



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 593 of 2009

DAVID MUCHIRI NDUNGU 42 OTHERS PLAINTIFF

VERSUS

1. SAMSON MWANGI GAITHO

2. SAMUEL NGACHA NJIRIRI.....DEFENDANTS

RULING

1. The Plaintiffs have pleaded in their plaint dated and filed on 30th October 2009 that they are members of the **African Independent Pentecostal Church of Africa** (hereafter called the **Church**) which has branches and members all over Kenya. They have further pleaded that they and others have had occasion to express in writing their dissatisfaction with the leadership of the Defendants who are respectively the Chairman and a trustee of the Church (1st Defendant) and the Archdeacon of the Gatamaiyu Parish (2nd Defendant).
2. The Plaintiffs' claim against the Defendants is that they have closed some churches where the Plaintiffs worship and placed armed policemen to prevent the Plaintiffs and others from attending religious services in those churches, and thus interfering with the Plaintiff's constitutional rights and freedom of worship. The main relief sought by the Plaintiffs against the Defendants is an appropriate permanent injunction.
3. The Defendants entered appearance and filed a joint statement of defence. They pleaded, *inter alia*, –
 - (i) that the Plaintiffs and also the Defendants are misjoined in the suit and have no standing to sue or to be sued;
 - (ii) that the Plaintiffs have brought a representative suit without complying with necessary procedural requirements;
 - (iii) that the Plaintiffs' claim is “based on events immediately preceding and focusing on November 1st 2009, and the same has been overtaken by events...”;
 - (iv) that there is a previous similar suit, Nairobi HCCC No. 14 of 2009, in which the 1st Plaintiff herein sought to be joined;
 - (v) that the African Independent Pentecostal Church of Africa is a body corporate with capacity to sue and be sued, and the 1st Defendant cannot be held liable for its operations as complained by the Plaintiffs;
 - (vi) that the Plaintiffs' grievance as pleaded ought to be ventilated through the mechanism established by

the constitution of the Church;

(vii) in effect, that any order issued herein as sought, would be in conflict with an order issued on 30th March 2009 in Nairobi HCCC No. 14 of 2009;

(viii) that the Defendants have not closed any churches as alleged, or prevented or obstructed the Plaintiffs from worship; and

(ix) that this suit is an abuse of the process of the court.

4. Together with the plaint the Plaintiffs filed **chamber summons dated 30th October 2009** in which they seek the main order of **temporary injunction** to restrain the Defendants from “closing/locking any place of worship within and form interfering in any way with the Plaintiff’s rights to enter into and worship in any church of African Independent Pentecostal Church of Africa (Kiambu Branch)”.

4. The application was brought under **Order XXXIX, rules 1 and 2** of the old **Civil Procedure Rules** (the **Rules**). The grounds for the application amount to the same complaint that gave rise to the action. There is a supporting affidavit sworn by the 1st Plaintiff. It gives the evidential basis for the application.

6. In response to the application the Defendant filed a notice of preliminary objection dated 11th November 2009. The points of law taken are –

(i) That in so far as the suit purports to be a representative suit, the same is fatally defective in that it is in violation of **Order I, rule 8(1) and (2)** of the Rules.

(ii) That the suit is also fatally defective for want of valid written authority under **Order I, rule 12(2)** of the Rules.

(iii) That the suit is barred by dint of **section 6** of the **Civil Procedure Act, Cap. 21** (the **Act**) on account of a previous suit, Nairobi HCCC No. 14 of 2009.

(iv) That the suit is bad in law in that the Defendants have no legal capacity to be sued in regard to a registered trust, the African Independent Pentecostal Church of Africa, which is a legal person independent of the Defendants.

(v) That there is no reasonable cause of action sustainable in law pleaded by the Plaintiffs.

7. The Defendants also filed a replying affidavit on 10th November 2009. It is sworn by the 2nd Defendant. To this affidavit are annexed various documents, including copies of pleadings and other papers filed in Nairobi HCCC No. 14 of 2009.

8. The application was canvassed by way of written submissions. Those of the Plaintiffs were filed on 7th December 2009 while the Defendants’ submissions were filed on 4th February 2010. I have duly considered the submissions, including the cases cited.

9. The material now before the court discloses a dispute over the management and leadership of the **African Independent Pentecostal Church of Africa** (the **Church**) between the Plaintiffs on one part and the Defendants. The Defendants have pleaded that there is a dispute-resolution mechanism provided in the constitution of the Church. Unfortunately, a copy of that constitution has not been provided to the court.

10. Be that as it may, I note that it is the very same relief sought in the plaint that is sought in the application, albeit on a temporary basis. Granting the application may therefore have the undesirable effect of deciding the case unheard. It would be best that all the issues raised by the Plaintiffs be

ventilated in a full trial of the action.

11. By the same token, it would not be proper that the Plaintiffs' suit should be defeated at this stage on account of the various technical objections raised by the Defendants, particularly those resting on procedural issues. In my considered view those shortcomings are capable of rectification by amendment or by appropriate directions as may be given by the court.

12. Regarding the previous suit, Nairobi HCCC No. 14 of 2009, it has not been pleaded that the 1st Plaintiff herein (or indeed any of the other plaintiffs) is a party in that other suit. The fact that the 1st Plaintiff has applied to be joined in that other suit is not the same thing as being a party in the suit. In any case, the remedy under section 6 of the Act is stay of the new suit pending disposal of the previous suit, not striking out of the new suit.

13. Purely on a balance of convenience, I hold that it would not be in the best interests of justice to grant the temporary injunction sought. The application is dismissed with costs in the cause. It is so ordered.

14. Delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have fully recovered my health.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2012