



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL SUIT NO 8 OF 2017**

**NJURI NCHEKE SUPREME COUNCIL OF AMERU ELDERS**

**(suing through its officials)**

**PAULO M'MITHEGA**

**PHARES MUTWIRI RUTERE**

**SIMON MWAMBA MUKANGU.....PLAINTIFF**

**Versus**

**LINUS KATHERA.....1<sup>ST</sup> DEFENDANT**

**JOSPHAT MURANGIRI.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MUTURA.....3<sup>RD</sup> DEFENDANT**

**AYUB BUNDI.....4<sup>TH</sup> DEFENDANT**

**ALHAJI MWENDIA.....5<sup>TH</sup> DEFENDANT**

**RULING**

**Injunction**

[1] The application dated 6<sup>th</sup> March 2017 is seeking for a temporary injunction under Order 40 rule 2 of the Civil Procedure Rules. I will not re-invent the wheel. Ojwang J (as he then was) stated in the case of **Amir Suleiman vs. Amboseli Resort Ltd (2004) eKLR 589** at page 607 that:-

*‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in GiellavsCassman Brown, in 1973, cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been “wrong”....”*

*Traditionally, on the basis of the well accepted principles set out by the court of Appeal in GiellaVsCassman Brown the court has had to consider the following questions before granting injunctive relief.*

*i) Is there a prima facie case....*

*ii) Does the applicant stand to suffer irreparable harm...*

*iii) On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....*

[2] In applying this test, is there prima facie case on which an injunction should issue? What is prima facie case? The Court of appeal in Mombasa in **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS CIVIL APPEAL NO 39 OF 2002** answered this question as follows:-

**“...I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter.**

The facts of this case should say whether prima facie case has been established to the required standard of law.

[3] The plaintiff asserts that the defendants are not bona fide office bearers of the plaintiff society; the plaintiffs are. Yet, these individuals have purported to act for the plaintiff society; have interfered with the operations of the plaintiff society and have infringed rights of the society and its members. According to the plaintiff, the defendants' actions are illegal and a breach of the Societies Act. The specific illegal acts committed by the defendants include holding of meetings in the name of the plaintiff society, purporting to change the plaintiff society constitution and election of new office bearers, and destroying several shrines of the plaintiff society. These illegal actions by the defendants are perfect grounds for issuance of an injunction to restrain them from their illegal activities. They alluded to the fact that the defendants have deliberately circumvented resolution of the dispute herein by frustrating efforts by the Registrar of Societies to adjudicate the dispute following court order in case Misc JR App NO 3 of 2015.

[4] The defendants argued that this suit is an attempt to re-canvass issue that were determined in MERU MISC JR APP NO 3 OF 2015. Instead of adhering to orders made by Makau J in that suit, the defendants filed this suit seeking injunction. They also stated that the allegations on which the application is premised are pure falsehoods. To them, the plaintiffs are trying to turn NjuriNcheke into a private entity yet it is an institution of the Ameru people through which they enjoy their right of association as well as culture as enshrined under article 44 of the Constitution. The application is therefore an attempt to block Ameru people from enjoying these rights. In addition, the defendants posit that the plaintiffs are not the bona fide officials of the Society herein; they are strangers thereto. In any case, the dispute on bona fide officials of the Society herein is in dispute and is being adjudicated upon by the Registrar of Societies. Therefore, the plaintiffs are not competent to apply and their application does not attain legal threshold for granting of an injunction. They urged the court to reject it.

#### **DETERMINATION**

[5] Yet again the court has been invited to consider leadership wrangles in NjuriNcheke Supreme Council of Ameru Elders among members (hereafter NjuriNcheke). The first case was in case number MSC JR NO 3 OF 2015 where Makau J directed the Registrar of Societies to arbitrate that dispute on leadership of NjuriNcheke. The second was in PETITION NO 2 OF 2017. In the latter proceedings, this court rendered itself thus:-

#### ***Applying the test***

***[11] Applying this test, leave was granted herein on 18<sup>th</sup> May, 2017, but no substantive motion was filed within the stipulated period of 21 days. There is obviously delay. But, is there any good reason shown by the Ex parte Applicant for these proceedings to continue? The explanation given for the delay may be reasonable or objective. However, the facts of this case require a keen consideration. In this case, I see parties who are constantly engaged in accusations and counter accusation about who is responsible for the deadlock on the resolution of the dispute among them. Of importance to note, these proceedings relate to the NJURI NCHEKE SUPREME COUNCIL OF MERU ELDERS, a society registered under and regulated by the provisions of the Societies Act- a reality that will never depart from the backyard of these parties. Depositions in the affidavit by ANN N. MWANGI and the facts before me, makes one thing clear; that the Registrar of Societies is of the opinion that, in light of the dispute among the members and officers of NJURI NCHEKE SUPREME COUNCIL OF MERU ELDERS, she is not satisfied as to the identity of the persons who have been properly constituted as officers of the society herein. Immediately, Section 18 of the Societies Act comes into play. According to the Registrar of Societies, upon invoking section 18 of the Societies Act as directed by Makau J, no report has been filed as sought by the Registrar. Similarly, there has been no arbitration or resolution of the dispute as per the order of Makau J and she blames the Ex parte Applicant for the malaise. I see parties who are trying to outdo the other by whatever means at the expense of the Society; such to me is wasted efforts and no wit at all. As a result, these parties have held the society hostage and has left it helpless. But as long as the society is alive, the law shall prevail and protect it. Accordingly, as the dispute resolution mechanism in section 18 of the Societies Act has not been exhausted, these proceedings are premature. They could as well be an abuse of the process of the court given the fact that the Ex parte Applicants have not shown how they facilitated the arbitration called by the Registrar. Good faith is everything in judicial proceedings especially those that entail court's discretion. In the circumstances, these proceedings do not deserve further breath of life by the court. I refuse to extend time for filing of motion for judicial review order of mandamus. Consequently, leave granted herein is hereby withdrawn. The entire proceeding dies; its remains shall be interred in the court archives. It is so ordered.***

#### ***Piece of advice***

***[12] The foregoing notwithstanding, referral of this matter by Makau J, for resolution by the Registrar of Societies in accordance with section 18 of the Societies Act, should be followed to the letter. And no party should impede the arbitration of the dispute by the Registrar. It is advisable that formal process of arbitration be commenced immediately, and if necessary, the Registrar should invoke the powers bestowed upon her to call any unwilling suitor to order. And of course, such belligerent suitor should not expect to find favour with the court in any proceedings arising from his default.***

***[13] Given the nature of these proceedings I will order each party to bear own costs. It is so ordered.***

***Dated, signed and delivered in court at Meru this 14<sup>th</sup> day of February 2018***

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**F. GIKONYO**

**JUDGE**

[6] Proceedings before me were also referred to in the above proceedings. I do not wish to delve into the substantive merits of these proceedings at this interlocutory stage. Nonetheless, the result of the arbitration by the Registrar of Societies as was ordered by Makau J and reinforced by this court shall have great bearing on these proceedings. Dispute as to the bona fide officers of Njuri Ncheke is subject of arbitration and so this court should not do anything that may prejudice the arbitral proceedings. In fact, the Constitution in article 159(2) (c) demands that:-

***In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***

[7] The arbitral process is governed by section 18 of the Societies Act and was accordingly sanctioned by the court. The process does not contravene the Bill of Rights; is not repugnant to justice and morality or one that results in outcomes that are repugnant to justice or morality; is not inconsistent with the Constitution or any written law. In the upshot, grant of injunction may not be appropriate at the moment. At least, the arbitral award should be filed in court as soon as possible on the leadership dispute upon which proper evaluation of the prospects or otherwise of this suit could be done. As Justice Hoffman in the English case of Films Rover International stated (supra):-

***“ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong” ....”***

[8] In the upshot, I decline to issue any injunction at the moment. I order each party to bear own costs of the application. No party should however destroy any shrine or property of Njuri Ncheke. This ruling be served upon the Registrar of Societies to act expeditiously on the arbitral proceedings. It is so ordered.

***Dated, signed and delivered in court at Meru this 4<sup>th</sup> day of April 2018***

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mwatha advocate for Mr. Kibe advocate for Plaintiff'/applicant

Mr. Kithinji for Mr. Kibanga advocate for defendant/respondent.

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**F. GIKONYO**

**JUDGE**