



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. NO. 86 OF 2016**

**(FORMERLY KERUGOYA ELC NO. 432 OF 2013)**

**BISHOP JOSPHAT MBOGO.....PLAINTIFF**

**VERSUS**

**BISHOP STEPHEN NJOGU.....1<sup>ST</sup> DEFENDANT**

**PASTOR JOSEPH MUCHANGI.....2<sup>ND</sup> DEFENDANT**

**DEACON DICKSON FUNDI MUCHANGI.....3<sup>RD</sup> DEFENDANT**

**PATRICK MURIITHI WILSON.....4<sup>TH</sup> DEFENDANT**

**PAULINE MURUGI.....5<sup>TH</sup> DEFENDANT**

**GORRET NJOKI.....6<sup>TH</sup> DEFENDANT**

**IRENE WAMUGO.....7<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 1<sup>st</sup> February 2010, the Plaintiff sought the following reliefs against the Defendants;

- a. *That the Defendants be ordered by a permanent injunction to refrain/to stop interfering with the ownership of church buildings and plots built and owned by the sect of the church led by the Plaintiff and the members of A.I.P.C.A of Kenya.*
- b. *That costs of the suit be ordered against the Defendants jointly and severally.*
- c. *Any other or better relief this honourable court deems fit and just to grant.*

2. In the said plaint, the Plaintiff described himself as the Bishop of Africa Independent Pentecostal Church of Kenya (hereinafter *AIPCK*) whereas all the Defendants, except the 3<sup>rd</sup> Defendant, were described as officials or representatives of a rival faction known as African Independent Pentecostal Church of Africa (hereinafter *AIPCA*).

3. It was pleaded that the Plaintiff and members of the congregation of the church at Kathangari were the proprietors of the church building which was the subject of the dispute between the two churches. It was further alleged that the Defendants had on the 10<sup>th</sup> and 17<sup>th</sup> January 2010, without lawful justification, invaded the said church and interfered with worship services and generally caused mayhem.

4. The Defendants entered an appearance under protest on 11<sup>th</sup> May 2010 but there is no indication in the court file of any defence having been filed by their advocate on record.

5. When the suit was listed for hearing on 19<sup>th</sup> September 2018 the Plaintiff's advocate attended court with 2 witnesses ready to proceed with the trial. The Defendants' advocate, on the other hand, was not ready to proceed and made an oral application for transfer of the suit to the Magistrate's court and for adjournment of the suit. The court declined the application for transfer as well as the application for adjournment since the suit had been pending for over eight (8) years.

6. The Plaintiff called two (2) witnesses and closed his case. The Plaintiff was the first to testify as PW 1. He testified that he was the Bishop in charge of several churches of AIPCK in Embu. He adopted his witness statement dated 30<sup>th</sup> July 2011 as his sworn testimony and produced the documents listed in his list of documents dated 25<sup>th</sup> February 2014 as exhibits.

7. During cross-examination, he stated that the church in Kathangari was built on land belonging to the defunct County Council of Embu and that he could not remember the parcel number on which it was built. He further stated that no title deed or certificate of lease had been issued in respect thereof. He further stated that he was not present when chaos allegedly broke out in church but he was simply informed about the fight. Regarding his capacity to sue, he simply stated that he had filed the suit as a Bishop on behalf of the church.

8. The second Plaintiff's witness was Jane Wawira Njeru who testified as PW 2. She adopted her witness statement dated 30<sup>th</sup> July 2012 as her sworn testimony. Although in her witness statement she stated that she joined the Plaintiff's church on 30<sup>th</sup> January 2003, she stated during her cross-examination that she joined the church in 2005.

9. Upon the close of the Plaintiff's case, the Defendants' advocate renewed his application for adjournment and sought leave to file a list of documents and witness statements. The court rejected both applications since no good reasons had been given to justify the adjournment sought.

10. The court thereupon directed the parties to file and exchange written submissions and authorities, if any, within 60 days. The record shows that the Defendants filed their submissions on 19<sup>th</sup> October 2018 whereas the Plaintiff filed his on 17<sup>th</sup> January 2019.

11. The court has noted that the parties herein did not file any agreed or even separate statements of issues for determination. In his written submissions, the Plaintiff's advocate framed the following two issues for determination;

- a. Whether *Ngandori/Kathangari/T.205* legally belongs to AIPCK or AIPCA faction.
- b. Which faction is entitled to use the suit land and buildings thereon?

The first question which comes to mind is how Title No. did *Ngandori/Kathangari/T.205* come into the proceedings? It was never contained in the pleadings, witness statements, or documents of the parties. It was never introduced when the Plaintiff and his witness gave oral testimony in court. The court can only assume that it is the parcel number of the land where the church building the subject of the dispute is located.

12. The Defendants' advocate did not bother to frame any issues for determination. It was simply submitted that the Plaintiff had failed to demonstrate ownership of the property the subject of the dispute between the two factions of the church. It was further submitted that the Plaintiff had not demonstrated his capacity to file suit on behalf of the AIPCK.

13. The court is, therefore, obliged to frame the issues for determination as provided for in law. Under **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues from any of the following;

- a. Allegations made on oath by the parties.
- b. Pleadings.
- c. Documents produced by either party.

14. The court is of the view that the following broad issues arise for determination;

- a. Whether the Plaintiff is entitled to the order of permanent injunction sought in the plaint.
- b. Who shall bear the costs of the suit.

15. In order for a party to be entitled to a permanent prohibitory injunction, he must demonstrate a violation of his legal rights. In the context of this suit, the Plaintiff must demonstrate the existence of some proprietary rights in the suit property. It was pleaded in paragraph 9 of the plaint that the Plaintiff and members of his congregation at Kathangari are the proprietors of the suit property and the church building erected thereon. Proprietary rights are capable of being demonstrated through documentary evidence. Neither the Plaintiff nor the Defendants demonstrated the existence of such proprietary rights in their favour.

16. The Plaintiff's case was that the church at Kathangari was constructed on land belonging to the defunct County Council of Embu. He did not produce any title document, certificate of search, extract of the land register or even a letter of allotment to support his claim of ownership. The court is of the opinion that a bare statement of ownership of landed property cannot suffice to demonstrate ownership thereof. The Plaintiff's claim is made no better by the pleading that the property is owned jointly by him and members of the congregation. It was not demonstrated that those unnamed members ever authorized him to sue on their behalf and to incur any legal liabilities, including costs, on their behalf.

17. The court is guided by the provisions of section 107 of the Evidence Act (Cap 80) which stipulates as follows;

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he**

**asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

18. The court is thus far from satisfied that the proprietary rights alleged by the Plaintiff have been demonstrated. The Plaintiff can only be entitled to utilize the land and church building at Kathangari upon establishing a certain legal basis such as ownership, licence, lease, e.t.c. In the absence of such a legal basis, the Plaintiff would not be entitled to an order of permanent injunction sought. An injunction can only be predicated upon violation of the Plaintiff's proven proprietary rights. The court, therefore, finds that the Plaintiff is not entitled to an order of injunction at all.

19. The court has seen a copy of the letter dated 11<sup>th</sup> September 2003 from the Registrar of Societies in which he advised the warring factions to retain the assets under their respective control. The court does not understand that letter to constitute a division of assets between the two factions. That letter may have been a temporary or stop gap measure pending a formal process of division of assets. No power is bestowed upon the Registrar to order an arbitrary division of assets through a letter under the Societies Act (Cap 108).

20. The second and final issue for determination is costs. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful party should normally be awarded the costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is of the view that each party should bear his own costs because the confusion on property ownership arising from the splitting of the church into two factions was not of their own making.

21. The upshot of the foregoing is that the court is not satisfied that the Plaintiff has proved his case to the required legal standard. The Plaintiff's suit is consequently dismissed. Each party shall bear his own costs.

22. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **21<sup>st</sup>** day of **FEBRUARY, 2019**.

In the presence of Ms. Muthama holding brief for Mr. A.P. Kariithi for the Plaintiff and Mr. Mugambi Njeru for the Defendants.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**21.02.19**