



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: WAKI, GATEMBU & OTIENO-ODEK, JJA)  
CIVIL APPEAL NO. 361 of 2017  
BETWEEN**

**REV. JOSEPH NTOMBURA.....APPELLANT**

**versus**

**GODFREY SIMIYU.....1st RESPONDENT**

**MATHEW KABURU.....2nd RESPONDENT**

**KOBIA MICHUBU.....3rd RESPONDENT**

**CHARLES KINOTI.....4th RESPONDENT**

**METHODIST CHURCH IN KENYA.....5th RESPONDENT**

**(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi  
(Sergon J.) dated and delivered on 22<sup>nd</sup> July 2016**

**in**

**High Court Civil Case No. 360 of 2015)**

**JUDGMENT OF THE COURT**

1. This is an interlocutory appeal. By a Plaint dated 14<sup>th</sup> October 2015, the 1<sup>st</sup> to 4<sup>th</sup> respondents filed suit against the appellant seeking orders that the appellant is not qualified to hold the office of Bishop of Methodist Church of Kenya in accordance with Standing Order of the Church No. 53 of 2011. The respondents prayed that the appellant be ordered to vacate the office of Bishop and pave way for fresh elections.
2. In the Plaint, it is alleged inter alia, that the appellant upon taking office as Bishop has brought infighting to the church; managed the church as his personal property; caused fear among church members; runs the church with impunity; has in contravention of the Standing Orders leased church property; has mismanaged the church as an institution; has conflict of interest in running his businesses with the church and has failed to disclose his academic qualifications.
3. The appellant filed a Statement of Defence dated 15th June 2016 contending inter alia that the 1<sup>st</sup> to 4<sup>th</sup> respondents had no authority to institute the suit; that the allegations in the plaint were spurious, fictitious and misleading; that he has three Master's Degrees and was elected to the office of Bishop of the Methodist Church of Kenya.
4. By Notice of Motion dated 14<sup>th</sup> October 2015, the 1<sup>st</sup> to 4<sup>th</sup> respondents moved the High Court seeking several orders inter alia that the appellant be restrained from holding office as the presiding Bishop of the Methodist Church of Kenya pending the hearing and determination of the suit before the court; the appellant be restrained from further transferring the clergy or any employee of the Church; the appellant be ordered to vacate office of Bishop of the Methodist Church in Kenya; the 1<sup>st</sup> to 4<sup>th</sup> respondents and the Church in general be at liberty to elect a new presiding Bishop of the Church as per Standing Orders of the Church; or the immediate former presiding Bishop do take up the office as per the Church Standing Orders pending the hearing of the application.
5. A detailed affidavit dated 14<sup>th</sup> October 2015 in support of the application was deposed by Mr. Godfrey Simiyu. The appellant filed a replying affidavit denying all the allegations in the supporting affidavit. Of significance, the appellant averred that he was elected to the office of presiding Bishop of the Methodist Church on 6<sup>th</sup> January 2013 by the Synod Delegates of all the Synods of the Methodist Church of Kenya.
6. Upon hearing the parties, in a Ruling dated 22<sup>nd</sup> July 2016, the High Court issued interlocutory orders restraining the appellant from

holding office of Bishop of the Methodist Church of Kenya. An order was also issued restraining the appellant from further transferring clergy or any employee of the Church.

7. Aggrieved by the interlocutory orders, the appellant filed the instant appeal on the following grounds as per the Memorandum of Appeal.

- (i) The judge erred in failing to find that the 1<sup>st</sup> to 4<sup>th</sup> respondents lacked locus standi and or capacity to commence the proceedings.
- (ii) The judge acted in excess of jurisdiction in granting the remedy of injunction.
- (iii) The judge erred in entertaining and granting the orders sought when the 1<sup>st</sup> to 4<sup>th</sup> respondents had not resorted to Internal Dispute Resolution Mechanism provided in the Church's Standing Orders.
- (iv) The judge erred in issuing orders incapable of enforcement.
- (v) The judge erred in failing to find that the appellant was well qualified and duly appointed by the appointing authority as the presiding Bishop of the Methodist Church of Kenya.
- (vi) The judge erred in finding that the 1<sup>st</sup> to 4<sup>th</sup> respondents had established *prima facie* case justifying the orders sought.
- (vii) The judge erred in failing to establish what irreparable damage the 1<sup>st</sup> to 4<sup>th</sup> respondents stood to suffer.
- (viii) The judge erred in failing to find that on a balance of convenience, the interests of the Church and its large membership far outweighed those of the 1<sup>st</sup> to 4<sup>th</sup> respondents.

8. At the hearing of this appeal, learned counsel Mr. Bochere Omariba appeared for the appellant; learned counsel Mr. R. O. Nyamweya appeared for the 1<sup>st</sup> to 4<sup>th</sup> respondents and learned Counsel Mr. Kibe Mungai appeared for the 5<sup>th</sup> respondent. All parties filed written submissions and list of authorities.

9. Counsel for the appellant submitted that the ruling by the trial judge is riddled with several errors of fact and law; that the Standing Orders of the Methodist Church bar any aggrieved party from invoking the jurisdiction of the court unless and until recourse has first been had to the internal dispute resolution mechanism set therein; that the court erred and failed to recognize that where an alternative dispute resolution mechanism exists, the same is to be pursued exhaustively before jurisdiction of the court can be invoked. In support of this submission, counsel cited the case of Daniel Nyongesa & Others -v- Egerton University College, Civil Appeal No. 90 of 1989 where it was stated that "the general principle is that courts do not interfere with domestic affairs of voluntary associations like churches and trade unions." The case of Geoffrey Muthinja Kabiru & 2 others - v- Samuel Munga Henry & 176 others [2015] eKLR was cited in support of the submission that it is imperative where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked.

10. The appellant further submitted that the learned judge improperly exercised his discretion in issuing the restraining orders; that the grant of the injunctive interlocutory orders did not meet the threshold in *Giella - v- Cassman Brown & Co. Limited* [1973] E.A. 358; that the judge erred in finding and stating that "if the evidence documented is anything to go by, then should orders sought fail, the respondent will suffer irreparable harm in that the reputation of the Church and other institutions will suffer."

11. The appellant submitted that balance of probabilities could not justify the learned judge's statement and finding; that a more reasonable approach reveals that the 5<sup>th</sup> respondent Church of whom the appellant is the presiding Bishop would be placed at a very precarious position by the grant of the interlocutory orders; that the orders granted by the learned judge create a grave leadership crisis in the 5<sup>th</sup> respondent Church along with all its institutions; that the net effect of the trial court's order is to paralyze the operations of the entire Methodist Church in Kenya, East and Central Africa. Counsel urged us to find that the interest of the 5<sup>th</sup> respondent Church and its institutions far outweigh the 1<sup>st</sup> and 4<sup>th</sup> respondent's interest. The case of *Teresa Shitakha -v- Mary Mwamondo & 4 others* (1982-1988) 1 KAR 965 was cited to support the proposition that it is not right to grant orders which have the effect of paralyzing a national organization and to do so would be out of proportion to the alleged wrongs suffered.

12. Submitting on unenforceability of the interlocutory orders granted, the appellant urged that the clergy and employees sought to be affected by the interlocutory orders are clergy and employees of the 5<sup>th</sup> respondent; that the appellant in person has not employed any clergy and it is the 5<sup>th</sup> respondent Church and or its Trustees who make decisions to transfer or employ. As a consequence, counsel submitted, the interlocutory orders issued by the trial court cannot be enforced against the appellant in person because the 1<sup>st</sup> to 4<sup>th</sup> respondents failed to identify and enjoin the correct parties to the suit.

13. The 5<sup>th</sup> respondent, the Methodist Church of Kenya, made submissions in support of the appeal. Counsel rehearsed the background facts of the suit and associated with submissions made by the appellant. It was recapped that the trial court did not have jurisdiction as the internal dispute resolution mechanism of the Church had not been complied with; further, that the 1<sup>st</sup> to 4<sup>th</sup> respondents did not sue the correct party who is the 5<sup>th</sup> respondent. On the contestation that the appellant was not qualified to hold the office of Bishop of the Methodist Church of Kenya, it was submitted that the trial court erred in failing to consider the appellant's Master's Degree Certificate annexed to his replying affidavit.

14. Counsel urged that the evidence adduced by the 1<sup>st</sup> to 4<sup>th</sup> respondents did not establish a *prima facie* case; that the nature of irreparable injury or damage that could be suffered by the 1<sup>st</sup> to 4<sup>th</sup> respondents was not demonstrated; that the interests of the 5<sup>th</sup> respondent has been

injured by grant of the interlocutory orders.

15. Recalling that the 5<sup>th</sup> respondent was not a party at the interlocutory proceedings, counsel cited dictum from the case of Republic - v - Director of Public Prosecutions & another Ex Parte Patrick Onyango Ogola 120161 eKLR where it was stated that an order made in proceedings to which an appellant is not a party cannot bind the appellant. In concluding his submissions, counsel urged us to consider the issue of justiciability of the 1<sup>st</sup> to 4<sup>th</sup> respondents' claims. It was submitted that courts have been slow to intrude into the realm of religious organizations in order to allow them solve their disputes.

16. The 1<sup>st</sup> to 4<sup>th</sup> respondents in opposing the appeal urged that the trial court did not err in granting the interlocutory orders. Counsel pointed out that there are four main issues for determination in this appeal namely: whether the trial court had jurisdiction to hear and determine the matter; whether the threshold for granting injunctive orders was met; whether the orders issued by the trial court are incapable of enforcement and whether the 1<sup>st</sup> to 4<sup>th</sup> respondents had locus in the application preceding this appeal.

17. Counsel submitted that despite the Methodist Church of Kenya being a voluntary organization with an alternative dispute resolution mechanism, the High Court by virtue of Article 165 (5) of the Constitution has unlimited, original and supervisory jurisdiction over all persons and organizations in Kenya; that in the instant matter, the High Court through Justices Aburili and Mboghohi Msagha on two occasions adjourned hearing to enable parties amicably resolve the dispute. However amicable resolution of the dispute failed and therefore the trial court had jurisdiction to hear and determine the application before it.

18. Counsel re-counted the principles for grant of injunctive relief as stated in *Giella - v - Cassman Brothers* (supra) as follows:

**(i) The plaintiff must establish that he has a prima facie case with a high probability of success at the trial.**

**(ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages and**

**(iii) If the court is in doubt, it will decide on a balance of convenience.**

19. Counsel cited the persuasive Canadian case of *R.J.R. MacDonald - v - Attorney General* where it was held that in determining the balance of convenience, the court must consider which party will suffer greater harm from granting or refusing the remedy pending a decision on the merits; that a court needs to weigh the relative strengths of the parties' case. On enforcement of the interim orders granted by the trial court, counsel submitted that the orders were enforceable; that court orders are not for cosmetic purposes; that it is essential for the maintenance of the rule of law that the authority and dignity of the court must be upheld at all times.

20. Submitting on locus standi of the 1<sup>st</sup> to 4<sup>th</sup> respondents, counsel urged that Article 32 of the Constitution confers locus standi to the respondents as the Article permits freedom of religion; that every person has the right to freedom of conscience, religion, thought, belief and opinion and this right is exercisable either individually or in community with others.

21. Whereas the 1<sup>st</sup> to 4<sup>th</sup> respondents identified four issues for determination, we remind ourselves that this is an interlocutory appeal and we must consider only issues that do not compromise the hearing and determination of the main suit now pending before the High Court. At the risk of repetition, the four issues identified by the respondents are whether the trial court had jurisdiction to hear and determine the matter; whether the threshold for granting injunctive orders was met; whether the orders issued by the trial court are incapable of enforcement and whether the 1<sup>st</sup> to 4<sup>th</sup> respondents had locus in the application preceding this appeal.

22. In our considered view, the only pertinent issue that will not compromise the suit before the High Court is whether the threshold for granting injunctive orders was met.

23. We are alive to dicta in the case of *CMC Motors Group Ltd and Another -v - Evans Kangeche Boro*, Civil Appeal No. 295 of 2007, where it was held that:

“In granting the injunctory reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge, if it is satisfied that the learned Judge did not exercise its discretion judicially”

24. The threshold for an interlocutory order is well stated in the case of *Giella - v - Cassman Brown & Co. Limited* [1973] E.A. 358. First, an applicant must show a prima facie case with a probability of success; second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and third, if the court is in doubt, it will decide an application on the balance of convenience. Those principles were further considered by this Court in the case of *Nguruman Limited -v- Jan Bonde Nielsen & 2 others* [2014]eKLR, as follows:-

“These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd - v - Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If Prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap frogging” by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

In this appeal, we shall evaluate from the evidence on record whether the trial judge properly applied the test for granting interlocutory orders.

25. In granting the impugned interlocutory orders, the trial judge evaluated the evidence as follows:

"I have taken into consideration the arguments of the parties and the documents presented in court. The correspondences (sic) and arguments made by the respondent are to the effect that the issues raised by the applicant are intra church issues which should be dealt with in church and not in a court of law as stipulated by Order 97 of the Church Standing Orders. This is an argument worth considering. Indeed, disputes arising in a church are of a moral nature....and may be best handled in the precincts of a church probably through an elected committee to probe the matter. Be as it may, the issues raised by the applicants in this case exceed the church since the very institutions that offer services to the general public are alleged to be in jeopardy. Amongst others, the applicants have specifically referred to KEMU University and correspondences (sic) to the effect that its charter has not been approved by the Commission for University Education nor signed by the President for falling short of the required standards. There are further allegations of mismanagement of a hospital and illegal leasing out of the property of the Church to a private company. It is in my considered view that the applicants have established a prima facie case with probabilities of success. If the evidence documented is anything to go by, then should the orders sought fail to issue, the respondent will suffer irreparable harm in the reputation of the Church and other institutions will suffer. The balance of convenience also tilts in favour of the applicant. "

26. In *Njenga -v- Njenga* 119911 KLR 401 it was aptly stated that an injunctive relief being a discretionary remedy is granted on the basis of evidence and sound legal principles. The first issue for our consideration is whether the trial judge properly held that a prima facie case had been laid out by the 1<sup>st</sup> to 4<sup>th</sup> respondents. Both the affidavit in support of the Motion and the Replying Affidavit raise issues of contestation that need to be resolved by way of full hearing. We however are satisfied that a prima facie case with probability of success had been laid out.

27. The next issue is whether the 1<sup>st</sup> to 4<sup>th</sup> respondents (who were the applicants before the trial court) would suffer irreparable injury if interlocutory orders were not granted. The trial judge in his analysis expressed that it is the appellant in this matter who will suffer irreparable harm in the reputation of the Church and its other institutions. In our considered view, this finding is not a correct application of the second test laid down in *Giella - v- Cassman Brown Limited* (supra). The test should be whether the person applying for the injunctive relief will suffer irreparable harm. The test is not whether the person against whom the orders is to be made will suffer irreparable harm. Going by the learned judge's finding that it is the appellant and the Church that would suffer irreparable harm, it follows the interlocutory orders should not have been issued. In his analysis, the trial judge did not make a finding whether the 1<sup>st</sup> to 4<sup>th</sup> respondents will suffer irreparable harm. In the absence of such a finding, the second test in *Giella - v- Cassman* was not established and the trial court erred in issuing the interlocutory orders.

28. In line with the *Geilla* and *Nguruman* cases (supra), those findings would have been sufficient to dispose of the application. Nevertheless, even if we had to consider the balance of convenience, the respondents would not have fared any better. The question would be between the appellant and the 1<sup>st</sup> to 4<sup>th</sup> respondents, as well as the 5<sup>th</sup> respondent *Methodist Church of Kenya*, who would suffer more if the interlocutory orders are issued?

29. In *Richard Owino & 2 others -v - Richard Abwao & 9 others* [2017] eKLR, the trial court in considering whether to grant injunctive orders against a church considered balance of convenience and correctly expressed as follows:

"In this case, what would happen if the injunction sought is granted in the interim and remains in force until this suit is heard and determined on its merits? The answer is obvious. That the church officials will remain ousted from office yet they have not been given a chance to ventilate their case, simply because some Society members have without authority purported to suspend them. On the other hand, the court will also be restraining those church officials who were elected from continuing to discharge their authorized duties, the main one being to preach the word of God to all people and believers. The law frowns on high handed oppressive orders that are only intended to bring chaos. The orders sought if granted, will in my view, not meet the ends of justice and neither will they serve the purpose of resolving the dispute and /or achieving justice for the parties, but might escalate the dispute to greater levels. It would also result in an injustice to the elected officials who have not been given an opportunity to be heard thereby condemning them unheard, thus going against the rules of natural justice. A court of law has no jurisdiction to do injustice. As was held in the case of *Suleiman vs. Amboseli Resort Limited* 12004] 2 KLR 589 (supra), there would be a much larger risk of injustice if the court found in favour of the applicants, than if it determined this application in favour of the respondent.

From the above exposition, I find that the balance of convenience tilts in favour of the respondents whose mandate as church leaders is to ensure that the legitimate spiritual expectations of the church congregants are met and the institution of the church continue to run as designed without any interruptions. "

30. Weighted against the facts of this case, we are persuaded by the reasoning in *Richard Owino & 2 others -v - Richard Abwao & 9 others* (above). In the

instant matter, the trial judge correctly established that the appellant and the Church and its institutions stand to suffer irreparable harm. We also note that the appellant in his replying affidavit deposed that the Church has a property manager responsible for managing, overseeing and safeguarding Church property.

Taking into account the correct finding by the trial court and bearing in mind that it was not controverted that the Church has a property

manager, it is our view that the learned judge erred in holding that balance of convenience tilted in favour of the 1<sup>st</sup> to 4<sup>th</sup> respondents. We find that balance of convenience tilts in favour of the Church and this negates grant of the injunctive orders.

31. For the above reasons, the learned judge erred in granting injunctive and restraining orders. We accordingly allow the appeal and hereby set aside in entirety the Ruling delivered on 22<sup>nd</sup> July 2016 by the High Court of Kenya and all consequential orders.

The 1<sup>st</sup> to 4<sup>th</sup> respondents shall bear costs of the application before the trial court and the costs in this appeal.

**Delivered at Nairobi this 7<sup>th</sup> day of December, 2018**

**P.  
JUDGE OF APPEAL**

**N.**

**WAKI**

**S. GATEMBU KAIRU FCIArb**

**JUDGE OF APPEAL**

**OTIENO-ODEK**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR