



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 127 OF 2014**

JAMES NJERU MAINGI.....PLAINTIFF

VERSUS

ARCH BISHOP AMOS MATHENGE KABUTHU.....DEFENDANT

**R U L I N G**

1. The dispute in this suit is over the management of the **African Independent Pentecostal Church of African (AIPCA)** (hereinafter called the **Church**). The Plaintiff is a member and an official of an organ of the Church. The Defendant, who is said to be the spiritual head of the Church, is accused in this suit of acting contrary to the Constitution of the Church and thus sowing seeds of discord in his own church. The main specific reliefs sought in the plaint are -

(i) **A permanent injunction restraining the Defendant his agents, commissioners appointed by him, or servants, followers or otherwise from continuing any religious or liturgical duties of the Church, including organizing and/or ordaining members of clergy in any place in the Arch-diocese of Nairobi or in the country.**

(ii) **An order to set a tribunal to investigate the conduct of the Defendant with a view to removing him from the office of Archbishop of the Church in Kenya for violating the Church Constitution.**

(iii) **An order that the Defendant's appointment of Church Commissioners to replace the Diocese Committee in Nairobi or elsewhere is null and void.**

2. This is not the only suit in this court over the management of this Church. The court is aware of at least one other case, **Nairobi HCCC No 21 of 2014** filed a few weeks before the present case.

3. The plaint herein was filed together with an application by notice of motion dated 12<sup>th</sup> May 2014 in which the Plaintiff sought certain injunctive orders pending disposal of the suit. The Plaintiff also sought certain interim orders pending hearing and disposal of the application. The application was placed before me under certificate of urgency on 13<sup>th</sup> May 2014. I directed that it be served for mention *inter partes* on 20<sup>th</sup> May 2014. On that date both parties were represented by counsel. Learned counsel for the Plaintiff informed the court that he was aware of the other suit, **HCCC 21 of 2014** and that he would have no objection to consolidation of the two suits. He also sought an interim order in terms of prayer (4) of the application to restrain the Defendant and "his fellow Bishops, agents, servants and followers from carrying on, conducting, presiding over or ordaining any persons as clergy of the Church on 25<sup>th</sup> May

2014 or at any other time, pending disposal of the application”. In so applying learned counsel informed the court that after the Defendant was served with the application as directed by the court on 13<sup>th</sup> May 2014 he proceeded to a lower court and filed **Milimani CMCC 2750 of 2014** and there obtained *ex parte* certain orders that were prejudicial to the Plaintiff in the present suit. Learned counsel further stated that the Defendant then ex-communicated the Plaintiff and other members of the Church. Learned counsel further stated that he intended to apply before the lower court for the striking out of the suit before it.

4. On his part learned counsel for the Defendant conceded that indeed the Defendant had proceeded to file the lower court case and obtain orders there after he was served with process in the present case, though he stated further that he disclosed to the lower court the existence of this present case. He opposed the issuance of interim relief. He indicated that he intended to file a preliminary objection in the present suit and sought time to do the needful.

5. In these circumstances the court ordered as follows –

**“COURT:**

**Let this matter be mentioned on 04/06/2014. In the meantime the Defendant may file and serve replying affidavit. In the interests of justice I will grant interim injunction in terms of prayer (4) of the application. This interim injunction is informed partly by the fact that after being served with process in the present case the Defendant filed suit in a lower court instead of coming to this court and there obtained certain orders. The interim order now granted will stop the dispute from further escalating. Further directions shall be given on the aforesaid mention date....”**

6. On 23<sup>rd</sup> May 2014 the Defendant applied by notice of motion for suspension of the order of 20<sup>th</sup> May 2014 pending hearing and determination of the suit. That application was supported by his affidavit sworn on 22<sup>nd</sup> May 2014. In it he acknowledged the order of 20<sup>th</sup> May 2014 and the effect thereof. He also deponed that a lot of resources and organisation had gone into the ordination ceremony scheduled for 25<sup>th</sup> May 2014 that had been stopped by the order. The Duty Judge on 23<sup>rd</sup> May 2014 declined to grant any interim order upon that application and placed the matter for mention before me on 26<sup>th</sup> May 2014. On that day there was no appearance for the Plaintiff who had not been served. Learned counsel for the Defendant then withdrew the aforesaid application dated 23<sup>rd</sup> May 2014. The significance of this withdrawn application, and particularly the affidavit sworn in support thereof by Defendant, will appear later in this ruling.

7. On 3<sup>rd</sup> June 2014 the Plaintiff filed **notice of motion of the same date** which is the subject of this ruling. It is a contempt application. It charges that on 1<sup>st</sup> June 2014 at **Bahati AIPCA Cathedral** in Nairobi the Defendant ordained several persons as clergy of the Church in disobedience and contempt of the order of the court of 20<sup>th</sup> May 2014. Appropriate punishment is sought against the Defendant. The grounds of the application appearing on the face thereof include -

- (i) That the order 20<sup>th</sup> May 2014 was issued in the presence of the Defendant’s advocates.
- (ii) That the order was duly extracted, endorsed with a penal notice and personally served upon he Defendant on 21<sup>st</sup> May 2014.
- (iii) That in blatant disobedience of the said order the Defendant on Sunday 1<sup>st</sup> June 2014 personally conducted an ordination at the Church headquarters at its Cathedral in Bahati, Nairobi.

8. The application is supported by an affidavit sworn by the Plaintiff which gives the factual background to the application. On 4<sup>th</sup> May 2014 the Defendant was ordered to file papers in response to the application within 7 days of that date. On 12<sup>th</sup> June 2014 the Plaintiff filed a **supplement affidavit**, initially without leave of the court, but which was validated the same day with the consent of learned

counsel for the Defendant. The Defendant had not yet filed any papers in response as directed. Time was extended for him by a further 7 days of that date. The application was then fixed for hearing on 26<sup>th</sup> June 2014.

9. The Plaintiff's supplementary affidavit filed on 12<sup>th</sup> June 2014 exhibited two videos on compact discs which were said to be of the ordination conducted by the Defendant on 1<sup>st</sup> June 2014 and a further ordination conducted at the Nyeri Cathedral of the Church by one **Bishop Stephen Njogu** on Sunday 8<sup>th</sup> June 2014.

10. The Defendant filed and served his **replying affidavit** on 26<sup>th</sup> of June 2014, the very day that the application was coming up for hearing. He then applied for cross-examination of the process-server who served the Defendant with the order of 20<sup>th</sup> May 2014. Because of the gravity of the application the court adjourned hearing of the same to 14<sup>th</sup> July 2014. It also directed that the process-server, one **Kennedy Mugo**, to be summoned for that date for examination and cross-examination upon his affidavit of service sworn on 30<sup>th</sup> May 2014.

11. In his replying affidavit the Defendant deponed as follows, *inter alia* -

(i) That he was not personally in court on 20<sup>th</sup> May 2014 when the interim injunction was granted.

(ii) That after the court appearance of 20<sup>th</sup> May 2014 his then advocates on record informed him that certain orders had been issued which would be served upon him by the Plaintiff's advocates, and that pending such service he should stop the ordination of the Church clergy which was to take place on 25<sup>th</sup> May 2014 at the Church's Bahati Cathedral, Nairobi.

(iii) That he agreed with this advice of his advocates but instructed them to apply to set aside the order of 20<sup>th</sup> May 2013.

(iv) That in fact such application was filed on 23<sup>rd</sup> May 2014 but he later instructed his advocates to withdraw the same.

(v) That he has never been served with the order of 20<sup>th</sup> May 2014 and that he did not know for certain what precisely he was enjoined from doing.

(vi) That on 21<sup>st</sup> May 2014 when he was alleged to have been personally served with the order in Nairobi he was in fact at Nyeri attending a meeting, having left Nairobi very early in the morning and coming back late in the evening.

(vii) That any assertion that he was personally served is false.

(viii) That in any event the order enjoined him from conducting the ordination of 25<sup>th</sup> May 2014 and not any other ordination.

(ix) That also in any event the two ordinations of 1<sup>st</sup> and 8<sup>th</sup> June 2014 were presided over by Bishops George Ngige and Stephen Njogu respectively and not by him as alleged.

12. There is no mention at all in the replying affidavit of the two videos exhibited in the Plaintiff's supplementary affidavit filed on 12<sup>th</sup> June 2014.

13. On 8<sup>th</sup> July 2014 the Plaintiff filed a **further supplementary affidavit** with leave of the court in answer to the Defendant's replying affidavit. In this affidavit the Plaintiff pointed out, among other things, that on 24<sup>th</sup> June 2014 the Defendant had filed a petition before what he called the Constitutional

and Judicial Review Division of the High Court, being **Petition No 280 of 2014**, in which he sought, *inter alia*, stay of the present contempt application against him, and that upon failure to obtain conservatory orders there he then filed his replying affidavit here. A copy of that petition and the application for conservatory orders are annexed to the further supplementary affidavit.

14. The present application was canvassed mainly by written submissions. The Plaintiff's submissions were filed on 26<sup>th</sup> June 2014 while those of the Defendant were filed on 11<sup>th</sup> July 2014. The Plaintiff also filed supplementary submissions on 11<sup>th</sup> July 2014 in response to the Defendant's submissions. Learned counsels also made brief oral submissions on 14<sup>th</sup> July 2014. On that day also the process-server, Kennedy Mugo, was examined and cross-examined under oath. I have considered the submissions of the learned counsels, including the cases cited. I have also considered the testimony of the process-server.

15. It is common ground that when the order in question was made on 20<sup>th</sup> May 2014 the parties' advocates, including the two advocates then acting for the Defendant, were present in court. The Defendant has also acknowledged under oath that immediately after the order was made his advocate got in touch with him and told him about the order and advised him to stop the forthcoming ordination. It is therefore hollow for him to now claim that he did not know precisely what he had been injunctioned not to do.

16. The process-server repeated in cross-examination under oath that he personally served the Defendant at his offices at his headquarters in Nairobi on 21<sup>st</sup> May 2014. It was the third time that he had served the Defendant and he thus knew him. He even mentioned the name of the secretary that he found on all those occasions. It is not the Defendant's case that he had no such secretary and in any case there is no affidavit by any person from the Defendant's office stating that the process-server never visited their offices as alleged on 21<sup>st</sup> May 2014.

17. Of more importance though is what the Defendant did the following day, 22<sup>nd</sup> May 2014. He instructed his advocates to file the application filed on 23<sup>rd</sup> of May 2014 (subsequently withdrawn) seeking the suspension of the order of 20<sup>th</sup> May 2014. He swore an affidavit in support of that application. What is stated, or not stated, in that affidavit is telling. It is worth quoting the entire affidavit in the material portion. He states-

i. ...

ii. **That on 20<sup>th</sup> May 2014, the Plaintiff, pursuant to his notice of motion application dated 12<sup>th</sup> May 2014, obtained an interim order of injunction restraining me from carrying on, conducting, presiding over and/or ordaining any as clergy of the AIPCA church, on 25<sup>th</sup> May 2014 or any other time.**

iii. **That the effect of the order is that I have effectively been stopped from presiding over a ceremony for ordination of clergy of the AIPCA Church, which was slated for 25<sup>th</sup> May 2015 at the Church headquarters in Bahati Nairobi.**

iv. **That it is not in dispute that I am the Archbishop and the National Spiritual Head of the Church.**

v. **That part of my function, under the Church Constitution is the ordination of Church Bishops and other clergy of various ranks and the general overseeing and administration of the whole church.**

vi. **That I have performed my duties in accordance with the Church Constitution and I have consulted and worked with other organs of the Church in accordance with its Constitution.**

- vii. **That I am duly qualified to be the Archbishop of the Church in accordance with its Constitution and I have been the Archbishop since July 2013.**
- viii. **That a lot of resources and organization have gone into the ordination ceremony scheduled on 25<sup>th</sup> May 2014 and those who have been prepared for the ordination and the Church will suffer greatly if the ceremony does not proceed as intended.**
- ix. **That there is no good reason why I should be restrained from performing the duties and the functions of my office unless it is shown that I do not have powers to perform those functions, or that the intended ceremony is an exercise in the abuse of those powers.**
- x. **That the Plaintiff will not suffer any prejudice if the ceremony is allowed to proceed.**
- xi. ....”

18. The Defendant has not stated anywhere in this affidavit that he has not been served with the order of 20<sup>th</sup> May 2014. The language and tenor of the affidavit is such that he must have been reacting to the order served upon him the previous day as stated by the process-server. The language in paragraphs 2 and 3 of the affidavit is such that he must have been holding in his hand a copy of the order which he read and fully understood in its scope and ramifications. This affidavit gives the lie to his assertion that he has never been served personally with the order.

19. The totality of the evidence before the court, including the testimony of the process-server and the Defendant's own aforesaid affidavit of 22<sup>nd</sup> May 2014, is such that I am satisfied beyond reasonable doubt that indeed the Defendant was personally served with a copy of the order of 20<sup>th</sup> May 2014 (with a penal notice endorsed thereon) on 21<sup>st</sup> May 2014. On the following day he instructed his counsels to file an application to challenge that order and in support thereof he swore the affidavit discussed above. On subsequently realizing the ramifications of that affidavit the application was withdrawn.

20. I must now consider if the Defendant disobeyed the order of 20<sup>th</sup> May 2014. He has not denied the ordinations that took place on the 1<sup>st</sup> and 2<sup>nd</sup> June 2014. He says he did not preside over them. The videos exhibited in the Plaintiff's supplementary affidavit, which I have watched, show that he presided over the ordination of 1<sup>st</sup> June 2014. He has not challenged the authenticity of these two videos. Both are in high definition colour and run for considerable amounts of time. The ordination of 8<sup>th</sup> June 2014 was presided over by another bishop, but the Defendant is the head of the Church, and it was his beholden duty and responsibility to instruct his subordinates to respect the order of the court and to see to it that nothing at all was done in disobedience of the order. That order forbade not only the ordination scheduled for 25<sup>th</sup> May 2014 but also any ordination on any subsequent date pending disposal of the application or the further order of the court.

21. I am also concerned about another aspect of the Defendant's conduct. Upon being served with process in the present case he quickly went to an inferior court and lodged there the same dispute and obtained orders which might turn out to be inimical to orders granted in this suit. And that is not all. Upon being served with the present contempt application he ran to another division of this court and there sought to stay prosecution of this application against him. This conduct of the Defendant was not doubt geared towards abuse of the process of the court with the possibility of bringing into conflict various courts and divisions of this court. It is conduct that is indicative of a person who has no respect for the courts or the rule of law.

22. Having considered all the material placed before the court, including the able submissions of the learned counsels, I find that the Defendant was duly served with the order of 20<sup>th</sup> May 2014 with a penal notice duly endorsed thereon; and that he deliberately, blatantly and in utter contempt of the court disobeyed that order and proceeded to do and to allow to be done what the order enjoined him from doing. I find him in contempt of the court. The Plaintiff shall have the costs of this application. The

other orders sought in the application cannot be granted at this stage. I shall now hear representations regarding what punishment I should mete out to the Defendant.

**DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2014**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2014**