



Seventh Day Adventist East Africa Union Limited (Suing Through Duly Appointed Agent, the South East Kenya Field of the Seventh Day Adventist Church) v Nairobi Cosmopolitan Conference (Civil Case E006 of 2024) [2024] KEHC 17037 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KEHC 17037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE E006 OF 2024
TA ODERA, J
NOVEMBER 22, 2024**

BETWEEN

SEVENTH DAY ADVENTIST EAST AFRICA UNION LIMITED (SUING THROUGH DULY APPOINTED AGENT, THE SOUTH EAST KENYA FIELD OF THE SEVENTH DAY ADVENTIST CHURCH) PLAINTIFF

AND

NAIROBI COSMOPOLITAN CONFERENCE DEFENDANT

RULING

1. Vide a plaint dated 24th July, 2024, the plaintiff moved this court seeking the following orders against the defendant;
 - a. An order directing the immediate closure of the church premises known as Nyabigena SDA Church to prevent further violence, harm and destruction of property.
 - b. An order directing the church premises known as Nyabigena SDA Church shall only be re-opened upon the court being satisfied that normalcy has returned and that the premises can safely be used without the threat of violence or disruption.
 - c. An order directing the plaintiff to file monthly situational report in court updating the court on return of normalcy before the Nyabigena SDA Church is re-opened.
 - d. An order directing the Officer Commanding Police Division (OCPD) Nyamarambe to enforce the closure order and ensure compliance
 - e. Costs of the suit.
2. The Plaintiff claimed that the defendant had trespassed into suit property (Nyabigena SDA Church) registered in its name between 2019 to 2024, disrupted the worship services of its members. It



contended that the defendants were seeking a forceful takeover of the church (Nyabigena SDA church) from it without following the law.

3. The Plaintiff equally filed a Notice of Motion Application under certificate of urgency urging this court to grant an Exparte order, barring members of either parties from conducting worship services at the disputed Church Premises Pending the hearing and determination of the Application Interpartes. In support of the said prayer, the Plaintiff averred that in the month of July, 2024, its members and those of the Defendant were engaged in a serious fight that led to serious injuries while they were fighting over who had a right to worship in the said church Premises. To ensure that there was no further breach of peace that would occasion any further injuries to its members and those of the defendant who intended to exercise their right of worship on the suit property, the Plaintiff urged this court to urgently reign in by issuing an order for the closure of the church pending the hearing and determination of the dispute Interpartes.
4. In response to the Application, the Respondents filed a preliminary objection that was based on ground that closure of a church is a mandate bestowed upon the Registrar of Societies in accordance with section 12 of the Societies Act and the court had been approached prematurely on the issue of closure of Nyabigena SDA Church.
5. The court directed that preliminary objection be disposed of first by way of written submission. Both parties filed there submissions for my consideration.

The Defendant's Submissions

6. The learned counsel for the Defendant in support of the preliminary objection submitted that Section 12 of the Societies Act provides that only the Registrar of Societies has the mandate to close a church and he or she can only do so after a fair administrative action. The learned counsel argued that the plaintiff's clarification of what meant by closure was of little assistance as the pleadings speak loudly for themselves. The learned counsel equally submitted that that the Court's jurisdiction has been invoked prematurely contrary to the doctrine of exhaustion. He relied in the case of Geoffrey Muthiga Kabiru & 2 others –vs-Samuel Munga Henry & 1756 others [2015] eKLR, observed as follows:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

7. The learned counsel contended that if the Plaintiff is aggrieved by the running and/or operation of SDA Nyabigena Church, the Plaintiff ought to have approached the Registrar of Societies first and their thus coming to court at the first instance was premature.
8. The learned counsel equally submitted that the duty to maintain law and order is reserved for the Police and if indeed the Plaintiff is concerned about the alleged violence in the Church then the Police and the criminal justice system are able to take care of that. He contended that for the Court to be pulled into what is in essence a Church dispute as regards to affiliation to a conference then the Court would be charting into unfamiliar and risky waters.



9. The learned counsel urged the court to take notice from the Plaintiff that the Plaintiff has also filed another suit in the ELC which is ELC Suit E010 of 2022 over the premises where Nyabigena Church is situated seeking a declaration that the Church belongs to the Plaintiff. He contended therefore that the essence of the Plaintiff is filing multiple suits all aimed at gaining control of the Church premises which he contended to be the suit was therefore an abuse of the court process.

The Plaintiff's Submissions

10. The learned counsel for the Plaintiff on the other hand submitted that Preliminary Objection is bad in law, incompetent, misconceived and an abuse of the process of the Court the same was based on severe lack of comprehension and an apparent misconstruction of the substratum of the suit on part of the Defendants. He contended that the tenor and the spirit of Section 12 of the Societies Act upon which the Defendant have based their objection, speaks to the cancellation or suspension of registration of a society, which would have rightfully fallen under the sole ambit of the Registrar of Societies and divested this court of jurisdiction had those been the Plaintiff's prayers. He urged the court to note that the Plaintiff's cause of action is founded on the basis of public order and protection of human rights.
11. Further, he argued Nvabigena SDA is not a registered society under the Societies Act and neither is the Defendant herein which is registered as a company registered under the Companies Act (Cap. 486). He contended therefore that that call upon the Registrar to adjudicate over the suit herein would be tantamount to inviting the Registrar to act ultra vires; thus contrary to the provisions of law or its principles, rendering it an illegality. The learned counsel equally submitted that the defendant have not placed before court any founding document where upon parties agreed to subject themselves to the jurisdiction of the Registrar of Societies should any dispute arise between them.
12. He therefore contended that the assertion asserting the Registrar of Societies' authority over the instant proceedings is far-fetched, baseless and a non-starter and a strategy by the defendants delaying the proceedings. He underscored that approaching the Registrar of Societies would in fact be approaching an unqualified and therefore wrong forum in the circumstance and therefore a futile endeavor.
13. The learned counsel contended that prayers sought by the Plaintiff are succinctly centered on the temporary closure of the premises known as Nyabigena SDA Church where both the Plaintiff and Defendants' congregations meet. It is on these very premises, that acrimony and tension between the two factions has given rise to outright vicious brawls, which resulted in injuries to persons and damage of properly valued in the thousands the most serious of these confrontation having occurred on the 20th of July, 2024. He argued that the continued convocation of the parties' respective followers on the same premises has not done any favors to both sides over time, only deepened the rift between them.
14. The learned counsel for defendant argued that Plaintiff having been on the premises before the inception and breaking away of the Defendant faction it holds sole possessive rights over the church premises and the land whereon it is erected. He decried that the defendant has refused to withdraw its members, who it expressly instructed to lay siege on the subject church premises and properties therein sometimes or around the year 2019 without any color of right.
15. The learned counsel argued that plaintiff fears that despite its attempts to quell its members it is only a matter of time before another distasteful confrontation occurs as tensions continue to run high. He argued that maintenance of status quo in the current situation will only serve to ensure further antagonism, which only serves to hinder the resolution of the conflict between the two parties herein as both parties have failed to come to an agreement on the utilization of the property the Plaintiff was left with no alternative but to institute the instant proceedings and seek the court's assistance. The learned counsel contended that the removal of both parties from the premises will not only serve to



separate the parties significantly curbing any future eruptions of violence but help maintain a peace and new status quo until the court can establish that the premises can be used safely without endangering the members of either party. This would go a long way to enable parties fully focus on resolving their disputes, rather than continuously putting our fires among its malcontents.

16. Addressing the issue raised by the defendant that the suit herein pertains to proprietary' rights over the subject premises, which is currently under adjudication before the Environment and Land Court in Kisii rendering as subjudice the learned counsel argued that the Plaintiff's sole concern in the instant suit, is one of public order, and the prevention of further conflict between the two parties herein, falling squarely under civil disputes rather than a land-related dispute. The learned counsel further submitted that in his plaint suit disclosed the ELC matter in his pleadings and therefore could not possibly be guilty of material non-disclosure as purported by the Defendant. He nevertheless contended that the High Court has unlimited original jurisdiction over all criminal and civil actions as enshrined under Article 165(3)(a) of *the Constitution* of Kenya, 2010 and the *Judicature Act*.

Issues Of Determination

17. From my analysis of the pleadings filed by the plaintiff, the preliminary objection filed and the written submissions filed by the parties, I deduce the following as the main issues for determination;
 - a. Whether this section 12 of the *Societies Act* takes away the Jurisdiction of this court to hear and determine the Plaintiff's suit.
 - b. Whether this matter is subjudice.

Whether this section 12 of the *societies act* takes away the Jurisdiction of this court to hear and determine the Plaintiff's suit

18. The defendant has argued that the plaintiff ought to have first engaged the services of the Registrar of Societies in seeking the suspension of the church before approaching this court. Relying on the doctrine of exhaustion the Respondent argued that this suit is premature and the court should down its tools and dismiss the same Section 12 of the *Societies Act* provides as follows:

12. Cancellation or suspension of registration

- (1) Where, in respect of any registered society, the Registrar is of the opinion that the registration of a society should be cancelled or suspended on the ground that—
 - a. the society has, where he has reasonable cause to so believe, among its objects, or is likely to pursue, or to be used for, any unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Kenya; or
 - b. the interests of peace, welfare, or good order in Kenya would, where he has reasonable cause to believe, be likely to be prejudiced by the continued registration of the society; or
 - c. the terms of *the constitution* or of the rules of the society are, where he has reasonable cause to believe, in any respect repugnant to or inconsistent with any law; or
 - d. The society has willfully, and after notice from the Registrar, contravened any of the provisions of its constitution or of its rules, or has contravened section 20 of this Act; or



- e. the society has failed to comply, within the time allowed for compliance, with an order made under section 31(1) of this Act; or
- f. the society has dissolved itself; or
- g. the executive of the society is constituted otherwise than in conformity with its constitution and rules; or
- h. a person has become an officer of the society who has been at some time an officer of a society which has been refused registration under this Act or which has had its registration cancelled under this section, and the Registrar has given written notice to the society in the prescribed form that such officer must be removed within a period (not being less than seven days from the date of the notice) specified in the notice, and the officer has not been removed within that period; or
- i. the society has failed to furnish, within the time allowed, one of the documents required by section 30(1) of this Act; or
- j. the society is, or has without duly notifying the Registrar in the prescribed form become, a branch of or affiliated to, or connected with, any organization or group of a political nature established outside Kenya, the Registrar shall give written notice in the prescribed form to the society calling upon the society to show cause, within such period as is specified in the notice, why its registration should not be cancelled or, as the case may be, suspended; and, if the society fails to show cause to the satisfaction of the Registrar within the time specified, the Registrar may cancel or suspend the registration of the society.

19. A clear reading of section 12 of the *Societies Act*, the same addresses cancellation and/suspension of registration of a society. A correctly submitted by the learned counsel the Plaintiff, the respondent have not demonstrated to this court in any way that Nyabigena SDA church whose registration is being sought for suspension or cancellation. Therefore, it will be absurd for this court to hold that the matter ought to be handled by Registrar of Society while the church in question is not a registered institution with under the *Societies Act*. The preliminary objection is thus overruled.

Whether this matter is sub judice.

- 20. The defendant did not raise the issue of sub judice in the preliminary objection in his submissions but not in the objection. It is trite law that parties are bound by their pleading and cannot resort to making out their case in the submissions.
- 21. However, to avoid abuse of the process of this court and issuance of conflicting orders, I have taken the liberty to peruse ELC case no. 10 of 2024 between the same parties coming up for hearing of the application dated 5.10.24 on 11.12.24. The said suit seeks a declaration that the plaintiff is the sole proprietor of all the suit properties where Nyabigena SDA church among other SDA churches lie, a declaration that the defendants and their agents are trespassers on the said suit properties, an order for immediate eviction of the defendant and their agents from the said suit properties and permanent injunction against the defendants. The said prayers are substantially similar to the prayers in the instant suit.
- 22. Section 6 of the *Civil Procedure Act* provides that “ No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously



instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. ”

23. In the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR it was held: “23. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)^[10] had occasion to pronounce itself on the subject of sub-judice. It aptly stated: -

(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

(68) In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of *the Constitution*. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of *the Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of *the Constitution* on leadership and integrity.

(69) In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of *the Constitution* as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.

[70] In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of *the Constitution*. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of *the Constitution*.

(71) In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of *the Constitution*, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These



are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.

(72) We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of *the Constitution*, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of *the Constitution* and that Court has already been moved.

(73) Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of *the Constitution*. This Reference is sub-judice and this Court will not usurp the High Court’s jurisdiction under Article 165 (3).”²⁷. As the High Court of Uganda held in *Nyanza Garage v Attorney General*:^[12]

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

“...we do not think that the word ‘matter’...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court...”

24. The Kisii Environment and Land Court is a court of competent jurisdiction and the matter is pending hearing and determination in that court. This said ELC case was filed on 21.6.24 while the instant case was filed on 24.7.24. about a month after filing on the ELC matter. It is clear that this suit is sub judice Kisii ELC no.10 of 2024

25. In any event a keen perusal of the plaint reveals that the cause of action raised by the plaintiff in this suit is that trespass to land (place of worship) which brings the Jurisdiction of this court under *the constitution* into 2 questions. The plaintiff claims that it is the registered owner of all parcel of land which the church premises of Nyabigena SDA is situate. It claims too that the defendant without any lawful justification or consent trespassed onto said premises and continue to carry unauthorized activities, including but not limited to religious gathering and seminars for its apostate members. Article 162 (2) (b) provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. The *Environment and Land Court Act* No. 19 of 201 established the Environment and Land Court and vested upon it under section 13 thereof both original and appellate jurisdiction to hear and determine matter outlined under Article 162(2)(b). Having established that the predominant cause of action trespass to land, it is outright therefore that the Environment and Land court is the best suited court to hear the dispute.

26. That being the case therefore, the only option left for this court is to down its tools for lack of Jurisdiction.

27. In the upshot the Suit is struck out for want of jurisdiction and being sub judice Kisii ELC no. 10 of 2024.

28. It is trite law that costs follow event, the suit has been struck out. I proceed to award costs to defendant.



29. It is so ordered.

T. AODERA

JUDGE

22.11.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Karue holding brief for Mr. Malenya for Defendant

N/A for Plaintiff

Court Assistant - Oigo

