IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller JJA & Kneller Ag JA)

CIVIL APPEAL NO. 4 OF 1982

BETWEEN

ARTHUR GATUNGU GATHUNA .....APPELLANT

AND

AFRICAN ORTHODOX CHURCH OF KENYA.....RESPONDENT

JUDGMENT

Law JA By a suit instituted by filing a plaint dated July 29, 1980, the respondent in this appeal, the African Orthodox Church of Kenya, which is a Registered Society, sued the appellant for a declaration that he (the appellant) was no longer a member of the respondent society, and for injunctions restraining him from interfering in the society's affairs and from claiming to be a bishop, and for other reliefs. The suit was based on a document described as "Legal Judgment No 1" issued by "The Holy Synod of the Apostolic and Patriarchal Throne of Greek Orthodox Patriarchate of Alexandria" composed of "His Beatitude the Pope and Patriarch of Alexandria" as President and ten Archbishops Metropolitan, purporting to "depose and unfrock" the appellant who is described as "Assistant Bishop of Nitria under the jurisdiction of His Beatitude the Pope", and to reduce him to the status of layman. This judgment was "judged, discussed and promulgated" in Alexandra on November 30, 1979.

The respondent Society then applied by Chamber Summons stated to be taken out under Order XXIX rule 2 of the Civil Procedure Code, asking for orders, *inter alia*, restraining the appellant from interfering with the respondent's churches and from claiming that he is a Bishop in the respondent's Church. The reference to Order XXIX rule 2 appears to be a mistake. What must have been intended was Order XXXIX rule 2, which empowers the court to restrain by temporary injunction a defendant from committing a breach of contract or other injury of any kind. This mistake has persisted throughout the proceedings in the High Court, and was only noticed and corrected when the hearing of this appeal began.

The affidavit in support of the application was deponed to by the Reverend Father Micara, who described himself as the current chairman of the African Orthodox Church of Kenya which, he stated, was in common with the Greek Orthodox Patriarchate of Alexandria. He further stated that the appellant was notified of the judgment of the Holy Synod defrocking him but that he, in defiance of the same, continues to act as though he had not been defrocked.

In his affidavit in reply, the appellant stated that he was the Bishop and Head of the African Orthodox Church of Kenya, which he says is "quite independent" from any other Church in Kenya or elsewhere. He went on to say that he was not aware of any valid judgment of the Holy Synod defrocking him, he denied the allegations of misconduct and of causing disunity made against him. A defence to the same effect to

the suit was filed on October 7, 1980.

When the application came on for hearing, after a number of adjournments, before Gachuhi J on February 25, 1981, the proceedings opened with a preliminary objection taken by Mr Kirundi for the appellant that the court had no jurisdiction to entertain matters involving ecclesiastical law, and that the judgment of the Holy Synod could not be enforced in Kenya. The learned judge heard lengthy submissions from Mr Kirundi and from Mr Kamere for the respondent. In his reserved ruling, delivered on June 23, 1981, the learned judge dismissed the preliminary objection, holding that the court had jurisdiction in the matter. He pointed to paragraph 15 of the defence, which reads:

> "Jurisdiction of this Honourable Court to hear and determine this case is hereby admitted"

and he held that the judgment of the Holy Synod was enforceable in Kenya as a foreign judgment.

From this decision the appellant has appealed. We have listened to argument on this interlocutory appeal from Mr Kirundi for the appellant and Mr Kamere for the respondent. To my mind, the learned judge's ruling that the court has jurisdiction is clearly correct. But this litigation is not, strictly speaking, concerned with ecclesiastical law, nor is the judgment of the Holy Synod a "foreign judgment", nor is the Holy Synod a "foreign court", within the definition of those terms in Section 2 of the Civil Procedure Act, and the judgment of the Holy Synod in Alexandria is not a judgment within the meaning of the Foreign Judgments Enforcement Act (Cap 43). What this litigation does concern is a dispute within members of a society registered under the Societies Act (Cap 108), and there can be no doubt that a suit by a registered society in its capacity as such, against one of its members, is within the jurisdiction of the Kenya courts. Where, with respect, I differ from the learned judge is in his holding that the courts in Kenya have jurisdiction to enforce and execute the judgment of the Holy Synod given in Alexandria as a foreign judgment. That judgment, however, may be relevant as evidence of the appellant's status in relation to the appellant society. The respondent church, as a registered society, must have a constitution and rules to enable it to be registered. We have not been favoured with a sight of that constitution or rules.

In my view, this appeal succeeds in part, that is to say, against the ruling that the judgment of the Holy Synod is enforceable in Kenya as a foreign judgment.

I would dismiss the appeal in so far as it challenges the jurisdiction of the High Court. As I understand previous decisions of the High Court in comparable cases, the judges have refused to interfere with decisions arrived at by properly constituted tribunals established under the rules governing recognized churches in Kenya, but they have never held that they had no jurisdiction in such cases. As the appellant has had a measure of success, I would leave the parties to bear their own costs. As Miller JA and Kneller Ag JA agree, it is ordered that the appeal be dismissed, with no order as to costs. It should be possible for the suit now to go to trial on properly and comprehensively framed agreed issues, now that the issue of jurisdiction has been settled.

Miller JA. The premises of contention as to the scope of authority of the respective religious bodies have been sufficiently set out by Law JA. In my view, the crucial point which has arisen in this particular case, is the existence of the transcendent and administrative nexus as from the Greek Orthodox Church of Alexandra, the projected parent body, upon the Orthodox Church of Kenya and thereby establishing recognition for purposes of the exercising of the jurisdiction of the courts of Kenya as a matter of law. I therefore agree with the judgment of Law JA and the order he has proposed.

Kneller Ag JA. The question in this appeal is whether or not Gachuhi J was right when he ruled he had jurisdiction to grant the relief asked for in the suit before him.

The record suggests the learned Judge took the point and if he did he was right to do so for it is *pars judicis* to raise and take into account any question of jurisdiction: see for example Uthwatt J in *Attorney General v Dean and Chapter of Ripon Cathedral* [1945] 1 All ER 479, E (Ch D). This is so even if the parties in these pleadings agree the court has jurisdiction as these in this case did.

Whether or not he would accede to any of the prayers of the parties is a different issue and will depend on, among other things, the consent of the parties or the evidence and law put before him and the exercise of his discretion to do so.

What were the parties asking him to do?

The African Orthodox Church of Kenya (the Church) by a summons in chambers of July 29, 1980 under Order XXIX rule 2 of the Civil Procedure Code (which should have been Order XXXIX of the Civil Procedure Rules), asked him to order that Arthur Gatungu Gathuna, (the defendant) should cease to hold himself out as a Bishop of this Church or interfere with the day to day running of its churches and further orders that he (and his supporters) should hand over to the Church its records, account books, vestments, sacred vessels, title deeds to its properties and the keys of its buildings. This was, in effect, an application for various interlocutory injunctions. The defendant asked Gachuhi J not to make such orders.

Behind this summons there were the affidavits of the Reverend Father Peter Nganga Micara, who claims to be the present Chairman of this Church, and the defendant, and, further still in the background, the parties' pleadings, from all of which it is possible to cull these allegations by each side.

The African Orthodox Church of Kenya is a registered society and claims it and its members, including the defendant, are part of the world-wide Orthodox Church and not only in communion with the Greek Orthodox Patriarchate of Alexandria in Egypt but subject to the jurisdiction of that Patriarch and the Patriarchate's tribunal, at any rate in matters spiritual and the discipline of its clergy and laity. The defendant was consecrated Assistant Bishop of Nitria on February 17, 1973 and was sent to work with and for the African Orthodox Church of Kenya but, instead, it is alleged that he misappropriated its funds, misled its illiterate members, used it as a political instrument and generated such disunity in it that its officials accused him before the supreme judicial authority of the Greek Orthodox Patriarchate in Alexandria on November 30, 1979. This authority was composed of twelve Metropolitan Archbishops prescribed over by his Beatitude the Pope and Patriarch of Alexandria and All Africa, Nicholaos VI. The Assistant Bishop of Nitria appeared before them in the Patriarchate's Assembly Room in Alexandria. He was found guilty of all the accusations and the consequence was the authority deposed him from his Assistant Bishopric and unfrocked him as a Bishop and priest and declared he was a layman. All this was done according to the laws and canons of the Holy Orthodox Church and the regulations of the Patriarchate. This is set out in a document in English called "Legal Judgment No 1" which might indicate the Patriarchate had few such matters to pronounce upon that year or that more could be delivered later in this case.

The African Orthodox Church of Kenya complains that the defendant has ignored this decision and insists he is still a Bishop and the head of the Kenya branch of this church. He has also repudiated a notice from the Registrar of Societies of July 10, 1980 telling him he was no longer an official of the society. Furthermore, in defiance of both these documents and those who issued them, he has purported to dismiss all its priests in Kenya, replaced them with laymen of his choice, closed sixteen of its churches here and withheld from it their keys, reports, account books, title deeds, vestments, patens and chalices, all of which is illegal.

So, in its plaint, the church asks for a declaration that the defendant is not one of its officials and has not been so since November 30, 1979 and damages with interest at court rates for the unlawful retention of the title deeds of its property and keys of its churches together with the orders sought in the summons that followed.

The defendant's reply to this included these averments. The church is a registered society but has no lawfully registered officials who are authorised to act on its behalf. The Holy Synod of the Patriarchate of Alexandria in Egypt has no jurisdiction over the church or the defendant. It did not pronounce any judgment or, if it did, it was not binding on the church or the defendant. He has not, therefore, been deposed, unfrocked or reduced to the status of a layman. He has no servants or agents and he has not committed any of the alleged acts set out in the plaint. He also denies the Registrar sent him any note telling him he was no longer an official of the Church or that he had any right to do so. He is still a

Bishop and the head of this church which is independent of the Patriarch or Patriarchate and anyone else or any other body anywhere. He asks for the Church's suit to be dismissed with costs.

So here we have, seemingly, a Church which says the defendant is acting illegally as its Bishop, because its Pope and Council has stripped him of his orders and rank, and a defendant who claims he is its Bishop and leader, because the Pope and Council did no such thing or, if it did, it had no right to do so, or, if it had, it did so contrary to the canons, laws and regulations of the church.

The issues between the parties include whether or not the church as a registered society has any properly appointed officials authorised to sue on its behalf the defendant for the relief set out in the plaint, who has the authority to consecrate its Bishops and unfrock them, whether the defendant, a bishop and its present head, has committed the acts complained of with regard to the church, its priests, its members and its property and, if so, whether they are illegal and whether the church is entitled to the declarations, injunctions and damages and, if so, how much?

The High Court has unlimited original civil jurisdiction under Section 60 of The Constitution of Kenya, which must be exercised in conformity with the Constitution and, subject thereto, all other written laws and the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897 and the procedure and practice observed in courts of justice in England on that date according to Section 3 of the Judicature Act.

A suit for a declaratory judgment or order is unobjectionable under Order II rule 7 of the Civil Procedure Rules. Provided the dispute is a justiciable one for example where the issue concerns a right to property, a right of contract or any other legal right and it would not be unconstitutional to grant the relief sought. See Simpson J in *Matalinga v Attorney General* [1972] EA 518 (K).

Lord Dunedin summarised the rules for the exercise of this discretion in the action of declarator in Scotland and for Order XXV rule 5 in England, which is in almost identical terms as the Kenya Order II rule 7, in this way:

> "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438, 448. All this is a valuable guide for such actions in Kenya. This suit between the Church and the defendant clearly reveals a dispute which is a justifiable one. The issues concern rights to property, among others, and it would not be unconstitutional to grant the relief sought. The questions are real and not theoretical ones, both parties have a real interest in them (and the answers to them) and the defendant has a true interest in opposing the declaration sought.

Actions for damages and injunctions are part of the daily work of the High Court. The Church's action is not to enforce a foreign judgment and this "Legal Judgment No 1" would not qualify as one under the provisions of the Foreign Judgments Enforcement Act (Cap 43).

Nor is the dispute concerned with ecclesiastical law or an established church and, in any event, there is no ecclesiastical law and no established church in Kenya.

There are, however, various churches in Kenya with their own constitutions, regulations and tribunals for those who voluntarily submit to them. If the church or a member of it complains in correct form to a court of law of any injury to a right in any matter of a temporal character or mixed spiritual and temporal character, the court may ascertain whether the judgment or sentence pronounced was regular and by a competent authority and then give redress if justice so demands. This may involve inquiry into the laws, rules, forms and procedure of the tribunal or authority of that church. (See para 338 pages 160 and 161 *Halsbury's Laws of England* 4th Edition (1975) volume 14).

Gachuhi J, in his ruling of June 23, 1981, held that the High Court had jurisdiction in the suit before him and, in my judgment, he was right. I part company with the learned Judge, however, when he wrote that the High Court was being asked to execute this "Legal Judgment No 1" of the Patriarchate's tribunal because, as I have endeavoured to show, the High Court was being asked for a declaration, injunctions and damages and the lawfulness, or otherwise and consequence of the tribunal's authority and pronouncement would be only one of many issues to be determined in the trial.

He also forecast that the dispute between the church and the defendant before the Patriarchate's tribunal was not within the High Court's jurisdiction and if, by that, he meant a dispute involving only spiritual issues and penalties, he was, in my respectful view, correct. Matters of mixed spiritual and temporal character with temporal consequences affecting legal rights, however, fall within the High Court's jurisdiction but each case depends on its own pleadings and facts and the High Court may, in the exercise of its discretion, decline to entertain the action for relief or strike out the claim.

Hancox J distinguished between the High Court's refusal to decide on matters which are not ordinarily justiciable by it and its jurisdiction to step in to correct clear breaches of natural justice if they were shown to exist: see *Solomon v Presbyterian Church of East Africa and Others* HCCC 2859 of 1977 (the plaintiff a layman, was excommunicated by the church's elders after due inquiry according to its constitution) and *Cannon Leonard Mbugua v Archbishop Festo Hebbakuk Olang' and the Diocesan Synod of Nairobi* HCCC 3338 of 1979 (the plaintiff, a vicar of a parish, sued for a declaration that the decision by the defendants requiring him to take leave of absence from his church and parish was null and void because he was not given any opportunity to show cause to the contrary as required by the rules of natural justice and law 17 (ii) of the Constitution of the Anglican Church in the Diocese of Nairobi).

Sachdeva J did the same in *Bishop Peter Mwangombe v Archbishop Manaseh Kuria, The Diocese of Mombasa Synod and the Church of the Province of Kenya*, Mombasa HCCC 391 of 1980, in which the plaintiff prayed for a declaration that the defendants' decision to suspend him from enforcing it and he held, in effect, that this was justiciable but, in the exercise of his discretion as to whether or not to grant the plaintiff an interlocutory injunction against the defendants he declined to do so on the merits.

The last two (Anglican) cases affected rights of property and contract just as this Orthodox one does.

Accordingly in my view, this appeal should be dismissed with no order as to costs, since each party has been partially successful. The costs of the proceedings in the High Court should be in the discretion of the trial Judge. I see no reason why the trial should not continue before Gachuhi J and I would not make an order that it should be heard before another judge.

Dated and delivered at Nairobi this 2nd day of September, 1982.

E.J.ELAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

A.A KNELLER

…….....

AG.JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR