



**Methodist Church in Kenya Trustees Registered & another v Maso (Cause E005 of 2023) [2024] KEELRC 1424 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1424 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
CAUSE E005 OF 2023**

**M MBARŪ, J**

**MAY 16, 2024**

**BETWEEN**

**METHODIST CHURCH IN KENYA TRUSTEES REGISTERED 1<sup>ST</sup> CLAIMANT**

**ISAYA DEYE ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**REBECCA GHAMAKALE MASO ..... RESPONDENT**

**RULING**

1. The claimants filed an application dated 19 October 2023 seeking orders that;
  1. Spent.
  2. Spent.
  3. Pending hearing and determination of this suit the court do issue orders restraining the respondent herself, associates, servants, her followers, sympathizers, or any other person or party under her direction or working on her behest or furthering her interests from interfering with the church programmes, church building, premises, services, inciting members, conducting church service in the Delta Circuit, preaching against church leaders and the claimants herein or any other property of the Methodist Church in Kenya Delta Circuit in Singwaya Synod.
  4. Spent.
  5. Pending hearing and determination of this suit this court do issue orders restraining the respondent herself, associates, servants, or any other person or party under her direction or working on her behest from interfering and/or preventing the new minister posted in Delta Circuit by the Conference from carrying out his duties in his new station, denying him access into the minister’s office or withholding any such office equipment necessary for the



performance of his duty as the Circuit minister or any other role given to the minister under the Church standing Orders 1996 or Deed of Church Foundation.

6. Spent.
  7. Any order hereby issued against the respondent herself, associates, servants, or any other persons or party under his direction or working on his behest or furthering her interests from spreading rumours, threatening, using violence to enter the church in MCK Delta Circuit within Singwaya Synod, retaining the Circuit ministers' office equipment, office, house or any other item that should be in use by the new MCK Delta Circuit minister pending the hearing and determination of this suit.
  8. ...
  9. The respondent be compelled to vacate the Minister's office with immediate effect and hand over the premises to the new minister of the Lamu Circuit Singwaya Synod pending hearing and determination of this suit.
  10. The police Coast region, County Commander Lamu and Tana River to ensure compliance with the court order herein.
  11. Costs of this application be provided for.
2. The application is supported by the Supporting Affidavit of Prof. Zablou Nthamburi a trustee of the 1<sup>st</sup> claimant and on the grounds that the Methodist Church Conference is the supreme authority of the church. The Kenya Conference Standing Committee (Conference) is the authority in charge of stationing ministers, transferring ministers and taking disciplinary action against ministers who fall short of the ministry's ethical standards.
  3. The respondent was served with a letter transferring her from MSC Delta Circuit Synod to MCK Kangeta Circuit in Nyambene Synod dated 1<sup>st</sup> August 2023 which transfer was to be effective on 15 August 2023. Upon receipt of the letter, the respondent neither reported to her new station nor gave any reasons for declining to do so. Following this defiance, the Conference served the respondent with a letter dated 26 September 2023 inviting her to within 14 days to show cause why disciplinary action should not be taken against her which she ignored.
  4. In his Affidavit, Prof. Nthamburi avers that following the defiance of the respondent, the claimants through a letter dated 26 September 2023 suspended the respondent from office for a period of 21 days pending disciplinary action per Church Standing Orders SO No 103(2b). The respondent has remained insubordinate of the Conference and the office of the Presiding Bishop. If her actions are not addressed, then a culture of impunity, defiance and insubordination in the church will take root.
  5. The respondent has disrupted the smooth flow of the function of the church in Delta Circuit and by extension, Singwaya Synod which disruptions the 2<sup>nd</sup> claimant complained about in his letter dated 11 October 2023 addressed to the Coast Regional Police Commander. For the smooth running of the Delta Circuit church services and programmes, the respondent should be restrained by an order of this court from interfering with any matters therein and should be compelled to hand over all church properties in her possession including material/office equipment or any other matter within her knowledge and custody. This should be handed over to the minister in charge and to forthwith vacate the church office.
  6. Prof. Nthamburi aver that the Methodist Church in Kenya 58<sup>th</sup> Annual Conference was held on 19 to 22 July 2023 where officials were elected chief among them the Presiding Bishop, the 2<sup>nd</sup> claimant



herein and who has authority to execute his role under the Standing Order 1996. The representative has no authority to address any MSC in Kenya Delta Circuit since she is no longer a minister in the circuit and unless the orders sought are issued the claimants will have irreparable loss and damage.

7. In reply, the respondent filed her Replying Affidavit which is undated and the Commissioner for Oaths, though has placed a stamp has not signed. She avers that claimants allege that she was served with a letter of transfer to another synod but failed to disclose that transfers are done when the Conference has sat. In this case, the conference only sat on 27 August 2023 and her letter is dated 1<sup>st</sup> August 2023. She was expected to report to the new station within 14 days but was expectant at the time. The order to report within 14 days failed to appreciate that she had school-going children and the Bishop acted in a discriminatory manner due to her gender and health status.
8. The respondent aver that she was initially transferred to Upper Tana Circuit where the current bishop had wrangles, he declined to give her space and was hence advised to return to the old station. No reasons were given at the time but due to her gender, no disciplinary action was taken against the other minister who is male.
9. The MCK Standing Orders require that when a notice to show cause is issued for disciplinary action, the affected minister/person should attend. In this case, no notice to show cause was served or a hearing notice. The notice referenced by the claimants did not indicate where and to who the respondent was required to report to. The suspension notice has no particulars or specifics on what she was to show cause for.
10. The respondent aver that there is no mayhem in the church where she serves or caused by her as alleged and is running the day to day activities. It is the current Bishop who caused mayhem with his followers to get justification for this case. The people in a good position to respond to these allegations are the congregations and not the Bishop who is not present at the church.
11. The respondent also aver that she is a victim of circumstances as the ousted Bishop was in good terms with her on the issue of work and the suit is filed with malice. The case was filed in October 2023 but was only served with the same in January 2024. The application lacks merit and should be dismissed with costs.
12. The 2<sup>nd</sup> claimant filed his Replying Affidavit and aver that he is the Presiding Bishop MCK and the chief pastor and spokesperson of the church. The respondent in response has filed an undated Replying Affidavit and has admitted being served with the transfer notice. She claimed that a transfer can only be issued after the conference meeting but under Standing Order No 103 transfers can be issued at any moment for good cause. Her transfer was ratified by the conference. Several other ministers were transferred at the same time as the respondent.
13. The respondent declined to report to her new station which is an offence. She did not respond to the notice to show cause but chose to respond to members of the church to decline any minister brought in to serve.
14. The respondent attached documents indicate she was 5 months pregnant on 1<sup>st</sup> February 2023 which meant that at the time of her transfer, 1<sup>st</sup> August 2023 she was not expectant. The conference was not aware of her circumstances and she did not bring this to the attention of the claimant. She was invited to attend the conference but declined. The conference where she is stationed has both male and female ministers with school-going children. The allegations that she is being victimised based on her gender, health and being expectant have no basis as this was a normal transfer done regularly.



15. There is no evidence that the respondent reported to her new station as required. The claimants have since deployed a new minister to replace the respondent but cannot take full control of the church/station as the respondent has declined to hand over her duties and to vacate the church office and house to the prejudice of the claimant.
16. One of the churches, Golbanti MCK was invaded on 19 December 2023. In some churches, there has been violence following incitement by the respondent. This was instigated to have church members reject Rev. Timothy who had been assigned the station. Despite being invited to the conference presided over by Dr. Lawi Imathiu, Bishop Prof. Zablon Nthamburi and Bishop Dr. Stephen Kanyaru, the respondent declined to attend. This demonstrates her unwillingness to take directions and unless ordered by the court to hand over her duties and vacate the office and residence of the MCK, the claimants stand to suffer irreparable loss and damage.
17. Both parties attended court and made oral submissions.

### **Determination**

18. As outlined above, on record is the respondent's Replying Affidavit that is undated and the Commissioner for Oaths has not signed. These matters were brought to the attention of the respondent's Advocate in open court on 22 April 2024 but there is no effort to regularize the matter.
19. An undated and unsigned Affidavit particularly by the Commissioner for Oaths renders it invalid. This offends the mandatory provisions of the Oaths and Declaration Act. Section 5 outlines what particulars will be stated in the jurat or attestation clause;

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

20. In affidavit must state the place and date the oath is taken and it should be in the presence of a Magistrate or Commissioner for Oaths.
21. The Supreme Court of Kenya in the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* (2018) eKLR in addressing the issue of an undated and unsigned affidavit held that;

We have no hesitation in finding that the purported Replying Affidavit filed by the 1<sup>st</sup> Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1<sup>st</sup> Respondent. ...

A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on 17th August 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd Respondents



had categorically stated that they do not oppose the application, the Court will therefore be excused for therefore deeming the application as opposed entirely

22. This is not a technicality that the court can cure by application of Article 159 of the Constitution. It goes to the heart of the response filed by the respondent.
23. To the main claim, despite the respondent being served with the claim, and application and attending court severally for the hearing of the matter, there is no Memorandum of Response on record.
24. As matters stand, save for the submissions by the respondent's advocate at the Bar, there is no challenge to the application before the court.
25. The gist of the application by the claimants is that the respondent as the employee of the 1<sup>st</sup> claimant and through a letter dated 1<sup>st</sup> August 2023 was transferred from MCK Delta Circuit in Singwaya Synod to MCK Kangeta Circuit in Nyambene Synod with effect from 15 August 2023. She was also directed to hand over to the new minister posted to the station as MCK Delta Circuit in Singwaya Synod.
26. The transfer or deployment of staff is a management prerogative and this Court will in very rare and exceptional circumstances interfere as held in Moses Kirui Toroitich v County Secretary, County Government of Baringo & 2 others [2021] eKLR. The respondent contends that her transfer is with malice and has failed to address her current circumstances. This position is challenged by the claimant that it does have the power to transfer and deploy the respondent and other ministers have been transferred and the current minister sent to replace her has since reported but cannot take over full operations due to her failure to hand over her office.
27. The right of the employer to move its employees is an operational requirement. This may require movement of employees from one station to the other. Subject to sufficient notice, the employee is bound to take lawful and proper directions of the employer as held in Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation (KALRO) [2017] eKLR that transfer of an employee is the prerogative of the employer and not the choice of an employee to choose where to work. The 1<sup>st</sup> claimant as the employer should be allowed to follow its policy to transfer the respondent and failure to attend is insubordination and being absent from work without good cause as held in Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others [2014] eKLR. The respondent should oblige reasonable and lawful directions of the employer under Section 44(4) of the Employment Act, 2007 as failure to do so would result in gross misconduct.
28. Based on the submissions in court, the respondent protested such transfer on the basis that she was expectant, she had school-going children, and fundamentally that she was being discriminated against based on her gender and the transfer had not been sanctioned by the Conference which had not met as of 1<sup>st</sup> August 2023 to sanction her transfer. She also submitted that the matter of her transfer was with malice since she had supported the ousted Bishop and was not in favour of the new Bishop.
29. For the respondent to take the position that the claimants are acting with malice, without her responses herein, such are matters farfetched. She should oblige to the proper and lawful directions of the employer.
30. Being expectant and pregnant while in employment is regulated under Sections 29 and 34 of the Employment Act, 2007. The respondent is well-guided.
31. The case that there is discrimination against the respondent based on her gender is a serious allegation and cannot be raised casually. These require a call of evidence with particular. This will suffice.



32. About the suspension of the respondent by the claimants, indeed, a suspension is equally allowed and at the disposal of the employer to allow the removal of the employee from the place of work pending disciplinary action.
33. Through notice dated 26 September 2023, the claimants suspended the respondent from office for 21 days pending a disciplinary hearing.
34. Like the case concerning the transfer of an employee, the employer has a legal duty to complete and conclude disciplinary proceedings against the employee. For such a matter to be complete, a suspension once issued is procedural. This is meant to remove the employee from the workplace pending investigations or the disciplinary hearing. Upon the outcome, the employee can resume her duties. The court in *Elizabeth Cherono Kurgat v Kenya Literature Bureau* [2014] eKLR held that;
- ... The Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision was made to terminate her contract of employment.
35. The Court of Appeal In the case of *Mutwol v Moi University* (Civil Appeal 118 of 2019) [2022] KECA 537 (KLR) (28 April 2022) (Judgment) held that;
- ... We are not persuaded that there must be a provision in the contract of employment providing for compulsory leave [or suspension] before an employee can be sent on such leave. The flip side of it is that there is no law that prohibits the placement of an employee on compulsory leave. It is our further view that it was necessary to have the appellant sent on compulsory leave to enable the respondent to carry out a meaningful investigation. It is not possible for an employer to carry out effective investigations against an employee who, in spite of accusations of wrongdoing, continues to occupy her/his office. In any case, looking at the circumstances of this matter, the appellant was informed and understood that she was being placed on compulsory leave to allow for investigations and she was given the opportunity to show cause why disciplinary action should not be taken against her. We do not find any good grounds to impugn the decision of the respondent which in our view was fair, reasonable and justifiable.
36. Indeed, the respondent was issued with a notice of transfer dated 1<sup>st</sup> August 2023 but failed to oblige. Subsequently, a notice suspending her was issued on 26 September 2023. There is no response herein by the respondent herein explaining her defiance. She cannot hold the claimants at ransom and urges a case that she will only move on her terms. Upon a reasonable direction to vacate the allocated premises, the respondent should oblige. See *Nancy Mwangera v Board of Governors, Salvation Army Thika High School for the Visually Challenged Persons* [2010] eKLR.
37. The claimants have equally not acted within their rights to be secured. Since the notice dated 1<sup>st</sup> August 2023 the suspension of the respondent through notice dated 26 September 2023 and the conference held soon thereafter, there is no action to assert its rights. A prolonged suspension only bears other unexpected results. The need for an employer to move expeditiously with matters of



workplace misconduct would bring to rest several issues now addressed in these proceedings. This is aptly captured in the case of *Samson Omwoyo v Maasai Mara University & another* Cause No 2367 of 2016 the court held as follows;

... the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern. ...

38. A period of three (3) of suspension was found excessive and unreasonable. See *Victor Sammy Mutiso v TSC* [2016] eKLR. In any event, an interdiction or a suspension like in this case should only be interim to allow for investigations and should not take long as held in *Peter Gaitbo Ng'ang'a v Board of Management Banita School and another* [2015] eKLR

Interdiction is a preliminary step in the disciplinary process. The petitioner may as well be vindicated by the investigations and that could be the end of the matter. Any pecuniary loss he may have suffered during the interdiction can be restored as provided for in the regulations.

39. The claimants should expedite the suspension and the alleged gross misconduct of the respondent within a reasonable time to avoid anxiety and further escalation of issues.
40. In this regard, orders sought in the interim are justified in the absence of the respondent making any effort to address the application with a proper response, the Replying Affidavit on record is invalid.
41. Accordingly, pending the hearing and determination of the claim herein the respondent is hereby Orders and directed as follows;
1. Pending hearing and determination of the suit herein, The respondent through herself, associates, servants, her followers, sympathizers, or any other person or party under her direction or working on her behest or furthering her interests is hereby restrained from interfering with the 1<sup>st</sup> claimant/church programmes, church buildings, premises, services, inciting members, conducting church service in the Delta Circuit, preaching against church leaders;
  2. Pending further directions herein, the respondent shall vacate the 1<sup>st</sup> respondent's office and residence and hand over to the officer identified by the claimant any property of the Methodist Church in Kenya Delta Circuit in Singwaya Synod with immediate effect;
  3. The respondent to cease her duties, occupation, possession or in any manner interfering with the property of the 1<sup>st</sup> claimant or preventing the new minister posted in Delta Circuit from carrying out his duties in his new station, denying him access to the minister's office or withholding any such office equipment necessary for the performance of his duty as the Circuit minister or any other role given to the minister by the claimants;
  4. Where the respondent fails to comply as (2) and (3) above, within the next seven (7) days, the claimants are to seek the services of the police Coast region, County Commander Lamu and Tana River to ensure compliance with the court orders herein at the full costs of the respondent.
  5. Costs of this application awarded to the claimant;
  6. On the claim, the time to file a response is extended by 14 days;
  7. Mention taking hearing directions on 5 June 2024;



**DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant:

..... and .....

