



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL CASE NO. 06 OF 2019

BETWEEN

ARCHBISHOP DR. HESBORN NJERA.....1ST PLAINTIFF/APPLICANT

JONATHAN ONYANGO.....2ND PLAINTIFF/APPLICANT

(suing as the Archbishop and General Secretary and Trustees

of St. Meshack's Fellowship Church (HERA) OCHARE

AND

TOBIAS OCHOLA.....1ST DEFENDANT/RESPONDENT

JULIUS ODUNDO.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion amended on 8th April, 2019 and filed on 9th April, 2019, the Applicants pray for orders that:

1) Pending the hearing and determination of this suit, an injunction does issue restraining the Respondents whether by themselves, their agents, representatives, servants and/or employees from interfering with the operations of St. Meshack's Fellowship Church (HERA) (*hereinafter referred to as the Church*) by collecting offerings, tithes or in any other manner handling church funds and property, carrying out any church duties contrary to the church constitution

2) Costs of the application be provided for

2. The application is based on the ground that **TOBIAS OCHOLA (*hereinafter referred to as the 1st Respondent*)** and **JULIUS ODUNDO (*hereinafter referred to as the 2nd Respondent*)** who are former clergy of *the Church* are not authorized to carry out any church activities for the reason that:

a) The 1st respondent was suspended on 4th June, 2018

b) The 2nd respondent has attained retirement age

3. The application is supported by an affidavit sworn by **ARCHBISHOP DR. HESBORN NJERA (*hereinafter referred to as the 1st Applicant*)** and his further affidavit sworn on 28th March, 2019 and 8th April, 2019 respectively. He avers that *the Church* was registered as a society on 21st June, 1994 and is governed by a constitution as evidenced by a copy of constitution and Certificate of Registration marked **ADHN-1**. He states that the 1st Respondent was appointed as Vicar General by a letter dated 2nd January, 2017 (**ADHN-3**), was transferred from Nairobi to Kisumu and his appeal against the transfer was rejected as shown by letters marked **ADHN-4 (a)** and **(b)**.

4. The deponent states that the 1st Respondent declined to take up the transfer and continued to conduct church activities notwithstanding that he had been served with notifications of transgressions (**ADHN-7** and **8**) and a suspension letter dated 3rd September, 2018 (**ADHN-9**).

5. Concerning the 2nd Respondent, it has been deposed that he has similarly continued to conduct church activities even after he was served

with a notice dated 1st November, 2018 (**ADHN-11**) notifying him that his retirement would take effect on 31st December, 2018.

6. In response to that application, the 2nd respondent on his own behalf and that of the 1st Respondent on 8th April, 2019 filed a replying affidavit sworn on 8th April, 2019. He avers that it is not certain whether **the Church** Annual General Meeting that allegedly approved constitutional amendments reducing the retirement age from 70 years to 65 years was held on 16th December, 2016 as stated in the notice of retirement dated 1st November, 2018 (**ADHN-11**) or on 10th February, 2018 as demonstrated by the letter dated 20th February, 2018 to the Registrar of Societies and the minutes of a general meeting held on 10th February, 2018 marked **ADHN-2**.

Submissions by parties

7. The parties' advocates made oral submission in support of their respective cases. The Applicants hold the view that the respondents are in breach of **the Church** constitution and that the orders sought are merited. The respondents on the hand hold the view that the Applicants have not established a *prima facie* case for the reason that the document they are referring to as **the Church** constitution is invalid for not having been filed and approved by the Registrar of Societies.

Analysis and Determination.

8. I have considered the notice of motion in the light of the affidavits and annexures on record and submission made on behalf of the parties.

9. Any discussion on temporary injunctions is not complete without a reiteration of the requirements for grant of injunction as set-out in the **Giella vs Cassman Brown [1973] EA 358**, as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

10. The principles on which the courts will grant an injunction were restated by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012**, together with the mode of their application 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) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

11. These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86**).

12. The Court of appeal in the **Mrao Ltd Vs First American Bank of Kenya and 2 others [2003] eKLR** interpreted the condition as to prima facie case as follows:

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."

13. The Certificate of Registration marked **ADHN-1** demonstrates that **the Church** is a registered society in terms of the Societies Act Cap 108 Laws of Kenya (hereinafter referred to as **the Act**). I have no doubt that **the Church** must have submitted its constitution to the Registrar of Societies at the time of making its application for registration although evidence thereof has not been tendered.

14. The applicants contend that the respondents have breached **the Church** constitution a copy of which has been exhibited as **ADHN-1**. According to the Applicants and from the exhibited documents, a resolution to amend the said constitution was allegedly passed in a general meeting held either on 16th December, 2016 or on 10th February, 2018. The uncertainty regarding the dates when the resolutions to amend the constitution were passed leaves the court in doubt as to whether such a resolution was indeed reached.

15. And even if the said resolution to amend was passed, it has not been demonstrated that the Applicants complied with Section 20 of **the Act** which provides that:

No registered society shall—

(a) amend its name, or its constitution or rules; or

(b)

(c)

except with the prior consent in writing of the Registrar, obtained upon written application to him signed by three of the officers of the society. (*Emphasis added*)

16. The Applicants' letter dated 20th February, 2018 to the Registrar of Societies does not purport, and is in my considered view not an application for amendment of ***the church*** constitution contemplated under the provisions of Section 20 of ***the Act***.

17. Further to the foregoing, the resolutions dated 10th February, 2018 have not been certified as a true copy by three of the officers of the society as contemplated by Section 20 (2) of ***the Act***. (*Emphasis added*)

18. On the totality of the material presented to court, I have come to the conclusion that the Applicants have not been demonstrated that the Respondents have breached *the church* constitution. A *prima facie* case with a probability of success that would entitle this court's exercise of discretion in Applicants' favor has not been established and the balance of convenience therefore tilts in favor of not granting the orders sought.

DISPOSITION

19. In the end, the notice of motion amended on 8th April, 2019 and filed on 9th April, 2019 fails and is dismissed with costs to the Respondents.

DELIVERED AND SIGNED IN KISUMU THIS 16th..DAY OF May..2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Plaintiffs/Applicants - Mr Yogo

For Defendants/Respondents - Mr Kobingo