



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CASE NO. 27 OF 2019

1. JOHNSON M'MWANGERA NJUKI
2. SHADRACK KIRUKI M'LAARIA
3. ELIZABETH KITZAO
4. JOSEPH MITHIKA M'IKIAO
5. SOLOMON MUKABA MATIRI
6. MICHAEL BENJAMIN SIMBA
7. LAWI MUCHAI
8. JOHN KIPKEMOI KOSKEI (*suing as the trustees*

Of Methodist Church in Kenya)**PLAINTIFFS/RESPONDENTS**

- VERSUS -

1. WELLINGTON SANGA
2. DR. TSAWE MUNGA WA CHIDONGO
3. IRENE MTANA
4. JOSEPH NDUNE
5. CHARLES MAKONDE
6. RICHARD YARO ABIO
7. DAVIS MATANO
8. RONALD NZAI
9. FERDINAND MUKARE
10. DR. AMOS LEWA
11. REYLAND MUNG'ONG'O
12. JOHN BASIRA
13. NELSON MWAGONA

RULING

1. The Defendants/Applicants brought to this application dated 18th June 2021 under the provisions of Order 40 rule 1 & 2 & Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya.

THE DEFENDANTS/APPLICANTS CASE.

2. The Defendants/Applicants seek for the following orders:

a) Spent

b) Spent

c) **THAT pending the hearing and determination of this suit, this Honorable Court do issue an order of temporary injunction restraining any/or barring the Respondents whether by themselves, their agents, servants and/or anybody working under their authority from preventing the Defendants/Applicants herein from accessing, entering, staying on, utilizing the facilities of the Methodist Church in Kenya for purposes for peaceful worship.**

d) **THAT the Officer Commanding Station (OCS) of the respective regions do ensure compliance with the order granted herein.**

e) **THAT the Courts do grant any other relief it deems fit and just in the circumstances.**

f) **THAT costs be provided for.**

3. The Defendants/Applicants claimed to be bona fide and regular congregants and members of the Methodist Church. They held they had been peacefully congregating and worshiping in the church until this Court issued a Court order on 16th September 2020. It is their assertion that the Plaintiff/Respondent used the afore stated Court order, to bar them and other congregants from accessing the church Sanctuary and which interfered, violated and/or infringed on their fundamental rights to worship from there. It was for these reasons that they felt aggrieved and moved court through their instant application hereof. The Defendants/Applicants pleaded with the Court to intervene and to ostensibly protect their right to worship and allow the application.

THE PLAINTIFFS/RESPONDENTS' CASE

4. Mr. Joseph Mithika M'Ikiao the 4th Plaintiff/Respondent swore a Replying Affidavit dated 23rd August 2021. He stated that after this court granted its orders on 16th September 2020, it became *functus officio* on the issues raised in the application dated 20th April 2020. He claimed that this application was therefore "*res judicata*" for asking Court to delve into the same issues it already had dealt with in the application dated 20th April 2019. The deponent claimed that the Defendants/Applicants had not adduced any evidence before Court on how they had been denied attendance to worship from the church and enjoy the services accordingly. He averred that their attempted interruption of church services, should not tantamount to worship. He asked Court to dismiss the application for lacking merit with cost.

SUBMISSIONS BY 1ST DEFENDANTS/APPLICANTS

5. On 8th October 2021, the Learned Counsel for the Defendants/Applicants filed written submissions in support of the application. He submitted that the Plaintiff/Applicants had "*a prima facie case*" that would warrant Court to issue the orders sought. He claimed that the Defendants/Applicants were bonafide members of the church and had a right to access the church buildings for the purposes of assembling and expressing their freedom of worship. He stated that the Defendants/ Applicants had diligently adhered to the Court orders made on 16th September 2020 which clearly prohibited them, the Plaintiffs/Respondents and other congregants from interfering with the management and operations of the Methodist Church in Kenya. However, they accused the Plaintiffs/ Respondents of misinterpreting the orders to limit Defendants/Applicants rights to worship from the said church sanctuary. He relied on the definition of Prima Facie case by the **Court of Appeal in Nguruman Limited – Vs - Jan Bonde Neilsein & 2 others (2014)eKLR**. He argued that the tights of the Defendants/Applicants stemmed from being the members to the Methodist Church in Kenya and claimed that it defied logic for the Plaintiffs/Respondents to bar them from attending church service while they were still members of the church.

6. The Learned Counsel relied on the provisions of Articles 32 and 36 of the Constitution of Kenya to hold that the Defendants/Applicants had a right to attend church services which included sermons and worship peacefully within the church entities. The Learned Counsel claimed that the misinterpretation of the court orders granted on 16th September 2020 by the Plaintiffs/Respondents had caused a violation denial, threat and/or infringement of the Defendants/Applicants Constitutional right to equality and freedom from discrimination. The Learned Counsel contended that in so doing the Plaintiffs/Respondents had caused disharmony within the church which had drastically affected the core principles of evangelism. He claimed that the Plaintiffs/Respondents had ensured that the Defendants/ Applicants never exercised their right to worship while the Court was still hearing and was awaiting to determine the dispute, which was not what was anticipated by Court. He urged Court to intervene and safeguard the Defendants/Applicants rights as they could not be adequately compensated by an award of damages.

7. The Learned Counsel claimed that the balance of convenience favored the Defendants/Applicants, who were only seeking the invention of this Court to enable them attend church services and had committed to keeping off from the day to day running, operations and management of the church. More so, Learned Counsel affirmed that the Plaintiffs/Respondents had not raised such complainants in their replies.

ANALYSIS AND DETERMINATION.

8. I have read the Pleadings and the written submissions, by both the Learned Counsels for the Defendants/Applicants and the Plaintiffs/Respondent and the relevant authorities and law cited over the subject matter. In order to arrive at an informed decision, I have framed the following issues:-

a. Whether the 1st Defendants/Applicants are entitled to the temporary interim injunctive orders as spelt out under Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010 sought from court

b. Who will bear the costs of the application

ISSUE No. (a) Whether the 1st Defendants/Applicants are entitled to the temporary interim injunctive orders as spelt out under Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010 sought from court

9. On 16th September 2020, this Court allowed the Plaintiffs/Respondents' the prayer sought from the application dated 20th February 2019. In essence the ruling of the Court restrained the Defendants/Applicants herein from trespassing and dealing with the suit properties until this suit was heard and finally determined. In the instant application, the Defendants/ Applicants herein accuse the Plaintiffs/ Respondents of misinterpreting these orders to deny them from accessing the suit properties for worship. The alleged denial as claimed by the Defendants/Applicants had led them to bringing this application before Court. According to their Learned Counsel, M/s Ng'ang'a, the application only sought for the Defendants/Applicants to be allowed access to the church sanctuary for purposes of worship and not on the day to day operation and management of the suit property.

10. When this application came up for hearing on 29th July 2021, the Learned Counsel for the Plaintiffs/Respondents Mr. Siminyu informed Court that the ruling of this Court of 16th September 2020 had not stopped anyone from attending the church service and worship. According to him, the Defendants/Applicants were free to attend the church services so long as they never interfered with the management of the church. On 29th July 2021, the Court ruled that the Defendants/Applicants were permitted to attend church service at the Methodist Church Kenya facilities for purposes of peaceful worship so long as they did not interfere with the running and management of the church or cause any interference. These orders had neither been set aside, varied or discharged. They were alive and spoke to the issues that were currently before this Court.

11. The orders sought herein are temporary injunction to restrain the Plaintiffs/Respondents from preventing the Defendants/Applicants from accessing the facilities of the Methodist Church in Kenya for worship. Though prayed as temporary injunction, but from the face value and the framing of the said orders appear more to be in the nature of mandatory interlocutory injunction orders rather than interim temporary injunction. To properly provide an accepted analysis under this heading I am compelled to define the concept of "**Mandatory/ Permanent Injunction**" as opposed to the Interim/Temporary Injunction clearly spelt out in the celebrated case of "**Giella –Versus - Cassman Brown case and MRAO Cases**".

The Black Law Dictionary defines "**Mandatory Injunction**" to mean '**.....an injunction that orders an affirmative act or mandates a specified course of conduct. It is also termed "Affirmative Injunction" while "Permanent Injunction" is defined as an injunction granted after a final hearing on the merits.** Despite its name injunction does not necessarily last forever.

12. The mandatory injunction is granted not under Order 40 rules 1, 2, & 3 of the Civil Procedure Rules as it is in the case of temporary/interim injunction which is to prevent or restrain a wrongful act- alienation wastage, damage and so forth from happening as the Court will not sit and wait where a right has been infringed or violated but under Sections 1, 1A, 3 & 3A of the Civil Procedure Act Cap 21. Legally, it requires a person to do a certain specific thing. It's the substance of the Order that makes it mandatory and not the positive wording.

13. I say so, as a mandatory injunction restores a wrongful state of things to their former rightful order. The principle difference between a prohibitory injunction and mandatory injunction is that, in the former a person is restrained from doing a particular thing in a particular manner, whereas, in the latter, the Court not only requires a person to restrain from doing an act, but also compels performance of certain acts necessary for putting an end to a wrongful state of things created by him and if he fails to do so as directed, the Court gets it done through its officers.

14. The circumstances under which the court would grant a mandatory injunction was stated by the Court of Appeal in the case of "**Maier Unissa – Versus - Edward Oluoch Odumbe (2015) eKLR as follows:-**

"The test for granting a mandatory injunction is different from that enunciated in the Geilla – Versus- Cassman Brown case which is the Locus Classicus case of prohibitory injunctions. The threshold in a mandatory injunction is higher than in the case of prohibitory injunctions and the Court of Appeal in the Case of Kenya Breweries Limited –versus- Washington Okeyo 2020 E.A. 109 had occasion to discuss and consider the principles that govern the grant of a mandatory injunction. The Court of Appeal held that the test for grant of a mandatory injunction was correctly stated in Vol. 24 of Halsbury's Law of England 4th Edition Paragraph 948 which states as follows:-

"A mandatory injunction can be granted on and interlocutory application as well as at the hearing, but in the absence of special circumstances, it will be normally, be granted. However, it the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiffs, a mandatory injunction will be granted on an interlocutory Application"

The principles applicable in cases of Mandatory Injunction were set out in the English case **Locabail International Finance Ltd Versus Agro export and others 'The Sea Hawk' (1986)1 All ER 901**. It was held that “A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

15. Since the *locus classicus* case, Courts have evolved these principles of caution that must be met before an interlocutory mandatory injunction may be granted. These are:-

- a) **The applicant must have a strong case for trial, and the standard is higher than that of a prima facie case that is often required for grant of a prohibitory injunction,**
- b) **The grant of interlocutory mandatory injunction is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money, and**
- c) **The balance of convenience is in favour of the one seeking grant of relief of interlocutory mandatory injunction.**

16. **The Court of Appeal in Shariff Abdi Hassan Versus Nadhif Jama Adan [2006] eKLR** held that “The Courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the Courts in such cases as those of alleged trespass on to the property.”

17. From the facts laid before me, are speculative. All what the Defendants/Applicants have stated in their supporting affidavit is that ‘until recently the Plaintiffs/Respondents started denying and/or barring us from accessing the churches for the purpose of peaceful worship on the basis of the Court order dated 16th September 2020.’ The Defendants/Applicants claim that the Plaintiffs/Respondents have denied them entry to worship in the church premises. However no empirical or documentary evidence has been tabled before Court to demonstrate how this purported denial threat, infringement and/or violation onto their fundamental rights has been caused in the circumstances, I am not persuaded that the Defendants/ Applicants have demonstrated a strong case that would warrant me issue the sought orders.

18. As already indicated, the powers of Court to grant mandatory injunction are exercised in very exceptional and rare circumstances. The relief can only be granted where the breach is an obligation and is capable to specific performance by the Court, and where the injunction is not enforceable, otherwise the Court will not grant it. The order sought by the Defendant/Applicant to have the said injunctive orders enforced by the Officer Commanding Stations of the respective regions, in my view, are not enforceable by the Court. It is a general principle of the law as to injunctions that the Court should not put itself in a position of making an order which are in vain and thus not enforceable. In the instant case, that seems to be to be exactly the position in which this Court may find itself if this injunction is granted.

DETERMINATION

19. Therefore, in view of the foregoing reasons, I find that the orders given by this Court on 29th July 2021 permitting the Defendants/Applicants to attend church service was still alive and ought to be maintained until the suit was heard and determined. After all none of the parties had applied for the said orders to be set aside, varied or discharged.

In light of this, I proceed to order:-

- (a) **THAT the Notice of Motion application dated 18th June 2021 by the Defendants/Applicants be and is hereby dismissed no orders to costs.**
- (b) **THAT for expediency sake to have the matter fixed for full trial within the next ninety (90) days from this date hereof.**
- (c) **THAT the matter to be mentioned on 18th January, 2022 for the Pre-trial conference session and fixing of a hearing date.**

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS ...25THDAY OFNOVEMBER....., 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

Mr. Siminyu Advocate for the Plaintiffs/Respondents.

M/s. Kithi Advocate for the Defendants/Applicants.