



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 335 OF 2015

AMOS MATHENGE KABUTHU.....APPELLANT

VERSUS

SIMON PETER MWANGI.....RESPONDENT

RULING

1. The Appellant has taken out the motion dated 27th August, 2015 seeking to set aside and or discharge this court's order of 11th August, 2015 allowing for the appointment of an Acting Archbishop, the chairman of the synod appointed on 20th July, 2015 pending the hearing of this appeal. The motion is brought under Order 51 Rule 1 and 15 of the Civil Procedure Rules, Section 3A and 63 (e) of the Civil Procedure Act. It was also prayed that this court does make a formal declaration that the position of Acting Archbishop in the (A.I.P.C.A.) constitutional structure is an infringement of its constitutional order and therefore void ab initio. The Applicant also sought for the reinstatement of the orders issued by this court on 31.7.2015.

2. In his supporting affidavit, the Appellant stated that the Respondent approached this court and in bad faith secured alternative orders setting aside the orders of stay he obtained in CMCC No. 1647 of 2015. He stated that the Respondent misrepresented material facts in respect of the church's affairs and misled the court since it was given the impression that there is a position for an acting Archbishop which position is non-existent and is not in any event transferrable.

3. In response thereto the Respondent filed a replying affidavit in which he contended that despite the court order of suspension, the Appellant has continued to constitute and call illegal meetings of persons he calls central board of the church and who are non members. That the Bishop synod in their full constitutional mandate, wisdom and consensus, appointed the chairman of the Bishop synod Bishop Philip Kubai to be acting arch Bishop on 20th July, 2015 as the Appellant served suspension.

4. When this application came up for hearing, the dispositions made were a reiteration of the averments in the affidavit. I have considered the said disposition and find that the issue for determination is whether or not a misrepresentation was made by the Respondent which misrepresentation led this court to give orders of 11th August, 2015.

5. In determining the said issue I am fortified by the decision **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated as follows:-

“It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible

disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. ... and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.. "

6. The question that arises is whether or not there exists the position of an acting Archbishop. If the said is answered in the negative, whether the Respondent made the said fact known to the court. I have taken the liberty to read the constitution of A.I.P.C.A. and find no provision for an acting archbishop. Further I have noted that the Respondent made no step to inform the court of the non existence of such a position and reveal how and on what basis they would create such a position.

7. I am convinced that grounds set out on the face of the facts motion dated 10.8.2015 and the facts deponed in supporting affidavit were meant to misled and indeed mislead duty judge when the matter was placed before him *exparte* in the first instance.

8. In those circumstances, I find that the Respondent is guilty of non-disclosure of a material fact which if was revealed might have had a bearing on the orders of the court on 11th August, 2015. Accordingly this application is allowed and I make the following orders:-

- a) This court's order of 11th August, 2015 allowing the appointment of Acting Archbishop, the chairman of the synod appointed on 20th July, 2015 is set aside and discharged pending the hearing of this appeal.
- b) The orders issued *exparte* by this court on 31.7.2015 and subsequently set aside are restored and reissued to last upto 16.9.2015 when the matter comes up for *interpartes* hearing.
- c) costs of the motion to abide the outcome of this suit.

Dated, Signed and Delivered in open court this 4th day of September, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

.....for the Respondent.