REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 4925 OF 1988

ELIUD OKIRING

FREDRICK EPOLOTO

ZAKAYO EPUS ……..….. APPLICANTS

VERSUS

ISAAC NAMANGO

J S KIAKULA ……..……..RESPONDENTS

RULING

The plaintiffs are practicing priests under the Diocese of Nambale in the Church of the Province of Kenya (hereinafter called CPK). The first defendant is the Bishop of the said Diocese and the 2nd defendant is its Chancellor.

The plaintiffs have sought a temporary injunction under order 39 of the Civil Procedure Rules and section 3A of the Civil Procedure Act restraining the defendants, their servants and agents from carrying out orders contained in the letters dated 16/10/1987 from the first defendant and letters dated 19/9/1988 from the 2nd defendant.

By his letters dated 16/10/1987, the first defendant had withdrawn the plaintiffs' licences to officiate as the Church Ministers and they had been directed to surrender their licences and hand over the parish property. The plaintiffs did not comply with the said letter and subsequently the 2nd defendant in his capacity as the Chancellor of the Diocese had written to the plaintiffs on 19/9/1988 advising them that as their licences had been withdrawn by their Bishop, they should immediately surrendar them to him so that he could forward them to the 1st defendant. By his same letter he had notified the plaintiffs that unless their licences were surrendered by them within a period of 2 weeks, he had instructions to file a court action to compel them to surrender the licences.

From the affidavits filed respectively in support as well as in opposition of the application the following facts appear to have given rise to this litigation:-

1. The 1st defendant was elected as Bishop of the said Diocese on 1/8/1987 when the said Diocese had been only recently established. The plaintiffs did not accept that he, the 1st defendant had been elected according to the CPK Constitution. They also disputed that the new

Diocese had been established according to the CPK Constitution. The plaintiffs wished the achdeaconry of Katakwa to be an independent Diocese but it was not finally accepted by the Church. It appears that the plaintiffs and some members of the Parish went to print stationary showing that a separate Diocese of Katakwa had been set up of which the 1st plaintiff was the custodian notwithstanding that CPK had never formally established it.

2. The first defendant wrote to the plaintiffs several letters calling them to see him to discuss important matters but the plaintiff failed to meet with him. Ultimately on 16/10/1987 the1st defendant wrote to the 1st plaintiff accusing him of establishing illegal new parishes without the authority of the Bishop re-instating a retired priest and also re-instating another priest who had been disciplined by the church, without any authority. He was also accused of not attending meetings called by the Bishop. He was further accused that he had refused to recognize the authority of the Diocese and although he had been transferred to another station he had refused to proceed to the new station. In conclusion the 1st defendant withdrew the 1st plaintiff's licence for having acted contrary to the CPK's Constitution and terminated his services as a church minister with immediate effect. He was asked to surrender his licence immediately and hand over the church property to a person nominated in that letter. Similar letters were written by the 1st defendant to the other plaintiffs on the same date. A copy of each letter was marked for the Archbishop, the Most Rev Manasses Kuria. The plaintiffs did not surrender their licences.

3. On 9/2/1988 the Archbishop of the Church the Most Rev Manasses Kuria wrote to the plaintiff confirming that their licences had been withdrawn by the 1st defendant's letters dated 16/10/1987. They were directed by the Archibishop not to officiate in the Diocese and by the same letter the Archbishop had informed all Diocesan Bishops of the action taken against the plaintiffs. The plaintiffs still continued officiating as the church ministers.

4. Thereafter a meeting of the Provincial Synod took place under the chairmanship of the Archbishop which was attended by some 100 delegates representing 12 Dioceses of Nambale. In that meeting the 1st defendant had brought up the matter of the plaintiffs not obeying him. The Synod appointed a fact finding team consisting of 2 Bishops two clergy and 2 laymen to investigate the matter. They did that and submitted their report to a standing committee of the Synod.

5. On 17/6/1988 a meeting of the Standing Committee of the Provincial Synod took place which received the recommendations of the fact finding team. It also noted that a full Diocesan Synod of Nambale was convened on 27/4/1988 which passed the following resolutions:- Namely: that nobody in the Diocese had formally and constitutionally asked for a split of the Diocese; that the division wish had been started and encouraged on tribal lines; that no feasible reasons were given for the need to split the Diocese which was only formed in January, 1987; that the members who wanted the split though invited to the Synod had refused to attend; that the subdivision of the Diocese was not a priority and that the move to split the Diocese was more externally influenced than within the Diocese. In pursuance of the report of the fact finding team the Diocesan Synod advised the Bishop of Nambale that he should withdraw the licences of the affected priests but should not deflock them. The said meeting confirmed that CPK was not aware of the existence of the separate Diocese of Katakwa which was only an archdeaconry in Nambale Diocese.

6. Then the second defendant wrote his letter dated 19/9/88.

Now I come back to the plaintiff's application. Mr Sampson who appeared for them has argued firstly that under Canon 15(2) of the CPK's Constitution a clergy can be displined by the Bishop only if there is a complaint by a member of the Parish against the Parish Priest of an unbecoming conduct. He cannot take cognizance of any complaint otherwise to discipline a parish priest. In this case he has argued that there is no evidence of any complaint having been lodged by a member of the Parish. The whole exercise in his view therefore is null and void. The second limb of his argument is that in any event the Bishop should have notified the plaintiffs of the nature of the complaint or complaints against them and should have allowed them sufficient opportunity of defending themselves before taking any action against them which he did not do. Thus, he has argued, the 1st defendant Bishop had failed to follow the rules of natural justice before condemning the plaintiffs.

He has also contended that as the 1st defendant took his action without complying with the rules of natural justice, no appellate authority of the Church could rectify the initial mistake.

He has further argued that as the 1st defendant had not followed the correct procedure, the plaintiffs did not have to appeal against his order which was null and void. They had every right to come to court, instead, to have his order declared null and void. He has cited from *Halsbury's Laws of England* 4th Edition Volume I Para 77 and also Para 1368 of Volume 30 of the said Laws.

He has submitted that although normally the court would not interfere with the internal matters of the church but in a case where the rules of natural justice have been flouted, the court must. He has relied upon the judgment of Hancox J in this court's (unreported) Civil Case No 3338 of 1979 *Rev Canon Leonard Mbugua vs The Most Rev Festa Habakuk Olang and another.* At page 7 of his judgment Hancox J said:

"I fully agree that the last thing the court wishes to do is to arrogate to itself powers to decide on matters which are not ordinarily justiciable by the courts ..... but there is in my view a world of difference between intermeddling in domestic decisions and stepping in to correct clear breaches of natural justice".

Mr Sampson has also cited Privy Council Case of *Calvin vs Carr and others* [1979] 2 All ER 440 is support of his contention that the decision of a domestic tribunal in breach of natural justice is void rather than voidable but until declared void by a competent body or court it was capable of having some effect or existence in law and could not be considered legally non existent.

Mr Sampson also quoted from *Lee vs Showman's Guild of Great Britain* [1976] 1 All ER 1175 in which it was held that the courts have jurisdiction to examine any decision of a domestic tribunal which involved a question of law including one of interpretation of the rules; that the rules must give the man notice of the charge and a reasonable opportunity of meeting it, that the courts will see that the domestic tribunal observes the procedure laid down by the rules and that the courts will not permit a domestic tribunal to deprive a member of his livelihood or to injure him in it unless the contract on its true construction gives them the power to do so.

Mr Khamati for the respondent argued that the applicants had been given ample notice; that both rules of natural justice and the CPK's Constitution had been complied with; that only remedy open to the applicants was to appeal; that the withdrawal of the plaintiffs licences was a domestic matter and the court should not interfere; that the rules of CPK are the terms of a contract binding on all its members, that now the right of appeal has lapsed and that the licences once withdrawn cannot be revived without the consent of the Bishop. He also argued that the applicants were guilty of indiscipline and that they have not come to court with clean hands and that they have rebelled against the authority of the church.

He has further argued that apart from Canon 15(II), the 1st respondent was empowered under Cannon VIII (3) (b) of the CPK's Constitution to withdraw the licences of the applicants if in his opinion the further services of the plaintiffs were not to the advantage of the Church. All that he was required to do in that case was to notify the applicant in writing of his intention to withdraw their licences stating clearly the grounds on which he had reached his decision. Mr Khamati said the 1st defendant had complied with the spirit and letter of the said Canon. Upon receipt of the said notification, he said, the applicants could have appealed within one month against the decision of the 1st respondent which they did not do. Thereafter the matter is now finally closed.

Mr Khamati has also argued that the applicants were guilty of laches. The 1st applicants's order to withdraw their licences was conveyed to them on or about 16th October, 1987, they took more than a year to move the court and that too only after the 2nd respondent threatened to take legal action. Mr Sampson denied that his clients were guilty of any laches. He said that even after the Bishop's letter his clients carried on with their jobs and the respondents did not take any action to withdraw their licences.

However, as soon as the 2nd respondent wrote to the applicants threatening them with court action unless they surrendered their licences, they instituted these proceedings, to pre-empt the said threatened action.

Applying the case of *Giella vs Cassman Brown and Co Ltd* [1973] EA 358, I am to take the following principles into account in adjudicating upon the application before me namely that;

(a) the applicants must show a *prima facie* case with a probability of success

(b) an interlocutory injunction is not normally granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages and

(c) if the court is in doubt it will decide the application on balance of convenience.

Here of course on all contradictory and inconsistent material laid before me I cannot make any finding whether the defendants had failed to observe Canon 15 (2) of the CPK Constitution whether they had acted without authority and in breach of the said Constitution. I cannot tell without having heard the parties and their witneses if the plaintiffs had an opportunity of knowing the case against them and whether or not they had a fair chance to defend themselves against the charges laid against them. I therefore hold that it is difficult to say that a *prima facie* case has been made out.

The position of the applicants *vis a vis* the CPK, of which the defendants are their superior officers, is that of a master and servant. As such the plaintiffs are expected to obey their superiors lawful commands. If they do not, the officers of the church can take disciplinary action against them. But at this interlocutory stage I am unable to determine whether the applicants have been guilty of insubordination. However, another questionwhich arises out of this relationship is “can a servant whose services have been terminated impose himself upon his master?” I think he cannot.

His remedy if he is unlawfully dismissed is in damages. Mr Sampson has argued that the plaintiffs will lose their livelihood unless the injunction is granted but in every case where the services of any employee are dismissed he stands to lose his livelihood at least for sometime but that cannot be taken particularly in the circumstances of this case as an irreparable injury which cannot be compensated with an award for damages if the plaintiffs succeed in the action.

Even if I am wrong in my judgment that the plaintiffs have failed to make out a *prima facie* case of wrongful exclusion of the plaintiffs from the Church which the defendants may be required to answer, on the facts as laid before me the injunction ought not be granted on the balance of convenience. It would not be right in the circumstances of this case to force the applicants on the Church pending the trial. Mr Khamati has cited in support *Larry vs National Union of Vehicles Bulders* (1971) 1 Ch 34. In that case the plaintiff was a member of the defendant Union. In breach of the rules of the Union in a meeting the breach concerned of the Union purported to exclude the plaintiff from membership. The plaintiff was unaware of the meeting. The branch committee endorsed the said action of the branch. The National Executive Committee of the Union also endorsed the decision of the branch. The plaintiff then appealed and he participated in the hearing of the appeal before the appellate tribunal under the rules. However, the Appeals Council also upheld the decision of the branch.

The plaintiff then filed an action in the High Court of Justice. At page 57 of the judgment, Magary J went on to hold:

“In these circumstances, where does the balance of convenience lie? The Union urges that there will be much embarrassment if the plaintiff is in effect restored to office. Some of that embarrassments is, I think, due to causes on which the Union cannot properly rely. Mr

Pain accepts that he can place no reliance on any embarrassment due to any possible feelings of guilt within the Union in having wronged the plaintiff.

Further, an affidavit by the general secretary speaks of the decision to exclude the plaintiff, and ends by saying,

“I verily believe that most members and officials are of the opinion that plaintiff ought to have accepted

the decision of the National Executive Committee and of the Appeal Council." I cannot think that embarrassment felt because the plaintiff refused to accept what I have held to be at least *prima facie* an insupportable decision ought to be put in the seals against him: to protest at injustice is not morally wrong".

Then at page 58, he comes back to the question of hardship and of the balance of convenience, and says:-

"Even so, I think that there remains considerable cause for legitimate concern by the Union on the score of embarrassment. Indeed, this must be implicit in many cases in which there is any question of what in effect is akin to the specific performance of a contract of service. For myself, I should be very slow to make any such order on motion, though in a clear and compelling case there is no doubt jurisdiction to do so. I do not think that this is a case of that sort. A union must of necessity depend in large measure of the loyalty and reliability of its officers in what is plainly often a difficult and controversial field of human activity. The union in this case is attempting to remedy defects of administration in the Luton area which the plaintiff, says the union, had done nothing to put right.

He was under the control of the N E C and had to work with other officers of the union; and things have been said on each side which cannot make the resumption of the former relationship an easy one. This is not a case like *Shanks v Plumbing Trades Union* in which there has been mere non-disclosure. Furthermore, Mr Turner- Samuels has failed to convince me that, in view of the payments being made and the undertaking offered, the plaintiff will suffer any real hardship from his exclusion from office continuing until the trial, at all events if the payments continue until then. In short the balance of convenience seems to me to be in favour of refusing the injunction. I do not think that it would be right to force the plaintiff on to the union until the matter is finally resolved one way or the other. At the trial it will be possible to explore more fully the status of the plaintiff, and in particular whether the characteristics of his office as an area organiser leave him, despite the process of election which brought him to that office, substantially in the position of a servant, and so able to claim only damages for wrongful dismissal, or whether instead he is on the other side of the line and holds an office or status to which the court will secure his restoration by injunction or otherwise. On the facts as they stand before me on motion I will say only that I am not satisfied that this is a case for an interlocutory injunction".

The said observations of Magary J do adequately apply to this case. The church very largely depends on the loyalty and reliability of its clergy whose defiance of authority can undermine the effectiveness of the Church. If the plaintiffs are allowed to carry on officiating in the church while this action is pending and they ultimately do not succeed in their action, it would be a dangerous precedent which will encourage disobedience to and disregard for the church hierarchy.

The said case of *Leary vs National Union of Vehicles Builders* was followed by Kneller JA in our Court of Appeal Civil Application NAI 41 of 1986 *Teresa Shitaka vs Mary Mwamodo and 4 others* (unreported).

Towards the end of his judgement Kneller JA said:

"It would not be right/ with particular reference to *Leary's* case (*supra*) to appear to force the applicant on the organization until we have heard the appeal and or even perhaps not until trial has been concluded. It may be of great importance to the applicant that she remains at the healm of the organisation now in the lead up to the meeting of the National Council .....But we are of the belief that to smother until further order the organisations' administration or part of it would be out of proportion to the alleged wrongs the applicant has endured. The balance of convenience tips in favour of discharging the *ex parte* injunction we sent forth on March 14th."

The conduct of the plaintiffs is also a relevant factor in the exercise of my discretion. Lord Wilberforce in *Calvin vs Carr* (*supra*) said at letter C page 451:

"That the court in exercise of its discretion when reviewing the domestic or statutory decision should take into account all the proceedings which led to it, the conduct of the complaining party and the gravity of

any breach of natural justice which may have occurred."

Again at letter (g) of the same page he said:

"In addition to these formal requirements, a reviewing court must take account of the reality behind them". Having carefully considered all aspects of the application, I am not convinced that the balance of convenience is in favour of the plaintiffs.

Accordingly I hereby dismiss their application but order that the costs of the application shall be the costs in the cause.

Dated and Delivered at Nairobi this 21st Day of February, 1989

G.S.PALL

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Ag JUDGE