C. J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 18 OF 1988

BETWEEN:

THE REGISTERED TRUSTEES OF
AFRICAN INTERNATIONAL CHURCH.....PLAINTIFFS

- and -

THE REGISTERED TRUSTEES OF AFRICAN CHURCH.....DEFENDANTS

CORAM: UNYOLO, J.
Msiska, of Counsel for the Plaintiffs
Chirwa, J M, of Counsel, for the Defendants
Selemani, Official Interpreter
Maore, Court Reporter

J U D G M E N T

The parties in this case are locked in a dispute which arises from the following facts.

The plaintiffs are members of a church which is registered under the name of African International Church. The said church has a very interesting history. The first members thereof were a break-away group from another church called the Free Church of Scotland, presently known as the CCAP, Livingstonia Synod, in the Northern Region. Those people broke away because they disagreed with the official stand of the said Free Church of Scotland as regards polygamy and beer-drinking. What happened is that the Free Church of Scotland did not allow its members to have more than one wife or to indulge in drunken-ness. Any member indulging in such practices was visited with ex-communication. Most people did not, however, appreciate this, because both these practices were entrenched in their society by tradition. As it turned out, many a member failed to live and behave as was expected of them. The church, on its part, did not bulge, with the result that a large number of members were ex-communicated from the church. This went on for sometime and things came to a head in 1920, or thereabouts, when a group of members of the church decided to break away and set up their own church which was to conform to local African traditions which would allow members to marry more than one wife and/or to drink beer. This they did and they established a church which was given the name African Church. Most of those who had been ex-communicated naturally welcomed this development and joined this new church almost at once. For sometime, the new church operated only in the North. However, with

passage of time, the church's operations extended to the Central and Southern Regions as well, the whole Malawi, that is. The leaders then thought that the name of the church should be changed to African National Church, to reflect this country-wide sphere of influence and operation of the church. PW5 said that this happened in 1931. DW1, on the other hand, said it was in 1954 when this change of name took place. DW1 appeared more knowledgeable and I accept his evidence on this point. The church continued to grow and by the late 60's it was introduced to Zambia, Zaire and Zimbabwe. With this further development, the leaders of the church decided to change the name of the church once more from African National Church to African International Church. According to the evidence, this change of name was made in about 1972. This is the plaintiffs' church's name up to this day. I think I should mention that from its inception in 1928 and throughout, the church ensured that it was registered under the relevant laws of this country and each change of name was effected in accordance with such laws

Such is the history of the plaintiffs' church. I now turn to that of the defendants' church. They say history repeats itself. I have shown above that the plaintiffs' church was started by people who broke away from the Free Church of Scotland. The defendants' church, on the other hand, was started by a group of persons who broke away from the plaintiffs' church in 1985 and established their own church which they registered under the name African Church. It will, of course, be recalled that this was the very name the plaintiffs' church used when the church was first registered in 1928, and, as I have shown, the church continued to use that name up to 1954, when it then took on the name African National Church. (International Church)

According to the defendants, the reason why the group broke away from the plaintiffs' church was that the leaders of the church at that time introduced foreign ideas into the church. The defendants' witnesses mentioned such things as new titles within the church leadership. For the first time in the church's history, leaders of the church were given new titles such as cardinal, archbishop, bishop, etc. It was the defendants' evidence that some members of the church were not happy with these developments and that when the two parties failed to resolve the matter, the dissident group decided to break away from the church. The plaintiffs' witnesses, but one, denied this. According to them, the real reason for the secession was scramble for positions and clash of personalities within the church. Be that as it may, the other group did break away from the plaintiffs' church and set up what is the defendants' church in the present case.

The evidence shows that since then there has been a protracted dispute between the leaders of the two churches over several issues. In the first place, there is a dispute over the very name of the defendants' church. The plaintiffs are not happy that the defendants took on the name African Church. They claim this name still belongs to them and is exclusively theirs. Further, the plaintiffs contend that the names African International Church and African Church are similar and that this has given rise to confusion amongst members of the plaintiffs' church. It is the plaintiffs' case that they approached the defendants and asked them to find another name for their church and stop using the said name of African Church, but to no avail. They then referred the matter to several authorities such as the Malawi Congress Party, the District Commissioner, the Regional Administrator and the Police, but again without avail. It is the plaintiff's case that this is how finally they resorted to law, hence these proceedings. On this aspect, the plaintiffs asked the Court to make an order restraining the defendants from using the said name of African Church.

In reply, the defendants contend that the plaintiffs cannot claim monopoly to the name African Church because the plaintiffs abandoned this name long ago and have not used it since. It is also contended that the plaintiffs had not shown that they had otherwise a legal right to the name which they must protect. The plaintiffs argued that, on the contrary, it is they who have shown that they have a legal right to the name, since they got permission from the Police to use the same as evidenced by Exh.D1. On this very point, the defendants also referred to the fact that they got their church registered under the Trustees Incorporation Act under the said name of African Church. In short, the defendants contend that the plaintiffs have no right to stop them from using this name.

I think that I should deal with this part of the case here and now. I shall take first the plaintiffs' contention that the name African Church is theirs, and their's alone. With respect, I am persuaded by the arguments put forward by the defendants. The plaintiffs changed the name of their church to African International Church. I have indicated that this change of name was effected officially in accordance with the provisions of the Trustees Incorporation Act. Legally, therefore, the name of the plaintiffs' church is African International Church, not African Church. The evidence shows that the plaintiffs abandoned this latter name; they did not retain it. Apart from showing that the name herein used to be the name of the plaintiffs' church earlier in its history, the plaintiffs have not shown on what basis they are claiming "ownership" of the said name. Indeed, it was not even suggested that the plaintiffs would like to revert to the old name or use it in any way again. I have also taken judicial notice of the fact that the name

African Church is not one of the protected names under the laws of this country. On these facts, the plaintiffs' claim that the name African Church is theirs or exclusively theirs, cannot succeed.

I now turn to the contention that the adoption of the name African Church by the defendants has given rise to confusion amongst members of the plaintiffs' church. Respectfully, I am unable to appreciate this. I look at the matter this way. The defendants broke away from the plaintiffs' church in broad daylight and it is a fact known by all and sundry that the defendants did break away. Significantly, the defendants have not assumed the name African Church. If they had done so, I would have been one of the first to admit that this was susceptible of causing confusion, in that there would, in such a situation, be two churches using one and the same name. Not so here. The defendants have assumed the name African Church, which is different from the name African International Church. In my view, even those people out there in the village must be able to see the difference between the two names inspite of the fact that there is some similarity in them, especially considering the fact that the name African International Church has been in use for a long, long time. Perhaps I should add that even assuming, for argument's sake, that there was some confusion, as alleged, in my view, such confusion would only be of a temporary nature; sooner or later everybody should be able to know which was which, and if need be, some kind of civic education would facilitate this. It is also interesting to note, as was observed by learned Counsel for the defendants, that there are other Christian churches in this country which have names somewhat similar to names of other churches. We have, for example, churches such as Seventh Day Adventist and Seventh Day Baptist, Assemblies of God and Independent Assemblies of God and Providence Industrial Mission and Zambezi Industrial Mission, to mention only some, and these appear to have co-existed quite well without any hassles or squabbles. For all these reasons, I would refuse to grant the injunction sought by the plaintiffs on this limb of the action, to restrain the defendants from using the disputed name.

Next, there is a dispute between the plaintiffs and the defendants over certain church buildings. The plaintiffs complain that the defendants have continued to use several church buildings belonging to the plaintiffs although the defendants broke away from the plaintiffs' church. The plaintiffs said that actually in some cases members of the defendants' church have forcibly prevented members of the plaintiffs' church from using those buildings on days of worship. The plaintiffs' witnesses mentioned several places in Karonga and Rumphi where this has allegedly happened. They said that as a result, there have been intermittent quarrels between members of the two churches. The plaintiffs ask for an order that the defendants vacate and deliver up all those church buildings.

The defendants deny that they are using any church buildings belonging to the plaintiffs. The witnesses called on the part of the defendants told the Court that the defendants gave up all the plaintiffs' church buildings. They said that immediately the plaintiffs started making the allegations herein, the defendants actually went all over the area and advised members of the defendants' church not to use any church buildings belonging to the plaintiffs. It was the evidence of these witnesses that after breaking away from the plaintiff's church, the defendants put up their own church buildings and that where they have not been able to do so, worship is done in the open, under trees, or they use classrooms at Government schools, in some places. Concerning the places specifically mentioned by the plaintiffs' witnesses these witnesses said that the church buildings the defendants are using there were built by the defendants after they broke away from the plaintiffs' church. Perhaps I should mention that the Court had planned to travel to the North in order to visit the places concerned and see things on the spot. For some reasons, the trip did not materialise. Anyway, I have considered the evidence with due care. With respect, I am inclined to believe the defendants' witnesses. For my part, it doesn't sound plausible that the defendants would break away from the plaintiffs' church and at the same time continue using the plaintiffs' buildings. Actually, and most importantly, the witnesses called on the part of the defendants impressed me as being truthful witnesses, and I accept their evidence. In short, I find that the plaintiffs have not proved their allegation on this point.

Actually, it is significant that the defendants do not dispute they are not entitled to use the plaintiffs' church buildings. I would, therefore, like to urge the defendants with all the emphasis at my command to ensure that they and members of their church refrain from occupying or using any of the churches and/or other buildings erected by the plaintiffs.

Still on the question of church buildings, the other complaint made by the plaintiffs was that the defendants have in some places erected their churches and other buildings on the plaintiffs' land. The place that featured high in the evidence on this point is a place known as Ponda in Karonga District. The plaintiffs established a station at this place quite sometime back. They have put up a few buildings there, including a church and a manse. The plaintiffs contend that this place is actually their headquarters. The defendants also established their own station at this same place in about 1995. They also built a church and a manse. The church has since collapsed, the Court was told. The defendants also regard this place as their headquarters. The plaintiffs contend that the land on which the defendants have put up the two buildings just mentioned belongs to them; that the said land was given to

them, the plaintiffs, by the Village Headman of the area at the time. The plaintiffs complain that the defendants are trespassers on the said land and they ask the Court to make an order that the defendants should dismantle their said buildings and leave the place.

On their part, the defendants deny the allegation that they have built their station on the plaintiffs' land. The defendants say that the piece of land in question was given to them by the Group Village Headman of the area. Fortunately, the Group Village Headman concerned was called as a witness in this case and, observably, he confirmed that it was indeed him who allocated to the defendants the place they have built their station at Ponda. The witness denied the place belongs to the plaintiffs.

It was suggested that the Group Village Headman was biased, in that he is a member of the defendants' church. With respect, I saw the Group Village Headman as he gave evidence. His demeanour was impressive and he came out unshaken in his evidence. It must also be mentioned that this Group Village Headman has been a group village headman for quite sometime. He began acting as village headman in 1952; he was installed a full village headman in 1971 and became group village headman in 1975. This clearly shows that he is a man of integrity and a respected person in the area, if not beyond as well. There can also be no doubt, on these facts, that this Group Village Headman knows the entire disputed area all too well. And then it is common case that the said area, including where the plaintiffs' station is built, is on customary land. All these years the plaintiffs have been at Ponda, they have not leased the land. I mention this because if the plaintiffs had done so, then clearly they could claim the land to belong to them, and if they then went on to show that the defendants had built their church or manse thereon, they would clearly be entitled to an order evicting the defendants from the land. Anyway, I have already said that I accept the Group Village Headman's evidence to the effect that it was him who allocated to the defendants the land the defendants have built their mission station on and that the land in question does not belong to the plaintiffs.

The other issue which emerged on this aspect of the case was that both at Ponda and at several other places as well the defendants had built their churches very close to those of the plaintiffs' and that this does cause confusion, in that some members of the plaintiffs' church stray to the defendants' churches on days of worship. Again, the plaintiffs would like the defendants to dismantle their churches and manses at the places in question and move to some other distant places. As I understand the evidence, the defendants admitted that some of the churches are indeed in close proximity of the plaintiffs' churches, but they denied that this has caused any confusion. The

Group Village Headman touched on this issue in his evidence as regards to the position at Ponda. He told the Court that he has not seen or heard of a member of the plaintiffs' church straying to the defendants' church on days of worship.

Again, the position with regard to the issue raised on this aspect of the case is that the land on which the plaintiffs and defendants have built their churches is customary land. The plaintiffs leased none of it. And it was common case that the responsible authority for the allocation of such land is the village headman of the area the land is situated. I do not know the criteria used or what principles are followed in the allocation of such land. I can only hope that the village headmen effect the allocations upon fair and equitable considerations, regard being had to all the facts of each case. In other words, the pieces of land in dispute in the present case were allocated to the defendants by the village headmen of the respective areas. In matters of this nature, my view is that courts should be slow to interfere with the allocations made by such authorities unless it is shown that the same were made upon wrong principles. With respect, I don't think that it has been shown that such is the case in the present case. In my view, an allocation cannot be impugned simply on the grounds of proximity of one place or building to another. Indeed, one sees in this country churches of different Christian denominations and even churches and mosques in close proximity of each other. I don't see anything objectionable about that.

It is also to be noted that the defendants would end up being unjustly and unfairly victimised if they were ordered to demolish their present churches and manses at those places the plaintiffs are complaining about and go to new places. Obviously, the defendants must have spent considerable sums of money to build these churches and manses. They will again have to spend more money to demolish these and put up new ones. This would also be embarrassing to the defendants and would degrade them in the eyes of the public in those places. And this would be unfair to the defendants since, as I have already shown, the places in question were allocated to them lawfully by responsible authorities. On these facts, I think that the plaintiffs' complaint on this aspect should fail.

Next, there is a dispute between the plaintiffs and the defendants over certain items of property, namely, clerical dress, church uniforms, Holy Communion utensils and hymn books. Members of clergy of the plaintiffs' church wear gowns and collars when conducting church services. The plaintiffs' church also has a group of women members, which is popularly known as the Women's Guild. Members of the said group wear uniform on certain occasions. The plaintiffs' church also serves Holy Communion and they use

such utensils as trays, jugs and cups. The plaintiffs have also hymn books of the songs members of the church sing during services of worship, for example. The plaintiffs allege that the defendants took some of these items at the time the defendants broke away from the plaintiffs' church. It is the plaintiffs' case that these items belong to them and that the defendants should not, therefore, have taken them. The plaintiffs are in this action asking that the defendants should be ordered to return these items to them. The defendants resist the claim. With regard to the clerical dress and the Women's Guild uniform, the defendants say that the plaintiffs cannot lay claim to these items, since they are bought by individual members of the clergy and Women's Guild using their own resources. The defendants deny having taken any Holy Communion utensils belonging to the plaintiffs. It is the defendants' case that the utensils they are using in their churches were procured by themselves after they broke away from the plaintiffs' church. And concerning the hymn books, the defendants say that these are general hymn books which were composed a long, long time ago by members of the first group that broke away from the Free Church of Scotland. Further, the defendants say that at all times individual members of the church bought their own copies of the hymn book in question and that these were, therefore, the property of the individual members concerned. The defendants contend that the plaintiffs cannot, in the circumstances, lay any claim to the said hymn books.

To my mind, it is, with respect, the defendants' story which has the ring of truth. I cannot imagine a church buying gowns, uniforms and hymn books for its clergy and members. That would be an expensive venture, and it must be appreciated that we are here talking about "small churches", out there in the villages, whose resources must be limited. Further, the defendants' witnesses appeared to me to be truthful and reliable. DW2, the Group Village Headman, told the Court that he used his own money to buy Women's Guild uniform for his wife. And DW3, who is a Reverend in the defendants' church, said that he also used his own money to buy a clerical gown for himself. He also said that he used his own money to buy Holy Communion utensils and donated these to his church.

It is also to be noted that the plaintiffs were unable to tell which individuals specifically had the gowns, uniforms and hymn books complained about. It is also not known whether the individuals concerned still have the items. All this makes the plaintiffs' case on this aspect hopeless, in my view.

I am conscious of the fact that what has happened is that both the plaintiffs' church and the defendants' church use the same kind of gowns and uniforms and sing the same songs, but that is not odd. Referring to the hymn books, as

was observed by learned counsel for the defendants, there are several other denominations which use the hymn book entitled **Nyimbo Za Mulungu** in their respective churches without any hassles. It is also to be observed the plaintiffs conceded they have no copyright title to the said hymn book. Fortunately, in the present case the defendants have designed a different cover for their hymn book with headings different from those in the plaintiffs' hymn book. The printers too are different. On these facts, the plaintiffs' claim on this aspect must also fail.

Finally, the plaintiffs' claimed damages. These are described in the Statement of Claim as "damages to be assessed by the Court". Plainly, this is a claim for general damages. Respectfully, the claim cannot succeed, since the plaintiffs have failed to prove their case on each and every limb pleaded in this action. Perhaps I should mention that in the course of the trial, the plaintiffs also sought to claim the sum of K2,500.00, being the value of bricks and iron sheets belonging to the plaintiffs and allegedly misappropriated by the defendants. This is clearly a claim for special damages. By rules of pleading and procedure, such damages must be specifically pleaded and proved. As I have already shown, the plaintiffs pleaded general damages only. Accordingly, the claim for special damages cannot succeed; indeed I don't think it was sufficiently proved.

The final position is, therefore, that the plaintiffs' action fails and it is dismissed in its entirety, with costs.

PRONOUNCED in open Court this 8th day of February 1994, at Blantyre.

L E Unyolo
JUDGE