IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL APPLICATION NO. 126 OF 2020

REGISTERED TRUSTEES OF

KANISA LA WABAPTIST TANZANIA ..... APPLICANT

VERSUS

NICHOLAS LUSELELE NZELA ..... 1ST RESPONDENT

ELIAS KASHAMBAGANI ..... 2ND RESPONDENT

MICHAEL BARNABA NGUSA ..... 3RD RESPONDENT

SYLVANUS PETER CHEYO ..... 4TH RESPONDENT

SAMWELI MUSALUSHINGE ..... 5TH RESPONDENT

NELSON PENFORD MADAMANYA ..... 6TH RESPONDENT

JAMES KASWAHILI ..... 7TH RESPONDENT

DIONIS KARWANI ..... 8TH RESPONDENT

RULING

24th November, & 10th December, 2020

ISMAIL, J.

By way of a Chamber Application, preferred under the provisions of section 68 (c) and (e); and Order XXXVII Rule 1 (a) of the Civil Procedure

Code, Cap. 33 R.E. 2019, the applicant seeks to move the Court to grant an injunctive order to restrain the "respondents, persons acting under their instructions and any other persons purporting to use the applicant Former Names (of Baptist Convention of Tanzania/Jumuiya Kuu ya Wabaptisti Tanzania) pending the determination of the main suit.

The application is supported by an affidavit sworn by Isaac Rajabu Sui, the applicant's Principal Officer duly appointed and authorised to swear the affidavit, setting out grounds on which the prayer for the injunctive order is based. The deponent of the affidavit avers, that the respondents are using the applicant's former name to call a General Meeting without the lawful authority of the applicant, and that the letter calling for such meeting has circulated across the country. The applicant further alleged that, in so doing, the respondents assumed powers of the applicant and illegally and fraudulently assumed power and utilization of the applicant's former name. It is alleged, as well, that the respondents have blocked the applicant's sensitization programs while at the same time soliciting contributions from churches across the country, with a view to funding activities that are intended to sabotage lawful activities undertaken by the applicant.

Through a counter affidavit sworn by Mr. Justus Magezi, a duly instructed counsel, the respondents dispute the contentions raised by the applicant. In particular, the respondents denied that they had convened a general meeting of the applicant institution. The respondents averred that the applicant was registered in the name Kanisa la Baptist Dodoma and not Baptist Convention of Tanzania. They contend further that the change of names from Baptist Convention of Tanzania to Kanisa la Wabaptist Tanzania was forged by the applicant, and that this change has been disputed by more than 800 member churches which constitute the Baptist Convention of Tanzania. On the grant of injunction, the respondents averred that issuance of the injunctive order will only serve to perpetuate destruction of the church values.

The filing of a counter-affidavit was done simultaneously with the filing of the notice of a preliminary objection to the effect that the application is incompetent for being filed prematurely.

When the matter came up for hearing, Ms. Dorothea Method and Anna Ngoti, learned counsel, represented the applicant, while the respondents were represented by Mr. Justus Magezi, learned advocate. To expedite disposal of the matter, I guided that the preliminary objection be argued alongside the application. This would allow composition and

delivery of a comprehensive ruling which would deal with the objection and the application if the latter was not going to be sustained.

Submitting in respect of the preliminary objection, Mr. Magezi contended that his objection is premised on the competence of the application which he said was questionable. He argued that the dispute is on the use of the name "JUMUIYA KUU YA WABAPTIST TANZANIA" otherwise known as "THE BAPTIST CONVENTION OF TANZANIA" which is used by the respondents. He submitted that change of the said name to "KANISA LA WABAPTISTI TANZANIA" adopted by the applicant is disputed by the respondents, led by the 1st respondent, and that the matter is awaiting the decision of the Minister, following an appeal against the Registrar's decision. Mr. Magezi asserted that the appeal was preferred in terms of section 19 (1) of the Societies Act, Cap. 337 R.E. 2019 that allows an aggrieved party to appeal against the decision of the Registrar.

Referring to Annexure A3 attached to the counter-affidavit and Annexure KWTA attached to the reply to the counter-affidavit, Mr. Magezi argued that the appeal is still pending and awaiting the decision. He contended that the said annexures are letters which prove that the matter is yet to be resolved by the Minister. He held, in consequence, that the dispute is misplaced and pre-mature. He argued that entertaining it is to

usurp the powers of the Minister and an act of abrogating the provisions of section 19 (1) and (2) of Cap. 337. The learned counsel urged the Court to strike out the matter with costs.

In response, Ms. Method took the view that the preliminary objection is lacking in quality as it contains factual points which disqualify it as an objection. Referring to ***Karata Ernest & Others v. Attorney General***, CAT-Civil Revision No. 10 of 2010 (unreported), which quoted the landmark case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*** [1966] E.A. 696, the learned counsel argued that in the instant case, the respondent's counsel has made reference to the pleadings. Ms. Method contended that the attachments referred to are evidence and, therefore, factual issues with no point of law. She argued that the pendency or otherwise of the dispute before the Minister is a question of evidence and should be raised during trial. To bolster her position, the learned counsel cited the case of ***Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd & National Insurance Corporation (T) Limited*** [2005] TLR 41, in which a preliminary objection was overruled for lacking the purity required of a point of law.

Beefing up the contention, Ms. Ngoti held the view that Annexure A3 requests the Minister not to de-register the society, yet there is nothing on the de-registration of Jumuiya Kuu. She contended, however, that the issue was resolved vide a letter dated 22nd April, 2020. She argued that there is no appeal that is pending before the Minister and that, if any exists, then that is a matter of evidence which cannot qualify as a preliminary objection. She prayed that the objection be overruled.

In his short rejoinder, Mr. Magezi held on to the contention that there is matter in the hands of the Minister challenging the decision of the Registrar to de-register Jumuiya Kuu ya Wabaptisti and re-name it Kanisa la Wabaptisti Tanzania. He argued that Annexure A3 and a letter attached to the reply to the counter-affidavit support his contention.

With respect to the substance of the application, Ms. Method first prayed to adopt the contents of the affidavit sworn in support of the application and the reply to the counter affidavit. She urged the Court to grant the restraint orders against the respondents and other persons purporting to use the name of JUMUIYA KUU YA WABAPTIST TANZANIA, pending determination of the main suit. The learned counsel argued that, guided by the principles enunciated in ***Attilio v. Mbowe*** [1969] HCD 284, the application has met all the conditions set under the said decision. On

whether there is a prima facie case, the learned counsel contended that the supporting affidavit, reply to counter-affidavit and the plaint have revealed that the respondents are meddling in the affairs of the applicant. Ms. Method submitted that in so doing, the respondents have caused a division in the applicant's society by calling themselves transitional leaders, and they have been collecting contributions and offertories from worshippers, a fact that she said has been acknowledged by the respondents in paragraph 14 of the counter-affidavit.

The learned counsel submitted further that there is an irreparable loss that continues to be suffered by the applicant, and it may escalate if the injunction is not ordered. She contended that actions of the respondents have caused panic and disharmony and the respondents' irregular assumption of powers has enriched the respondents at the expense of the applicant, and that its persistence may lead to loss of trust from the worshippers.

With respect to balance of convenience, the applicant's counsel held the view that the applicant stands to suffer more if the prayer is not granted and, on this, she referred me to the case of ***Abdi Ally Salelhe v. Asac Care Unit Limited & 2 Others***, CAT-Civil Revision No. 3 of 2012

(unreported), in which it was held that temporary injunction was important to grant even where the respondent was using the name of the applicant.

Weighing in for the applicant, Ms. Ngoti submitted that the respondents' interference has been admitted in paragraph 12 of the counter-affidavit. She added that the respondents were warned against what they are doing but to no avail. She held the view that the applicant will likely suffer more than the respondents if the application is not granted.

Submitting in rebuttal, Mr. Magezi argued that grant of injunction is discretionary and that the discretion has to be exercised judiciously. He held the view that principles propounded in ***Attilio v. Mbowe*** (supra) had not been demonstrated. With respect to a serious question to be tried, he argued that the applicant is Kanisa la Wabaptisti Tanzania as it appears in the annexures to the affidavit while the craved injunction is against the renounced name. The learned counsel further contended that the name whose application is sought to be censured is no body's name. Mr. Magezi held the view that the power to bar the use of the said name is the Registrar of Societies under sections 25 and 26 of Cap. 337 who is lies with of this matter. He flatly denied that the respondents had ever used the applicant's name.

On irreparable loss, Mr. Magezi contended that this criterion has not been met by the applicant since there has been no infringement of any kind as alleged by the applicant. He argued that the respondents are priests in their own churches and there is no way the applicant would suffer loss.

With respect to the balance of convenience, Mr. Magezi poured some cold water on the relevance of the decision in ***Abdi Ally Salelhe*** (supra), holding that circumstances in that case were substantially different, as the use of the names in that case was different. He argued that, in the cited case, the prayer for injunction was refused. Mr. Magezi argued that maintenance of the status quo in applications for injunction is actually to maintain the position as it is currently. He prayed that the application be dismissed with costs.

In her rejoinder submission, Ms. Method was still of the contention that the name is still being used against the applicant's interests and that this establishes a prima facie case. The learned counsel reiterated her contention that losses will continue to be suffered if the respondents are left to meddle in the applicant's affairs as the same is still being used within the applicant's society.

With regards to ***Abdi Ally Salelhe***, the learned counsel submitted that the superior Court censured this Court's decision when it dwelt on the merits of the case, while on the balance of convenience, the counsel's argument is that the applicant will suffer more. She argued that the counsel for the respondents has not disputed that the name is used to collect funds while the respondents are not registered under that name.

Ms. Ngoti's intervention was to the effect that the question of registration is not contentious in this Court, while with respect to A3 and KTW2A, the use of that name was on the headings and nothing more. With respect to ***Abdi Ally Salelhe,*** Ms. Ngoti's contention is that the said decision should be read as a whole. She insisted that the case for grant of injuction has been made and she prayed that it be so granted as prayed.

Let me begin the duty of disposing of the matter by first dealing with the nagging issue raised by the respondents. This is in the form of the preliminary objection raised, questioning the competence of the application that is before me now and, by extension, the main suit that is pending. The contention is that the Court is not seized of jurisdiction to entertain a matter which is yet to be resolved by the Minister for Home Affairs. The matter is simply pre-mature. The applicant's Counsel took the view that since the objection would successfully sail through with the aid of

attachments to the pleadings, then the same is not a pure point of law and, as such, it does not qualify to be a preliminary point of objection.

As rightly submitted by the counsel, an objection will qualify as a preliminary objection if the same conforms to the requirements set out in the ***Mukisa Biscuits*** and the ***Karata cases*** cited above. The description in the in the latter case maintained the stance which was set by the superior Court in its earlier decision in ***Sugar Board of Tanzania v. 21st Century Food and Packaging & Two Others***, CAT-Civil Application No. 20 of 2007 (unreported). It was held as follows:

> *"A preliminary objection is in the nature of legal objection not based on the merits or facts of the case but on the stated legal procedural or technical grounds. Such an objection must be argued without reference to evidence.* ***The fundamental requirement is that any alleged irregular defect or default must be apparent on the face of the notice of motion so that the objector does not condescend to affidavits or other documents accompanying the motion to support the objection."***
> [Emphasis is supplied]

From these decisions, what comes out, quite clearly, is the fact that any point of objection whose disposal requires adducing evidence fails the test of a valid preliminary objection. The question for determination at this

juncture is whether the present objection qualifies as a preliminary objection within the ambit prescribed in the cited decisions. A glance at the respondent's submissions compels me to answer this question in the negative. My view is premised on the fact that the respondent's basis for contending that the matter is pre-mature is Annexure A3 and KWT2A. These are correspondences on the status of the matter that is alleged to be pursued with the Ministry. To be able to decide on the point, need would arise for having to call upon all these documents and examine their contents. This means that the question of the pendency of the appeal is a matter to be ascertained through production of evidence. In my view, calling of testimony in that respect means that this is an objection which cannot be argued without reference being made to evidence. Since the respondents' contention with respect to this objection is dependent on other documents to support it, the same loses the fundamental quality of a preliminary objection. It is neither a legal, procedural nor is it a technical ground whose disposal would be done by legal arguments alone. It is this lack of purity in the respondents' objection that has dwarfed their argument and I find legitimacy in the applicant's resort to the reasoning in ***Karata's case*** (supra). This then allows me to borrow a leaf from the scintillating decision of the Court of Appeal in ***Hezron M. Nyachiya v.***

Tanzania Union of Industrial and Commercial Workers, CAT-Civil Appeal No. 79 of 2001, in which it was held as follows:

> *"In the light of these observations, we ask ourselves: in the instant case, were all the three points of objection raised at the trial, preliminary objections? With due respect to the learned counsel who raised them, we think, it was only the first point of objection which was a preliminary objection worth its name. Time limitation is a point of law. The second and third points were not purely points of law. They were of mixed points of law and facts. The facts required proof by evidence.* ***In that respect, we think, the learned trial judge should have struck them out and proceed with the first objection only".*** [Emphasis added].

It behooves me to take inspiration from the just cited decision and make a finding. I do so by striking out the preliminary objection.

Deducing from the parties' fabulous submissions and depositions, the pertinent question for my determination is whether circumstances of this case justify grant of the injunctive order sought by the applicant.

It is an established position that a temporary injunction is an equitable relief that is issued before or during trial for the sole purpose of preventing an irreparable loss or injury from occuring before the court has a chance to decide the case (see Black's Law Dictionary, 8th ed., pg. 800).

In other words, injunction is a conservatory restraint order that is intended to maintain the current state of affairs as the disputants battle out in the substantive matter that is pending in court. It is, therefore, granted upon satisfaction by the Court that the applicant has a concluded right capable of being addressed through the injunctive order. This lucid position was accentuated in an Indian case of ***Agricultural Produce Market Committee v. Girdharbhai Ramjibhai Chhaniyara***; AIR 1997 SC 2674, wherein it was held as follows:

> *"a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction."*

Back home, the governing principles for grant of a temporary injunction were set out in the landmark decision of ***Atilio v. Mbowe*** (supra). These principles have been splendidly underscored in the subsequent decisions of this Court and the Court of Appeal, and the emphasis is that these conditions must be cumulatively met. The decision in ***Abdi Ally Salelhe v. Asac Care Unit Ltd & 2 Others***, cited by the applicant's counsel comes out as the most accomplished guide in that respect. The Court of Appeal incisively held as follows:

"The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. In deciding such applications, the Court is only to see a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage.

Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only. The risk must be in respect of a future damage (see ***Richard Kuloba Principles of Injunctions*** *(OUP) 1981).*

And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer

greater injury if the injunction is refused that the defendant will suffer if it granted."

See also: ***Anastasia Lucian Kibela Makoye & 2 Others v. Veronica Lucian Kibela Makoye & 4 Others***, CAT-Civil Appeal No. 46 of 2011 (unreported).

From the parties' submissions, it is incontrovertible that there is a pending suit in this Court, and the contention centres on the legitimacy of the alleged use of the name Baptist Convention of Tanzania or Jumuiya Kuu ya Wabaptisti Tanzania. This dispute pits the applicant against the respondents. This implies that there is a fair question that awaits determination by this Court. This is what is meant by *prima facie* case. Consistent with the commentaries in ***Sarkar on the Code of Civil Procedure***, 10th ed., Vol.2 p.2011, the applicant need not demonstrate any probability of success in the pending case. In the cited book, the learned author had the following commentary to make:

"In deciding application for interim injunction, ***the court is to see only prima facie case, and not to record finding on the main controversy involved in the suit prejudging issue in the main suit,*** *in the latter event the order is liable to be set aside."* [Emphasis added].

See also: ***Colgate Palmolive v. Zacharia Provision Stores & Others***, CAT-Civil Appeal No. 1 of 1997 (unreported); and ***Kibo Match Group Ltd v. H.S. Impex Ltd*** [2001] TLR 152.

The contention by the applicant is that an irreparable is looming if the respondents continue with what the applicant contends as an improper use of the former name since the worshippers will be left in limbo and the respondents will continue to unjustly enrich themselves, through offertories and contributions collected form the confused worshippers. This contention has been refuted by the respondent's counsel who holds the view that the applicant has nothing to do with a name that it has renounced. If anything, it is the Registrar who should take action against what appears to border on criminal undertakings.

In gauging the question of irreparable loss, the legal requirement is that the loss to be prevented must irreparable as evidenced by an applicant of the injunctive orders, and that it should be serious, not trivial, minor, illusory, insignificant or technical only. This requirement was emphasized by Lord Diplock, in ***American Cynamid Co. v. Ethicon Ltd*** [1975] 1 All E.R. 504 at p. 509. He held thus:

> *"Evidence that there will be irreparable loss which cannot be adequately compensated by award of general damages."*

This requirement implies that where no evidence exists to prove that loss to be suffered is not irreparable, the court may refuse to grant is. This position was expounded in the Indian case of ***Best Sellers Retail India (P) Ltd. v. Aditya Nirla Nuvo Ltd.***, (2012) 6 SCC 792, wherein it was observed as follows:

> *"Yet, the settled principle of law is that even where prima facie is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered on account of refusal of temporary injunction was not irreparable."*

Applying the wisdom ushered in the cited decisions, can we say that the applicant has discharged or fulfilled this requirement? Nothing convinces me that this requirement has been met. Nothing, in the supporting affidavit lends credence to the contention that the alleged misuse or irregular use of the name that has been renounced by the applicant has caused any of the alleged loss, be it physically, emotionally of financially. None of the worshippers has come forward to attest that as a result of the alleged use of the name, they have been misled or that any of the respondents coerce them into making any contributions which were otherwise meant for the applicant. In the absence of any evidence in that respect, I take the view that the talk of loss, irreparable or otherwise, is

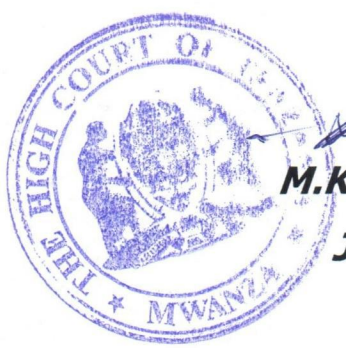
one that is illusive and too paltry to qualify for grant of an injunctive order. On whether what happened borders on criminality, I refrain from making a comment, knowing that this may be a subject to be canvassed during the trial proceedings of the main suit.

Having held so with respect to irreparable loss, I take the view that the question of assessing the balance of convenience takes a back burner as that alone, would not have the decisive effect where the contention of irreparable loss has failed to resonate.

Consequently, I take the view that the facts deponed in the affidavit and the oral submissions made in support have failed to convince me that a credible case that meets the threshold for the grant injunctive orders has been met. Accordingly, I dismiss the application with costs.

It is so ordered.

DATED at **MWANZA** this 10th day of December, 2020.



M.K. ISMAIL

JUDGE

Date: 10/12/2020

Coram: Hon. M. K. Ismail, J

Applicant: Ms. Dorothea Method & Anna Ngoti, Advocate

Respondents: 1st

2nd

3rd

4th

5th

6th

7th

8th

B/C: B. France

Court:

Ruling delivered in chamber, in the presence of Ms. Dorotha Method and Anna Ngoti, Advocate for the applicant and Mr. Justus Magezi, Counsel for the Respondents, this 10th of December, 2020.

M. K. Ismail

JUDGE

At Mwanza

10th December, 2020