



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2054 OF 2013

BISHOP BAKARI KEA.....CLAIMANT

VERSUS

**THE EVANGELICAL LUTHERAN CHURCH OF KENYA (ELCK) through
ARCH-BISHOP RT. REV. DR. WALTER OBARE OMWANZA.....1ST RESPONDENT**

REV. BENJAMIN LEMOSI.....2ND RESPONDENT

JOSEPH MUCHIRI.....3RD RESPONDENT

RULING

This file was reconstructed by an order of this Court made on 26th May 2014 pursuant to Miscellaneous Application No. 47 of 2014 by the Claimant. The original file went missing some time after the ruling on a preliminary objection filed by the Respondents which was dismissed. The Respondent had sought leave to appeal against the ruling on the preliminary objection and was waiting for issuance of certified proceedings and ruling at the time the file went missing.

Background

The Claimant approached the Honourable Court vide an application dated 19th December 2013 under certificate of urgency on grounds that his position as Bishop ELCK Central Diocese was unfairly jeopardized by the Respondents. Before the Respondents put in their reply, they raised a preliminary objection challenging the jurisdiction of this Court to hear and determine the case. The said preliminary objection was canvassed vide written submissions and a ruling dismissing the objection was delivered on the 12th day of February, 2014. The Respondents applied for and were granted leave to appeal against the ruling. The original file has since gone missing. The Claimant asserts that there were conservatory orders to the effect that he (the Claimant) was to remain Bishop ELCK, Central Diocese pending the filing, hearing and determination of the appeal, and the original file disappeared while he was in the process of extracting those orders, while the Respondents deny that there were such orders, hence these submissions.

I directed both counsels to file affidavits on the issue. Mrs. Kimotho, counsel for the Claimant filed her affidavit dated 12th August 2014 while Mr. Ochich, counsel for the Respondents filed his affidavit of 20th September 2014. Parties thereafter filed written submissions.

Mrs. Kimotho annexed additional documents to her submissions which were filed on 24th November 2014. Mr. Ochich also annexed two letters, both dated 14th February 2014, to the submissions filed on behalf of the Respondents on 8th December 2014.

While highlighting their submissions in court both counsels the positions in their respective affidavits and written submissions. Mrs. Kimotho for the Claimant insists that on 12th February I allowed the Respondents' application to appeal and at the same time granted conservatory orders to the Claimant. Mr. Ochich for the Respondents on the other hand deponed in his affidavit sworn on 30th September 2014 that he has no recollection of the Court making any pronouncements in respect of conservatory orders on 12th February 2014. The Court is placed in the unenviable position of trying to fathom the elusive truth between the two positions taken by the parties. Unfortunately I do not have the Solomonic wisdom to unravel the truth which is buried somewhere in the missing file.

This being the position the Court is left with only one option, to fall back on the inherent powers of the Court to do substantive justice. In this respect I will fall back on the only order on record which was granted by this court in respect of the conservatory orders to be the starting point.

On 19th December 2013 the Court granted orders as follows:

1. That the application dated 19th December 2013 shall be served upon the Respondents.
2. That Respondents shall file and serve their grounds of opposition/replying affidavits within 7 days of service.
3. That mention for further orders on 27/12/2013 before the Judge on duty.
4. That in the meantime, Respondent's resolution made on 16th December 2013 is stayed until the further orders of the Court.

There is no record of any other orders made after the date of this order. In view of the position taken by the parties with regard to what transpired after these orders were made, I direct that the orders of 19th December 2013 be deemed to be the last orders in respect of the conservatory orders.

I further order that the Respondents' resolution made on 16th December 2013 be and are hereby stayed pending the hearing and determination of the Claimant's application dated 19th December 2013. The orders made on 16th May 2014 restraining the Respondents themselves, their organs, structures, servants, agents from carrying out any elections with regard to ELCK Central Diocese pending hearing and determination of Claimant's application dated 15th May 2015 are also extended pending hearing and determination of the said application.

Parties are directed to take a date on priority basis for hearing of the two applications.

Due to the many applications pending in this file, parties are advised to consider staying all the applications in favour of taking a hearing date for the main suit for a final determination.

Dated this day of 2015

MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 29th day of October 2015

HELLEN WASILWA

JUDGE