



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
CAUSE NUMBER 95 OF 2016

BETWEEN

WILSON SHISIA NYANGWESO
CLAIMANT

VERSUS

CHURCH OF GOD IN EAST AFRICA (K) RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Wachenje Advocate, instructed by Lumatete Muchai & Company Advocates for the Claimant

Mr. Muranje Advocate, instructed by Muranje & Company Advocates for the Respondent

RULING

1. A Man of God, Pastor Wilson Shisia Nyangweso, filed the Claim herein on the 12th February 2016. He prays for the following orders in the main Claim:-

- i. A temporary injunction restraining the Respondent, its agents or assigns, from installing a new Pastor in the Respondent's Kongowea Church of God in Mombasa.
- ii. A temporary injunction restraining the Respondent, its agents or assigns, from evicting the Applicant from house situate at Kongowea on Plot No. 4324.
- iii. Costs of the Claim together with interest thereon and interest on (ii) above at Court's rate.
- iv. Any further relief this Honourable Court may deem just.

2. Filed together with the Statement of Claim is a Notice of Motion seeking interim measures. This application is the subject matter of today's Ruling. The Application seeks in main, the following orders: -

1. A temporary injunction restraining the Respondent, its agents or assigns from installing a new

Pastor in the Respondent's Kongowea Church of God in Mombasa, pending hearing and determination of this Application.

2. Similar order as in (i), pending hearing and determination of the Claim.
3. A temporary injunction restraining the Respondent, its agents or assigns, from evicting the Applicant from the house situate at Kongowea on Plot No. 4324 pending hearing and determination of the Application.
4. Similar order as in (iii), pending hearing and determination of the Claim.
5. In the alternative, a temporary injunction do issue restraining the Respondent, its agents of assigns , from installing a new Tenant in the house situate at Kongowea Plot No. 4324, pending hearing and determination of this Application.
6. A temporary injunction restraining the Respondent from withholding the Applicant's monthly salary while on suspension, pending hearing and determination of this Application.

3. The Respondent filed its Replying Affidavit on 23rd February 2016. The Affidavit was sworn by the Church Overseer, the Reverend Didimu Nyongesa, on 22nd February 2016. The Statement of Reply to the Claim was filed on 18th February 2016.

4. The Claimant appeared in Court *ex parte*, under certificate of urgency, and was granted the interim order barring the Respondent from installing a new Pastor. The prayer relating to the Claimant's occupancy of the Church house has been abandoned. The Claimant states he had been evicted by the time he came to Court. The Respondent confirms the Claimant no longer occupies the house, but was not evicted: he left of his own volition. Hearing of the Application *inter partes*, took place on 24th February 2016.

Applicant's position

5. Pastor Nyangweso states he was made Associate Pastor by the Respondent, on 1st July 2014. On 6th November 2015, he received a letter from the Respondent's Director of Human Resources, sending him on compulsory leave. He was advised this was to allow the Respondent to investigate into '*integrity and moral conduct*' of the Claimant's person.

6. The decision to suspend the Claimant and replace him with a new Pastor, he submits, is contrary to the Church Constitution. Under Article 6.0.2 (m) the decision of the Executive Council on behalf of the General Assembly, must be through the Church Relations, Arbitration and Disciplinary Committee, and must be ratified by the Annual General Assembly.

7. The decision to place the Claimant on compulsory leave is contrary to the Respondent's Constitution. Article 23.0.11 contemplates only 6 kinds of leaves: annual leave; sick or medical leave; maternity leave; compassionate leave; special leave; and study leave. Compulsory leave is not contemplated.

8. Rule 5 (b) (v) of the Bye- Laws for General Assembly Region Regions, Areas/ Special Districts, Normal Districts and Local Congregations of the Church of God in East Africa, requires disciplinary matters are placed before the Disciplinary Committee. The Disciplinary Committee refers the matters to the Pastor's Committee. This was not done with regard to the Claimant, which renders the decision by the Respondent null and void.

9. Pastor Nyangweso states he was not heard before termination. The Respondent intends to replace the Claimant as the Pastor of the Kongowea Church, without having given the Claimant the opportunity to be heard.

10. He submits he has demonstrated to the Court interim injunctive measures are merited. He has brought his Application within the principles of *Giella v. Cassman Brown*. If interim measures are not availed to him, he stands to suffer irreparable loss, incapable of being compensated by an award of damages.

11. He did not know what moral issue was being investigated. The Employment Act requires charges in an employment disciplinary cases are precise. The investigation process, he complains, appears to be open-ended. The Respondent states it has initiated a criminal process against the Claimant, and pegs the disciplinary process to the criminal one. The Parties have no control of the criminal process. Investigations have taken over 3 months. The Claimant does not receive his salary, even through only under suspension. Investigations by the Respondent against the Claimant should be for a specific period. Suspension cannot be indefinite. The balance of convenience favours the Claimant. There is a presumption of innocence under the criminal process. The assertion by the Respondent that the Claimant is a threat to the Children at the Respondent's Church and School is irrelevant to the Application. The Church Constitution provides for an internal dispute resolution mechanism. It is for the Church, not its Employees/ Members, to initiate that mechanism. The Church has failed to do so with regard to the Claimant. The Respondent is bent on constructively dismissing the Claimant. The Claimant urges the Court to offer him protection in terms of his Application.

Respondent's position

12. The Respondent adopts its Replying Affidavit, which was sworn by the Rev. Didimu Nyongesa. It is submitted by the Respondent that the Claimant moved out of the Church house voluntarily. There were reasons why he did so. He did not disclose these reasons to the Court, on filing his application. He obtained the *ex parte* orders without making full disclosure

13. The Claimant failed to disclose that he is alleged to have defiled a Child who goes to school within the Church compound. The Child attends the same Church where the Claimant was the Pastor. Her Parents worship at the same Church. The Claimant's moral conduct is a danger to the Children. He would not continue to be safe within the Church Community. He did not disclose to the Court that he faces the allegation of defilement of a minor. This is material non-disclosure, which led the Court to issue an interim injunction, barring the Respondent from bringing a new Pastor to Kongowea. On this score alone, he is not entitled to the order of injunction.

14. It is not possible to conduct investigations into the allegations against the Claimant as he continues to serve. He was sent on compulsory leave, to enable the Church conduct meaningful investigations. It would not be prudent to let the Claimant continue to minister, while the investigations are carried out.

15. If the Claimant has a valid dispute with the Church, he should invoke the Internal Dispute Resolution mechanism. The mechanism is well provided for under Article 14 of the Church's Constitution. The Claimant says he has a legitimate complaint against the Church. He has not set in motion at all, the internal dispute resolution mechanism. Until this mechanism is exhausted, he has no business in approaching the Court. Issues about the compulsory leave and about the possibility of another Pastor replacing him are complaints which ought to be addressed through the internal dispute resolution mechanism. If the issue of eviction is still alive, it should similarly be addressed through the same mechanism.

16. The Claimant is mixing up issues. He was placed on compulsory leave for a specific purpose. The process is underway. It is only on completion, that it will be determined, if his expulsion should ensue. He talks about suspension and termination. No termination has taken place.

17. There is no prima facie case with the probability of success, shown by the Claimant. His main prayers are for temporary injunction. A temporary injunction cannot be a final order. A temporary injunction is sought by way of the main Claim, pending what?

18. Non-payment of dues is not ground for granting an injunction. Salaries are definite amounts, which can be pursued in the main Claim. The balance of convenience is by far against the Claimant. The

Respondent comprises a number of Churches, with numerous Pastors. The Pastors are subject to transfer. They can serve any Church. There is no basis to stop Kongowea Church from having another Pastor in the interim. The replacement involves mere transfer, not appointment of a Pastor to discharge the Claimant's role, as the Claimant is investigated. Appointment of a Pastor is tedious, involving the ordaining of a Pastor. No injury will be occasioned to the Claimant as he remains a Pastor.

19. Kongowea Church of God, one of the Respondent Churches, has a congregation of more than 300 Church Members. The Claimant's conduct has already affected the Members. Members could feel they need to leave the Church altogether. The Claimant's conduct has resulted in reputational damage to the Church. The Church suffered and continues to suffer. There is a School within the Church compound, with over 250 Pupils. The Claimant worries what is happening to him, will affect his family adversely. What happens to the 250 Children in the School if the Claimant is granted his wish to continue ministering? Injunction would affect all these Members of the Respondent's Community. The Respondent submits there is no prima facie case shown with a probability of success. Unpaid salary can be recovered. The Claimant does not stand to suffer irreparable damage, while his conduct has resulted in profound damage to the Church. The Respondent prays the application be dismissed, with costs to the Respondent.

The Court Finds:-

20. The first issue the Court must deal with is whether there is a prima facie case shown by the Claimant, with the probability of success. He has prayed for temporary injunction as his substantive prayer. This, even without looking into the other aspects of the application, makes his case, in the respectful view of the Court, stillborn. Temporary orders cannot issue as final orders.

21. There are in main, 2 temporary orders sought in the Claim: to restrain the Church from installing a new Pastor; and to restrain the Church from evicting the Claimant. The latter order has been compromised, because the Claimant, either by compulsion or own volition, is no longer residing in the Church house. The first order is improper, because the Court does not issue temporary orders upon hearing the Parties in full; final orders are meant to be fully dispositive of the issues in dispute. Without the 2 temporary orders, the Claim is on costs, and interest on the prayer for eviction, plus any other suitable relief. The Court does not see what the prayer on eviction [ii], has to do with 'interest at Court rates'. This Claim is bad in law. The Claimant has not shown that he has a prima facie case. The final orders sought are not final; they are temporary and therefore not awardable. Essentially the entire Claim is one long application for a temporary injunction.

22. Pastor Nyangweso is faced with very serious allegations of deflowering one from his flock. He is alleged to have defiled a Child of 6 years. He is under internal investigations by the Church, and external investigations carried out by the Police. The Child he is suspected of deflowering is a Worshipper in the Claimant's Church. She is a Pupil at the School which operates under the wings of the Church. The School shares the same compound with the Church. There is the likelihood the Children and Parents at the School and the Church are traumatized by the continued presence of the Claimant within the Respondent's premises.

23. It is impossible that even as he fights to clear his name, the Claimant would find any attentive Church Member listening to his gospel. The Constitution of the Church of God demands its Members adhere to holiness of life and conduct, walking the talk and preaching what they live. Church-goers and all the impressionable minds going to School within the Church, will find it hard to believe the Claimant is walking the talk, and preaching what he lives. He has fallen, in the eyes of the Church Community. At the moment, the Claimant remains fallen. While no one has judged him to be a defiler, the perception is that he is one. He must fight, and be given space to fight, to restore his high sense of morality and integrity, virtues which saw him ordained as a Man of God. But the Church Community must be protected, and the Children protected from the possibility of further violation. They must be protected from the likelihood of further physical violation and psychological trauma, the continued presence of the Claimant at the Institution portends. The Court is totally persuaded that in considering this application, the interest of the Child shall be the primary concern. The interest of the Child who complains she was defiled by her Pastor, and the interest the other over 200 Children attending the Kongowea Church and

School, is paramount. They must not be left to feel there is a wolf among them, as they school and worship. The balance of convenience is clearly in favour of rejecting the Claimant's pursuit of continued stay in the Church.

24. It was correctly submitted by the Respondent that the Claimant has not been defrocked. He has not been ex-communicated. All he has been asked to do is step aside. He remains an ordained Church Minister. The Respondent does not intend to ordain another Pastor, to fill the gap left by the Claimant's unavailability. It is allowed through its Constitution, to transfer Pastors from one Church to another. It intends to have another Pastor transferred to Kongowea as a stop-gap measure. Such a measure does not result in an irreparable injury occasioned to the Claimant. It is a necessary measure, for the work of the Institution to continue.

25. The Respondent has an internal dispute resolution mechanism, under Article 14.0.0 of its Constitution. Sub-section 4 provides that a Church Member wishing to lodge a complaint shall do so through a letter addressed to the Church Arbitration and Disciplinary Sub-Committee of the Church Relations, Arbitration and Disciplinary Committee. The proceedings of the Sub-Committee are reported to the Committee for determination. The decision is forwarded to the Executive Council for appropriate action.

26. The Court is of the view that complaints such as those brought before the Court by the Claimant Pastor, are intended to be taken through the internal grievance handling and arbitration process. It is not correct that the internal process should have been initiated by the Church. It is the Claimant who has complaints about his treatment by the Church, necessitating his filing of the Claim in Court. His complaints as contained in this Claim should properly have been taken through the procedure under Article 14 of the Constitution of the Church. The issues revolving around his suspension; the replacement by another Pastor; withholding of his salary; and eviction from the staff house, are complaints by a Church Member contemplated under Article 14. The Church has complaints against the Claimant and has initiated the disciplinary process by suspending the Claimant. The alleged crime has been reported to the Police. The Claimant complains in making its decisions against him, the Church has wronged him. He should have these perceived wrongs addressed through the same internal mechanisms through which he has been suspended.

27. Churches and other religious Institutions encourage their Members to shun resolving their disputes in Secular Institutions. Courts are secular. Article 14, subsection 6 [c] of the Respondent's Church Constitution, makes clear the intention of the Church, in espousing the internal dispute resolution mechanism. It states that a Church Member may be ex-communicated for instituting any proceedings in Courts or Tribunals against the Church, in contravention of the provisions of the Church Constitution.

28. In *the Industrial Court at Nairobi Cause Number 415 of 2011 between Obadiah K.M. Ng'ang'ira v The Presbyterian Foundation & Another*, the Court found this preference for internal dispute resolution mechanism is rooted in scriptural teachings. The scriptures admonish Faithfuls who file their disputes before secular Judges. The use of the internal mechanism has support under Article 159, the Constitution of Kenya.

29. There is no good ground why the Claimant has skipped the internal mechanisms and come directly to the Court. He should invoke those mechanisms in pursuing his civil rights, even as he fights the non-arbitrable criminal allegations at other Law Enforcement Agencies.

30. The Court is not able to find any fault with the letter sending the Claimant on compulsory leave. The Claimant was not prejudiced by being sent on compulsory leave, while the Church Constitution does not provide for such leave. There is a provision for immediate suspension of a Member under Article 4.2.3 [e], in event of gross misconduct. The term 'compulsory leave' and 'suspension' denote an Employee is under administrative leave, pending investigations about his conduct. Use of one term in place of the other has not prejudiced the Claimant. If the Claimant feels suspension has taken too long, his recourse lies in the internal mechanism as pointed out above.

31. He did not show to the Court any provision under the Church Constitution, which allows him to continue earning any salary while under investigation for defiling a minor. The Court is not able to say he should be earning his full salary, or a portion of it, as he serves suspension. It would be advisable for the Church to note that in event the Claimant is absolved of the allegations against him, he will be entitled to claim his salary backdated to the date he was suspended. It should be noted he remains an Employee of the Respondent, and until his contract is terminated, he would be entitled to claim his salary.

32. In all the Court is satisfied the Claim is defective. Temporary orders are sought as the final orders. The interests of the affected Children by far outweigh those of the Claimant, in considering this application. The Claimant is not irreparably harmed by rejection of the orders sought. The Church and its Members would suffer reputational, psychological and possible physical harm, by the continued stay of Pastor Nyangweso. The Pastor has not been defrocked or ex-communicated, but merely suspended, as evidence of defilement and gross misconduct is processed at various levels. His replacement, in the interim, is necessary if the work of the Church is to go on. Such replacement also affords the Claimant protection from the Members of the Church who may wish to take the law into their own hands, perceiving the Claimant to have gone against the community's moral, religious and ethical standards. IT IS ORDERED:-

- a. ***The application by the Claimant dated 10th February 2016 is rejected.***
- b. ***The entire Claim is improperly before the Court and is hereby struck out, with costs to the Respondent.***

Dated and delivered at Mombasa this 15th day of March, 2016

James Rika

Judge