



Nzioki v Machakos Regional Church Council- AIC Kenya & 4 others (Constitutional Petition E001 of 2023) [2023] KEHC 25651 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E001 OF 2023**

MW MUIGAI, J

NOVEMBER 22, 2023

**(1), 22 (1) (2), 23 (1) (3), 24, 27 (1) (2), 28, 29 (F),
32, 33 (1)(A), 35 (1) (B), 36 (1), 47 (1) (2), 159 (2) (2)
(A) (B) (D) (E), 165 (1) (3) (6) (7), 258 & 259 OF THE
CONSTITUTION OF KENYA.**

**IN THE MATTER OF: THE CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
PETITIONER UNDER ARTICLES 24, 28, 29 (F) 32, 33 (1)
(A), 35 (1) (B), 36 (1), 47 (1) (2) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: RULES 4, 23 AND 24 OF THE
CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE
& PROCEDURE) RULES, 2013**

AND

**IN THE MATTER OF: SECTIONS 4, 6, AND 12 OF THE
FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015**

AND

**HIGH COURT PETITION E001 OF 2023 MHC1
IN THE MATTER OF: CONTRAVENTION OF AFRICA
INLAND CHURCH KENYA AMENDED CONSTITUTION,
2018**



AND
IN THE MATTER OF: CONTRAVENTION OF AFRICA
INLAND CHURCH KENYA BY- LAWS [2015]
IN THE MATTER OF: CONTRAVENTION OF LEGITIMATE
EXPECTATION OF THE AFRICA INLAND CHURCH –
KENYA KAMUTONGA
BETWEEN

WILFRED MUTHOKA NZIOKI PETITIONER

AND

MACHAKOS REGIONAL CHURCH COUNCIL- AIC KENYA 1ST
RESPONDENT

REVEREND DANIEL MUNGUTI 2ND RESPONDENT

REVEREND EVANS NDUTO 3RD RESPONDENT

GREGORY KAVUA 4TH RESPONDENT

DUNCAN MUMINA 5TH RESPONDENT

RULING

Notice of Motion

1. Vide a Notice of Motion brought under certificate of urgency dated and filed in court on 11th January,2023, brought under Articles 22, 23, 24, 28, 29 [f], 32, 33 [1] [a], 35 [1] [b], 36 [1] 47 [1] [2] of the *Constitution* of Kenya, 2010, Rules 4, 23 and 24 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) (Practice & Procedure) Rules, 2013, wherein the Petitioner sought the following orders that:
 - i. This Court to certify this Application extremely urgent and heard ex-parte in the first instance and service be dispensed with.
 - ii. This Court to issue a conservatory order staying the installation of a New Pastor and New Leadership at AIC Kamutonga by the Respondents and the unprocedural take-over of the Administration of AIC Kamutonga by the Respondents from the church’s lawful and known Administrator Athi River DCC and the threatened action of interfering with the peace and running of the church of 11th January,2023 pending hearing and determination of this Application.
 - iii. This Court to compels the Respondents and/or their agents to open the Church Premises, the Church Offices and to hand over the keys of the same to the Resident Pastor for the benefit of the congregation and be barred from interfering with the Petitioner and AIC Kamutonga Worship Schedules pending hearing and determination of this Application.



- iv. This Court to issue an injunction barring Respondents in themselves, their agents, servants, employees or proxies from interfering in anyway whatsoever from the running, administration, leadership, or worship of AIC Kamutonga pending hearing and determination of this Application.
 - v. The O.C.S Mwatate Police Station to enforce these orders.
 - vi. Such other orders as may appear to the to be just and convenient.
 - vii. Costs to be borne by the Respondent.
2. The grounds for Application are on the face of the application.

The Petition

3. *Vide* Petition dated and filed in court on 11th January,2023 the Petitioner herein sought the following reliefs from the court:
- a. A declaration be and is hereby issued that the decision by the 1st Respondent, executed by the 2nd, 3rd, 4th and 5th Respondents to forcefully take- over the management of AIC Kamutonga from Athi River DCC causing chaos during worship on the 8th January,2023 is invalid as it violates the laid down AIC church procedures and processes on church management, ignores the congregants right to freedom of religion and manifesting religion in community through worship as enshrined in Article 32 [1] [2] and suppresses the right to fair administrative action enshrined in Article 47 of the Constitution.
 - b. A declaration be .and is hereby issued that the actions of the 1st Respondent executed by 2nd, 3rd, 4th and 5th Respondents removing the resident pastor of AIC Kamutonga on 8th January,2023 and imposing another one on the congregants amounts to compulsion of the Petitioner and other congregants to accept the Respondents' imposed pastor which violates and continues to violate the Petitioner and other congregants right not to be compelled to act or engage in any act that is contrary to the Petitioner and other congregants belief and religion in violation of Article 32 [4] of the Constitution.
 - c. A declaration be and is hereby issued that the locking of AIC Kamutonga church premises and the church offices inconveniencing the Petitioner and other congregants is unlawful and a violation of Article 32 [3] of the Constitution.
 - d. A declaration be and is hereby issued that the installation of another pastor on AIC Kamutonga church and the chasing away of the Resident pastor is a nullity, cruel and amounts to inhumane treatment violating Article 28 of the Constitution.
 - e. A declaration be and is hereby issued that the Respondents Actions violated the Petitioner's rights provided for in Article 33 [1] [b], 36 [1] [2] and 47 of the Constitution, therefore militate against the public interest of fair, procedural, reasonable and transparent administration of public processes.
 - f. A declaration be and is hereby issued that AIC Kamutonga church is under the administration and management of Athi River DCC and the Respondents should not interfere.
 - g. An injunction barring the Respondents from installing a pastor and/or new or different leadership at AIC Kamutonga on 11th January,2023 and makes amends the violations enumerated herein.



- h. Damages for violation of the Petitioner's rights and freedom on 8th January, 2023 and punitive damages for the continual violation of the same.
- i. The Respondents be and are hereby directed to bear the costs of this petition.
- j. Such other reliefs that this Honorable Court may appropriate to meet the ends of justice.

Background

4. The Petitioner instituted this Petition on his behalf as a worshipper of AIC Kamutonga and on behalf of other worshippers of AIC Kamutonga and for greater public interest violation of his rights and those of other worshippers on Sunday the 8th January, 2023 and which rights continue to be violated under the bill of rights, statutory backed rights and violation of their legitimate expectation to peacefully associate, congregate and worship at AIC Kamutonga under the leadership and guidance of a pastor from Athi District Church Council [DCC] which AIC Kamutonga is under as a mission Church which the DCC manages its welfare, leadership and supervises development to achieve the mission of AIC-Kenya of the great commission.
5. He averred that as per the church previous constitutions and by-laws and mission statement and the current by-laws and church Constitution amended 2018 AIC Kamutonga is a mission station which was allocated to Athi River DCC as per the church Constitution and by-laws many years ago and it has been since 1990 and the two other churches planted by AIC Kamutonga which is AIC Digahi and AIC Manoa being under Kitengela and Kasina DCC respectively which DCCs are also under Machakos RCC and each DCC manages its church as per the previous church constitutions and currently clause VII [E] of the church constitution amended 2018 and existing by-laws [2015].
6. He lamented that the DCC ensures they post pastors to the said churches, ensures there is proper and valid local leadership, ensures the welfare of pastors, local leadership and congregation is taken care of including remunerating pastors in the respective churches.
7. He contended that as per church Constitution, DCCs shoulder the responsibility of interviewing, posting, paying and ensuring general welfare of pastors and other church workers in local churches under them and every local church everywhere in the country is under specific DCC with mission stations allocated mainly to DCCs far from their physical jurisdiction which is the case of AIC Kamutonga and that the RCCs has no any role in this.
8. It was opined that DCC Athi River would post different pastors to the church and supervise election of elders every election cycle and all the Respondents have had no role in the running of the AIC Kamutonga.
9. The Petitioner averred that the church is organized into five administrative councils, namely: The Local Church Council [LCC], District Church Council [DCC], the Regional Church Council [RCC], The Area Church Council [ACC] and the Central Church Council [CCC] in that order. Contending that these units are charged with various responsibilities according to the church Constitution and by-laws. that as per the hierarchy given, Respondents supervises DCCs and not local churches neither do they have any mandate human resource or otherwise of the local churches or on individual pastors or elders in the local churches.
10. It was his position that though this is the expected AIC Kenya Church administrative procedure in posting pastors, managing of local churches, planting of new churches and ensuring growth in numbers and spiritual knowledge of congregants in the respective local churches, the 1st Respondent and its executive office breached every known law of the church and of the country and every known



procedure of the AIC church Kenya and violently installed a person claimed to be pastor only known to them in AIC Kamutonga on 8th January,2023, inhumanly chased the pastor who had nourished the church with the word of God for months and had held the congregation in peace and harmony and spurred growth, they violently dispersed the congregation locked the church building and church offices and violently claimed they had taken over the management of the church from Athi River DCC to be managed by themselves yet the DCC is the only entity mandated under the church Constitution to manage a church and if such management was to cease from a DCC, the said DCC would request another DCC under a Gentle man's agreement to take up the said local church.

11. He contended that the RCC and ACC would only bless the hand over but not interfere. He opined that the RCC cannot take over the running of a local church from a DCC and claim to administer it the way the Respondent did to AIC Kamutonga on 8th January,2023 which actions according to him destabilized the peace and stability of AIC Kamutonga, violated the Petitioner and the congregants rights to religion, to associate and their freedom to worship, which actions were ultra vires, unlawful, unreasonable and procedurally unfair and continues to violate the congregants rights until now for the church is locked making it impossible for congregants to congregate there and worship.
12. The Petitioner averred that the Respondents actions contravened Article 24, 28, 29 [f] 32, 33 [1] [a], 35 [1] [a], 36 [1], 47 [1] [2] of the Constitution of Kenya.
13. The averred that the decision of the Respondents contained in a letter dated 28th December,2022 and the actions of 8th January,2023 of takeover of AIC Kamutonga be nullified and the threatened Action of 11th January,2023 be stopped.

Supporting Affidavit in Support of Both the Application and the Petition

14. The Petitioner in his supporting affidavit dated and filed in court on 11th January,2023, sworn by Wilfred Muthoka Nzioki, wherein he deposed inter alia that the Respondent were on their way to their church AIC Kamutonga from Machakos to unlawfully install new leadership after forcefully and unprocedurally taking over the church management on 8th January,2023 from the lawful administrator Athi River DCC, against the will of the congregation and DCC Athi River's will which is the administrator of their church and is responsible for posting pastors, paying the pastors, supervising election of church elders, mediating any dispute that may arise in their church, materially, morally and spiritually supporting their church's programmes and ministry and financially and materially supporting their church's development.
15. Deposing that the Respondents interrupted AIC Kamutonga worship service on 8th January,2023 barred the resident pastor from preaching or giving any guidance to the Petitioner and the rest of the congregation, chased the resident pastor, imposed on them as congregation another pastor and directed them as congregation to be answerable to the 1st Respondent henceforth whereas the Respondent do not have any mandate in their local church which administratively and procedurally is under Athi River DCC their overall office; that the Respondent threatened to install different leadership on 11th January,2023 in blatant disregard of AIC Kenya Constitution amended in 2018 and by-laws of 2015.
16. He deposed that as per church Constitution, DCCs shoulder the responsibility of interviewing, posting, paying and ensuring general welfare of pastors and other church workers in local churches under them and every local church everywhere in the country is under specific DCC with mission stations allocated mainly to DCCs far from their physical jurisdiction which is the case of AIC Kamutonga and that the RCCs has no any role in this.



17. It was deposed further that as per the church previous constitutions and by-laws and mission statement and the current by-laws and church Constitution amended 2018 AIC Kamutonga is a mission station which was allocated to Athi River DCC as per the church Constitution and by-laws many years ago and it has been since 1990 and the two other churches planted by AIC Kamutonga which is AIC Digahi and AIC Manoa being under Kitengela and Kasina DCC respectively which DCCs are also under Machakos RCC and each DCC manages its church as per the previous church constitutions and currently clause VII [E] of the church constitution amended 2018 and existing by-laws [2015].
18. Lamenting that he has been a member of the AIC church for many years and he knows RCC cannot take over running of a local church from the DCC and claim to administer it in the way the Respondents did to AIC Kamutonga on 8th January,2023 which actions according to him destabilized the peace and stability of their church, violated his rights and those of other congregants.
19. The Petitioner averred that the Respondents actions contravened Article 24, 28, 29 [f] 32, 33 [1] [a], 35 [1] [a], 36 [1], 47 [1] [2] of the Constitution as shown below:
 - a. The claimed take over and imposition of a stranger by the Respondents on 8th January,2023 without participation of the leadership known to the congregation of Athi River DCC was a clear contravention of Article 32 [1] [2], Article 33 [1] [a] and it was unfair administrative action contrary to Article 47 [1] [2] of the Constitution of Kenya 2010.
 - b. The imposition of a stranger to teach the congregants on 8th January,2023 and the insistence that that was the person the Respondent had chosen for congregants to be teaching them as opposed to the known pastor of the church was a clear violation of the Petitioner and Congregant's rights enshrined in Article 32 [4] of the Constitution of Kenya 2010.
 - c. The locking of church building and church offices on the said date curtailing their rights as congregants and their pastor from congregating and being taught the word of God by their pastor contravened Article 32 [3] and [4] of the Constitution of Kenya 2010.
 - d. The continual denial of access to church building and offices by the Respondents violated rights as congregation to associate under Article 36 [1] and freedom of worship.
 - e. Dispersing of congregants on 8th January,2023 as they worshipped at AIC Kamutonga for refusal to accept the stranger being imposed on them was a clear violation of freedom of religion as enshrined in Article 32 [1] [2] of the Constitution of Kenya 2010.
 - f. The chasing away of AIC Kamutonga resident pastor by the respondents before the congregants was demeaning, degrading inhumane and violated the pastor's right to human treatment and protection of his dignity as enshrined in Article 28 and Article 29 [f] of the Constitution of Kenya 2010.
 - g. The threat to use force to install a stranger on 11th January,2023 to be teaching himself and AIC Kamutonga is in clear violation and disregard of AIC Kenya church administrative process and is an illegal, unreasonable, unprocedural, unlawful and unfair and ultra vires action in clear violation of Article 47 [1] and [2] of the Constitution of Kenya 2010.
 - h. The forceful take-over of AIC Kamutonga from its administrative DCC of Athi River and causing the congregants to be answerable to the Respondents directly is forceful imposition of the association for them to belong to which is in clear contravention of Article 36 [2] of the Constitution of Kenya 2010.



20. Deposing that the Respondents actions are clear abrogation of his right to religion, belief and opinion, community worship and association which justifies this honorable court's intervention to impugn the decision of take-over of AIC Kamutonga elders on 3rd January,2023 of removal of the Resident pastor and threatened action of 11th January,2023 to install another leadership.
21. Lamenting that the AIC Kamutonga congregation does not intend to have another pastor or made to disassociate themselves from Athi River DCC or be forced to be under the Respondents directly and decision antecedent to these parameters cannot be made unilaterally by the Respondents.
22. It was the affiant position that he is advised by his Advocate that 1st, 2nd, 3rd, 4th and 5th Respondents cumulative actions are tantamount to a violation of his constitutional rights and those of other worshippers of AIC Kamutonga.

Notice of Preliminary Objection

23. By a Notice of Preliminary Objection dated 16th January,2023 and filed in court on 18th January,2023, wherein the Respondents raised a Preliminary Objection on point of law on the following grounds that:
 - a. The Application and Petition dated 11/1/2023 disclose no cause of action against the first Respondent as it is not capable of suing or being sued.
 - b. The Petitioner/Applicant lacks the requisite capacity to commence these proceedings as he is not a member of AIC Kamutonga.
 - c. The Application and Petition dated 11/1/2023 offend both the Constitution of AIC Kenya [2018] and by-laws [2018].
 - d. This Court lacks jurisdiction to hear this matter in view of the provisions of the Constitution of AIC Kenya [2018] and by-laws [2018] as well as the Constitution of Kenya 2010.

Replying Affidavit

24. The Respondents on their Replying Affidavit dated 16th January,2023 and filed in court on 18th January,2023 sworn by Reverend Daniel Munguti on behalf of 3rd, 4th and 5th Respondents, wherein he deposed that the Application is premature brought in bad faith, an abuse of the court process and thus must fail.
25. Further he lamented that the said application is full of falsehood and grossly exaggerated facts and discloses no cause of action against the parties herein to warrant the reliefs sought.
26. That in response to the said application he deposed that the removal of the presiding pastor of AIC Kamutonga was done at the instance and request of the members of the said church (attached and marked copy of affidavit sworn by the secretary and treasurer of AIC Kamutonga); further the church service on 8th January,2023 proceeded as scheduled and chaos only erupted before the final prayer could be made when the former presiding pastor forcefully grabbed the microphone and started addressing the congregation stating that he would not leave the church.
27. He denied the church building being locked on the said date as alleged and nobody infringed on the Applicant's constitutional right at all (reference to annexure marked DM 5); he lamented that he is advised by his Advocate on record that the right and freedom to worship is not absolute and when it is exercised in association with others through the means of voluntary organization such as church, its exercise is limited to the extent dictated by membership of that society; The AIC church Kenya is



- a place of worship for members of the public, but as a church its functions within an organizational structure.
28. Deponing that on 26/6/2022 the Bishop visited AIC Kamutonga and the congregants again aired their grievances and expressed their desire to be removed from the leadership and supervision of the DCC Athi River.
 29. It was lamented that the DCC Athi River requested to be allowed to continue supervising the Affairs of AIC Kamutonga up to 31st December,2022; and that a meeting chaired by the Bishop was held on 15/7/2022 and was attended by the officials of Machakos RCC and Athi River DCC. (attached and marked copy of the minutes).
 30. Deposing that on 15/8/2022 the Bishop through the RCC in Machakos wrote to the leaders of AIC Kamutonga informing them that church would remain under the supervision of the DCC Athi River until 31st December,2022 and then the leadership of the church would be handed over to the RCC in Machakos. (attached and marked copy of the letter).
 31. It was the affiant lamentation that the leaders of AIC Kamutonga again wrote to the Bishop through the regional office expressing their desire to be removed from the supervision of DCC Athi River (attached and marked copies of the letters dated 15/12/2022).
 32. Deposing that it is against this backdrop that a new pastor was installed at AIC Kamutonga on 8th 1/2023
 33. It was deponed that the church and the persons who serve in it are subject to internal rules and regulations which they agree to abide by when they agree to join that church and in this case AIC Kenya Constitution as amended in 2018 and AIC church Kenya by-laws 2018
 34. He deposed that Clause XI of the Church Constitution gives clear guidelines on procedure to be followed in the event of a dispute (attached and marked copy of the church Constitution)
 35. It was his position that Chapter XII and XIII of the church by laws 2018 also give the procedure to be followed in the event of a dispute and establishes the church Disputes Resolution Tribunal and Church Disputes Resolution Appeals Tribunal. (attached and marked copy of the said by laws).
 36. It was consequently deposed that he is advised by his advocate on record that the AIC constitution and its by-laws are comprehensive and adequate and should given a chance in line with the spirit and letter of the *Constitution* of Kenya 2010 that alternative dispute resolution mechanisms should be embraced; and that if court entertains this dispute, the evident acrimony between the parties will only be made worse.
 37. It was deposed that the Appellant herein did not exhaust the rather elaborate dispute resolution mechanisms provided by the *Constitution* and by-laws of AIC Kenya; lamenting that the Petitioner ignored the mechanism yet he did not allege that it was inadequate or unconstitutional or that the official refused to hear any dispute or that there was a violation of procedure.
 38. Finally, it was deponed that the Applicant has no cause of action in this court as it has no jurisdiction to hear him in matters he has complained about herein which are in the domain of the church's dispute resolution machinery.
 39. The matter was canvassed by written submissions however the Petitioner did not file and serve his written submissions at the time of writing this ruling.



Submissions

The Respondents Submissions

40. Respondents in their submissions dated 9th June,2023 and filed in court on 14th June,2023, counsel for the Respondent raised the following issues for determination:
- Whether the firm of P.K Kiteng'e & Company Advocates had been instructed by the petitioner.
 - Whether the petition is a public interest matter.
 - Whether there is a case for the court to determine after withdrawal by the Petitioner.
 - Whether the Respondents are entitled to costs.
41. On Whether the firm of P.K Kiteng'e & Company Advocates had been instructed by the petitioner, it was submitted by the Counsel for the Respondent that an Advocate/client relationship is grounded on retainer and in the absence of retainer, there is no relationship that exists as was held by the court in the case of [*Ochieng Oyango, Kibet & Ohaga Advocates v Akiba Bank Limited*](#) [2007] eKLR.
42. It was submitted that based on the averments by the Petitioner on 7th February,2023 it was crystal clear that the Advocate who filed these proceedings did not have instructions to do so and he informed the court that he had reported the matter the Director of Criminal Investigations in Machakos, according to counsel, the Petitioner contended that he had not given any authority, paid any monies as fees or signed any the documents that were filed in court on his behalf. His alleged counsel on record did not rebut these allegations or provide any proof to the contrary.
43. It was the position of the Respondent that the alleged counsel insisted that the petition could still stand even in his absence. Reliance was made on the case of [*Ochieng Oyango, Kibet & Ohaga Advocates v Akiba Bank Limited*](#) [2007] eKLR. To buttress his point, and submitted that in the absence of any proof by the Advocate that she had indeed retained by the Petitioner, she instituted this suit without authority and/or permission of the Petitioner.
44. As to whether the petition is a public interest matter, it was the submission of the counsel that the Petitioner's Advocate alleged that this matter can proceed even after the Petitioner withdrew it because it is a public interest matter. Credence was placed on the case of [*Kenya Anti-Corruption Commission v Deepak Chamala Kamni & 4 others*](#) [2014] eKLR, where it was held that:
- “... a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large”
45. Further, reliance was made on the case of [*Dindi Oscar Okumu v Robert Pavel Oimeke & 5 others*](#) [2021] eKLR, to buttress the point of public interest litigation and submitted further that the Petition herein creates a dispute between the ousted pastor and the church leadership disguised as a constitutional Petition. According to the counsel, the Petition does not in any way champion for rights of the other church goers but rather seeks to use this honorable as a tool for settling scores.
46. Contending that the Petition as filed also offended the Constitution of AIC Kenya [2018] and by-laws [2018] which provide for an elaborate system of resolution of disputes between members. Averring that the Petition was not a matter of public interest as claimed.
47. On Whether there is a case for the court to determine after withdrawal by the Petitioner, it was the counsel's contention that Rule 27 (1) (a) of the [*Constitution of Kenya \(Protection of Fundamental*](#)



Rights and Freedoms) (Practice & Procedure) Rules, 2013, allows a Petitioner who wishes to withdraw a petition to apply to withdraw the same after giving notice of his intention to both court and the Respondent. According to the counsel, the Petitioner complied with the said rule and filed the notice of withdrawal dated 17th January, 2023. Reliance was made on the cases of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards [interested party]* [2021] eKLR, which was quoted with approval in *Charles Kiptarbei Birech v Paul Waweru Mbugua & Another* [2021] eKLR and *Nicholas Kiptoo Arap Korir Salat v IEBC & others* Supreme Court Application No. 16 of 2014 where the Supreme Court reiterated that:

“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot deny a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate”

48. It was submitted that upon withdrawal, the court becomes functus officio. Reliance was on the case of *Smt. Rais Sultana Begam v Abdul Qadir & others* which was quoted with approval in *Charles Kiptarbei Birech v Paul Waweru Mbugua & Another*, to buttress this point, and submitted that from the above cases the much court can do in a withdrawal of case situation is to order costs be paid to the opposite side should it be appropriate.

49. Counsel further relied on the case of *Pil Kenya Limited v Joseph Oppong* Civil Case No. 102 of 2007 the Court of Appeal stated:

“The effect of withdrawal of a notice of is to terminate the suit of course subject to costs to the opposite side. The question I pose is of withdrawal of suit in existence in which orders other than orders on costs could be made either for or against the Appellant...”

50. Counsel submitted that costs follow the event and the Respondents are entitled for reimbursement of the legal costs incurred in [inter alia] perusing the Petition and Application, drawing the notice of preliminary Objection and replying Affidavit attending court on several occasions for various directions and researching on the issue of law.

Determination/Analysis

Preliminary Objection

In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 the Court observed;

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

The Respondent raised the P.O. that the Petition dated 11/1/2023 disclosed no cause of action against the first Respondent as it is not capable of suing or being sued; that the Petitioner/Applicant lacks the requisite



capacity to commence these proceedings as he is not a member of AIC Kamutonga; the Application and Petition dated 11/1/2023 offend both the Constitution of AIC Kenya [2018] and by-laws [2018] and this Court lacks jurisdiction to hear this matter in view of the provisions of the Constitution of AIC Kenya [2018] and by-laws [2018] as well as the *Constitution* of Kenya 2010.

Article 165 CoK outlines the jurisdiction of the High Court partly as follows;

- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

Clearly, the Court has requisite jurisdiction to hear and determine the dispute. The Court's jurisdiction is not ousted by preliminary and/or internal dispute resolution processes.

The Respondent's contention is that at Paragraph 16 of the Replying Affidavit filed on 18/1/2023, referred to the guidelines on dispute resolution within the Church as per the annexed Constitution of the Church which at IX states that no member of AIC -K shall take the Church or Church Officials to Court. Annexed is also prescribed Church Dispute Resolution Tribunals and Church Disputes Resolution Appeals Tribunal.

On 7/2/2023, the Petitioner, Wilfred Muthoka Nzioki told this Court that he did not have a matter in Court. He claimed that he was approached by the Pastor alleged to be ousted to give his ID card and later an advocate promised to represent him. He Filed Notice of Withdrawal on 18/1/2023 and Notice to Act in person on same date. It is not clear to this Court how the matter would proceed where the Petitioner has withdrawn the Petition and at the same time wishes to proceed in person.

The issue that is presented for determination is whether this petition qualifies as a public interest matter.

51. On matters of public interest reliance is placed on the decision in the case of *Kenya Anti-Corruption Commission v. Deepak Chamanlal Kamni and 4 others*, [2014] eKLR where it was held that:

“...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large.”

52. In the case of *People's Union for Democratic Rights & Others v Union of India & Others* (1982) 3 SCC 235 it was observed that:-

“Public interest litigation is essentially a cooperative or collaborative effort by the Petitioner, the State or public authority and the Court to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society.”

53. The petitioner is a worshipper at AIC Kamutonga, a mission station and alleged that his rights as well as those of other congregants of the church rights are protected by the *Constitution* of Kenya and other statutes. He sought conservatory orders staying the installation of a new pastor and new leadership at AIC Kamutonga by the respondents from the Church's lawful and known administrator Athi River DCC and the threatened action of interfering with the peace and running of the church and that the court to compel the respondents and or their agents to open the church premises, the church offices and to hand over the keys of the same to the resident pastor for the benefit of the congregation and barred from interfering with the petitioner and AIC Kamutonga worship schedules.



54. The court is of the view that this matter is more of a dispute between church officials than a matter of public interest looking at the petition itself. It was alleged that by the petitioner that he learnt that the respondents wanted to unlawfully install new leadership after forcefully and unprocedurally taking over the church management taking over the church management from its lawful administrator.
55. It was further alleged that the respondents interrupted the AIC Kamutonga Worship service, barred the resident pastor from preaching or giving any guidance to the church congregants, chased the resident pastor and imposed another pastor and directed the congregants to be answerable to the 1st respondent.
56. It was averred by the petitioner that the actions of the respondents were blatant disregard to AIC Kenya Constitution and by-laws of 2015 and a violation of the congregation's right to freedom of worship and expression as enshrined in the Constitution.
57. The 1st respondent in his replying affidavit contended that the petition was premature, brought in bad faith, an abuse of the Court process and must therefore fail. He alleged that the application was full of falsehoods and grossly exaggerated facts and disclosed no cause of action against the parties herein to warrant grant of the reliefs sought.
58. The 1st respondent averred that members of the AIC Kamutonga had been having disagreements with the presiding pastor for along time, the matter was escalated to the DCC Athi River however some members felt that their concerns were not being addressed properly and with the seriousness it deserved and reported to the regional church council and finally it was escalated to the bishop. It was at this point that he was instructed to take over and help solve the matter.
59. The 1st respondent stated that he had a meeting with the members of AIC Kamutonga who expressed their displeasure at the casual manner in which their concerns regarding the church leadership were being handled and on further discussion it emerged that the concerns involves issues of misappropriation of church funds and church property and the conduct of the presiding pastor.
60. It was averred that due to the complaints the presiding pastor was removed and a new pastor installed. Chaos erupted when the former pastor forcefully grabbed the microphone addressing the congregation.
61. The court is of the view that these disputes of private in nature as it involves a church and its leadership that is clearly divided. In this case, AIC Kamutonga has a leadership structure, a Constitution and by laws which should have clear internal guidelines on the procedure to be followed in the event of a dispute and should be the exhausted first before resorting to external mechanisms such as a court.
62. In the case of Esther Angawa v Minister for Education (responsible for Basic Education) Constitutional Petition 371 of 2021 The 3 Bench Court expressed itself thus on withdrawal of Petitioner and in allowing substitution thereof;

We are alive to the circumspection with which public interest litigation ought to be viewed to avoid abuse and on this we are guided by the Supreme Court of India which in the case of *Ashok Kumar Pandey v State of West Bengal* AIR 2004 SC 280 in relation to public interest litigation, stated as follows:

“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking... As indicated above, [the] Court must be careful to see that a body of persons or [a] member of public, who approaches the



court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations...The Petitioners of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.”

63. Whereas the Court has requisite jurisdiction to hear and determine the dispute; the Parties; the Church has employed an elaborate Dispute Resolution Mechanism and process which in light of Article 159 2 (c) CoK 2010 is to take precedent before the Court can/may intervene to hear and determine the dispute.
64. In the instant Petition, the Petitioner categorically withdrew as the Petitioner told this Court orally in Court and later a letter of 12/6/2023 by Advocate on record P.K.Kitenge Advocates requesting the matter is stood over generally to pave way for internal dispute resolution to take place first.
65. For the reasons hereof, The Court’s finding is that this matter does not meet the threshold of a public interest matter. And the Petitioner withdrew and was /has /not been substituted.
66. The petitioner vide a notice of withdrawal dated 17th January 2023 stated that he wished to withdraw the petition and this is not in contention.

Disposition

1. I direct that the dispute be subjected to and exhaust the internal dispute resolution mechanisms provided within the Church’s Constitution and by its laws first.
2. In default of internal dispute resolution mechanism uptake the parties are at liberty to substitute the Petitioner and proceed with the Petition to heard and determined on its merits.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 22ND NOVEMBER 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

