



Republic v Registrar General & another; Kenyakisa (Exparte Applicant); Lihanda & 2 others (Interested Parties) (Judicial Review E002 of 2022) [2023] KEHC 1829 (KLR) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1829 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
JUDICIAL REVIEW E002 OF 2022
PJO OTIENO, J
FEBRUARY 24, 2023

IN THE MATTER OF THE SOCIETIES ACT CAP 108 LAWS OF KENYA
AND
IN THE MATTER OF PENTECOSTAL ASSEMBLIES OF GOD-KENYA CHURCH
AND
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDERS FOR CERTIORARI, MANDAMUS AND PROHIBITION
AND
IN THE MATTER OF THE PURPORTED REGISTRATION
OF PATRICK LIHANDA, RICHARD OBWOGI, JULIUS K.
RONO AS OFFICE BEARERS OF THE P.A.G KENYA CHURCH

BETWEEN

REPUBLIC APPLICANT

AND

REGISTRAR GENERAL 1ST RESPONDENT
REGISTRAR OF SOCIETIES 2ND RESPONDENT

AND

ANTHONY KENYAKISA EXPARTE APPLICANT

AND

PATRICK LIHANDA INTERESTED PARTY
RICHARD OBWOGI INTERESTED PARTY
JULIUS K RONO INTERESTED PARTY



RULING

1. Before the court are three applications. The Notices of Motion applications dated July 4, 2022, July 19, 2022 and November 21, 2022. The prayers in each is as below.

Application dated July 4, 2022

2. This is an ex parte applicant's application brought pursuant to order 53 rule 1(2), (4) of the Civil Procedure Rules and it seeks orders that: -
 - a. This court be pleased to issue an order of *certiorari* to bring up to this court and quash the decision of the registrar of societies, registrar general and the attorney general to effect changes that have registered reverend Musungu Lihanda as general superintendent, reverend Richard Obwogi as general secretary and reverend Julius Kipkemboi Rono as general treasurer of the Pentecostal Assemblies of God-Kenya church.
 - b. This court be pleased to issue an order of *mandamus* to compel the registrar of societies, registrar general and the attorney general to nullify and cancel the registration of reverend Musungu Lihanda as general superintendent, reverend Richard Obwogi as general secretary and reverend Julius Kipkemboi Rono as general treasurer of the Pentecostal Assemblies of God-Kenya church.
 - c. This court be pleased to issue an order of prohibition to inhibit, restrain and bar the registrar of societies, registrar general and the attorney general from effecting any further changes to the office bearers of the Pentecostal Assemblies of God-Kenya Church until further orders of court.
 - d. spent
 - e. Costs be in the cause.
3. The application is supported by the affidavit of Antony Kenyakisa sworn on July 4, 2022 in which he avers that despite the existence of a court order issued in Kakamega High Court Constitutional Petition No. 6 of 2018 barring the registrar of societies from registering Reverend Patrick Musungu Lihanda, Reverend Obwogi and Reverend Julius Kipkemboi Rono as officials of the Pentecostal Assemblies of God- Kenya Church, the registrar of societies vide a letter Dated June 17, 2022 has confirmed the changes of offices bearers of the church by registering reverend Musungu Lihanda as the general superintendent, reverend Richard Obwogi as the general secretary and reverend Julius Kipkemboi Rono as the general treasurer of the Pentecostal Assemblies of God-Kenya church.

Response to the application

4. In the replying affidavit of Patrick Musungu Lihanda sworn on July 20, 2022, he states that he is the general superintendent of the Pentecostal Assemblies of God-Kenya, having been elected to office on December 6, 2013 and commencing duties on January 1, 2014. He avers that he remains the general superintendent of the church until elections are conducted and he hands over.
5. In the replying affidavit of Richard Obwogi sworn on July 20, 2022, he affirms that he was elected into office as an official of the Pentecostal Assemblies of God Church-Kenya on March 4, 2019. He further



asserts that he is not a party to Kakamega HC Petition No. 6 of 2018 and is thus not aware of any order stopping his registration as an official of the church.

6. Julius K. Rono in a replying affidavit sworn on July 20, 2022 reiterates the statement of Richard Obwogi and asserts being properly in office, denies having been served with the orders of July 21, 2022 but concedes that his counsel was in court and there was an application to set aside those orders and the court needs to deal with the application to set aside before dealing with the motion for judicial review motion

Application dated July 19, 2022

7. This is an application by the interested parties seeking orders that: -
 - a. That this honourable court be pleased to strike out the suit herein for want of prosecution.
 - b. That the honourable court be pleased to strike out the suit herein as it is *sub-judice*.
 - c. That the honourable court be pleased to grant such further or other orders as it deems fit in the interest of justice.
 - d. That the cost of this application and the application be provided for.
8. The application is supported by the affidavit of Patrick Musungu Lihanda sworn on July 20, 2022 in which he avers that that the issues raised in the notice of motion dated July 4, 2022 and supported by the statutory statement of July 4, 2022 and the affidavit of Antony Kenyakisa sworn on July 11, 2022 are the same issues raised in Kakamega HC Petition No. 6 of 2018.
9. The application was resisted by the Replying Affidavit of the ex-parte applicant sworn on December 13, 2022 whose gist is to deny the allegations of *sub-judice*, abuse of process and assert that these proceedings are targeted at undoing the unlawful conduct of the registrar of societies by which the office bearers of the church were changed without due process and contrary to several orders and directions by the court. The court orders allegedly flouted are then identified and enumerated and the substratum of the Kakamega High Court Petition No. 6 of 2018 is explained to be the constitutionality of the Church's constitution which resulted in the suspension of the elections of the church.
10. That cause is distinguished from the cause herein challenging the conduct of the three respondents in effecting changes in the leadership of the church a fact that has not been contested.
11. On the allegations that the respondents are non-parties to the pending petition, the ex-parte applicant contends that all were parties and fully participated and continue to participate, were always aware of the status including the restraining orders save for the 2nd and 3rd interested parties. On the principle of exhaustion, the ex-parte applicant contends that the same isn't effective nor available in that the church constitution providing the internal dispute resolution is under challenge and the mechanism has been inoperative since 2018. In any event, it is contended that that mechanism is limited to disputes between church members and thus applies not to the 2nd and 3rd respondent.



Application dated November 21, 2022

12. The application is brought pursuant to articles 19,20,21,22,23,159 and 258 of the [Constitution of Kenya, 2010](#), rules 13 and 19 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and it seeks the following orders: -
 - a. Spent
 - b. The ex-parte applicant herein be granted leave to institute contempt proceedings against the 1st, 2nd and 3rd interested parties herein Patrick Lihanda, Richard Obwogi and Julis Rono.
 - c. A notice to show cause does issue against Patrick Lihanda, Richard Obwogi and Julis Rono as to why contempt proceedings ought not to be instituted against them.
 - d. Interim conservatory order does issue directing the Vihiga County Police Commander and the OCs Serem police station to bar and restrain the interested parties from gaining access into Nyang'ori mission station forthwith.
 - e. Mr. Patrick Lihanda, Richard Obwogi and Julis Rono be committed to civil jail for six months or for any such punishment the court may deem to impose for being in contempt of this honourable court's order dated July 21, 2022.
 - f. The cost of the application be borne by Patrick Lihanda, Richard Obwogi and Julius Rono jointly and severally.
 - g. Any other remedy that the court deems fit and just so as to preserve the dignity of the court.
13. The application is supported by the affidavit of Antony Kenyakisa sworn on November 12, 2022 in which he avers that despite a ruling by this court on July 21, 2022 barring the interested parties from holding themselves as general superintendent, general secretary and general treasurer of the Pentecostal Assemblies of God church, they have defied the orders and continue representing themselves as such through circulars.
14. In opposition to the application, the interested parties filed Replying Affidavits all sworn on the December 14, 2022 in which the three unanimously deny having been present in court on the July 21, 2022 when the order was made, was not served with that order but had since filed an application to set it aside hence the question as to compliance should await the decision on setting aside. It is then asserted that the letter upgrading the mission station main road was written before the order was made, that the letter dated September 29, 2022, does not bear the names of the interested parties hence no contempt had been shown against them and therefore the goal of the application is merely to curtail and deprive them of their constitutional freedoms of conscience, religion, belief, worship, expression and assembly.
15. For the 1st interested party specific position was taken that him, the secretary general and the treasure's names were registered as the officials of the church on December 19, 2013, his name has remained so without being stayed or set aside or challenged by anyone and lastly that the orders of July 21, 2022 only relate to the returns filed on March 4, 2019.
16. Having been filed in quick successions, the court viewed the application by the interested parties as an opposition to the substantive notice of motion seeking orders of judicial review in so far as it challenges



its propriety hence fit for being dealt with together towards effective and efficient application of judicial resources. The court thus directed that all the applications be heard by way of written submissions and all the Parties have filed their respective submissions. Even when argued together, the motion for judicial review orders challenges actions by the Respondents while the contempt application targets only the interested parties.

Submissions by the ex-parte applicant

17. It is his submission that the registrar of societies being a party in Kakamega HC Petition No. 6 of 2018 was aware of the court order issued on March 18, 2019 barring them and the 1st interested party from effecting any changes of the office bearers of PAG-K Church. He further argues that the purported elections held on 3rd/4th of March, 2019 appointing the 2nd and 3rd interested party as office bearers was dismissed by a ruling by Justice William Musyoka on June 18, 2021 in which he directed that elections cannot be held without an order of the court allowing elections.
18. On whether this suit is *sub-judice*, the ex-parte applicant submits that it is not since the 2nd and 3rd interested parties have confirmed to not being a party in Kakamega HC Petition No. 6 of 2018 and cites the case of *Selebaddin Gulen v Inspector General of Police & 5 other* (2021) eKLR and *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* (2020) eKLR in that regard.

1st, 2nd and 3rd Interested Parties' Submissions

19. They identify four issues for determination namely;
 - a) whether this honourable court has jurisdiction and whether the matter is *sub-judice*;
 - b) whether the decision of the 1st respondent was lawful;
 - c) whether the prerogative orders of *certiorari*, *mandamus* and prohibition should be granted and;
 - d) whether the order of July 21, 2022 should be reviewed and/or varied.
20. On whether this honourable court has jurisdiction and whether the matter is *sub-judice*, it is their submission that this court lacks jurisdiction to deal with this matter as it involves a society and that the ex parte applicant seems to dispute its leadership and/or registration of the officials to the society. They argue that the *ex parte* applicant ought to have lodged a complaint with the registrar of societies and they cite the case of *Geoffrey Muthiga Kabiru & 2 others vs Samuel Munga Henry & 1756 others* (2015) eKLR. The interested parties further claim that this suit is *sub-judice* being that it raises similar issues to those raised in Kakamega HC Constitutional petition No. 6 of 2018 and they place reliance on the case of *John Juma & 2 others v Patrick Libanda & another; Zedekiah Odera & 4 others (Interested Parties)* (2018) eKLR, *Patrick Lubanda v Antony Kanyakisa & 10 others* (2020) eKLR, *Republic v registrar of Societies-Kenya & 2 others ex-parte Moses Kirima & 2 other* (2017) eKLR and *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex-parte Law Society of Kenya* (2020) eKLR.
21. On whether the prerogative orders of *certiorari*, *mandamus* and prohibition should be granted, the interested parties submit that the 1st respondent is the legal custodian of all societies and to invoke judicial review proceedings, a party must demonstrate the principles laid down in *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* (2014) which are illegality, irrational & unreasonable and procedural impropriety. They argue that these have not been met by the ex parte applicant since section 17 of the *Societies Act* cap 108 requires officials to file change of officials with the registrar of societies and that



section 18 of the [Societies Act](#) provides a mechanism for dispute resolution which has not been invoked by the *ex parte* applicant.

22. On whether the order of July 21, 2022 should be reviewed and/or varied, they submit in the affirmative reason being when the *ex parte* applicant sought for leave to institute the judicial review, no stay orders were granted.

Respondents' Submissions

23. The respondents jointly submit that the motion is scandalous, frivolous and vexatious since the applicant cannot claim the existence of a cause of action against the respondents who were never parties to the earlier suit and that the registrar of societies acted in good faith and relied on the information provided by members of PAG-Kenya.
24. They also submit that the applicant's suit is bad in law, incurably incompetent and an abuse of the court process since the court order dated 8/11/2018 was against the general superintendent, Reverend Patrick Lihanda, the general secretary and the general treasurer and that the applicant cannot seek judicial review orders against the respondents who acted in good faith.
25. Lastly, the respondents submit that this court lacks the jurisdiction to hear this suit because the *ex parte* applicant has not exhausted the dispute resolution mechanisms provided for in article 27 of the PAG-Kenya Society Constitution (1998).

1st, 2nd & 3rd Interested Parties Submissions to the application for contempt

26. They submit that the application for contempt is procedurally not proper as no leave was sought and place reliance on the case of [F.A.M V H.S.S](#) (2008) eKLR.
27. On whether they are in contempt, they argue that the order was not clear since the leave to institute judicial review granted by the court did not operate as stay. They also argue that they did not have knowledge of the order and question the affidavit of service sworn by Stephen Otieno Onyango on 19/7/2022 and filed in court on 20/7/2022 in which he claims to have served an order made on 21/7/2022. They further purport not to have acted in breach of the order as the first letter was written on 14/7/2021 before the order was issued, the letters dated 29/9/2022 do not have their names and that the letters of 18/10/2022 and 9/11/2022 were by the church.
28. Having sought and obtained leave to be joined to the matter, the 4th and 5th respondents also filed a Joint Replying Affidavit and submissions. In the Replying Affidavit, the two introduce themselves as representing the Pentecostal assemblies of God- Kenyan Church Woman caucus who have read and understood the tenure and effect of the application dated 4.7.2022 and consider it to fall short of the tenets of Judicial review being that it offends the doctrine of exhaustion in accordance with the [Constitution](#) and the biblical edicts. The application was in addition faulted for being sub judice and seeking to enforce orders issued in Petition No 6 of 2018 through the back door.
29. In the submissions, the two assert that the threshold that judicial review be issued as a last resort and in exceptional circumstances was stressed and the decisions in [Market Plaza Ltd vs Commissioner of Lands](#) (2019) eKLR and [Republic v National Environment Management Authority](#) (2011) eKLR on the doctrine of exhaustion was submitted while citing section 9(2), [Fair Administrative Action Act](#), and [Vania Investments Pool Ltd vs Capital Markets Authority](#) that the court must defer to internal dispute resolution mechanisms before being seized of a matter. The submissions conclude by asserting that the matter is *sub-judice*.



The order of considering the three motions

30. This determination, even if it hinges substantially on the motion for orders of judicial, must first address the question of propriety of the motion for the twine reasons and challenges by both respondents and interested parties that it is bad for being *sub-judice* and for failure to exhaust the internal dispute mechanism in the church. As said before, the application to set aside is deemed an opposition to the main motion, will be determined on the questions whether the matter is properly before the court. The contempt matter stands on its own at the end of this ruling.

Analysis and Determination

Whether this suit is *sub-judice*

31. The need to use judicial time efficiently and not to abuse the process cannot be gainsaid. To allow a matter pending before one court to be dealt with before another court, when both courts are seized of jurisdiction, portends not only prospects of conflicting outcomes and thus confusion but also misuses public resource in time and thus defeats the value of the Constitution that court disputes be disposed of expeditiously and justice is not delayed.
32. Civil procedure Act therefore codes the *sub-judice* rule at section 6 and forbids the court from proceeding 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.’
33. While the prohibition is as old as the common law and the Kenyan judicial system, the application of that law keeps coming up for determination as if it was new and emerging concept yearning for settlement by the court. The Supreme Court in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) eKLR reiterated the rationale and object of the rule to be:-
- “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.”
34. The test to be applied is whether the subject matter is live and active in the previously filed suit and between the same parties. In this matter, while the foundation is undeniably the orders issued in Kakamega High Court Pet. No 6 of 2018 by which the outcomes of the contested elections purportedly conducted on the 3rd/4th march 2019 were suspended not to be presented for registration and the instant 1st interested party, and others, restrained from holding themselves out as the bona fide officials of the church. It is common ground that indeed the 1st respondent did receive and had



registered the outcomes of the said impugned election and it is that single act the ex-parte applicant views to run affront the court order and asks that it be quashed.

35. To this court, the cause alleged here is one that had not accrued as at the date the Kakamega petition was filed but accrued subsequent to the orders issued in that earlier matter. I find that it is a matter that is not live before that court. In addition, the court finds that, the dispute here, regarding the presentation and registration of the office bearers is a question more directed at the two respondents who are not parties in the petition. Moreover, the ex-parte applicant, 2nd and 3rd interested parties are on the face of it not parties in the petition. The court thus concludes that in so far as the cause here is not pleaded and sought to be determined in the previously filed matter it being between parties different from the parties in the petition, the two matters, even if related, are distinct from each and this cause is not *sub-judice* the petition.

Whether the application is premature and bad for evading the internal dispute resolution mechanism.

36. It is now established that where there exists a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, an agreement by parties or a bidding document, that procedure should be strictly followed. Accordingly, whereas here, it is alleged that the Constitution of the society creates an internal dispute resolution mechanism the court must differ to that special procedure provided so that it be strictly adhered to since there must be good reasons for such special procedures to be preferred by the church.
37. Both parties agree that the Constitution of the church under article 28 creates an internal mechanism for dispute resolution and decrees that the body called Appeals and Arbitration Tribunal shall hear all disputes and differences arising between and among members as members of the church, its executive committee and between its different organs including matters of excommunication and alleged departure from the tenets of the faith. The disagreement is whether the body is operational. The ex-parte applicant has sworn in the Replying Affidavit sworn on 13.12.2022 that the dispute resolution mechanism has been inoperable since 2018 and that in petition Number 6 of 2018, one of the issues for determination is the efficacy of the mechanism. To that assertion no response was filed.
38. The exhaustion doctrine is a compelling one upon the court but not an absolute doctrine. It has over the years, like all rule, attracted exceptions when a court would deem its strict application not to serve justice. In Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, the court of appeal when called upon to address the issues did say: -

“What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)



As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively.”

39. Applying those principles to the facts of this case, the court finds on a balance of probabilities that the mechanism created by the church may fail the adequacy test for these two reasons; the first reason is that the dispute between the ex-parte applicant and the respondents clearly falls outside the mandate of the mechanism in both substance and jurisdiction. The mechanism created, as the name suggests, is internal to the church and would not bind the two respondents. In its substance, I don't consider the dispute pleaded to fit within the jurisdiction created and vested by the Constitution of the church. Instead, I consider the dispute to be one seeking the furtherance of the rule of law as a Kenyan constitutional value. It is therefore the finding of the court that this suit is not barred or deemed premature on the application of the doctrine of exhaustion.
40. The foregoing disposes the application dated July 19, 2022 to the extent that it was deemed an opposition to the motion for judicial review and sets the stage for determination of that substantive motion. In that motion what stands for determination are the three prayers for *certiorari*, *mandamus* and prohibition.
41. Those three order issue to serve distinct purposes and each is effective in its own sphere. All however will issue at the discretion of the court where the applicant proves that there has been illegality, irrationality and procedural impropriety. *certiorari* looks at the past and interrogates if the act complained about is tainted with any of the three I's. *mandamus* is invited to compel the performance of a due public duty while Prohibition forestall an anticipated action that would prove effectuated by irrationality, illegality or procedural impropriety.
42. Here the orders are sought on the basis that despite a specific court order suspending the implementation of elections on the 3rd and 4th March 2019, the respondents did receive and had registered persons allegedly elected on the two dates as office bearers of the church. That fact is not challenged nor controverted. To this court, that a court order was flouted is not a trivial matter. It goes to the root and very foundation of the rule of law the Kenyan people have enshrined as principle of their governance. The court finds it irrational and unjustifiable on any basis least of all the ground set forth by the respondents and the interested parties.

Whether Reverend Patrick Musungu Lihanda, Reverend Obwogi and Reverend Julius Kipkemboi Rono are in contempt of the orders issued by this court on 21/7/2022

43. It has been contended and submitted by the interested parties that the ex parte applicant failed to obtain leave prior to the filing of the application for contempt thus rendering the application a nullity. The court is persuaded by the decision in North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR for the proposition of the law that leave is not required where committal proceedings relate to a



breach of a judgement, order, or undertaking. The application for contempt relates to an order of this court and thus obtaining leave is not mandatory.

44. The elements of contempt were discussed in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR as follows: -

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

45. On whether the order issued by this court on July 21, 2022 was clear and unambiguous, the contemnors have argued that it was not since the leave to institute judicial review granted by the court did not operate as stay. I am not sure which order they seem to refer to but the order issued by the court read as follows in part: -

“That pending the hearing and determination of this proceedings there be stay of decision of the Registrar of Societies by which Reverend Patrick Musungu Lihanda, Reverend Obwogi and Reverend Julius Kipkemboi Rono were registered as office bearers of the Pentecostal Assemblies of God-Kenya Church and an order barring the said individuals from acting or holding themselves out as or claiming to be General Superintendent, General Secretary and General Treasurer respectively of the Pentecostal Assemblies of God-Kenya”

46. I find this order to have been clear and unambiguous on the stay of registration of the contemnors as officials of the Pentecostal Assemblies of God-Kenya Church officials and their representation as such. I find it indubitable that the terms could be doubted as being unclear.

47. The three interested parties cited for contempt contend that they were not in court when the order was made and thus they cannot be charged for having disobeyed what was unknown to them. In fact, there is no direct evidence of service of the order upon them. However, for contempt, what counts and matter is Knowledge of the existence of the order rather than the conventional personal service. The rationale for the rule is to protect the integrity and dignity of Court orders so that even those who may want to evade personal service in order to avoid the consequences of non-compliance are netted and held to account. It would be irredeemably wrong to excuse a contemnor who has knowledge of a Court order, by virtue of having retained an advocate to represent him, the advocate attends court at which the order is issued, even where the decision is ex tempore, simply because he has not been personally served would open up Court orders and process to contemptuous, fragrant and brazen disobedience. Because the law of agency remains that he who acts by agent does so by self, a party represented at a session of the court by counsel is deemed to have knowledge of a Court order if the party's advocate is aware of it¹.

¹ *Oilfield Movers Limited v Zabara Oil and Gas Limited* [2020] eKLR



48. The shift in jurisprudence in this area is evident in a number of decisions of the Court of Appeal and one needs only cite *Shimmers Plaza Limited -vs- National Bank of Kenya* [2015] eKLR in which the court observed: -

“The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience...

On the other hand, however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved...

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings...

Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case”.

49. In this matter, at the court session of the 21.7.2022, the interested parties were duly and ably represented by their counsel, Mr Wambani. It was counsel's duty, as an officer of the court, to not only convey the import and obligations of the client to comply with the dictates of the order, but also to carry out civic education by hinting to them the consequences of non-compliance. It is thus the finding of this court that all the three interested parties, the 4th and 5th were by that time not yet parties to the suit, had sufficient and due notice of the order and it was thus their unwavering and singular obligation obey and respect the order.
50. Have Patrick Musungu Lihanda, Richard Obwoi and Julius Rono acted in breach of the order issued by this court on 21/7/2022!? In a memo dated 12/10/22 and letters dated 18/10/2022 and 9/11/2022 addressed to overseers and pastors, Patrick Musungu Lihanda unequivocally carried out and represented himself as the general superintendent in blatant contravention of the orders of this court. I see no corresponding evidence of disobedient conduct on Messrs Richard Obwogi and Julius Rono. It is therefore the finding of the court that Patrick Lihanda did write the letter contrary to the court order and disobedience thereof.
51. Have his actions been deliberate? In his affidavit sworn on July 24, 2022 at paragraph 7, other than the ambivalence of knowing about and not knowing the existence of the order, the 1st Interested party appears to question the orders of this court by stating that in granting those orders this court went beyond the scope of stay. It is to this court a proof that the 1st interested party felt entitled to ignore and breach the orders because in his view the orders were erroneous. That to the court is willful and deliberate breach.



52. The significance of obedience to court orders was stressed by the Court of Appeal in *A.B. & Another v R.B.* [2016] eKLR which cited with approval the Constitutional Court of South Africa's decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held;

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. the *Constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

53. Court orders are never issued in vain and are to be upheld and respected. That said, I thus find Patrick Musungu Lihanda to be in contempt of the orders of this court and is therefore convicted for the contempt.

Rendition and Final Orders

54. Accordingly, for the reasons stated above, this court makes the following orders: -
- a. The application dated July 4, 2022 is allowed with costs and orders issued that;
 - i. An order of *certiorari* is issued to bring up to this court the decision of the registrar of societies, registrar general and the attorney general to effect changes that have registered reverend Musungu Lihanda as general superintendent, reverend Richard Obwogi as general secretary and reverend Julius Kipkemboi Rono as general treasurer of the Pentecostal Assemblies of God-Kenya church, for purposes of being quashed.
 - ii. An order of *mandamus* is hereby issued compelling the registrar of societies, registrar general and the attorney general to nullify and cancel the registration of reverend Musungu Lihanda as general superintendent, reverend Richard Obwogi as general secretary and reverend Julius Kipkemboi Rono as general treasurer of the Pentecostal Assemblies of God-Kenya church.
 - iii. An order of prohibition to prohibit, inhibit, restrain and bar the registrar of societies, registrar general and the attorney general from effecting any further changes to the office bearers of the Pentecostal Assemblies of God-Kenya Church until further orders of court.
 - b. The application July 19, 2022 is hereby dismissed with costs.



- c. The 1st Interested Party, Patrick Musungu Lihanda, to be in contempt of the orders of this court issued on July 21, 2022 and is thus convicted as such. For the purposes of curtailing further disobedience, the Vihiga County Police Commander shall enforce the compliance by ensuring that the 1st interested party does not access the Church Headquarters while holding himself as the General Overseer.
- d. Since the ex-parte applicant has succeeded, the costs are awarded to him as against the respondent and the Interested Parties.
- e. Matter stood over to March 21, 2023 at 2.30 p.m. for 1st Respondent to show cause why he cannot be punished for contempt.
- f. Leave to appeal is granted against conviction for contempt.

DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 24TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

