REPUBLIC OF KENYA

Tanui & 4 others v Birech & 11 others

Court of Appeal, at Nairobi
October 17, 1991

Gachuhi, Cockar JJ A & Omolo Ag JA

Civil Application No NAI 107 of 1991

(Being an appeal from the Ruling of the High Court at Nairobi, Githinji J,

dated 24th May 1991 in Civil Case No 1338 of 1991)

RULING

This application for an injunction is brought pursuant to rule 5(2)(b) of the Court's Rules and it seeks an order:-

> "THAT the respondents by themselves their servants agents or representatives be restrained by injunction from proceeding or proceeding further with the election process to fill the declared vacancy of the Diocesan Bishop of Eldoret until the final determination of the appeal ..."

Following the untimely death of the Right Reverend Bishop Alexandar Kipsang Muge in a road accident on the 14th August, 1990, the Standing Committee of the Synod of the Eldoret Diocese of the Church of the Province of Kenya (the CPK) held a meeting on the 19th September, 1990 at the St Mathew's Pro-Cathedral at Eldoret, and at that meeting, the most Rev Manasses Kuria, the Archbishop of the CPK.

> "declared the seat of Eldoret canonically vacant and that the Chancellor of Eldoret Diocese was free to get things moving for the preparation of the election of the new Bishop according to our constitution. He handed over a letter to the Chancellor to this effect. He further explained in details procedures to be followed in an election of a bishop as per constitution."

We quote these matters from the Exhibit marked "A" at page 23 of the record.

The 1st respondent Mr Paul Birech who is the Chancellor of the Diocese, duly got things moving for the preparation of the election of the new Bishop and indeed on the 24th November 1990, one Rev Stephen Kewasis Nyorsok who is among a group of five persons listed as "3rd respondent" became the Bishop-Elect. His enthronment was scheduled to take place on the 27th January, 1991. Before that could happen, Dr Khaminwa, who described himself as acting "for a large group of Members of the Diocese of Eldoret" wrote a letter dated 11th January, 1991 (see page 61 of record) and the effect of that letter was to challenge the validity of the election of the Bishop-Elect. Apparently the complaint raised in the letter was valid and on the 18th January, 1991, the Standing Committee of the Synod in the presence of the

Archbishop met again at the Pro-Cathedral and at that meeting it was decided that:-

> "In order to save the Church from embarrassment due to this hitch it was felt that the elections be revoked and fresh elections be conducted" – See A2 at pgs 27 to 30 at pg 29. The hitch referred to was "that Rev Kewasis replaced Rev Omusundi as a member of the Electoral College when Rev Omusundi had not resigned. This vacancy could not be filled by an *ex-officio* which is the case with Rev Kewasis. Rev Kewasis is therefore not and has not been a member of the Electoral College"
>
> Exh A2 pg 28.

New elections were then scheduled for the 23rd March, 1991 but on the 2nd February, 1991, Dr Khaminwa this time wrote a long and detailed letter

> "To all the Members of the Electoral College, Eldoret: - Exh A3 at Pg 31 – and that letter demanded, among other things, that
>
> "(d) The current Electoral College must resign (including Rev Yego and Rev Kewasis)."
>
> The 1st respondent by his letter of 12th February, 1991, rejected the contents of Dr Khaminwa's letter and asserted that "... your advice is not being heeded and the election will be held as scheduled"- see Exhibit A4 at pg 39.

On the 15th of March, 1991, the applicants filed a suit in the High Court, and among the prayers sought were:-

> (a) An injunction restraining the defendants, their agents or representatives howsoever, from proceeding or proceeding any further with the election of the Bishop to fill the canonically vacant seat of Eldoret.
>
> (b) Declaration that the Diocesan Chancellor and or the Electoral College have no jurisdiction to conduct the election by reason of Article X of the constitution (of the Church).
>
> (c) Declaration that the mandatory quorum of the Electoral College as at this date.
>
> (d) Declaration that there are at least three vacancies in the Electoral College as at this date.
>
> (e) Declaration that Rev Yego and Rev Kewasis are unfit and disqualified by reason of questionable conduct.

We have set out only those prayers which we think are immediately relevant. Simultaneously with the plaint, the applicants also filed a chamber summons under order 39 rules 2 and 9 of the Civil Procedure Rules and among the orders sought was a temporary injunction to restrain the respondents from proceeding or proceeding any further with the elections scheduled for 23rd March, 1991, he granted the orders sought. It was subsequently heard *inter-partes* before Mr Justice Githinji and on the 24th May, 1991. He dismissed the application and discharged the *ex parte* order granted on the 19th March, 1991. The applicants now come to us for the same orders, they filed their notice of appeal against the ruling of Mr Justice Githinji on the 28th May, 1991. Should we grant to the applicants an injunction pending the hearing and determination of their appeal?

The principles on which the Court acts when considering this type of application are now well settled. We only need to refer to the recent application by *Mrs Herma Muge*, Civil Application No Nai, 77 of 1990 which dealt with a different aspect of the dispute following the death of Bishop Muge. Quoting from the previous application of *Githunguri v Jimba Credit Corporation,* Civil Application No Nai 161 of 1988 the Court in the *Herma Muge* application said:

> "... the guiding principles which emerge and are discernable from case law on this subject are first, the appeal should not be frivolous or as it is otherwise put, the applicant must show that he has an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be nugatory. Accordingly, we put to ourselves these two questions namely, first, on the material made available to us, is the intended appeal frivolous or has the applicant shown, prima facie, that he has substantial points to present to the Court on this appeal, and second, if he has, would his appeal be nugatory if we denied him the interim relief sought? We are statisfied that these pronouncements correctly embody the law and the principles to be applied on an application under rule 5(2) (b), and ....

Both Dr Khaminwa and Mr Sampson agreed that these are the principles which are to apply and Dr Khaminwa contended that he had shown to us that he has substantial points to be presented to the Court in his appeal and further that unless we grant to him an injunction his appeal will be nugatory. The main thrust of Dr Khaminwa's submissions on the first head, namely that he has an arguable appeal, was that the applicants had complained about certain irregularities, ie a breach or breaches of the constitution of the Church, during the nullified elections and that their complaints were found to be genuine and valid and hence the nullification of the previous elections. Dr Khaminwa contended that the same breach or breaches would be repeated during the repeat elections and that if that be so the applicants are entitled to an injunction. We would agree that while it is not the business of the High Court or this Court to involve itself in the day to day running of institutions such as the Church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and this Court would not only be entitled to but under a duty to compel it, either, by injunction or otherwise, to obey its constitution. That is exactly what this Court did in *Daniel Nyongesa and others v Egerton University College,* Civil Apeal No 90 of 1989 (unreported). Dr Khaminwa contended that the learned judge decided the matter against the applicants because he was of the view that:-

> "The general principle is that courts do not interfere with domestic matters of voluntary associations like churches, clubs and trade unions ..."

Dr Khaminwa contended this was a misdirection and constitutes a substantial point of law to be urged during the appeal. To this point is to be added the first point that even the Church itself had acknowledged the validity of the complaints raised by the applicants and nullified the previous elections. We think the appeal by the applicants raises arguable points and cannot be described as frivolous.

But the applicants had also to satisfy us that if we do not grant to them an injunction, their appeal would be nugatory. In this respect the only injury which Dr Khaminwa said the applicants will suffer is that the Church in Eldoret would be disunited. It is contended that the matter is being prosecuted on behalf of a large group of laymen from the Diocese of Eldoret but no estimation is given as to how many people constitute that "large group". The 1st respondent swears that that assertion is false and documents in support of the 1st respondent from various parishes in the Diocese were attached. The issue of disunity in the Church is such a speculative affair that we cannot treat it as an injury personal to the applicants and, which would be irreparable. Again, we think that even if the elections were to go in, the applicants would still have a remedy because they could still challenge the validity of these elections. The applicants challenged the validity of the first election and it was nullified by the Church itself. Even if the Church were not to listen to them a second time, the applicants would still have their right of access to the High Court and show there that the elections were not conducted in accordance with the constitution of the Church. We do not, in these circumstances, see how their appeal would be rendered nugatory.

We agree with the learned judge that to grant the applicants the injunction they seek would be to paralyse the operations of the Church and this, the Court ought not to do. This Court dealt with the point of paralyzing the operations of an organization in the case of Teresa Shitakha v Mary Mwamondo and 4 others (1982-1988) 1 KAR 965 and held that

> "It would not be right to grant orders which would have the effect of paralyzing the National Organization or bringing it to a halt, both by restraining the holding of meetings and by the

organizations of elections, pending a decision in the main action, or on the appeal from Mbaya, J's interlocutory order. To do so would be out of proportion to the alleged wrongs suffered by the applicant ..."

In our view these remarks apply even with greater force to the present situation where the sheep have been without the shepherd, if we may be allowed to put it so, for well over one, year. This application fails and we order it dismissed with cost to the respondent.

October 17, 1991 the following Ruling of the Court was delivered.

Dated and delivered at Nairobi this 17th day of October, 1991.

JOHN MWANGI GACHUHI

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JUDGE OF APPEAL

JOSEPH RAYMOND MASIME

.....

JUDGE OF APPEAL

RIAGA SAMUEL OMOLO

.....

AG. JUDGE OF APPEAL