



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 201 OF 2014

**REGISTERED TRUSTEES OF THE EAST AFRICAN YEARLY MEETING OF FRIENDS
CHURCH KAIMOSI through**

1. LUCAS MUDOGA
2. DAUDI EHAJI
3. JAPHETH MUHASI
4. EDWARD AGESA.....PLAINTIFFS/APPLICANTS
5. DAN OMIBO AGEVI
6. NICHOLAS ANYANJE

VERSUS

1. ANDREW INGANJI
2. APOLLO AYUKU
3. CHARLES SHIKALAMA
4. FRED SHIJENJE.....DEFENDANTS/RESPONDENTS
5. ERASTUS LITUNDA
6. VINCENT MATEKWA
7. OBADIAH LISANZA

RULING

1. This is a Notice of Motion application dated 13/6/2014, brought under **Section 63 (e)** of the **Civil Procedure Act** and **Order 40 rules 1, 2 and 3** and **Order 50 rule 1** of the **Civil Procedure Rules, 2010**.

2. By this Motion, Registered Trustees of the East African Yearly Meeting of Friends Church, Kaimosi through Lucas Mudoga, Daudi Ehaji, Japheth Muhasi, Edward Agesa, Dan Omibo Agevi and Nicholas Anyanje (the applicants) have sought a temporary injunction restraining the defendants, their agents and or servants from entering into, occupying, defecating or in any other way or manner interfering with the applicant's church premises at the Central Yearly Meeting, Lirhanda Mission pending the hearing and determination of this suit.

3. The application is based on the affidavit of Lucas Mudoga sworn on 13/6/2014, and on the grounds appearing on the body of the motion.

4. The applicants argue that the church premises belong to the plaintiff/applicant and that the respondents were expelled from the church due to insubordination but they (respondents) have taken over the church premises after they registered a splinter-group, which actions, the applicants fear, may cause a breach of the peace.

5. It is the applicants' case that the respondents have taken over the church premises after staging a coop

(sic). The applicants therefore argue, that the respondents' actions have no basis in law and that these actions are not done in accordance with Article 4.1 of the applicant's Constitution.

6. The applicants further argue that this being a spiritual matter, the loss likely to be suffered by the applicants cannot be compensated by way of damages. They pray that their application be allowed.

7. in a replying affidavit by Fred Shijenje (the 4th respondent) sworn on 23/6/2014 on his own behalf and on behalf of his co-respondents, the respondents hold that they are not members of the applicant but registered members and officials of a different society where the 7th respondent is the Secretary General. The respondents state that the applicants are members of a separate society based at Kaimosi in Vihiga County. According to the respondents, the East African Yearly Meeting of Friends (Quakers) is the central meeting of friends (and is now defunct) and the applicants are hiding under its glory for their own benefit although that organisation is different from that of the respondents.

8. The respondents state that they have been occupying the church premises which they continue to do to-date, and that the applicant's sole interest is to dispose of the property on which the church stands. The respondents are of the view that the applicants' action is meant to silence them into submission. They therefore ask that the applicants' application be dismissed.

9. Counsel for the parties filed written submissions to the application and a Preliminary Objection. When they appeared before me on 7/10/2014, Mr. Vadanga for the applicants and Mr. Shivega for the respondents, agreed to abandon the application and prepare for the main suit. They erroneously indicated that the application that was being withdrawn was one dated 16/7/2014 instead of 13/6/2014. Shortly thereafter, on 14/10/2014, an application was filed under certificate of urgency seeking to set aside the consent order withdrawing the application and praying that the court do deliver a ruling on the application dated 13/6/2014 and the attendant Preliminary Objection.

10. That application was allowed by consent on 21/10/2014 hence this ruling.

11. I have considered the application before me and the affidavits by both sides. I have also perused the documents annexed to the affidavits of parties and the submissions by their respective counsel. This ruling will only relate to the application which I think will be more appropriate.

12. The dispute seems to me to be a contest between rival church groups competing for followers or positions of leadership. Whereas the applicants have annexed a copy of certificate of registration as annexure KMI, that certificate seems to be for CENTRAL YEARLY MEETING OF THE RELIGIOUS SOCIETY OF FRIENDS (QUARKERS) issued on 24/12/1992, a different society from the one suing through the applicants before court. It has not been explained whether the EAST AFRICAN YEARLY MEETING OF FRIENDS CHURCH KAIMOSI is the same as the society whose certificate has been exhibited. This discrepancy in the society suing raises doubt as to who should be before this court as the applicant.

13. The second and important issue that arises in this matter is the capacity of the people to sue. The applicants have described themselves as Trustees of EAST AFRICAN YEARLY MEETING OF FRIENDS CHURCH, KAIMOSI (the applicant) but there is no Trust Deed annexed to their application to confirm that indeed they are trustees and that the society in whose name they litigate is duly registered. The capacity of the applicant either as a society or otherwise has not been demonstrated to enable the court ascertain their standing in this matter. This is because the certificate of registration exhibited belongs to a different society from the one the applicants herein say they represent.

14. Societies registered under the Societies Act (Cap. 108) Laws of Kenya have no capacity to sue or be sued in their own names and when suing through some other persons, the capacity of these persons must be clearly demonstrated.

15. The applicants have said that the respondents are "rebels" who have been expelled from the Society and should be restrained from interfering with the church premises belonging to the applicant. the

respondents on their part, have said that they belong to a different society called LIRHANDA MISSION CHURCH, registered on 16/4/2014, and have exhibited their copy of registration certificate and Constitution. This society is also registered under the Societies Act (Cap. 108). It would appear that the respondents have decamped and registered their own society which they manage and control. That society is not the one represented by the applicants in this suit.

16. The applicants want the court to restrain the respondents from among other things, entering into, occupying, defecating or interfering with applicants' church premises at Central Yearly Meeting, Lirhanda Mission. However, from the certificate of registration of the respondent's society, the respondents society appears to be registered as LIRHANDA MISSION STATION CHURCH. It is not clear from the applicants whether the "Lirhanda Mission" they seek to restrain the respondents from occupying, is the same as Lirhanda Mission Station Church the respondents seem to have registered as their church/society.

17. The applicants have not also shown that they occupy the premises they want the respondents restrained from occupying. There is neither an ownership document nor lease, if the premises are leased, to enable the court establish who has a better claim to the premises, if any. The respondents have attached a copy of a search for parcel of land known as Isukha/Muranda/1102. The Search shows that the land belongs to the Kakamega County Council. It is not clear whether this is the property in contention which the applicants seek to restrain the respondents from accessing or whether this is where the respondents' church is based.

18. To my mind, the dispute between the two groups is about leadership and management of a society and from the above analysis, there are already two independent societies, both registered and therefore lawfully in existence. The respondents having registered their own independent society may not necessarily be members of the applicants' society.

19. I have also stated elsewhere in this ruling, that the ownership or occupation of the church premises claimed by the applicants has not, prima facie, been shown to the satisfaction of the court to belong to the applicants to enable the court exercise its discretion and grant the applicants' prayers.

20. I am not therefore persuaded, that the applicants have made a prima facie case with a probability of success as laid down in the famous case of ***Giella –vs- Cassman Brown & Co. Ltd.*** The applicants say that theirs is a spiritual organisation and that if the orders sought are not granted they will suffer irreparable loss that cannot be adequately compensated by way of damages. The respondents have demonstrated that they are also a church and therefore a spiritual organisation. If I grant an injunction to the applicants and thereafter the respondents win, and being leaders of spiritual organisation, they will also have suffered the spiritual loss the applicants fear. This therefore militates against granting the injunction sought.

21. In the case of ***Nsubuga & Another –vs- Mutowe [1974] EA 487***, the Court of Appeal for Eastern Africa (Mustafa, JA) quoting ***Giella –vs- Cassman Brown & Co. Ltd.*** with approval said –

“As regards the conditions for the grant of interlocutory injunctions, I think they are now well settled in East Africa. I would refer to the decision of this court Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358... Briefly two of the main ones are:- (1) the applicant must show that he has a probability of success and (2) that unless the injunction is granted the applicant would suffer irreparable damage which cannot be adequately compensated by an award of damages. As regards the first point, that of probability of success, the plaintiff had not, on the evidence adduced, shown how he could succeed, let alone probably succeed....”

22. The words of his lordship (Mustafa, JA) seem to sufficiently sum up the case before me. Given the facts and materials before this court, I do not see how the applicants would succeed, let alone probably succeed.

23. As a result, the applicants' application dated 13/6/2014 is hereby dismissed with costs to the

respondents.

Dated and delivered at Kakamega this 12th day of November, 2014

E. C. MWITA

J U D G E