, the counterclaim by the 1<sup>st</sup>-5<sup>th</sup>, 9,11-13<sup>th</sup> Defendants in the lead suit and the claims in the constituent suits survived the withdrawal of the Plaintiff's suit and the Defendants who were plaintiffs in the said pleadings were entitled to proceed to prosecute their respective claims. And indeed, their pending applications, there being no merit in the claim made by counsel for the Plaintiff and Rev. Joseph Ntombura Mwaine that an interim motion cannot be anchored on a counterclaim. By parity of reasoning however, upon the withdrawal of the main suit, the 10<sup>th</sup> Defendant's application dated 12<sup>th</sup> September 2022 fell by the wayside having lost the substantive anchor pleading, as the said Defendant did not file a counterclaim in the suit.

50. Regarding the question of costs, it is trite that costs follow the event and Order 25 Rule 3 provides that a defendant is entitled to apply for the costs of a suit that had been withdrawn. All the Defendants in the lead suit had instructed counsel who filed various pleadings and participated in the matter prior to withdrawal. Having thus incurred costs, and despite the context in which the suit arose, there can be no justification to deny them costs as they were dragged to court. The court will therefore grant the costs of the withdrawn suit to all the Defendants in the lead suit.



51. In view of all the foregoing, only the 1<sup>st</sup> and 2<sup>nd</sup> motions dated 17.12.21 and 26.8.22 respectively fall to be considered under the second issue identified earlier. Noting however that the prayers in the said applications largely relate to interlocutory/temporary injunctive orders and arise out of similar or related circumstances, the court will deal with the two applications contemporaneously. As observed earlier, the Plaintiff and Rev. Joseph Ntombura Mwaine did not file any response to any of the motions.

52. Order 51 Rule 14 of the Civil Procedure Rules provides that:

“ 1)Any respondent who wishes to oppose any application may file any one or a combination of the following documents — (a)a notice of preliminary objection: and/or; (b)replying affidavit; and/or (c)a statement of grounds of opposition; (2)the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing. (3)Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit. (4)If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte.”

53. What is the effect of the failure by the Plaintiff and Rev. Joseph Ntombura Mwaine to file responses to the two motions? Asike-Makhandia J (as he then was) in *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR stated as follows:

“ The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition to the aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant. In this regard, the court held in *Kipyator Nicholas Kiprono Biwott .v. George Mbuguss and Kalamka Ltd* Ciivil case no. 2143 of 1999 “.....From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit.....having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I therefore have no alternative but to strike out paragraphs 3,4,5,6 and 10 of the defence and enter judgment for the plaintiffs on liability...”

54. In addition Makhandia J (as he then was) concluded that failure to file a replying affidavit is equivalent to an admission of facts on the applicant’s application, as was held in the case of *Crown Berger Kenya Ltd v Kalpech Vasuder Devan* and another civil case no. 246 of 2006 (UR).

55. In the case of *Mohammed & Another vs. Haidara* [1972] E.A 166 at page 167 paragraph F-H, Spry V.P stated with regard to the failure by a party to file a reply to allegations set out in evidence that :

“ The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent’s affidavit gives no material facts, and the only real evidence of facts is that contained in the appellant’s affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix, but it should have made clear which of the facts alleged by the appellants were denied...”



56. Similarly, the court stated in *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others* [2012] eKLR that:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

57. The same principle was applied in the cases of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR and *Alloys Otieno Aboka v Kenya National Highway Authority & 2 others* [2020] eKLR, albeit being in the nature of constitutional petitions, but where the respective respondents failed to file a response to the petitions.

58. That said, the affidavit material in support of the unopposed application must rise to the requisite threshold and the court may still decline to grant the prayers in the unopposed application if the threshold is not met. The Court of Appeal held in *Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998* that it was an error for the Court to hold that the failure to file grounds of opposition automatically entitles the applicant to orders *ex parte*, asserting that even in such a case, the applicant is not relieved of the legal onus to justify his application.

59. In the more recent case of *Gideon Sitelu Konchellah v Julius Lekakony Ole Sunkuli & 2 others* [2018] eKLR which was initiated as a constitutional petition, and where the respondent failed to file a replying affidavit in answer to the petition, the Supreme Court held that :

“A replying affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. Absence of this foundational pleading, the replying affidavit, it follows that even the written submissions purportedly filed by the 1st respondent ... are of no effect. Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that *prima facie*, with no objection, the application is meritorious, and the prayers may be granted.”

60. Thus, in this case the allegations contained in the affidavits of the Defendants stand uncontroverted, the Plaintiff and Rev. Joseph Ntombura Mwaine having eschewed to file a replying affidavit thereto. The allegations must be deemed as admitted, and true. The next question for consideration is whether the Defendant applicants’ affidavit evidence rises to the requisite threshold for the granting of the orders sought in the two applications under consideration. As stated earlier, the key prayers in the two applications are for interlocutory injunctions against the Plaintiff and Rev. Joseph Ntombura Mwaine.

61. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR restated the principles governing the grant of interlocutory injunctions as enunciated in *Giella v Cassman Brown & Company Limited* [1973] E.A 358 and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. The Court cautioned that such a court ought to exercise care not to determine with finality any issues arising. The Court expressing itself as follows:

“Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella’s* case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already (settled)... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:



In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:

- a) establish his case only at a prima facie level
- b) demonstrated irreparable injury if a temporary injunction is not granted.
- c) allay any doubts as to (b) by showing that the balance of convenience is in his favor.”

62. In addition, the Court stated that the three conditions above apply separately as distinct and logical hurdles to be surmounted sequentially by the applicant. That is to say that the Applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no prima facie case is established, the court need not investigate the question of irreparable loss or balance of convenience.

63. As to what constitutes a prima facie case, the Court of Appeal rendered itself as follows:

“Recently, this Court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues, but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant’s case is more likely than not to ultimately succeed.” (Emphasis added).

64. From the pleadings and affidavits of the Defendants, it is apparent that the said parties are primarily challenging the notice dated 17.12.21 defrocking and/ or excommunicating the 1<sup>st</sup> to the 9<sup>th</sup> and 11-13<sup>th</sup> Defendants herein from their leadership positions held in the MCK and from membership of MCK, the regularity and validity of the 57<sup>th</sup> Annual Conference of the MCK held in early August 2022 and the validity and legality of the decision made during the said conference to extend the term of office of Rev. Joseph Ntombura Mwaine whose maximum tenure of two terms as presiding Bishop MCK



pursuant to the Standing Orders of the MCK was supposed to end in the first week of August 2022. The two applications seek temporary reliefs in that regard. However, as crafted, some of the prayers in the motion, for instance seeking certain declarations call for final orders unsuited for interlocutory applications.

65. In addition to the interlocutory injunctive orders sought in the 2<sup>nd</sup> application, the Defendants therein also sought a mandatory injunctive order to have the Reverend Joseph Ntombura Mwaine removed from the office of the Presiding Bishop of the MCK. Upon considering the nature and subject matter of the dispute, the court would be hesitant to grant the above order at this early stage. An order of such nature can only be granted at the interlocutory stage in the clearest of cases.
66. This was the position stated by the Court of Appeal in the case of Kenya Breweries Limited v Washington Okeyo [2002] 1 EA 109; [2002] eKLR thus:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4th Edn. para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application”.

Also in Locabail International Finance Ltd. v Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

67. By their affidavits and submissions, the Defendant applicants assert that they are members of the MCK. While the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 9<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendant applicants were in the material period ordained ministers of the MCK, the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> Defendants were members of the MCK holding leadership positions in their respective congregations of the MCK. By a notice published in the Daily Nation newspaper of 17<sup>th</sup> December 2021 by the Plaintiff, (copy exhibited as annexure KM1 in the affidavit supporting the 1<sup>st</sup> application sworn by of the 6<sup>th</sup> Defendant), the former set of applicants were defrocked while the latter set of applicants were excommunicated.
68. The notice which bore the photographs and names of the 1<sup>st</sup> to 3<sup>rd</sup> defendant applicants stated inter alia that:

“The Conference Standing Committee of the Methodist Church in Kenya wishes to notify all our esteemed members and the General Public that the Persons whose photographs appear ABOVE as well as those whose names are listed BELOW ceased to be ministers (defrocked) and members (excommunicated) of the Methodist Church in Kenya....  
(names of the defrocked and excommunicated persons) ....



These persons and their allies who purport to be Leaders of Methodist Regional Conference are therefore not authorized to transact or conduct any business on behalf of the Methodist Church in Kenya.

Please take note that the Methodist Church in Kenya will not be liable for any conduct or transaction carried out by the above mentioned from the date of this notice.”

69. The Defendant applicants complain that their purported excommunication and defrocking is not provided for by the MCK Deed of Foundation and Deed of Church Order or Standing Orders and that the Standing Orders 2011 and 2015 only provide for a disciplinary procedure of dealing with complaints against MCK Ministers and laity. There seems to be a dispute regarding the valid and current Standing Orders of MCK, but the two versions of 2011 and 2015 Standing Orders exhibited before the court by the various applicants contain similar provisions in that regard, the former at Standing Orders 99 to 108 and the latter at chapter 12.
70. The standing orders provide for a disciplinary procedure that includes the right of the affected member or minister to be notified of the complaint against him, appointment of a committee to hear the complaint and the right of hearing to the accused person accused. This procedure, according to the Defendant applicants was not followed and they were not accorded a right of hearing before the decision communicated in the newspaper notice. Thus, they complain that the Plaintiff and Presiding Bishop violated the rules of natural justice and consequently their constitutional rights to equal protection and benefit of the law (Article 27); to freedom of conscience, religion and belief (Article 32); freedom of association (Article 36); and to fair administrative action (Article 47) inter alia were impinged upon.
71. They view the actions of the Plaintiff and the Presiding Bishop, who pursuant to the Standing Orders occupies the positions of chief pastor and principal executive officer of the MCK, the convenor and chairperson of the Conference Standing Committee which is also responsible for discipline (See standing order 29 of the 2015 Standing orders) as illegal, irregular, unprocedural and contrary to the MCK's Deed of Foundation and Deed of Church Order and provisions of its Standing Orders and in violation of their constitutional rights. In the court's view, the Plaintiff was obligated to follow the discipline procedure in the Standing Orders and as a minimum to notify the Defendant applicants of the charges/complaints against them and to give them a hearing before taking the decision to defrock and excommunicate them.
72. The Plaintiff and presiding bishop did not answer these complaints or furnish any explanation on the events culminating in the notice in the Daily Nation Newspaper notifying the excommunication and defrocking of the Defendant applicants. One of the objections raised in submissions by the counsel for the Plaintiff and presiding bishop though not clearly articulated appeared to conflate the defrocking and excommunication with termination of employment, hence the obtuse statement that these matters fall under the jurisdiction of a different Court, presumably the Employment and Labour Relations Court.
73. The excommunicated Defendant applicants from the material before the court appear to be lay leaders and there is no evidence that they were employees of the church as such. As for the defendant applicants who were ordained Ministers, it is not clear whether they were in the employ of the church in the material period and whether their defrocking as ministers ordained by the MCK amounted to having their services terminated. Indeed, there is material showing that the 1<sup>st</sup> Defendant applicant was the immediate former presiding bishop of the MCK prior to the election of the Rev. Joseph Ntombura Mwaine in 2012. Moreover, the Plaintiff in its plaint and notice of motion dated 27.12.2021 referred to the Defendants as "an amorphous group largely composed of former church officials". In the absence



- of evidential material to support the objections, the Court could not proceed on the basis of guesswork. Based on the material before it, this court concludes that prima facie the Defendant's enumerated rights have apparently been infringed by the Plaintiff and the presiding bishop of the MCK therefore calling for an explanation or rebuttal from the latter, but no rebuttal has been made.
74. Further it appears that the clear and unmistakable rights of the Defendant applicants are directly threatened. Pursuant to the prima facie patently illegal actions of the Plaintiff and presiding bishop, the Defendant applicants stand defrocked or excommunicated from the MCK, placing their constitutional rights and freedoms, including their rights and freedom of worship and association in jeopardy. No amount of damages would be adequate compensation for the apparent denial of the Defendant applicants' constitutional rights enumerated earlier and likely to be further violated if the court does not intervene. Hence there is a demonstrable and urgent necessity to prevent the irreparable damage that may result from further invasion.
75. By the 2<sup>nd</sup> application, the Defendants primarily challenge the validity and regularity of the 57<sup>th</sup> Annual Conference of the MCK allegedly held secretly from 1<sup>st</sup> to 3<sup>rd</sup> August 2022 and the extension of the term of Rev. Joseph Ntombura Mwaine by 2 years during the said conference. The Defendant applicants complain that contrary to the applicable Standing Orders regulating the holding of the annual conference and election of the presiding bishop, namely, Standing Orders 28 of 2011 and 29 of 2015; 23(3) of 2015 and 11(3) of 2011; 18(3) of 2011 and 33(4) of 2015, the said Conference was convened by Rev. Joseph Ntombura Mwaine rather than the Standing Committee of the Conference, and scheduled for dates in August 2022 rather than November 2022 the latter being the month determined earlier by the Standing Committee meeting of 9<sup>th</sup> July 2022; that a notice of less than 14 days prescribed and containing misleading information and without agenda was issued only to select members of the MCK regarding the conference dates thereby locking out many bona fide delegates; that the limited circulation of the short notice calling for candidates to vie for the position of Presiding Bishop in the elections to be held during the conference locked out potentially eligible candidates for the position; and that the conference illegally extended by two years the term of Rev. Joseph Ntombura Mwaine who having served the maximum period of two consecutive terms of 5 years each as presiding bishop was ineligible for such extension which, in any event was not provided for in the Standing Orders.
76. In addition to being aggrieved by the foregoing, the Defendant applicants express apprehension that together with the Plaintiff the Rev. Joseph Ntombura Mwaine who is not validly in office may unlawfully enter into contractual obligations with innocent third parties committing members of the MCK and exposing the church to liabilities without following the proper procedure. These are serious matters that call to question not only the regularity of the 57<sup>th</sup> Annual Conference of the MCK, but also the validity of the extension of the term of Rev. Joseph Ntombura Mwaine. If the facts deponed to above are true, and there has been no attempt by the Plaintiff and Rev. Joseph Ntombura Mwaine to controvert them, the Plaintiff and Rev. Joseph Mwaine Ntombura have apparently violated the Standing Orders outlined above.
77. As earlier observed the Plaintiff and Rev. Joseph Ntombura Mwaine did not file any response to the 2<sup>nd</sup> motion, and in my opinion it was too little too late for his counsel to submit that the court could not issue orders against him as he was not a party to the suit. As correctly observed by the Defendant applicants, the Plaintiff and Reverend Joseph Ntombura Mwaine are sued as the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, respectively in the counterclaim in the lead suit. While in the constituent suits the Plaintiff and the Presiding bishop of MCK are sued as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.



78. To my mind, the most egregious violation alleged in the 2<sup>nd</sup> motion appears to relate to the extension of the Reverend's term of office. According to the Applicants, the Reverend Joseph Ntombura Mwaine was elected as presiding bishop MCK in August 2012 and after five years was re-elected to the same position. Thus, according to the Applicants, Rev. Joseph Ntombura Mwaine's second term expired on 4.08.2022 and his term was irregularly extended by two years at the 57<sup>th</sup> Annual Conference of MCK. This position appears to be corroborated by the notice dated 25<sup>th</sup> July 2022 from one Rev. Naftaly Gitonga, the Conference Secretary and addressed to the Synod Bishops MCK and was inviting applications for the position of presiding bishop, inter alia to be sent to the search committee. The notice cites Standing Order 147 (2) (Election Procedures) and indicated that the application deadline was 1<sup>st</sup> August 2022. A copy of the letter is attached to the affidavit supporting the 2<sup>nd</sup> motion and marked as annexure GM11.
79. Was the Rev. Joseph Ntombura Mwaine eligible for a further term in office as presiding bishop in the circumstances and was the contested extension of two years proper? The Reverend did not challenge the Defendant applicants' allegations in this regard or in any way attempt to explain the circumstances of his "re-election" as reported in the Daily Nation Newspaper of 4.08.2022 (see the copy of news article marked as the Applicant's annexure GM13).
80. The Standing Orders 18(3) of the undisputed 2011 Standing Orders (as well as its counterpart Standing Order 33(4) of 2015 whose validity is in dispute) provide as follows:
- “The Presiding Bishop of the Conference, shall hold office for two terms of five years each, provided that at expiry of the first term he received a simple majority of the votes cast during a regular Bi-Annual Conference, and provided that he shall not be eligible for re-election for a further term of office without an intervening period of five years in which he is not the Presiding Bishop”.
81. The question of eligibility will be determined with finality at the trial. However, at this stage it appears prima facie, that the Rev. Joseph Ntombura Mwaine was ineligible for re-election for a third term, or extension of term, there being no provision in the Standing Orders allowing such extension. His continued occupation of the office of Presiding Bishop in these circumstances is an issue involving the public interest and transcends the narrow interests of the parties before the Court. Under the Standing Orders 2015, the presiding bishop MCK exercises extensive powers and functions. For instance, pursuant to Standing Order 33, he is the official head and chief pastor of the MCK and as the Principal Executive Officer enjoys wide powers that include being the principal representative and Spokesperson of the MCK and is the signatory of all Conference and Conference Institution (including synods) accounts with power to inspect and freeze accounts.
82. In view of the wide array of functions and powers of the incumbent, the Defendants' apprehension may not be idle. The court has looked at the Defendant applicants' earlier letters raising concerns regarding the running of the affairs of the MCK, dated 20.08.2015, 16.09.2015, 15.04.2019 and 31.07.2019 attached to their complaint to the Registrar of Societies dated 5.08.2022 which is exhibited in the supporting affidavit to the second motion as annexure GM15. The letters raise issues of abuse of office, financial impropriety, illegal disposal of church assets and general mismanagement against Rev. Joseph Ntombura Mwaine. While these remain mere allegations at this stage, it is not difficult to anticipate given the powers vested in the presiding bishop, that in the absence of an interlocutory order, substantial damage could well be occasioned to the church in addition to the risk to third parties who might transact with the presiding bishop during the pendency of this dispute.



83. Equally, the court notes with concern that because of the contentious extension of the term of Rev. Joseph Ntombura Mwaine, the faults already existing in the church body have deepened and both clergy and laity are riven apart leading to a multiplicity of suits before the High Court and even in the subordinate Courts. Although it is eminently desirable that an amicable solution to this dispute is found as soon as possible, the Court feels inclined to intervene to protect the church body and innocent third parties from likely adverse and far-reaching consequence resulting from a possible illegitimate exercise of power by the incumbent presiding bishop. In the court's view allowing the current status quo to continue might occasion serious damage to the MCK's interests without any feasible prospects of adequate reparations by way of damages. If there was any doubt, and there is none here as to the irreparability of likely damage, the court is of the considered view that based on the material before it, the balance of convenience tilts in favour of the Defendant applicants.
84. In the result, the Court is persuaded to grant the motions dated 17.12.2021 and 26.8.2022. With regard to the former motion in HCCC No. 311 of 2021, the court will grant the following interlocutory reliefs:
- a. A temporary injunction against the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from executing and/or effecting the excommunication decision and related notice issued on 17<sup>th</sup> December, 2021 pending the hearing and determination of the suit.
  - b. A temporary injunction prohibiting the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from interfering with the Applicants'/Plaintiffs' membership and full participation in the affairs of the Methodist Church in Kenya pending the hearing and determination of the suit.
  - c. A temporary injunction prohibiting the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from interfering with the right of worship of the Applicants/Plaintiffs as members of the Methodist Church in Kenya in Kawangware pending the hearing and determination of the suit.
  - d. A temporary injunction prohibiting the Respondents/Defendants jointly and severally including the organs and offices of the 1<sup>st</sup> Respondent/Defendant, their agents or by themselves from removing the Applicants/Plaintiffs from office or interfering with their positions in office and performance of their duties as leaders at Kawangware Methodist Church pending the hearing and determination of the suit.
85. Concerning the motion dated 26.08.2022 filed in HCCC NO. 315 of 2021, the court will grant the following temporary reliefs:
- a. A temporary injunction restraining the Methodist Church in Kenya Trustees Registered and Rev. Joseph Ntombura Mwaine by themselves, their agents or servants or any person acting in their behalf from executing and or effecting the decision of the Standing Conference Committee of the MCK and related notice published in the Daily Nation of 17<sup>th</sup> December, 2021 purporting to defrock and excommunicate the 1<sup>st</sup> to 9<sup>th</sup> Plaintiffs in the counterclaim pending the hearing and determination of this suit.
  - b. A temporary injunction restraining the Reverend Joseph Ntombura Mwaine from exercising the mandate, powers, or discharging any duties or functions conferred upon or reserved for



the office of the Presiding Bishop of the Methodist Church in Kenya pursuant to the Deed of Foundation and Deed of Church Order and the Standing Orders of the Methodist Church in Kenya, or exercising any mandate, functions or powers incidental to the office of the Presiding Bishop of the Methodist Church in Kenya, pending the hearing and determination of this suit.

86. The costs of the two motions will abide the outcome of the suits herein. Notwithstanding the events surrounding this dispute and earlier unsuccessful pleas, the Court remains optimistic and beseeches the disputants to consider resolving this dispute amicably through court-annexed mediation or through alternative dispute resolution (ADR) mechanism, for the sake of the members and mission of the church.
87. At the time of this ruling, there are several other pending suits revolving around the leadership dispute in the MCK, some of them filed after this suit and involving the parties herein. This multiplicity of suits is not only costly but also dissipates the Court's scarce resources and is inimical to the unity and mission of the MCK. Accordingly, the Court will grant the parties a period of 30 days to consider the proposal for referral of this dispute to court-annexed mediation or ADR, and to report back to the court on a date to be fixed hereafter.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the 1<sup>st</sup>-5<sup>th</sup>, 9<sup>th</sup>, 11-13<sup>th</sup> Defendant /Applicants: Ms. Wambui Kyama**

**For the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> Defendant/ Applicants: Mr. Charles Kimathi**

**For the 10<sup>th</sup> Defendant/Applicant: Mr. Kimathi Kamenchu**

**For the Plaintiff/Respondent and Reverend Joseph Ntombura Mwaine: Miss Kurgat holding brief for Mr. Kamotho**

**C/A: Carol**

