



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 383 OF 2013 (MULTI-TRACK)**

**WILLIAM CHARLES FRYDA. .... PLAINTIFF**

**VERSUS**

**LANCE P NADEAU. .... 1<sup>ST</sup> DEFENDANT**

**MARYKNOLL FATHERS AND BROTHERS SOCIETY. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The Motion of Notice that is for consideration is dated 17<sup>th</sup> December, 2014. It is brought under Order 2 Rule 15(1) of the Civil Procedure Rules and seeks that the suit be struck out. The grounds upon which the application is based are contained in the body of the application and the supporting Affidavit of Lance P Nadeau sworn on 17<sup>th</sup> December, 2014.
2. The grounds for the application are that; the suit is sub-judice NRB HCCC No. 423 of 2012 and Nakuru HCCC No. 224 of 2010; that the suit does not disclose any reasonable cause of action and is an abuse of the court process that the issues raised by the Plaintiff are not justiciable; that by virtue of his membership in the 2<sup>nd</sup> Defendant, the Plaintiff is bound by the Constitution of the 2<sup>nd</sup> Defendant and the Canon Law; that the suspension of the Plaintiff from the 2<sup>nd</sup> Defendant was an internal matter within the ecclesiastical forums, that the appellate procedure of the 2<sup>nd</sup> Defendant have not been exhausted. That there is no justiciable dispute before court. That the 2<sup>nd</sup> Defendant is out of jurisdiction and the Orders sought cannot be enforceable against it.
3. It was deponed in the Supporting Affidavit of Lance P Nadeau sworn on 17<sup>th</sup> December, 2014 that this suit is sub-judice NBI HCCC No. 423 of 2012 and Nakuru HCCC No. 224 of 2013; that the Plaintiff is a permanent member (ordained Priest) of the 2<sup>nd</sup> Defendant and is therefore bound by the latter's constitution; that his suspension from the 2<sup>nd</sup> Defendant was because of his continued disobedience to his legitimate superiors and failure to account for funds received through the 2<sup>nd</sup> Defendant for the construction of St. Mary's Hospitals; that the 2<sup>nd</sup> Defendant had severally summoned the Plaintiff to New York to answer charges in accordance with Constitution of the 2<sup>nd</sup> Defendant but failed to heed to those summons. Lance Nadeau swore that the issues raised by the Plaintiff are purely domestic and/or internal and which could be properly be dealt with through the ecclesiastical forums under Canon Law.
4. The application was opposed through a Statement of Grounds of Opposition dated 24<sup>th</sup> April, 2015. The Plaintiff contended that the prayer sought in the motion was ambiguous; that Section 6 of the Civil Procedure Act was not applicable as there was no other similar suit or proceeding in Kenya; that the application was defective in so far as it was brought under order 2 Rule 15(1) and

the same was supported by evidence contrary to Rule 15(2) of the Civil Procedure Rules; that this is the 3<sup>rd</sup> time the Defendants are bring this type of application; that the thrust of the suit was the supremacy of the Constitution vis a vis other laws personal Customary or otherwise. The Plaintiff urged that the same be dismissed.

5. I have considered the Affidavit on record and submissions of counsel. A court must act with caution before striking out a pleading since striking out of a pleading is a draconian power that should be exercised sparingly. The Court of Appeal in **D.T. Dobie & Co. (K) Ltd Vs Muchina (1982) KLR 1** held at page 9 that: -

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*”**

***The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sachs LJ (Supra)***

6. In the latter case of **Crescent Construction Co. Ltd Vs Delphis Bank Ltd (2007) eKLR** the Court of Appeal again delivered itself thus: -

***“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”***

7. Those are the parameters within which this court has to consider the Defendants Application. The first ground is that the suit is sub-judice NRB HCCC No. 43 of 2012 and NKR HCCC No. 224 of 2010. The Plaintiff retorted that Section 6 of the Civil Procedure Act was not applicable as the suits were not similar. For the sub-judice rule in Section 6 aforesaid to apply, there must be an existing suit or proceeding in which the matter in issue in the current suit is directly and substantially in issue in the previous suit or proceeding; the parties in both suits must be the same or be parties under whom or any of them claim; they should be litigating under the same title and that suit should be pending in Kenya.
8. I have looked at NRB HCCC No. 423 of 2012. The Plaintiff therein has sued one John Cardinal Njue and Marie Theresa Gacambi. The claims therein are completely different from the current suit. Surely, Section 6 cannot apply as far as that suit is concerned. As regards NKR HCCC No. 224 of 2010, the Plaintiff has therein sued an entity by the name of Assumption of Sisters of Nairobi Registered trustees and St. Mary’s Mission Hospital. There is nothing on record to connect the said entities to the Defendants in this suit. To my mind, the allegation that this suit is sub-judice those two suits is a red herring. It is unfounded. The Plaintiff is correct; Section 6 of the Civil Procedure Act is not applicable.
9. The other objection to the application by the Plaintiff was that, in so far as the application was brought under the omnibus Sub rule (1) of Rule 15 without specifying under which paragraphs thereunder and ground No.2 in the Motion was that the suit does not disclose any reasonable cause of action, the application was incompetent as it fell foul of sub-Rule 2 of the Rule 15 which bars evidence. I agree with the Plaintiff on this. Once a party brings an application under Order 2 Rule 15 sub-rule (1) (a), he is not permitted to adduce evidence. In this case, the application was supported by an Affidavit thereby introducing evidence which is not permitted under sub-rule 2 or Order 15. This is enough to have the application struck out but there is one thing that has struck

this courts attention.

10. The Defendants have contended that the Plaintiff's claim is not justiciable. That it is an internal/domestic matter between the Plaintiff and his society to which he belongs as a voluntary member. That the Society has its own constitution with its own internal mechanism on how to settle disputes such as the one before court. That indeed, the Plaintiff has already availed himself that remedy by appealing to some body in the Vatican against the very decision of the 2<sup>nd</sup> Defendant which he is challenging in this suit. To the Defendants, that claim is not justiciable. On the Plaintiff's part, his claim is justiciable as it is a tussle between the supremacy of the Kenya Constitution and some Canon Law; that the Constitution prevails and that, therefore, his claim is justiciable.
11. The issue of justifiability of claims has been dealt in the past by various courts. In an English case of **Forbes Vs Eden (1867) LC Sc** and Divisional Appeal Cases 508, the House of Lords held: -

*“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.”*

12. In **Guaranty Trust Co. of New York Vs Hanay & Co. (1951 2QB 536)** Bankers L. J. observed: -

*“There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction. That shows that the wide language of R. S. C. O. 15 r 17, is not free of all limitation. It is subject to this, the declaration claimed must not be contrary to the accepted principles on which the court exercises the jurisdiction and one of those principles is that the court will not make a declaration in a dispute which is not a justiciable dispute. For that reason, I propose to order that the endorsement of this writ of summons and the statement of claim be struck out.”*

13. In **Cox vs Green (1966) 1 ch**, Plowman J held at page 220 that: -

*“But however wide Order 15 Rule 17, may be, it does not seem to me that it is so wide as to make justiciable disputes which are not justiciable. .... the issue between them does not concern any right of property, it does not concern any right of contract, it does not concern any legal right. The question is purely whether the Plaintiff as the Defendant alleges has been guilty of unethical conduct in a professional way and that is a matter, in my judgment, for the Central Ethical Committee constituted under the Rules of the British Medical Association.”*

14. In the case of **Hinga & another Vs P. C. E. A Through Rev. Dr. Njoya & Another (1986) KLR 317**, the court held that for an issue to be justiciable, it must constitute a cause of action in law, and it must be concerning a right to property, contract or any other legal right. That the issue must not be a domestic matter that can be dealt with by the laws and regulations concerning a particular body or organization.

15. Then in **Andrew Inyoto Abwanza Vs Board of Trustees of Pentecostal Assemblies of God – Kenya & 3 others (2009) eKLR**. The court held: -

*“Here too the Plaintiff is complaining about the conduct not only of the church appearing to be “deaf” to Plaintiff's complaints about the 2<sup>nd</sup> to 4<sup>th</sup> Defendants' poor performance and conduct, but also of the officials' failure or perceived failure to carry out their duties and obligations properly to his satisfaction.*

*The conclusion and finding I come to,.... is that the Plaintiff had failed to exhaust the dispute resolution machinery of the 1<sup>st</sup> 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."***

16. From the foregoing, it is clear that this court's jurisdiction can only be exercised upon a claim which is justiciable, that is, which discloses a legal right, a right over property or a right in contract. In disputes of a domestic nature, for example where a society has a Constitution with elaborate procedures on dispute resolution mechanisms, courts will hardly interfere. Until and unless the dispute resolution mechanism put in place has been exhausted or the society breaches the rules of natural justice, the Court's jurisdiction cannot be invoked.
17. In the present case, the Plaintiff is an Ordained Priest and a Voluntary Member of the 2<sup>nd</sup> Defendant whose Head Office is in New York but has Regional Offices in Kenya. Due to some disagreements on accounting issues relating to funds obtained through the 2<sup>nd</sup> Defendant to the Plaintiff in the acquisition and/or establishment of some hospitals known as St. Mary's Hospital, the 2<sup>nd</sup> Defendant invoked its internal disciplinary machinery under its constitution and charged the Plaintiff before an internal tribunal. Certain decisions were made thereat and the Plaintiff is said to have appealed against those decisions to some church body known as Congregation for the Institutes of Consecrated Life and Societies of Apostolic Life at the Vatican. That appeal is still pending. This is attested by the documents that accompanied the Plaint. The declarations sought in the Plaint relate to the Plaintiff's continued membership in the 2<sup>nd</sup> Defendant and the 2<sup>nd</sup> Defendant's requirement of the Plaintiff's conduct under the statutes or Constitution of the 2<sup>nd</sup> Defendant to practice what is said to be Evangelical Poverty, Chastity and Obedience to his legitimate Superiors.
18. To my mind, this is clearly an internal dispute as to the Plaintiff's conduct or obligations in pursuance of his membership in the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is said to be a religious order of the Catholic Church which apart from having a Constitution of its own on how to deal with the membership of the Plaintiff in that society, has Canon laws that are said to lay down an internal dispute resolution mechanism. Clearly, the claim by the Plaintiff is not justiciable. A member of the Public who voluntarily joins and/or subscribes to a society is bound by its rules and regulations. The court will only come in to exercise its jurisdiction if such a society oversteps its mandate under those rules which such a member has subscribed to. That has not been shown in this case.
19. I had earlier on indicated that the Defendant's application was for striking out. From the foregoing, however, I have come to the conclusion that the Plaintiff's suit is a non-starter in the words of the Court of Appeal in the aforesaid case of **Crescent Construction Co. Ltd Vs Delphis Bank Ltd (supra)**. Of what use will it be to leave the suit pending and vex the parties by them incurring extra costs in having yet another complaint filed for the same result, striking out the suit as the claim is not justiciable?
20. In the case of **Andrew Inyolo Abwanza Vs Board of Trustees of Pentecostal Assemblies of God (Supra)**, after striking out objections raised by the defendants, the court moved to strike out the suit after finding that the issues raised therein were not justiciable. I will do likewise.
21. Accordingly, the Defendants Notice of Motion dated 17<sup>th</sup> December, 2014 is hereby struck out with costs to the Plaintiff. At the same time, the Plaintiff's suit is hereby struck out with costs to the Defendants.

Orders accordingly

Dated and delivered at Nairobi this 10<sup>th</sup> day of July, 2015.

.....

**A. MABEYA**

**JUDGE**