



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 857 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

BISHOP PAUL MATUMBI MUTHURI

CLAIMANT

VERSUS

THE TRUSTEES OF THE METHODIST CHURCH IN KENYA 1ST RESPONDENT

REVEREND JOSEPH NTOMBURA MWAINE

2ND RESPONDENT

RULING

There are three (3) applications filed by the Claimant/Applicant Bishop Paul Matumbi against the Respondents, The Trustees of the Methodist Church in Kenya and Rev. Joseph Ntombura, which are up for determination before this Court. The Respondents on their part filed a notice of preliminary objection citing the following grounds of objection –

1. That this Court lacks jurisdiction to hear and determine this suit by dint of the following: -

a) There is no Employment relationship between the Claimant and the Respondents in relation to the position of Methodist Church in Kenya (MCK) Bishop of Nairobi.

b) The dispute herein is subject to arbitration proceedings of the Methodist Church in Kenya (MCK).

2. The Claimant has no locus standi to prosecute this suit on account of the expiry of his employment as Bishop of Nairobi on 31st December, 2019.

All the three applications and the preliminary objection were disposed of together and are the subject of this ruling.

In the Notice of Motion Application dated 18th December 2019, the Claimant/Applicant seeks for Orders:

1. Spent

2. That an order of injunction do issue staying the letter of the Respondents dated 26th November, 2019 and delivered to the Claimant on 10th December, 2019 pending the hearing and determination of this application inter partes.

3. That pending the hearing and determination of this application, the Respondents, by themselves through their agents, servants or otherwise be restrained by an order of injunction from demoting, removing, transferring, disciplining or in any manner changing the employment status of the Claimant as Bishop, Nairobi Synod.

4. That pending the hearing and determination of the application the Respondents be restrained from initiating any disciplinary proceeding against the Claimant contrary to the Employment Act and or Standing Orders of the 1st Respondent.

5. That pending the hearing and determination of this application, the Respondents whether by themselves or through their agents, servants and employees be restrained by an order of injunction from in any manner restricting his access to or interfering with the residential leased premises occupied by the Claimant.

6. That an order of injunction do issue staying the letter of the Respondents dated 26th November, 2019 and delivered to the Claimant on 10th December, 2019 pending hearing and determination of Memorandum of Claim.

7. That the Respondents, by themselves through their agents, servants or otherwise be restrained by an order of injunction from demoting, removing, transferring, disciplining or in any manner changing the employment status of the Claimant as Bishop, Nairobi Synod pending hearing and determination of the Memorandum of Claim.

8. That pending the hearing and determination of the Memorandum of Claim the Respondents be restrained from initiating any disciplinary proceeding against the Claimant contrary to the Employment Act and or Standing Orders of the 1st Respondent.

9. That pending the hearing and determination of the Memorandum of Claim, the Respondents whether by themselves or through their agents, servants and employees be restrained by an order of injunction from in any manner restricting his access to or interfering with the residential leased premises occupied by the Claimant.

10. Such other or further orders as to this Court may seem just.

The Application is based on the grounds that the 1st Respondent through the 2nd Respondent demoted the Claimant/Applicant from a Bishop to an ordinary Church Minister through the letter dated 26th November 2019. That the Respondents' action is not premised on the Church's Constitution and Standing Orders and that the said demotion letter is a culmination of the 1st Respondent's desire to unlawfully discipline the Claimant. That the 2nd Respondent's claims of indiscipline and violation of Church practices against the Claimant have not been substantiated and that the constitution of the Church requires a party in conflict with the Church or its members to engage the Church through the internal dispute resolution mechanism before proceeding to any Court action. That the Claimant has written to the Respondents to convene the prescribed dispute resolution process but the Respondents have failed to do so thus prompting these proceedings.

Further, that the Claimant also demanded in writing for the resolutions made at the Annual Conference through the flawed process to be set aside and for the nomination and election of the Bishop, Nairobi Synod to be repeated in accordance to the express provisions of the Standing Orders and the Constitution of the 1st Respondent. That the Respondents deliberately failed to convene the Council of Bishops and the 2nd Respondent unilaterally appointed a 3 member Committee to investigate the matter contrary to the Standing Orders. That in a Standing Committee meeting of 5th October 2019 attended by the Claimant, the 2nd Respondent falsely alleged that the Claimant had gone to Court against the rules and should thus be dismissed from service. That it is clear the Respondents are not keen to invoke the express procedure of dispute resolution as under the 1st Respondent's Constitution and Standing Orders.

The Claimant states that his contract of employment with the 1st Respondent requires the Respondents to comply with the Standing Orders and the Employment Act when dealing with issues of discipline of employees. That the Respondents have failed to give him an opportunity to be heard and that the letter of 26th November 2019 should be rescinded and suspended pending the convening of the Council of Bishops to deliberate upon any allegations of discipline or indiscipline by the Claimant.

In the Notice of Motion Application dated 23rd January 2020, the Claimant/Applicant seeks for leave to commence contempt of court proceedings against the Respondents jointly and severally. He further seeks orders that the Respondents to be restrained from installing the Rev. John Maromba as the Bishop of the Nairobi Synod of the Methodist Church in Kenya pending the hearing and determination of the Application and Cause. In the alternative, that the leave granted to the Claimant to commence contempt proceedings to operate as a stay of the installation of the Rev. John Maromba as the Bishop of the Nairobi Synod of the Methodist Church in Kenya. The Application is founded on the grounds that the Respondents were served with a court order on 19th December 2019 suspending the operation of the said letter dated 26th November 2019 pending inter partes hearing of the Application dated 18th December 2019. That however the Respondents wilfully and deliberately disobeyed the court order and are therefore in contempt of this Court.

That the Respondents' interference with the Claimant's functions as a Bishop and their failure to reinstate his salary to the payroll and further provide him and his family with accommodation in Nairobi are acts which grossly undermine the authority and dignity of this Court. That unless the Respondents are punished for their gross violation of the Order and restrained from continuing to act in blatant violation of it, this Court's authority and dignity stands to suffer immensely.

The Respondents filed a Replying Affidavit dated 13th February 2020 sworn by the 2nd Respondent who is the Presiding Bishop of the Methodist Church in Kenya. The 2nd Respondent avers that the Applications are fatally defective as they contravene the **Standing Orders of the Methodist Church in Kenya 2015**. That if the Orders are granted, it would amount to acceding to the prayers sought by the Claimant in the main suit without canvassing the merits and demerits of the Claim. He avers that the Claimant/Applicant was allowed to run as a candidate in the 54th MCK Conference elections despite his questionable conduct and his failure to meet the academic qualifications required for appointment as Bishop. That the Claimant/Applicant was not removed as a Bishop but was duly replaced in the said elections after garnering 44 votes against Rev. Dr. Maromba's 157 votes.

He further avers that the Letter dated 26th November 2019 only informs the Claimant/Applicant of change in his work station and is not a demotion since his former position as Bishop Nairobi Synod was subject to an election which he lost to Rev. Dr. John Maromba. That it is the prerogative of MCK Conference to deploy and station all its employees to any station in Kenya, Uganda and/or Tanzania. He also avers that contrary to the Applicant's assertions, the Respondents have been ready to settle the dispute through the internal mechanism as shown in their advocates' letters to the Claimant dated 27th September 2019, 9th October 2019 and 22nd October 2019. That it is the Claimant/Applicant who declined to honour the said invitation of the Church and has thus not been interested in amicable resolution of the dispute.

The 2nd Respondent further avers that they respected the Court order dated 23rd January 2020 and did not install Rev. Dr. John Maromba and annexes the **Order of Service for 26th January 2020** to demonstrate that the same was only a thanksgiving service. He notes that Synod Ministers draw their stipend from their respective Synods and that the Applicant is no longer the Synod Bishop of Nairobi MCK by virtue of his letter of Appointment dated 8th January 2016 which clearly states his tenure of office would end on 31st December, 2019. That the Respondents have no power or authority to set aside the outcome of the elections and that in any event, the new Bishop was inducted immediately after elections and in the presence of the Claimant/Applicant. He prays that the applications dated 18th December 2019 and 23rd January 2020 are dismissed with costs to the Respondents.

In the Notice of Motion Application dated 19th February 2020, the Claimant/Applicant seeks for orders that:

1. *All proceedings that may be contemplated by the Respondents be suspended until this Application for contempt has been heard and determined.*
2. *Upon hearing the Respondents, this Court do cite the Respondents in contempt of its Orders made on 18th December 2019 ("the December Order") and on 24th January 2020 ("the January Order").*
3. *As a consequence, thereof the Respondents be ordered to purge the contempt committed by revoking the installation and assumption to office of Reverend John Maromba and also by unequivocally suspending the letter of 26th November 2019 within a period of three (3) days.*
4. *The Respondents be further ordered to pay into court a fine not exceeding Kenya Shillings Five Hundred Thousand (Kshs.500,000/=) each, within three (3) working days.*
5. *In the event that the Respondents do not, within three (3) days, purge of the contempt and also pay such fine as this Court shall impose, they be arrested and detained in prison for a period not exceeding three (3) months until they shall have purged the contempt and also paid the fine.*
6. *The Respondents be denied any further right of audience before this Court until such time as they shall have purged the instances of contempt complained of and also paid the fine imposed by this Court.*
7. *The costs of this Application be provided for.*

The Application is premised on the grounds that the terms of the Orders made on 18th December 2019 and 24th January 2020 were clear and unambiguous and that the Respondents also had proper notice of the said terms which they wilfully broke as hereunder:

- a. The Claimant was physically and violently ejected from office by the Respondents' employees, servants and/or agents on 2nd January 2020;
- b. There is no Affidavit on record by or on behalf of either of the Respondents to refute the matters deposed in the Claimant's Affidavit sworn on 23rd January 2020 regarding his ejection from office;
- c. On 26th January 2020, the Respondents went ahead and installed Bishop John Maromba as Bishop of the Nairobi Synod; and
- d. Other grounds as contained in the Claimant's Notice of Motion dated 23rd January 2020.

In response to the Application dated 19th February 2020, the Respondent filed a Replying Affidavit dated 13th February 2020 sworn by the 2nd Respondent who denies that the Respondents wilfully disobeyed this Court's Orders. He avers that the Orders issued by the Court on 18th December 2019 did not have any effect on the expiry of the Claimant's term as Nairobi Synod Bishop and denies that they or their advocates were served with the two Court orders. That the Claimant has not produced evidence of service of the said Orders upon them or any evidence of his violent ejection from office as alleged and that the instant contempt application constitutes gross abuse of court process since it is based on an installation ceremony that is yet to take place.

He avers that this Court ought to first determine the issue of jurisdiction of this Court and the Claimant's *locus standi* which they raise in their preliminary objection dated 13th February 2020 as jurisdiction is everything irrespective of the contempt application herein. Further, that the unconstitutionality of Standing Order 116(3) of the Methodist Church is neither a prayer in the main Claim nor does it fall within the jurisdictional ambit of this Court. He contends that the Claimant was transferred in the normal operations of the Methodist Church in Kenya in its normal administrative functions. That the Claimant is only seeking court orders so as to get back to the office of Nairobi Bishop after expiry of his term.

The 2nd Respondent believes that the Court's power to punish for disobedience of its orders does not envisage reinstatement of elected officials whose terms in office have expired. Further, that Bishop Maromba stands to be adversely affected by the orders sought by the Claimant since he was duly elected to the Claimant's former position in August 2019.

Claimant/Applicant's Submissions

The Claimant/Applicant draws this Court's attention to paragraphs 7 to 15 of his Supporting Affidavit sworn on 23rd January 2020 wherein

he has given further details of the unlawful take-over and his physical ejection from office with the help of armed policemen. He also refers the Court to paragraphs 16 to 19 of the said Affidavit demonstrating how the Respondents terminated his residence tenancy in defiance of this Court's Orders which suspended his transfer.

He submits that this Court has jurisdiction because this suit relates to an employment and labour dispute and which matter is vested upon this Court by **Article 162(2) (a) of the Constitution of Kenya 2010** and **Section 12(1) of the Employment and Labour Relations Court Act**. Further, that it is a well-settled general rule that where parties might have an agreement purporting to oust the jurisdiction of the courts, such agreements are prohibited and a court called upon to determine its jurisdiction should lean against a construction which would purport to oust its jurisdiction in such circumstances. That the same was the proposition of the Court in **Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank [1999] eKLR**.

The Claimant submits that the simple approach to the matter would have been for the Respondents to obey this Court's Orders then challenge them, rather than disobey the Orders and subsequently raise the issue of alleged lack of jurisdiction. That the question of jurisdiction is secondary where the question of contempt of court has been raised and he relies on the case of **A.B & Another v. R.B. [2016] eKLR** where the Court held that where the rule of law is at risk of being deliberately undermined, the Court may decline to hear a party until they have complied in full with the orders of the Court or until further orders of that Court. He further relies on the cases of **Clean Analytical System AB & another v Faith Kagwiria & another [2015] eKLR**; **Hadkinson v Hadkinson [1952] 2 All ER 567**; and **Nalcor Energy & Another v Andrea Jackson & Others [2018] NLSC 12** where the Courts were all in agreement that Court Orders are to be obeyed as long as they are in effect and have not yet been discharged.

That the Court in the **Clean Analytical System case (supra)** further observed that ex parte orders are meant to preserve the subject matter of the claim and must be obeyed as the defendant in any event has the unimpeded right to challenge that order at the earliest opportunity. He submits that this Court should therefore find and hold that its Orders were flagrantly disobeyed, and that both the 1st and 2nd Respondents are in contempt of its Orders and further grant the orders as sought in the Claimant's contempt application.

It is submitted by the Claimant/Applicant that in **James H Gitau Mwara Attorney General & another [2015] eKLR**, the High Court held that it cannot fold its hands in helplessness and watch the Rule of Law being dishonoured with impunity by any person who himself/herself is under the protection of the same law as that would be an abdication of the sacrosanct duty bestowed on the judicial system. The Claimant/Applicant believes that on the basis of well-established case law, the hearing and determination of the Injunction Application ought to be deferred until the two Contempt Applications have been heard and determined.

Respondents' Submissions

The Respondents submit that this Court lacks the requisite jurisdiction to hear and determine this suit as there is no employment relationship between the Claimant and them in relation to the position of Synod Bishop Methodist Church in Kenya, which is an elective position. That the Claimant also lacks the *locus standi* to prosecute the suit as he is seeking orders to keep him in a position he was not dismissed from. That **Standing Orders Nos. 81(3)(c), 106(1)(g), (h) and 116(3) of the Methodist Church in Kenya 2015** oust the judicial process as the initial forum for resolving differences and emphasize on Alternative forms of Dispute Resolution as a matter of first resort, and which ADR is also recognized in **Article 159 (2) (c) of the Constitution**. That the Claimant's claim and applications are prematurely before this Court since the internal dispute resolution mechanisms of the MCK have not been exhausted. They rely on the case of **Andrew Inyolo Abwaza v Board of trustees of Pentecostal Assemblies of God-Kenya & 3 Others [2009] eKLR**, the court held that:

"...the plaintiff had failed to exhaust the dispute resolution machinery of the 1st defendant church. He accordingly has no cause of action in this court which has no jurisdiction to hear him in matters he has complained about herein which are in the domain of the church's dispute resolution machinery. Put differently, the plaintiff's complaints as pleaded in his plaint are not justiciable. His coming to this court with this case in general is premature and outside of his church's constitution."

They submit that granting the orders in the application dated 18th December 2019 shall create a grave leadership crisis in the MCK and all its institutions and further paralyze operations of the entire Methodist Church in Kenya, East and Central Africa. They submit that the balance of convenience tilts in their favour and they rely on the case of **Joseph Ntombura v Godfrey Simiyu & 4 others [2018] eKLR** where the Court of Appeal held 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 v Amboseli Resort Limited [2004] 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."*

It is submitted by the Respondents that contempt orders are of a quasi-criminal nature and the bar of proof for contempt is as such significantly higher. That it is incumbent on an applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order, as was espoused in the case of **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** where Mativo J cited with approval the case of **Gatharia K. Mutikika v Baharini Farm Ltd** where it was held as follows: -

"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor

is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge..."

The Respondents submit that they were not served with the Orders made on 18th December 2019 and 24th January 2020 and no evidence has been adduced to indicate that the same were served upon them. That the said orders cannot therefore be enforced against them vide the contempt proceedings herein. They rely on the Court of Appeal case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** where it was stated that service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement.

They further submit that the Applicant has also not met the rules applicable for an application of contempt of Court as under **Rule 81.4 of the Civil Procedure (Amendment No. 2) Rules, 2012 of England** which requires setting out the grounds of committal and identifying each alleged act of contempt separately and numerically. That the Applicant has also failed to prove that the Respondents by conduct, deliberately or wilfully acted in a manner that breached the orders. They cite the case of **Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others [2018] eKLR** where the court summarized:

"...The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith. It is trite that all that the applicant bears onus to prove is that (a) the court order was granted; (b) the respondent has knowledge thereof, and (c) the respondent has failed to comply with the court order. These elements were not proved in this case."

Analysis and Determination

The issues arising for determination from the three applications on record and the Respondent's preliminary objection are the following –

1. Whether this court has jurisdiction to hear and determine the instant suit.
2. Whether the Respondents are in contempt of the orders of this court made on 18th December 2019 and 24th January 2020.
3. Whether the Claimant is entitled to the orders sought in the application dated 18th December 2019.

Jurisdiction

The Respondents have faulted the jurisdiction of this court on two grounds, the first being that there is no employment relationship between the Claimant and Respondents and the second being that the dispute is subject to arbitration.

The jurisdiction of this court is donated by Article 162(2) and (3) of the Constitution and Section 12 of the Employment and Labour Relations Court Act as follows

Article 162

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- (a) employment and labour relations; and**
- (b) the environment and the use and occupation of, and title to, land.**

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Section of Employment and Labour Relations Court Act

12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) disputes between an employer and a trade union;**
- (c) disputes between an employers' organisation and a trade union's organisation;**

- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

The Employment Act defines an employee as –

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

The Act also defines a contract of service as –

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

The Claimant attached several salary vouchers at Exhibit 1 of his affidavit sworn on 18th December 2019. He further annexed a letter dated 26th November 2019 in which he was advised by the 1st Respondent of change of his work station.

In the Respondents' replying affidavit sworn by Bishop Rev. Joseph Ntombura Mwaine, Exhibit “JN2” is a letter of appointment as Synod Bishop addressed to the Claimant.

The letter of appointment and salary vouchers are sufficient proof of employment relationship in terms of the definition in Section 2 of the Employment Act as they establish the existence of an employment relationship. In this respect, this court is clothed with jurisdiction in this matter.

The second ground in support of jurisdiction is that the Standing Order 116(3) of the Methodist Church ousts the jurisdiction of this court. Standing Order 116 provides –

“S.O. 116, - DISPUTE RESOLUTION

1. New Testament Spirit

The Methodist church shall always embrace the spirit of the New Testament teaching to reconcile its members to live in harmony and order as the body of Christ. The discipline of our church shall be informed and be guided by the Bible as taught and practiced by our Lord and Saviour Jesus Christ and the apostles thereof as seen in, 1 Corinthians. 6:1-8, 2 Corinthians 5:18-20 and Matthew 18:15-20.

2. Reconciliation

Members shall be guided by the scripture to resolve disputes. Guided by the above, if any member or Minister of the Methodist Church in Kenya takes the Church and or institution to court over any issue without following the laid down Church machinery and having not exhausted the provided biblical guideline shall be considered a betrayer of their own faith and shall be excluded from the church membership forthwith. In case of Secondment, it shall be withdrawn with immediate effect.

3. Legal Proceedings

No legal proceedings shall be instituted by any formal or informal structure or grouping of the Church or any Minister or any member of the Church, acting in their personal or official capacity, against the Church or any formal or any informal structure or grouping of the Church, Minister or Member thereof for any matter which in any way arises from or relates to the Mission work, activities or governance of the Church.

4. Legal Entities

Any legal proceedings and legal action by or against the Church shall be Instituted in the name of the MCK Trustees. Registered who shall sue and be sued in their representative capacity on behalf of the church and that no individual either in their personal or acting capacity, or group or institution under the Methodist Church in Kenya has legal basis to sue or be sued.”

The Respondent also refers to Standing Order 81(3)(c) and 106(1)(g) and (h). Standing Order No. 81 has only subsection (1) and (2) while Standing Order 106(1) only has (a) and (b). the Standing Orders referred to by the Respondent other than 116(3) are therefore non-existent.

From the wording of the Standing Order 116(3) it would appear that there is total ouster of jurisdiction of courts.

Article 50(1) of the Constitution provides as follows –

50. Fair hearing.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 24 provides for limitation of rights and fundamental freedoms as follows –

24. Limitation of rights and fundamental freedoms.

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

The Respondent has justified the ouster of the court’s jurisdiction on grounds that alternative dispute resolution is recognised under Article 159(2)(c) of the Constitution which provides –

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

The Respondent relies on the case of **Andrew Inyolo Abwaza v Board of trustees of Pentecostal Assemblies of God-Kenya & 3 Others** where the High Court relied in the decision in the English case of **Forbes v Eden (1867)** in which the court opined as follows –

"There is no jurisdiction in the Court of session to reduce the

*rules of voluntary society or indeed to inquire into them at all, except so far as may be necessary for some collateral purpose." The court also cited the case of **Hinga & Another v P.C.E.A Trough Rev Njoya & Another 1966 KLR** where Aluoch J., (as he then was) stated as follows, "in fact those church courts are vested with powers to suspend church a minister, investigate him etc." The Court went ahead to hold as follows, "the plaintiff has failed to exhaust the dispute resolution machinery of the 1st defendant church. He accordingly had no cause of action in the court which has no jurisdiction to hear him in matters he has complained about herein which are in the domain of the church's dispute resolution machinery. Put differently the plaintiff's complaints as pleaded in his plaint are not justiciable. His coming to Court with this case in general is premature and outside of his church's constitution."*

The Claimant on the other hand submitted that where parties might have an agreement purporting to oust the jurisdiction of the courts, it is a well-settled general rule that such agreements are prohibited, and that a court called upon to determine whether it has jurisdiction should lean against a construction which would purport to oust its jurisdiction in such circumstances. The Claimant relied on the case of **Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank [1999] eKLR** as the authority for this proposition.

The Respondents did not avail the authorities it has relied upon to the court to enable it consider the same. Be that as it may, it would appear that in the case of **Andrew Inyolo Abwaza**, there was a dispute resolution machinery which had to be exhausted before the parties could approach the courts. In the instant case, the Respondent has not referred the court to any alternative dispute resolution machinery within the Standing Orders of the Respondent. And even if the Standing Orders provide for the same, this would only be the preliminary or first level of dispute resolution so that if parties do not reach settlement at that level the aggrieved party would still have the right to move the courts. Standing Order 116(3) does not refer to any internal dispute resolution procedure and totally ousts jurisdiction of courts. It is thus unconstitutional.

As provided at Article 2 of the Constitution of Kenya, the Constitution is the supreme law and binds all persons. Any law inconsistent with the Constitution is void to the extent of the inconsistency and therefore is invalid. I find Standing Order 116(3) of the Methodist Church in Kenya inconsistent with Article 24 and 50 of the Constitution of Kenya and therefore void and invalid by virtue of Article 2 of the Constitution.

The other ground in the preliminary objection is that the Claimant lacks *locus standi* to prosecute this suit on account of the expiry of his employment as Bishop of Nairobi on 31st December 2019. In the first case, this suit was filed on 18th December 2019 when the Claimant was Bishop. Secondly, the expiry of the Claimant's contract is part of the issues in dispute in this case that is for determination by this court. Needless to say, this is a matter that does not qualify to be brought or argued as a preliminary objection as stated in the celebrated case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA 696**.

For the foregoing reasons all the grounds in the preliminary objection by the Respondents fail and the same is accordingly dismissed. The corollary is that this court has jurisdiction to determine this matter.

Contempt of Court

It is the Claimant's averment that the Respondents are in contempt of this court's orders of 18th December 2019 and 24th January 2020. On 18th December 2019 the court granted the Claimant orders as follows –

1. *That the application is certified urgent and fixed for hearing on 20th February 2020.*
2. *That the letter dated 26th November 2019 is suspended pending inter partes hearing of the application.*

The court again granted the Claimant orders as follows in respect to his application dated 23rd January 2020 –

1. *That the application is hereby certified urgent.*
2. *That a temporary stay is hereby granted staying the installation of Bishop John Marumba as Bishop of the Nairobi Synod of The Methodist Church of Kenya on the 26th January, 2020 or any other date or at any other places whatsoever pending the interpartes hearing of this application.*
3. *That the application is fixed for interpartes hearing on 6th February, 2020.*
4. *That these orders to be served with a penal notice and to be served through the OCPD Kabete and OCPD Kasarani respectively where the office of the Synod is situated and where the Installation is to take place.*

It is the Claimant's averment that the Respondents should not be given any audience until they have purged the contempt in question. That the terms of the order made on 18th December 2019 were clear in that the Order suspended the Respondents' letter dated 26th November 2019. That the said letter was itself clear in its terms and was notifying the Claimant of his transfer to the MCK Mogonga Circuit within the Western Kenya Synod with effect from 1st January 2020, and his demotion to a Superintendent Minister.

The Claimant avers that the terms of the Order made on 24th January 2020 were equally clear in that the Order stayed the installation of Bishop John Maromba as Bishop of the Nairobi Synod of the Methodist Church in Kenya. That both Bishop Ntombura and the 1st Respondent had proper notice of the terms of the two Orders.

The Claimant contends that the terms of the two Orders have been broken by the said Bishop Ntombura and the 1st Respondent. That the breaking of the terms of the two Orders was wilful in that: -

a. On 2nd January 2020, the Claimant was physically and violently ejected from office by employees, servants and/or agents of the said Bishop Ntombura and of the 1st Respondent and that there is no Affidavit on the record by or on behalf of either of the Respondents to refute the matters regarding the Claimant's ejection from office; and

b. On 26th January 2020, the said Bishop Ntombura and the 1st Respondent went ahead and installed Bishop John Maromba as Bishop of the Nairobi Synod.

The Respondents submit that they have never deliberately disobeyed orders of this court including orders granted on 18th December 2019 and 24th January 2020. It is further the averments of the Respondents that Rev. John Maromba was not installed as Synod Bishop of Nairobi MCK on 26th January 2020 as alleged by the Claimant.

That on 26th January 2020 what happened was a thanksgiving service as demonstrated by the Respondent's order of service for 26th January 2020 annexed as Exhibit "JN2" to the replying affidavit of Bishop Rev. Joseph Ntombura Mwaine. It is further the Respondents' averment that there is no evidence of service of the orders of 18th December 2019 or 24th January 2020, the subject of the contempt applications, upon the Respondents. Further that the committal proceedings herein were not served upon either of the Respondents or the Presiding Bishop.

It is trite law that contempt proceedings, being quasi criminal in nature which if proved may lead to the loss of liberty to the contemnor, must be proved beyond the test in civil cases being "on a balance of probability". The test must be almost, though not to the level of "beyond any reasonable doubt" as in criminal cases. This was succinctly illustrated by Mativo J. in the case of **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi (2016) eKLR** as follows –

*"Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of **Gatharia K. Mutikika v Baharini Farm Ltd** where it was held as follows:*

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"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases, it is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge..."

Mativo, J in **North Tetu** further states that:

"Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order ..."

The Court of Appeal in **Woburn Estate Limited v Margaret Bashforth (2016) eKLR** stated as follows:

*"This Court in two recent successive decisions in **Christine Wangari Wachege (supra)** and **Shimmers Plaza Limited (supra)** explained in extenso the procedure in commencing and prosecuting an application for contempt of court under the English Civil Procedure Rules, 1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question. Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service. There has been little change in this requirement since the decision of this Court in **Ochino & Another v Okombo & Others [1989] KLR 165**. The court may also make an order in respect of service by alternative method or at an alternative place.*

In the matter before us, the appellant has alleged that the order was not served personally on it nor was there dispensation with such service. The respondent's answer to this was that, as a lay person she is not versed in legal procedures. It is therefore uncontroverted that the judgment of 16th April 2013 and the order of 31st March 2014 were not served on the appellant."

There is an affidavit of service annexed to the affidavit of the Claimant sworn on 23rd January 2020 to the effect that the orders were served upon the Presiding Bishop at Methodist Church Lavington who is not identified by name. In any event, the orders granted were to the effect

that the letter dated 26th November 2019 was suspended pending inter partes hearing of the application.

The Claimant's averments in respect of disobedience of the orders

of 18th December 2019 are that he was evicted from the Synod Office on 2nd January 2020. Although the application dated 18th December 2019 seeks orders restraining the Respondents from demoting, removing, transferring, disciplining or in any other manner changing the employment status of the Claimant and further seeks orders restraining the Respondents from restricting the Claimant's access to or interfering with the residential leased premises occupied by the Claimant, when Counsel Ms. Makori for the Claimant appeared before the court on 18th December 2019, holding brief for Kelvin Mogeni, she only sought the prayers as granted by the court in the interim, that is, stay of the letter dated 26th November 2019. There were therefore no orders with respect to eviction from office or residential premises capable of being disobeyed as no such orders had been issued by this court.

With respect to the orders of 24th January 2020, the affidavit on the court file shows that it was served upon Rev. Joseph Ntombura, the 2nd Respondent herein was personally served.

In the application dated 19th February 2020, the only evidence adduced by the Claimant in support thereof is the Nairobi Synod Bishops Work Programme for the period 1st January to 30th April 2020, a copy of Board notices and photographs. The Claimant avers that this is evidence of installation of Bishop John Maromba as Bishop of Nairobi Synod of the Methodist Church of Kenya. The Respondents deny that there was any such installation and that after receiving the court orders, what took place was a thanksgiving ceremony.

The evidence on record is not sufficient to distinguish between an installation and a thanksgiving ceremony. The Claimant did not explain what was taking place in the scenes captured in the photos. The photos do not indicate the person who took them and the date. I do not find these to be sufficient evidence to prove that there was installation of Bishop Maromba as Bishop of Nairobi or evidence that controverts the averments of the Respondents to the effect that they abandoned the installation and instead held a thanksgiving ceremony. I find no proof of disobedience of this court's orders of 24th January 2020.

The final application for determination is the one dated 18th December 2019 wherein the Applicant seeks injunctive orders as set out on the face thereof.

The Claimant did not make any submissions in respect of the application while the Respondent submitted that the balance of convenience tilts against granting the orders.

It would appear from the submissions and affidavits of the parties that the orders sought in the application have since been overtaken by events. It is further evident that the Claimant's tenure as Bishop of Methodist Church Nairobi Synod expired on 31st December 2019. He has admitted that elections for the office of Bishop of Nairobi were held at the Annual Conference that took place between 20th and 24th August 2019. The Claimant's complaint is that the elections, at which he lost to Bishop Maromba, were irregular. His other complaint is about disciplinary process against him that were ongoing. These are matters that can be dealt with by the court without having to grant the orders sought in the application.

The test for grant of injunctive orders as set out in the case of **Giella v Cassman Brown (1973) EA** are that there must be a prima facie case, that the Applicant will suffer irreparable injury and if in doubt, on a balance of convenience.

In the instant case the Claimant would have to demonstrate at the hearing that the elections were irregular and that there is disciplinary action that has been taken against him that is in contravention of the law. As of now, no prima facie case has been demonstrated by the Claimant in respect of the irregularity of either the elections or the disciplinary process.

In conclusion therefore all the three applications filed by the Claimant fail with the result that they are dismissed. The preliminary objection also fails as had already been stated herein above. Costs for the applications and the preliminary objection shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE