



Case Number:	Civil Suit 9 of 2014
Date Delivered:	08 Dec 2015
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Ruling
Judge:	Enock Chacha Mwita
Citation:	Festis Laiso & another v Samuel Y Mulati & 6 others [2015] eKLR
Advocates:	none mentioned
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dated 14th April, 2014 declined and dismissed with costs to the Respondents
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL SUIT NO.9 OF 2014**

**FESTIS LAISO .....1<sup>ST</sup> PLAINTIFF**

**JOHN MUTORO .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL Y. MULATI .....1<sup>ST</sup> DEFENDANT**

**BEN MASIKA ..... 2<sup>ND</sup> DEFENDANT**

**ENOCK B.P.L. MUKONYI .....3<sup>RD</sup> DEFENDANT**

**JOSEPH MASINDE .....4<sup>TH</sup> DEFENDANT**

**SAMWEL WALTER MBOLI .....5<sup>TH</sup> DEFENDANT**

**JOSEPH WEKESA ..... 6<sup>TH</sup> DEFENDANT**

**JAIRO MUKANGAI ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

This is a notice of motion dated 14<sup>th</sup> April 2014, brought by *Festus Kausi and Johnson Mutoro* (The applicants) suing on behalf of *Church Group of Light* against *Samuel Y. Mulati* and Six other respondents. The motion premised under *Order 40 rules 1 and 2* of the Civil Procedure Rules 2010 and *sections 3 and 3A* of the Civil Procedure Act, (Cap 21), Laws of Kenya, seeks temporary injunction restraining the respondents, their agents, assignees, representatives and or any other person acting on their behalf from representing themselves as officials of the Church Group of Light.

The application is based on the grounds appearing face of the motion among them the grounds that the Church has its official constitutional office holders; that the respondents have secretly filed a Notice of change of officials of the Church threatening to overthrow the lawful officials; that the Church has not conducted elections to replace its officials with the respondents as per its Constitution and the respondents have grossly violated the said Constitution. Further grounds are that the Notice of change of officials through which the respondents registered themselves as officials of the Church was obtained unlawfully and fraudulently and the respondents are threatening to assume office any time and halt religious objectives of the Church. The applicants therefore plead for the orders they seek.

The application is supported through an affidavit by Festus Kausi the 1<sup>st</sup> applicant in which he depones that the Church is a legally registered society having been so registered under Registration Certificate No.10096 which is annexed as annexure 2, According to him, the office bearers of the Church are Festus Kausi the High Priest, Alexander Mukulo, Assistant High Priest, Johnston Mutoro General Secretary, James Akula Assistant Secretary and Joseph Karungani Treasurer. The 1<sup>st</sup> applicant says that since the registration of the Church he has been the High Priest together with the other officials

and they have been filing returns with the Registrar of societies as required by law.

The 1<sup>st</sup> applicant further depones that when the 2<sup>nd</sup> applicant presented returns for filing on 24<sup>th</sup> March 2014, for the year 2013, he discovered that the respondents had filed a Notice of change of office bearers and fraudulently changed the office bearers of the Church. They then instructed their advocate to write a letter to the Registrar of societies to complain and protest against the notification of change of office bearers filed by the respondents. The deponent further states that the Church has never changed its officials or had them removed from office. He depones that the only way the officers of the Church can be removed is through an election in accordance with the Constitution of the Church which the Church has not done. The 1<sup>st</sup> applicant further depones, that as the High priest, the only way he can be replaced is upon death or resignation which is not the case here. He says that the respondents have short changed the leadership of the Church and are holding themselves out as officials of the Church which is an illegal act that should be restrained.

The application is opposed. The respondents have filed a replying affidavit sworn on 26<sup>th</sup> May 2015 through *Jairo Mukangai*, the 7<sup>th</sup> respondent herein. The respondents have deponed that the 1<sup>st</sup> and 2<sup>nd</sup> applicants and others left the Church and formed a splinter group. The respondents state that they have their Church on a separate Parcel of land, being Parcel of Land No. Kabras/Matsakha/333, while the applicants have their Church on Parcel No. N. Kabras Matsakha/397, and that the two churches have independent Constitutions, High Priests and set of leaders. According to the respondents, there are two distinct churches with distinct congregations, and the only question that is available for determination is who is entitled to the exclusive use of the name "*CHURCH GROUP OF LIGHT*". The respondents aver that they own the name having acquired registration lawfully after the 1<sup>st</sup> applicant reported that he had lost the original certificate of registration leading to a new one being issued to the respondents.

The respondents are of the view that the application before court, is merely meant to cause confusion and should be dismissed as it serves no purpose. Both sides agreed to dispose of the application by way of written submissions which are on record and which the court has considered.

I have carefully considered the application, supporting affidavit, responses thereto and submissions by counsel. The 1<sup>st</sup> and 2<sup>nd</sup> applicants said to be officials of the Church Group of Light have brought this application seeking to restrain the respondents from presenting themselves or holding out as officers of the Church. In other words the applicants are seeking an injunction against the respondents whom they accuse of presenting themselves to the worships and members of the Church as the *bona fide* officials or officers of that Church. According to the applicants, the respondents filed a notification of change of officers of the Church on 17<sup>th</sup> March 2014 with the Registrar of Societies seeking to replace the applicants as officers of the Church in question. On discovering this, the applicants held a meeting on 4<sup>th</sup> April 2014 and resolved to challenge that notification of change, saying that they had not held an election, thus officials of the Church had not been replaced.

The respondents on their part have held the position that they are the lawful officers of their Church which is distinct from that of the applicants, that they hold their prayers in a distinct church premises and have a different congregation from that of the respondents. It is their position that they have not done anything wrong to warrant grant of the orders sought.

This being an application for injunction, it is the duty of the applicant to establish that it has a prima facie case with a probability of success, that if the injunction sought is not granted the applicants will suffer irreparable loss that cannot be compensated by an award of damages or that the balance of convenience tilts in their favour. – See (*Grella Casman & Brown & Co Ltd [1973] EA 358*).

The 1<sup>st</sup> and 2<sup>nd</sup> applicants have alleged that they are the officials of the Church Group of Light but have not attached a search from the Registrar of Societies to show that indeed they are the current officers of the Church (society). They have also not attached returns they allege they have been filing with the Registrar of Societies to show when such returns were last filed. It is also unfortunate that the applicants have not attached a copy of the Constitution of the Church to enable the court ascertain the averments that the 1<sup>st</sup> respondent is to hold the position of High Priest till death or resignation. What is the case for the other officers, when were they last elected" These are unclarified issues that have left the court unable to properly address its mind on the matter.

The applicants have come to court ostensibly to prevent the respondents from taking over the leadership of the Church Group of Light. However, a Notification of change of officers was lodged in March 2014 while the application was filed on 5<sup>th</sup> May 2014. Was the Notification acted upon by the Registrar of societies" What is the current position regarding the leadership of the Church at the office of the Registrar of Societies"

The present application was intended to prevent the respondents from holding themselves out as officers of the Church. In the absence of clear information as to who the current leaders or officers of the Church are, the court cannot grant orders under unclear circumstances. If the notification has been acted upon, the respondents will be lawful officers of the Church and cannot be restrained when they are the officers on record. If it was not acted upon it was the applicants' duty to establish that fact to enable the court make an informed decision.

The respondents on the other hand have stated that they are different from the applicants and run an independent Church although they use the same name. According to them it is the applicants who decamped and established their own church. If this be true, and the applicants have not controverted it, this is not a case that warrants a grant of injunction at this stage, which may end up causing more harm than was intended. There are issues that are unclear and which can only be substantiated during the hearing of the main suit so that positions of respective parties are made clear and a determination thereon made. The purpose of granting restraining orders of injunction is to maintain a given state of affairs until rights of parties are determined, and in the case of the applicant, they want the court to maintain the state of affairs as at 17<sup>th</sup> March, 2014, while the suit was filed on 5<sup>th</sup> May 2014. The position of the leadership of the church in dispute was not clear and the applicants have not made it any easier for the court by failing to show by evidence who the officers of the church were at the time they filed the suit.

The principles for granting an interlocutory injunction are clear as enunciated in the case of Giella vs Casman Brown & Companyt (supra) and amplified in the case of Nsubuga & another vs Mutawe [1974] EA 487 where *Mustafa JA* said at page 491:-

*"As regards the conditions for grant of an interlocutory injunction, I think they are now well settled in East Africa. I would refer to a decision of this Court, Giella vs Casman Brown, [1973] E.A. 358 .... Briefly two of the main ones are (1) the applicant must show that he has a probability of success and (2) that unless the injunction is granted the applicant would suffer irreparable damage which would not be adequately compensated by an award of damages. As regards the first point, that of probability of success, the plaintiff had not, on the evidence adduced, shown how he could succeed let alone probably succeed ...."*

What then is a *prima facie* case" This question has been discussed in a number of decisions and I can only mention two. The Court of Appeal discussed this question in the case of Mrao vs First American Bank of Kenya Ltd & 2 others [2003] KLR 125 when it said:-

*“A prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case.’ It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”*

And the same court in the case of Nguruman Limited vs Jan Bonde Nelsen & 2 others [2014] eKLR said:-

*“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a min-trial and must examine the merit of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put, on a preponderance of probabilities. This means no more than that, the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”*

Going by the above decisions, the applicants must show through evidence that their rights have been infringed or threatened. The court should not be left to look around for facts or evidence. Such evidence must demonstrate the position of the applicants and their rights under threat to enable the court to intervene.

The applicants herein were required to show that they have a *prima facie* case with a probability of success and that they would suffer irreparable loss that could not be compensated by an award of damages. However in the present application the applicants have not met the threshold for granting an injunction. The pleadings, affidavits and annexures to the affidavit, do not show that the applicants have established a *prima facie* case with a probability of success to persuade this court to excise its discretion and grant them the injunction they seek. Moreover, they have not shown what loss they will suffer if an injunction is not granted. No materials have been tendered before court to show that the loss that will be suffered is one that cannot be adequately compensated by an award of damages.

Having failed on the first two tests for granting injunction, the court does not have to consider the third one, that of balance of convenience.

The issue at hand also appears to be one where two different groups are fighting over leadership of the same Church. Although the applicants say they are the *bona fide* officers of the Church, the respondents on their part say the Church belongs to them and not the applicants. Both sides however appear to agree that the name of the Church is the same that is *Church Group of Light*. The applicants say in their affidavit that they instructed their advocate who wrote a letter to the Registrar of Societies on 5<sup>th</sup> April 2014 to formally complain and protest against the action taken by the respondents to file a notification of change of status. The applicants have not told the court the outcome of that complaint. The Registrar of Societies has power under the *Societies Act (cap 108) Laws of Kenya*, to deal with disputes relating to the administration of societies registered under that Act. *Section 17(1)* is in the following words:-

*“A Notice in the prescribed form of any change of officers, or of the title of any office, of a registered society shall be given to the Registrar within fourteen days of the change and the Notice shall be signed by three of the office bearers of the society.”*

Section 18 further provides:-

*“(1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper management and of the lawful officers of the society or of the Institution of proceedings for settlement of such dispute.”*

The Registrar has power to take further steps against a society that fails to comply with his orders, including de-registration of such a society. The provisions to the Act shows that there is an internal mechanism for resolving such disputes and indeed the applicants had embraced one of such mechanisms to complain to the Registrar. However, the applicants have not disclosed to the court whether their letter of complaint if any, was acted upon or whether the Registrar took action as contemplated by *section 18* of the Societies Act. That being the case and given the fact that at the moment it is difficult to say what the position of the leadership of the Church is, I am not persuaded that the applicants have met the threshold granting an injunction.

For the foregoing reasons, the application dated 14<sup>th</sup> April, 2014 is declined and is dismissed with costs to the respondents.

**Dated and delivered at Kakamega this 8<sup>th</sup> day of December, 2015.**

**E.C. MWITA**

**JUDGE**



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