



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 285 OF 2014**

**BOARD OF TRUSTEES OF AFRICAN INDEPENDENT  
PENTECOSTAL CHURCH OF AFRICA CHURCH..... PLAINTIFF**

**VERSUS**

**PETER MUNGAI KIMANI..... 1<sup>ST</sup> DEFENDANT**  
**JOHN WAINAINA MWAURA..... 2<sup>ND</sup> DEFENDANT**  
**ISAAC NJOROGE MWIHAKI..... 3<sup>RD</sup> DEFENDANT**  
**PAUL MWANGI WAWERU..... 4<sup>TH</sup> DEFENDANT**  
**JAMES NJOROGE KAMANDE.....5<sup>TH</sup> DEFENDANT**  
**JOSPHAT MBUGUA MWAURA..... 6<sup>TH</sup> DEFENDANT**  
**MICHAEL KARIUKI NDUNGU.....7<sup>TH</sup> DEFENDANT**  
**ISAAC NDUNGU KIHAMA..... 8<sup>TH</sup> DEFENDANT**  
**WILSON WANYOIKE KINUTHIA.....9<sup>TH</sup> DEFENDANT**  
**PETER GITAU KANGETHE..... 10<sup>TH</sup> DEFENDANT**  
**JOHN WANYOIKE KURIGI.....11<sup>TH</sup> DEFENDANT**  
**ISAAC MACHARIA MBURU.....12<sup>TH</sup> DEFENDANT**  
**HARUN MWAURA MWANGI.....13<sup>TH</sup> DEFENDANT**

**R U L I N G**

Before me are two applications for determination. One is an application dated 15<sup>th</sup> September 2014 and filed on 16<sup>th</sup> September 2014 under certificate of urgency. It is brought by the plaintiff seeking for orders

that

- (a) ...spent
- (b) ...spent
- (c) The respondent jointly and severally either by themselves, their servants, agents, employees or any other persons acting under their directions or supervision be barred by an order of injunction from holding any meeting, presiding over the church activities, roles or in any other way from engaging or participating in the affairs of The African Independent Pentecostal Church of Africa within Gatanga Diocese pending the hearing and determination of this suit.
- (d) That the offices commanding Kirwara and Ndakaini Police Station do ensure the compliance of the order.
- (e) Costs of this application be provided for.

The said application is premised on the grounds that

- (i) The respondents hold diverse offices within the church structure as either archdeacons, pastor, deacon, and church leaders and all come from Gatanga Diocese of Murang'a County;
- (ii) This act was not only contrary to the constitution of the church but also meant to destabilize worship affairs of the church and the Central Board on 8/9/2014 suspended all these persons issuing them with suspension letters;
- (iii) On 7/9/2014 the respondent conducted themselves contrary to the church's constitution as they adorned themselves in attire and adornment that are not supposed to be worn by them;
- (iv) Due to the age of the church that has been in existence since 1922, it has acquired a large following and hence the need to protect our flock, followers and believers from being misinformed or misled.
- (v) It is in the interest of justice and to ensure harmony and proper governance of the church activities that the orders sought be granted.

The said application is supported by the affidavit of Timothy Gitonga Gachoya sworn on 15<sup>th</sup> September 2014.

The above application which was filed under certificate of urgency was placed before **Hon. Waweru J** (duty judge) in chambers on 16/9/2014 and he directed that the same be served upon the respondents for a mention interpartes on 23/09/2014 for orders/directions before Hon. Sergon J. No interim orders were granted.

The application came before me on 26/9/2014 as **Hon. Sergon J** was not on duty on 23/9/2014 it was supported by a fresh certificate of urgency and I granted interim orders of injunction pending interpartes hearing which was scheduled for 16<sup>th</sup> October 2014. This was after satisfying myself that the plaintiff had effected service of the application upon the respondent as directed by **Hon. Justice Hatari Waweru** on 16/9/2014.

Upon the interim order issued on 26/9/2014 being served upon the respondents, they were provoked into filing their own application dated 8<sup>th</sup> October 2014 and filed in court on the same day under certificate of urgency seeking to set aside/discharge the orders of injunction I had granted on the interim basis on 26/9/2014, citing 16 grounds upon which the said orders should be discharged among them that the plaintiff had misled the court into issuing the said ex-parte orders which orders had created tension, intimidation, oppression, threats, violence and to destabilize the AIPCA in Gatanga Diocese which is in

Murang'a county.

- (ii) That the plaintiff was guilty of non-disclosure of the existence of several other suits between the same parties over the same subject matter so they had come to court with unclean hands.

It was further alleged that the plaintiff was totally dishonest in that it had not served the application upon the defendants as directed by **Hon. Waweru J** on 16/9/2014 and having obtained an interim injunction on 26/9/2014, were now using the police to harass the defendants, which actions were occasioning grave injustice and suffering to the congregation of Gatanga Diocese, as the respondents are said to be duly elected and or ordained church leaders who have rightfully disagreed with the church leadership of Arch Bishop Amos Mathenge Kabuthu and as such were being punished by these proceedings and orders, they therefore prayed for the lifting of the orders granted and dismissal of the application for an injunction against them with costs.

Both parties to this dispute were ably represented by advocates Mr. Mathenge for the plaintiff and Mr. Kirimi for the defendant. In his submission, Mr. Mathenge urged the court to grant the orders sought in the application dated 26<sup>th</sup> September 2014 relying on the affidavit of Timothy Gitonga sworn on 15<sup>th</sup> September 2014 and a replying affidavit sworn on 14<sup>th</sup> October 2014, and several annexures thereto. He submitted that the defendants ought to be enjoined from misrepresenting themselves as holding various positions within the church hierarchy which has caused acrimony within the flock and which prejudices the church congregation; that the plaintiff is trustee of the church and that by the defendant purporting to use the church facilities without authorization is prejudicial to the interests of the church leadership; they should not be allowed to hold themselves as leaders of that church. He conceded that there were several suits inter related but none of them were against the defendants herein or property of the Gatanga Diocese. He maintained that the plaintiffs being trustees of the church under section 3 (3) of the trustee perpetual succession Act has capacity to sue and be sued. He challenged the capacity of the defendants to respond to the application as only the 1<sup>st</sup> defendant had filed a response and lodged an application to discharge the interim injunction granted without getting authority from the others to plead.

He maintained that Timothy Gachoya was mandated to file suit herein as there was authority granted as annexed (TGGI).

The defendants opposed the application and Mr. Kirimi submitted at length that the plaintiffs are not suited as the Archbishop Amos Kabuthu Mathenge is not one of the trustees and as there was no authority from the trustee Board as required by chapter 9 of the church constitution the alleged authority TGGI, is signed by the Archbishop and Stanley Mwangi emanates from the church headquarters and not from the Board of trustees of the church. Furthermore, that the said Stanley Mwangi is not one of the trustees of the church. In addition it is contended that the said purported authority was prepared and back dated to fit the suit herein as it is dated 19/9/2014 and therefore raises curiosity as to why it was not signed by any of the church trustees.

Mr. Kirimi further submitted that the dispute herein touches on spiritual and leadership matters of the church which disputes are not meant to be resolved by the courts and neither do they fall within the purview of the Board of Trustees of the church. He referred the court to chapter 9 of Article 12 (b) of the church constitution which vests all property whether movable or immovable acquired by the church into the trustees. He pointed out that none of the pleadings on record disclose any issue of property that is alleged to be at risk of destruction or damage; that the church as a registered society is at liberty to discipline any errand members; that there is no allegation of punishing the defendants as a faction as they are on suspension. He charged that the Archbishop had forced elections on members and those who rejected his directives are the ones being sued, maintaining that elections can only be held after 5 years with the next being in 2017 and that the Registrar of Societies must be involved. It was further submitted that the Archbishop has been responsible for the wrangles in leadership which has caused the disintegration of the church. It was further submitted that the plaintiff is being misused by the Bishop to file several suits whose existence was not disclosed to this court an indication of bad faith and intended to circumvent justice, besides harassing the defendants herein and other worshipers in other churches including Dagoretti. It is further contended that the Archbishop Mathenge has been is misrepresenting

himself as the Archbishop of the church.

Mr. Kirimi concluded that matters of ecclesiastical law cannot be subject of court proceedings unless it is shown that church procedures have failed. He relied on the case of **Arthur Gatungu Gathure - Vs - Africa Orthodox church of Kenya CA 4/82** and urged the court not to issue any injunction against fellow church members as such issues are not sufficiently justiciable.

He also relied on the **HCC 69/2009** between **Andrew Inyolo Abwanza - Vs - Board of Trustees of Pentecostal Assembly of Kenya** saying the issues are said to be similar to this suit. He further relied on **HCCA 1/2005 David Muli – Vs - Daniel Nzioki Muli** and another where the court held that it will not intervene in church matters.

In addition, the defendants advocate submitted that the plaintiff had not demonstrated before the court that he is entitled to an injunction sought; first that he has a prima facie case with probability of success and that he stands to suffer as a trustee, if the injunction sought is not granted. He contended that it is the defendants who are suffering because they cannot go to any church and perform any functions. They are oppressed by the plaintiff using court injunction to entrench their positions in various churches. He prayed that the plaintiff's application be dismissed and the defendant's application be allowed.

In response, Mr. Mathenge advocate maintained that only the 1<sup>st</sup> respondent/defendant had responded to the application as Order 1 Rule 13 of the Civil Procedure Rules provide that such authority must be in waiting to permit a party swear affidavit on behalf of all others.

On who the trustees of the church were, he referred to annexure PMKJ which showed Stanley Mburu Mwangi as one of the trustees which appointment has not been revoked.

He also maintained that the authority given on 11/9/2014 was proper before the court he added that even a single trustee could sue or give authority under Section 2 of Trustee Perpetual Succession Act which defines a trustee to include a sole trustee.

He further pointed out that Article 11 chapter nine of the plaintiff's constitution provides that the arch bishop is one of the members of the board of trustees and such board, under Article 11 Clause(B)(1) is mandated to take disciplinary action against errand church members who seek to disobey his authority or try to change its doctrines.

On the pending suits, he submitted that Order 4 Rule 1(f) of the Civil Procedure Rules only mandate disclosure in cases where suits are between the same parties and that as none exists, the plaintiff was not bound to make such disclosure to this court.

On misrepresentation in the verifying affidavit, he submitted that the defect can be cured under Order 19 rule 7. He also dismissed the authorities relied on by the defendant as being irrelevant.

Mr. Kirimi maintained that the suits ELC No. 1216/2014 as per annexure PKN 5 concerns property of the church and all other issues are relevant herein were canvassed. He maintained that no authority to swear an affidavit on behalf of all defendants is required. Further, he contended that it is not an automatic right for arch bishop to be deemed to be a trustee of the church. He must be registered as such.

## **ANALYSIS**

From the onset, it is an undisputed fact that the dispute herein involves church leadership between the board of trustees of the African Independent Pentecostal Church of Africa Church being the plaintiff/applicant and the 13 defendants/respondents whose membership of the African Independent Pentecostal Church of Africa is undisputed. The plaintiff's claim against the defendant is that the defendants who are followers of the AIPCA have misrepresented themselves and proclaimed themselves as holding various church leadership positions without lawful authority or approval of the Central Board of the plaintiff, as either Archdeacon, church leaders, pastors or deacons which actions caused the church

leadership to suspend them from the AIPCA church within Gatanga Diocese.

The plaintiff therefore seeks from this court:

- (a) Declaration that the defendants have misrepresented themselves as holders of diverse position within the AIPCA within Gatanga Diocese,
- b) A permanent injunction restraining the defendants from proclaiming referring, and or utilizing the titles they have taken up in the conduct of the AIPCA church actions.

Simultaneous with the filing of the suit, the plaintiff filed an application for injunction seeking to bar the defendants from holding any meeting, presiding over the church activities, roles or in any other way from engaging or participating in the affairs of the AIPCA within Gatanga Diocese pending hearing and determination of this suit; and seeking the police assistance in enforcing the injunction in question. The defendants have denied the above allegations, contending that they are duly ordained church leaders who have refused to be compelled to participate in elections of the church leadership because it is premature as election are held after every 5 years which is due in 2017, and that they are being victimized by Mr. Timothy Gachoya and the Archbishop for disagreeing with the church leadership.

I have carefully considered the twin applications herein the rival submissions and authorities cited by both counsels for the parties hereto. Several issues emerge from one main question which is:-

Whether the plaintiffs have satisfied the conditions for grant of interlocutory injunctions and if so, what are those conditions.

Derivative of this key issue are the ancillary but significant questions which this court finds absolutely necessary to address and determine before arriving at the final decision.

The law applicable to granting of interlocutory temporary injunctions is as provided for under the provisions of Order 40 Rules 1 of the Civil Procedure Rule 2010 which provides:-

***“2 (1) in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.***

***(2) the court may by order grant such injunction on such terms as to an inquiry into damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit”.***

The above legal position has been interpreted and applied in many cases as was settled in the **Giella vs Casman Brown & Co. Ltd (1973) E.A 358** case that:-

***“..... 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 adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.***

As to what a prima facie case is, the Court of Appeal in the case of **Mrao Ltd – Vs - First American Bank of Kenya Ltd & 2 others (2003) KLR 125** held that.

***“... a prima face case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon***

**trial. That is clearly a standard which is higher than an arguable case.”**

The court further held that the power of the court in an application for an interlocutory injunction is discretionary. The applicant must show a prima facie case, which is not confined to a genuine and arguable case. It is a case 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. Being an equitable remedy, a party who comes before the court seeking an injunction must show utmost good faith.

Albeit the case of **Cassman Brown (supra)** settled the conditions for grant of an interlocutory injunction, the said conditions appears to have been unsettled in the case of **Ian Bolden Nielsen – Vs - Herman Phillips Steyn & 2 Others (2012) eKLR** where the Court of Appeal held that ... I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the **Giella – Vs - Cassman Brown** case. The court may look at the circumstances of the case generally and the overriding objective of the law.

As I have stated above, the dispute herein involves leadership of AIPCA church Gatanga Diocese, what appears from the record, clearly, is that there have been constant litigation involving members of the said church and its spiritual head as well as between members and the management of the church affairs, in one form or another, but none of those cases have substantially resolved the core dispute. The cases deal with divisions within the church.

The church is one indivisible body governed by a constitution which was exhibited by the parties to this application. In order to determine the relationship between the church and its members, their constitution must therefore be first port of call. Membership of a church is a voluntary and decisions regarding its operation, management and organization vest in the members who make decisions through their duly elected or appointed leaders through the central board.

#### **ISSUES/QUESTIONS FOR DETERMINATION**

Whether the matter is justiciable.

In the case of **Arthur Gatungu Gathuna – Vs - African Orthodox Church of Kenya, CA 4/82** the Court of Appeal, when faced with the question of whether matters of ecclesiastical law could be determined by courts held that the High Court had jurisdiction to determine such matters depending on each case, pleadings and facts especially in matters of mixed spiritual and temporal character, with temporal consequences affecting the rights. The Court of Appeal further observed that in such matters the High Court may, in the exercise of its discretion, decline to entertain the action for relief or strike them out. The court referred to several High Court decisions where the courts distinguished between the high court's refusal to decide on matter which are not ordinarily justiciable by it and its jurisdiction to step in to correct clear breaches of natural justice if they were shown to exist. See **Solomon v. Presbyterian church of East Africa & Others HCC 2859/77; Cannon Leonard Mbugua – Vs - Arch Bishop Habbakuk Olang & the Diocesan Synod of Nairobi HCC 3338/79; Bishop Peter Mwangombe – Vs - Arch Bishop Manaseh Kuria & Another Mombasa HCC 391/80.**

The above cases involved disputes affecting rights of property and contract, within the church.

In the case herein, the plaintiff claims that the defendants are not only claiming to be duly ordained church leaders but that they are also using the property of the church for preaching, meeting in the various churches and adorning themselves as pastors; and deacons; church leaders and Arch deacons thereby causing confusion among the congregation.

Whereas it is the view of this court that church leadership disputes are better handled in the church through mediation and conciliation, however, the High Court has unlimited original jurisdiction in civil matters under Article 165 of the Constitution of Kenya 2010, except those matters that are in the exclusive jurisdiction of the courts contemplated in Article 162 (2) (a) (b) of the said Constitution.

The justiciable issues raised in this case include rights of the defendants to proclaim themselves as ordained church leaders and the plaintiff's right to discipline and bar the defendants from adorning themselves with titles that are not conferred by the church as well as the right to bar them from using the property of the church for meetings and or preaching purposes. The right to property is guaranteed under Article 40 of the Constitution whereas the freedom of worship and association are equally guaranteed by article 32 and 36 of the Constitution. I therefore find that there is a real interest to raise in the claim herein capable of being adjudicated upon by the court, and it cannot, therefore, be said that all spiritual matters or church leadership matter are completely outside the purview of the courts.

Furthermore, the freedom and right of worship under the Constitution is not absolute. It comes with responsibilities, when exercised in association with others through the means of voluntary organizations such as a church. Its exercise can be limited to the extent that is dictated by membership of that society's constitution.

I have examined a plethora of local decisions concerning disputes relating to church leadership where the courts have had to intervene to grant interlocutory injunctions including **NRB Petition No 395/2012 Rev Bishop Silas Yego and Another – Vs - Minister of State for Provincial Administration and Internal Security and Others**. The court granted an injunction restraining the respondent from interfering in the church activities. The respondents had been excommunicated from the church. In that case, a *bona fide* church official had filed a petition seeking for conservatory orders.

In **HCC 513 of 2007 Bishop Rev. Silas Yego & 3 others – Vs - Daniel Mulei Mburu and 5 others** where there were opposing factions of the AIC church with each faction claiming to be the rightful officials, the court held that there was a triable issue hence, a cause of action for determination by the court to ensure the rules for natural justice are not breached or threatened to be breached and that if the court declines to hear the parties, that would result into a breach of natural justice.

The court further added that where internal mechanisms of a church could not work, then the institution could tap on the unlimited jurisdiction of the high court conferred by the Constitution to resolve the matter so long as the proceedings are initiated within the provisions of the AIC constitution.

In addition, the court added that access to justice by any litigant is a basic right.

Based on the above principles, which I find override those laid down in the All England Laws as cited by the defendants in cases decided almost 60 years ago, I find that it would be wrong for this court as established to adjudicate over disputes whatever nature except as limited by the Constitution of Kenya 2010 to decline jurisdiction solely because the constitution of the AIPCA church prohibits or does not make provision for resolution of ecclesiastical disputes by the courts. In this case, there is no such prohibition, subject, of course, to such dispute being procedurally initiated. Like in the **Silas Yego – Vs - Daniel Mulei** case, there is a leadership problem in the AIPCA church and there is room to have the dispute resolved within or using the established internal mechanisms but until that is resorted to by parties, the court, being a temple of justice, has a duty to hear the dispute in question.

The same principles were applied in the case of **Mbugua – Versus - Bishop Olang & Another (1989) KLR 595**. In which the plaintiff filed suit against the Arch Bishop of Kenya and the Diocesan synod of Nairobi, challenging what he termed as their decision to write a letter to him intended to terminate his services as a clergy of the church. This was on an application to discharge an interim injunction and strike out the second defendant from the proceedings on the ground that it was not a proper party to the suit.

The cases, as cited by the defendant in my view not being binding on me, are not persuasive enough to oust my findings above that the dispute herein is justiciable.

2. The second question necessary for this court to answer is whether the plaintiff is properly suited and if so, the ancillary issue would be; whether there was authority obtained from the board of trustees as required by Chapter 9 of the church constitution to institute suit or swear an affidavit on behalf of the plaintiff by Timothy Gachoya.

The certificate of registration No. 126 annexed to the plaintiff's application and response to the defendants' application show that AIPCA is a church registered as a society under the Societies Act. The church has a constitution and standing orders as annexed (2010 as amended). The church was registered on 14<sup>th</sup> January 1970.

The said AIPCA was further registered under the Land (Perpetual Succession) Act Cap 286 Laws of Kenya as a corporate body under the name of "*the registered trustees of the AIPCA*" on 6<sup>th</sup> July 1970 by the Registrar of Documents. The plaintiff having been duly incorporated as a corporate body, in my view, has the capacity to sue and be sued in its name. Albeit it would have been prudent to name the specific registered trustees of the society as per the notifications, but this court hesitates to declare the plaintiff non-suited as the registered trustees are shown and disclosed in the certificate of incorporation attached and the plaint could still be amended with leave of court to name the said registered trustees.

The only question, in my view is whether in bringing the suit and swearing affidavit in support, there was authority to do so given by the board of trustees. The decisions relied on by the defendants to wit, the case of **Andrew Anyolo Abwanza – Vs - Board of Trustees of Pentecostal Assemblies of God Kenya & 3 Others**, where a point of law was taken concerning the capacity of the 1<sup>st</sup> defendant, being an organization registered under the societies Act Cap 108 was incorporated with capacity to sue or being sued and that it should not have been sued, the Hon. Learned Judge D.A Onyancha, after considering the argument observed that PAG Kenya was not sued as a church but that what was sued was a board of trustees. In that case, however, the Hon. Judge observed that no certificate of registration was exhibited to remove the existence of the said "*board of trustee*" from under the societies Act or under any other written law to suggest that it had any capacity to sue..."

In this case, however, my perusal of the certificate of incorporation "PKM 9" clearly shows that the "registered trustees of the AIPCA" were incorporated as a corporate body" and as notified from time to time as appointed from time to time by resolution to hold office in accordance with the provisions of the church constitution in this case 5 years. The said corporate body was incorporated under the Land (perpetual successions Act Cap 286 Laws of Kenya and not under the societies Act. In other words, in this case, it is not the "*church as a society*" purporting to sue but a board of trustee as incorporated. I therefore find that the plaintiff is properly suited.

In the said certificate, on 17/7/2003 one Stanley Mburu Mwangi was notified and registered as a trustee. Timothy Gachoya too is a registered trustee as notified on 18<sup>th</sup> April 2013. However, the Arch Bishop Amos M. Kabuthu is not a notified or registered or notified as one of the trustees as required under Chapter ix Article xii of (a) and (g) of the church constitution which clearly stipulate that the Arch Bishop shall be one of the trustees and in addition, the said article make provision that trustees must be registered. The argument by the plaintiff that Arch Bishop is an automatic trustee does not hold as paragraph (g) provides that the "seven trustee shall be registered with the registrar of lands in the Ministry of Lands" the seven according to Chapter ix Article xii of (a) are;

- 1) Arch Bishop
- 2) National chairman
- 3) Secretary General
- 4) National Treasurer of the Central Board
- 5) Any other three members who shall be appointed at a general meeting for a term of 5 years. They shall be eligible for re-election.

On the question of authority to sue as given by the central board by the Arch Bishop and Stanley Mwangi the National Treasurer on 11/9/2014, it is clear that such authority could be given by the board of trustees through a resolution. The Arch Bishop not being one of the trustees, he had no authority to issue an

authority to Timothy Gachoya who is one of the registered trustees, to handle church matters. However, the issue of whether or not such authority is valid taking into the account the fact that it is endorsed by one of the registered trustees Stanley M. Mwangi, is a matter of evidence to be adduced at the main hearing of the suit and not to be determined at this interlocutory stage as a preliminary issue. This also applies to the contention whether the said authority should have been filed together with the suit and or whether in the circumstances of this case a sole trustee would have the power to sue or swear an affidavit.

3. Another question that begs an answer from this court is whether all the defendant are defending or opposing the application for an injunction and, or the application to discharge the interim injunction granted ex-parte in the first instance on 26/9/2014, as there is no written authority given to the 1<sup>st</sup> defendant Peter Mungai Kimani by the rest of the defendants as required under the civil procedure rules, to swear an affidavit on their behalf. I have perused the said affidavit sworn by the 1<sup>st</sup> defendant. In paragraph 1 he deposes that he swears the said affidavit on his own behalf and as authorized by his 12 co-defendants. Under Order 1 Rule 13 of the Civil Procedure Rule, ***“where there are more defendants than one, any one of them or more may be authorized by any other of them to appeal, plead or act for such other in any proceeding”*** (2) the authority shall be in writing signed by the policy giving it and shall be filed in that case.

No such written authority was exhibited. The court is given power to strike out a proceeding where the above rule is not complied with. However, using the same scales of justice applied to the plaintiff, I hesitate to strike out the proceeding by the defendants as filed as the rule does not specify at what stage the authority must be filed. And even if I was to hold otherwise at this stage, the affidavit as filed would still be valid with respect to the 1<sup>st</sup> defendant.

4. On the question whether non-disclosure of the many pending suits involving nearly the same type of dispute as the one herein although the parties are not exactly the same, but touching on leadership of the same AIPCA church of Gatanga Diocese is fatal to these proceedings as filed by the plaintiff, it is on record that the said suits are not between the same parties and neither do they involve the same subject matter as outlined and annexed to the pleadings, although the Arch bishop is said to be a party to all those proceedings. This court hesitates to inquire into those suits as filed because it was submitted that they are still pending determination as such inquiry and comments touching on them would be subjudice since the defendants have not pleaded or submitted that the proceedings herein are res judicata those other suits in as much as some of them may be related to the leadership wrangles like the one herein.

The plaintiff has made admission in the supplementary affidavit of their existence and a summary of what each case is concerned with which disclosure at this stage I find sufficient, as indeed, they do not concern the same subject matter as the one before this court.

5. On the question of whether the police should be involved in the enforcement of an order of this court if any is made, it is this court’s view that the police are able to maintain law and order when requested or called upon to do so, without the necessity of a court order to that effect.

As the Inspector General of National Police Service or Principal Secretary responsible for internal security is not party to these proceedings, it would be inappropriate if such an order is made affecting persons who are not parties to the suit and who have not had an opportunity to be heard. The police being the authorized state agency in law enforcement and responsible for the protection of life and property of citizens on behalf of the state, are on call at all times. They only need to be notified of possible breach of the peace and they would act.

6. On the overall issue of whether the plaintiff, based on the above analysis is entitled to a temporary order of injunction against the defendants herein, and therefore whether it has satisfied the conditions for granting of an injunction; based on the pleadings submission and authorities cited and analysis of the issues above, it is not disputed that the defendants who were members AIPCA church received suspension letters for allegedly contravening the church constitution. The plaintiff avers that by so doing, the defendants are causing confusion in the church which is likely to cause chaos and therefore pending such disciplinary proceedings they should be restrained from adorning themselves as church leaders to

wit pastors, deacons, and or arch deacons,:

The defendants on the other hand claim that they are ordained/elected church leaders who have disagreed with the Arch bishop's leadership and are being victimized for their stand which includes refusal to hold elections as directed by the Arch bishop, on account that such elections are due in 2017 and not earlier. (See paragraph 18 of affidavit of Peter Mungai Kimani sworn on 8/10/20140. From the above rival positions, it is clear that there are material contradictions in the defendants'.

Reply. If they are ordained church leaders as alleged, and elected, then the issue is, when were they ordained or elected church leaders (as per paragraph 17 of the affidavit).

Albeit the letter of 9/12/2013 "confirming that one of the defendants was still a pastor, it is clear that suspensions were effected on 8/9/2014 it is not deemed that they received suspension letters and it would only be fair and just if they challenged the suspension following due process and not insist on being in positions of leadership interfering with church affairs, it is further not denied that during such suspension, it is expected that the defendant would cease holding themselves as church pastors, Deacons, church leaders, Arch bishop until the suspension is lifted.

In addition, the land on which the various churches of Gatanga diocese is built, it is not denied, is held by the registered trustees. In as much as the dispute herein is not concerning property perse, and in the absence of any evidence that the defendant while on suspension are authorized to carry out the business of the AIPCA Church, no doubt, in the event of a clash between the supporters of the Arch bishop and those the defendants, there is likelihood of damage, injury and destruction not only of church property but also loss of lives or limb.

For the above reasons, the plaintiff has established on a balance of probabilities a prima facie case against the defendant.

On whether or not the plaintiff would suffer irreparable damages of the orders sought are not granted, in **Waithaka – Vs - Industrial & Commercial Development Corporation 2001 KLR** the court **Ringera J** held that even where damages would be an adequate remedy, an injunction can issue where the opponent has acted in a high handed and oppressive manner.

Applying this principle to the facts in this case, it is clear that it is one of those cases falling within the exceptional rule of damages not being adequate compensation, not because the resultant injury to the plaintiff will be irreparable, but because of the peculiar nature of the case . the quarrel being over leadership of the church , and as was held in the **Silas Yego and 3 Others – Vs - David Mulei Mbuvi and 5 Others {2008} eKLR** case **Nambuye J** (as she then was), there are both sentimental value and prestige that accompanies the high profile positions both within and without the church. This cannot be compensated for in terms of money.

**In Silas Misoi Yego and 2 Others – Vs - Minister of State Provincial Administration and Internal Security and 8 Others (2014) eKLR** the **Hon. Judge Isaac Lenaola**, where the applicants were bona fide officials and trustees of the AIC church, it was held that as official of the church have duties and obligations as stipulated under the church constitution and the Constitution of Kenya to perform their duties within the protection of the law, to deny them to fulfill these obligations, within the doctrines of their church, to deny them the right to use church properties for the ends of the church and conversely to allow a breakaway group to do so will cause irreparable injury. He concluded that spiritual nourishment cannot be adequately compensated by an award of damages.

In this case the defendants may have a legitimate claim to leadership in the church but the available evidence, prima face, is that they were suspended on 8/9/2014. Perhaps their suspension was not deserved, but the issue is yet to be resolved by the same church mechanisms which, they took oath to adhere to. Their protestation, therefore cannot be through defiance. It has to be through the laid down procedures as per the church constitution.

This court frowns upon the rule of the jungle in the abundance of available mechanisms for resolving disputes of whatever nature. All persons are bound to respect and uphold the rule of law, being one of the national values and principles of good governance espoused in article 10 of the Constitution of Kenya, 2010. There is no justification therefore, for the defendants, in disagreeing with the leadership of the church, to forcefully adorn themselves as elected/ordained church leaders while serving suspension, without seeking to challenge the said suspension if it was carried out unprocedurally, through the laid down procedures. In the case of **Ian Bolden Nielsen – Vs - Herman Phillepus Steyn & 2 Others (2012) eKLR**, the court held that in dealing with interlocutory injunction application, it did not believe that the ...court is necessarily bound to the three principles set out in **Giella - Vs - Cassman Brown** case. The court may look at the circumstances of the case generally and the overriding objective of the law.

The issue herein being leadership in the church. The alleged misrepresentation and or adorning by the defendants as such church leaders while on suspension is in my view, likely to cause confusion, chaos and or breach of peace in the church which cannot be compensated in terms of money. I am equally persuaded by the holding in **Waithaka – Vs - Industrial & Commercial Development Corporation (2001) KLR p.381** that

***“... by the court in the case of Giella – Vs - Cassman Brown (supra) using the term normally very carefully in instances where an injunction can issue even if damages would be an adequate remedy for injury, the applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind is the strength or otherwise of the applicants case for a violation or a violation threatened or its legal rights and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant, this may move a court of equity to say “money is not everything at all times and in all circumstances and don’t think you can violate another citizen’s right only at the pain of damages.”***

***In the instant case, although I have said enough to show that the plaintiff has an arguable case and that the defendants’ conduct may be regarded as high handed and probably unfounded in law, all in all I think this is one case which should be outside the normal rule of no interlocutory injunction if damages will be adequate recompiles. It now remains to weigh the balance of convenience”.***

The defendants herein sought, in addition to the prayer for dismissal of the application for injunction, discharge of the interim Ex-parte orders granted on 26/9/2014. As there are and were no such orders extended when this matter came up for interpartes hearing and or pending the hearing of this application and ruling hereof, there is nothing to be discharged. The court had an opportunity to speak to both parties who undertook to maintain status quo peacefully.

However, the balance of convenience tilts in favour of the plaintiff as failure to grant an interlocutory injunction pending hearing of the main suit would be tantamount to this court sanctioning further divisions in the AIPCA church which will not only affect the leaders but also the entire congregation of the AIPCA Gatanga diocese.

For the reasons advanced herein, I grant the prayer No C of the notice of motion dated 15<sup>th</sup> September 2014 restraining the defendants, their agents, servants, employees or any other persons acting through them and under their direction or supervision from holding any meeting presiding over the AIPCA Gatanga diocese church leadership activities, roles or in any other manner from engaging in the leadership affairs of the said church pending hearing and determination of this suit, or the lifting of their suspension, whichever is the earlier.

To prevent any mischief that may result should the beneficiary of this injunctive relief use it as both a shield and a sword at the same time, and for avoidance of doubt, the defendants are not barred from congregating with the rest of the church membership and or attending church service as worshippers. Further, and in view of the nature of the dispute herein involving church leadership, this injunctive order is conditional upon the plaintiff expediting the process of readying of the suit herein for hearing and disposal within 120 days from the date hereof failure to which the temporary injunction herein granted shall lapse. Order 40 Rule 2 (2) of the Civil Procedure Rules permits the grant of such conditional

injunctive relief. Prayer (d) of the notice of motion is declined for reasons provided in the body of this ruling.

**FINALLY**

The interests of justice demands that in matters of this nature, each party bears their own costs of the application and I so order.

**Dated, signed and delivered at Nairobi this 4<sup>th</sup> day of December, 2014 at 9.00 a.m.**

**R.E ABURILI**

**JUDGE**

4/12/14

Coram: Hon. Aburili J

Cc: Kavata

Mr. Mathenge for the plaintiff present

Mrs. Waweru holding brief for Mr. Kirimi for defendants.

**Court:**

Ruling read and pronounced in open court as scheduled.

**R.E. ABURILI**

**JUDGE**

**Mr. Kirimi:**

I seek for a typed copy of the ruling. We undertake to pay copying charges.

I also seek for leave to appeal if necessary.

I also seek for stay of execution of the orders pending filing of the said appeal

**R.E. ABURILI**

**JUDGE**

**Mr. Mathenge:**

I oppose the application for stay. No prejudice will be occasioned by the defendants. The ruling is sound in law.

The court has expressed that the matter should be expedited. No stay should be granted at this stage.

**R.E. ABURILI**

**JUDGE**

**Mr. Kirimi:**

There has been relative peace since the temporary injunction was lifted.

**R.E. ABURILI**

**JUDGE**

**Court:**

The parties may be supplied with the typed and certified copies of proceedings and ruling as requested upon payment of the requisite court fees.

The defendants are granted leave to file an appeal against the ruling herein if they so deem fit to appeal.

On the issue of stay of execution of the ruling and order herein, this court declines to grant the same for reasons that it was not denied or disputed that the defendants are under suspension from the church leadership as leaders of the church.

In addition, there was no prayer for lifting/staying of such suspension.

**R.E. ABURILI**

**JUDGE**

**4<sup>TH</sup> DECEMBER 2014**