Ogada & 3 others v Mulwa & 3 others (Constitutional Petition E010 of 2023) [2024] KEHC 10170 (KLR) (15 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10170 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CONSTITUTIONAL PETITION E010 OF 2023

RE ABURILI, J

AUGUST 15, 2024

BETWEEN

ELD. AMOS NAYIGA OGADA (AIC KISUMU CITY REGION) . 1ST APPLICANT

ELD. MARTIN ORWA OBUYA (AIC KISUMU CITY REGION) 2ND APPLICANT

ELD. JOSHUA DUMA AYIECHO (AIC MUHORONI REGION) 3RD APPLICANT

ELD. DAVID OUKO ANYANGO (AIC KISUMU CITY REGION) ..... 4TH APPLICANT

AND

REV. ABRAHAM MULWA (PRESIDING BISHOP AIC KENYA) ..... 1ST RESPONDENT

REV. PAUL KIRUI (DEPUTY PRESIDING BISHOP AIC KENYA) ..... 2ND RESPONDENT

REV. JOHN KITALA (ADMINSTRATIVE SECRETARY, AIC KENYA) ..... 3RD RESPONDENT

THE REGISTERED TRUSTEE, AIC CHURCH KENYA ..... 4TH RESPONDENT

RULING

1. This court has written many rulings in respect of the dispute between these two parties who are all church members and officials of the Africa inland Church such that as soon as one file is closed, the dispute germinates through another file and the question that I pose is, did the people in the service of God and humanity in the Christian calling forget what the Bible, the Holy Book tells them about how to resolve conflicts between and among themselves, as far as the church and congregants is concerned?

2. Matthew chapter 18, verses 15 and 16 instructs members of the church congregation to settle their differences privately with each other. And, if this fails, they are to seek help in resolving the dispute. Moreover, if your brother sins against you, go and tell him his fault between you and him alone. If he hears you, you have gained your brother.

3. The Bible Confirms God is the Peacemaker and in a number of passages, God is revealed as the one who brings peace. Psalm 46, verses 8 and 9 implores as follows:

> " Come behold the works of the Lord, who has made desolations in the earth. He makes wars to cease to the end of the earth: He breaks the bows and cuts the spear in two. He burns the chariot in the fire."

4. This and other scriptures proclaim how God is actively involved in the affairs of men, and there are at least eleven different examples in the Bible of God intervening to help men resolve their differences with each other.

5. A good example of God's intervention is at Genesis chapter 26, verses 12 to 31, where God helped Abraham's son Isaac resolve his dispute with some Philistine herdsmen. He and the herdsmen had a bitter struggle over some wells Isaac's servants dug for him. Every time Isaac's men dug a well, the Philistine herdsmen would claim that the water it produced was theirs. Because these men fought him over these wells relentlessly, resolution of this problem appeared hopeless to him. But, suddenly, things changed. When his men dug another well, the herdsmen mysteriously chose not to fight them over it. Isaac knew that only God could have brought peace. For this reason, he named the new well, Rehoboth, testifying about what God had done for him,

> " For now the Lord has made room for us, and we shall be fruitful in the land."

6. It follows that no Conflict is Impossible for God to Resolve. Sometimes, people refuse to discuss their differences with each other or to seek the help of a mediator because they see no hope in doing this.

7. God helped Joseph (the son of Jacob) resolve a very difficult conflict he had with his brothers. In the story, Joseph's brothers became jealous of him, and this led them to throw him in a pit and sell him into slavery (see Genesis chapter 37, verses 1 to 36). Joseph remained a slave in Egypt for thirteen years, until God delivered him out of prison and made him a great ruler. Most of us would have remained bitter, unforgiving and unwilling to consider making peace after suffering as Joseph had. But not Joseph. Because of God's grace, he was able to forgive his brothers, and give them food and shelter when they came to him to seek help during a terrible famine (see Genesis chapter 45, verses 1 to 15).

8. Thus, if God could help resolve a conflict as difficult as the one above, there is a hope that He can help them settle their differences as well.

9. In addition, Churches being registered societies have constitutions that govern their operations and, in those constitutions, it is expected that they provide therein the mode of dispute resolution so that not every dispute must be brought to court. Surprisingly, some church constitutions do not provide for any effective dispute resolution mechanisms and in some cases, there is absolutely no mode of dispute resolution provided which is a lacunae that exists and this is what leaves room for an influx of court disputes between and among church members and officials.

10. Happily, for the court, the *Constitution of Kenya* 2010 at Article 159(2)(c) is explicit that disputes are not necessarily to be resolved by courts but that courts exist to promote other forms of alternative

dispute resolution including negotiation, mediation, reconciliation and traditional dispute resolution mechanisms.

11. Furthermore, we now have an elaborate Alternative justice system, AJS, which has been fully rolled out throughout the country and churches and church elders are recognized as one of the avenues by which disputes should be resolved.

12. I have gone to this great length pointing out why such disputes as the one herein should not be oscillating in court time in time out as if the parties have personal vendetta towards each other and therefore they want to show each other dust through the court system, which would be very unfortunate, indeed.

13. Having said that, now that the dispute is here and I find no other effective alternative remedy disclosed within the church constitution, I must do what the people of Kenya delegated to me to do which is to exercise their judicial authority on their behalf.

14. This court had already given directions on the hearing of the petition by way of filing of written submissions and the parties did agree to that mode of hearing. This was on 9/4/2024. The directions are in accordance with the Mutunga Rules, this being a constitutional petition.

15. On 27/5/2024, the parties appeared for highlighting of the said submissions and that is when the petitioners" counsel, Mr. Mwamu, stated that there were issues requiring clarification and that he wished to cross examine the deponent. Further, that he had since issued a Notice to cross examine Reverent Abraham Mulwa on two affidavits of 6/5/2023, 17/1/2024 and 10/11/2023 under order 19 rule 2 of the *Civil Procedure Rules*. Counsel submitted that there are contradictions in the said affidavits because there are issues in the paragraphs which the deponent denies yet he swore them in previous affidavits. That his clients had annexed two certificates of registration which is denied and that the cross examination will help the court resolve the controversial issues. Further, that there was a disclosure of another filed in Siaya High Court hence the court should establish whether there was such a case.

16. Opposing the request, Mr. Amalemba counsel for the respondents submitted that this court had already given directions for disposal of the petition and that the petitioners were now changing the mode of disposal which then means that even the respondents should be allowed to cross examine the petitioners on their affidavits. That the issue of registration certificates was resolved in Nairobi HC Petition No. 395 of 2012 wherein other suits were consolidated and that if the petitioners have issues with the registration certificates, they can enjoin the Registrar of Societies. Furthermore, that the AIC is exempted from registration. On the Siaya Court matter as alleged, it was submitted that that issue was answered in the sense that it was the Kisumu HC matter which has simply been administratively allocated to Siaya HC when Ochieng J was elevated to the Court of Appeal hence no case was filed in Siaya.

17. Counsel for the respondents also submitted that the petitioners had filed another further affidavit without leave of court after the court had taken directions and parties already filed submissions hence the affidavit in question should be struck out.

18. In a rejoinder, Mr. Mwamu submitted that Mutunga Rules (*The Constitution of Kenya (Protection of. Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013) did not get rid of the *Civil procedure Rules* and that they only filed a further affidavit responding to new issues. That the respondent cannot cross examine the petitioner's deponent as no notice to cross examine had been filed. Further, that there was no decision on the two registration certificates.

Determination

19. I have considered the submissions b both counsel on the issues raised by Mr. Mwamu and Mr. Amalemba Advocates. Commencing with the further affidavit filed, I observe that no leave of court was obtained to file a further affidavit. On 9/4/2024 this court granted the petitioners leave to amend the petition which they did and filed. The respondents filed their replying affidavit and even as the petitioners were seeking leave to cross examine the respondents' deponent, they never disclosed that they had filed a further affidavit. They also never sought leave of court to have the furthers affidavit on record. In the circumstances, noting that the issue arose on the day of highlighting of submissions already filed, I find that the petitioners wanted to ambush the respondents which is not acceptable. I hereby proceed and strike out the further affidavit which was filed without leave of court.

20. On whether I should allow the petitioners to cross examine the respondents' deponent as per the notice to cross examine, cross-examination on the affidavit is a discretionary power conferred upon the court by the provisions of Order 19 Rule 2 of the *Civil Procedure Rules* which recognize that:

> "(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent."

21. This discretion is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words, a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent's affidavits otherwise if the courts become too willing to allow cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice.

22. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held by Ochieng, J. in the case of *Ahmednasir Abdikadir & Co. Advocates v. National Bank of Kenya Limtied* (2) [2006] 2 EA 6.

23. In *GGR v HPS* [2012] eKLR, the court held that:

> "The law has allowed evidence to be proved by way of affidavits under order 19. But under rule 2 of the said order, the court may order a deponent of an affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, malafides, authenticity of the facts deponed (*sic*), bad motive among others are raised, cross examination of the deponent of an affidavit may be ordered. This also extends to where there is a conflict of affidavits on record or order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an affidavit. The court must feel that adequate material has been placed before it that shows that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination."[emphasis added]

24. In *Invesco Assurance Co. Ltd v Commissioner of Insurance & others* [2016] eKLR, Odunga J (as he then was in the High Court) confronted with a similar application to cross examine the deponent in a petition had this to say:

> " In *Simon Kitavo Nduto & Another v. Owenga Anjere* Civil Appeal No. 170 of 1995, it was held that a wrong statement of fact made in an affidavit makes that statement worthless and may in certain circumstances amount to perjury. If that is the Petitioner's contention, then the same can be dealt with by way of submissions instead of going the unusual route of cross-examining the deponent whose affidavits are alleged to be self-contradictory. This is not to rule out cross-examination on self-conflicting affidavits, but just to state that apart from mere allegation of self-conflicts in the affidavits, the Applicant ought to go further and show in what manner the said conflicts can be said to constitute exceptional circumstances which cannot be dealt with in submissions. I am afraid that the Petitioner herein has failed to satisfactorily show this."

25. The learned Judge further observed after reviewing several cases on the subject, as follows regarding cross examination of deponent in civil cases and in judicial review cases and by extension, in constitutional petitions and I agree that:

> " The foregoing statement is the general position with respect to cross examination particularly in purely civil matters. However, different considerations apply when the same discretion is being exercised in judicial review proceedings. The exercise of that discretionary power in such cases is placed on a higher pedestal than in ordinary civil cases. Such discretion, as was appreciated by Korir, J in *R. v. Constituency Development Fund Board & Another ex parte Robert Iltaramwa Ochale & 5 Others* [2012] eKLR, though can be exercised under the inherent power of the Court, ought to be invoked sparingly taking into account the fact that allowing cross examination would lead to unnecessary delays in determining judicial review matters and hence the logic behind its policy that such proceedings be fast and quick fix to challenges encountered by citizens in their interaction with the administration defeated."

26. This position is restated by Wade and Forsyth: *Administrative Law*, 9th Edn. at page 648 where it is stated that:

> " A feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit, i.e. sworn statement in writing rather than orally. It is possible but exceptional for the court to allow cross-examination on the affidavit."
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> Similar observations were made in *Kibaki v. Moi & Another* Election Petition No. 1 of 1998 where the Court in dismissing the application for cross-examination of a deponent expressed itself as hereunder:
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> > " In exercise of its ordinary jurisdiction, the High Court is vested with discretionary power to allow the cross-examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed cross-examination will not be allowed."

27. In this case, the petitioners allege that there are contradictions in the affidavits named in that there are matters which the deponent had deposed on earlier on but now he contradicts himself on the same by denying. That there are two registration certificates which are denied by the respondent's deponent,

that there was disclosure of a case in Siaya and that the cross examination will help the court resolve the controversies.

28. I have considered the submissions by Mr. Mwamu against and the response by Mr. Amalemba. The court had given directions for the hearing of the petition. I have considered the allegations of contradictions and or existence of the Siaya case and in my view, those are matters that can ably be considered in the submissions and highlights and not requiring cross examination of the deponent.

29. In addition, the notice to cross- examine has come late into the proceedings as the directions have already been given by the consent of the parties and that the parties had already filed submissions and agreed to highlight the submissions on the main petition and that the intended cross examination will no doubt delay the hearing of the petition which is intended to resolve the long-standing dispute between the parties.

30. I find that no prejudice will be occasioned to the petitioners' the request to cross examine the respondent's deponent is declined and no such prejudice has been shown.

31. The upshot of the above is that the application is dismissed with no orders as to costs. Highlighting of the submissions as filed, in the main petition shall be on 3/10/2024.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF AUGUST, 2024

R. E. ABURILI

JUDGE