**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VIHIGA**

**JUDICIAL REVIEW NO. 5 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT**

**EX PARTE:**

**REV. PATRICK LIHANDA,**

**ORESIA BARANGA AND**

**JOSEPH CHOGE**

**RULING**

1. There are two Motions for simultaneous resolution, one dated 12th September 2021 and the other is dated 14th September 2021.

2. The Motion dated 12th September 2021 has been brought by the Pentecostal Assemblies of God, Church, as a proposed party, seeking to be joined to the judicial review proceedings as an interested party. The proposed party describes itself as a complainant and victim, and details how it lodged a complaint with the police, which led up to the *ex parte* applicant being charged with the offences the subject of these proceedings. It cites section 4 of the Victims Protection Act, No. 17 of 2014, and Articles 10, 27, 47 48 and 50 of the Constitution, to justify its plea for joinder to these proceedings.

3. The second Motion, dated 14th September 2021, has been brought by the Pentecostal Assemblies of God, Pentecostal Assemblies of God Pastors and Staff Provident Fund (PAG Scheme). The application is a copycat of the Motion dated 12th September 2021, in terms of content. The Scheme alleges that it reported a loss of property or money belonging to the Church to the police, and that the Scheme and its Trustees were complainants and victims with respect to the criminal case the subject of these proceedings. They also cite section 4 of the Victims Protection Act and Articles 10, 27, 47 48 and 50 of the Constitution, to advance their case.

4. The *ex parte* applicant has opposed the application, and filed grounds of opposition, dated 16th September 2021, and a replying affidavit sworn on even date. He contests that the firm of advocates that drew the first application was not among the advocates of the Church, and did not have instructions to represent the Church in the proceedings. He also contends that the persons who swore the affidavits in support of the applications had since retired, and, therefore, they were not the proper persons to file the applications. He further argues that the Church could only be brought into the matter through its Trustees. It is also argued that one of them was no longer an official of the provident and pension scheme of the Church. It is further argued that the subject matter of the criminal matter was the property of the Church and not the Scheme. It is submitted that the Scheme was not a victim to warrant its being added to the proceedings as interested party.

5. The response by the *ex parte* applicant provoked a detailed response by Elisha Kimaiyo, the deponent of the affidavit in support of the first application, to justify his having to swear that affidavit, and he has attached a trove of documents to support the position of the proposed interested parties. Like the second application, the further affidavit by Nathan Ondego is a copycat, globally, of the further affidavit by Elisha Kimaiyo.

6. The parties were directed to file and serve written submissions. There has been compliance. The submissions were highlighted on 5th October 2021. I have taken note of the written submissions and their oral highlights. The only issue for me to determine is whether I should order the joinder of the two entities as interested parties to the judicial review proceedings.

7. It was stated in *Welamondi vs. The Chairman, Electoral Commission of Kenya* [2002] 1 KLR 486 (Ringera J) and *Ndete v Chairman Land Disputes Tribunal and another* [2002] 1 KLR 392 (Ringera J), regarding judicial review proceedings, that they are *sui generis*, created by their own independent legislation, which confers special jurisdiction with respect to those proceedings. Being a special procedure sets it apart

from ordinary civil proceedings, and the provisions of the Civil Procedure Act, Cap 21, Laws of Kenya, and the Civil Procedure Rules do not apply or cannot be invoked. So, according to *Welamondi vs. The Chairman, Electoral Commission of Kenya* [2002] 1 KLR 486 (Ringera J) and *Ndete v Chairman Land Disputes Tribunal and another* [2002] 1 KLR 392 (Ringera J), one has to look inwards into Order 53, to establish whether it does allow for joinder of parties, in the manner proposed by the applicants.

8. I agree totally with the position stated in *Welamondi vs. The Chairman, Electoral Commission of Kenya* [2002] 1 KLR 486 (Ringera J) and *Ndete v Chairman Land Disputes Tribunal and another* [2002] 1 KLR 392 (Ringera J). The mere location of Order 53 within the Civil Procedure Rules does not make the proceedings it provides for subject to the substance of the Civil Procedure Act and the other provisions of the Civil Procedure Rules. The substantive law for it is the Law Reform Act, Cap 26, Laws of Kenya, which, imports the law applicable to judicial review in England. The relevant provisions are in sections 8 and 9 of the Law Reform Act, which state as follows:

*PART VI – MANDAMUS, PROHIBITION AND CERTIORARI*

*8. Orders of mandamus, prohibition and certiorari substituted for writs*

*(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.*

*(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.*

*(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.*

*(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.*

*(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.*

*9. Rules of court*

*(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—*

*(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;*

*(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;*

*(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.*

*(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.*

*(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*

9. So, I have perused through Order 53 of the Civil Procedure Rules. It does not provide for making of applications by parties who wish to be added to the proceedings, but it does, at Rule 4, allow the High Court to have persons who, in its opinion, ought to have been served, served, and it may adjourn the proceedings to allow such service. Order 53 Rule 4 provides as follows:

*If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.*

10. The position stated in that provision is that the High Court has power, where it forms an opinion that there is a person or entity who or which ought to have been served, because the proceedings affect him or it, or may affect him or it, or his or its input into the matter may be relevant to the proceedings, to order service of the judicial review papers on them. The provisions do not require their joinder as such. It

merely requires that they be served with the papers, and that would suffice to make them parties to the proceedings, who would then acquire a right to be heard.

11. In the instant case, the proposed interested parties have stepped out and informed the High Court, by their applications, that they are parties who ought to have been served with the papers herein, whether or not they had been named as parties to the dispute. The question that I have to answer is whether they are persons who ought to have been served with the papers, or persons that the court ought to hear with respect to the matters the subject of these judicial review proceedings.

12. The applicants claim to be complainants and victims in the context of the criminal proceedings. They claim to have been the persons or entities that initiated the complaint with the police, leading up to charges being drawn and brought against the *ex parte* applicant. The first application is by an entity calling itself the Pentecostal Assemblies of God, Church, and the person swearing the affidavit in support of the application is an Elisha Kimaiyo, in his purported capacity as member of the Church and at all material times the Treasurer of the Church. The second application is by an entity identified as the Pentecostal Assemblies of God, Pentecostal Assemblies of God Pastors and Staff Provident Fund (PAG Scheme), and the affidavit in support of the application is sworn by a James Ogendi, in his purported capacity as a member of the Church and a member of the Board of Trustees of the Pentecostal Assemblies of God, Pentecostal Assemblies of God Pastors and Staff Provident Fund (PAG Scheme), otherwise the Scheme. There is a further affidavit, sworn on behalf of the Scheme, on 22nd September 2021, by a Nathan Ondego, who describes himself as a member of the Church and an administrator of the Scheme.

13. The charge sheet, annexed to the affidavit of the *ex parte* applicant, sworn on 3rd August 2021, in support of the application for judicial review, indicates that the money, the subject of the charge, was the property of the "PAG churches of Kenya." That would appear to be reference to the entity sought to be joined through the first application. In the column for witnesses, in the said charge sheet, at number 4, appears the name of Elisha Kimaiyo, who I suppose is the individual who has sworn the affidavit in support of the first application. The name of the Scheme does not appear in the body of the charge sheet, but the individuals, who have sworn affidavits in support of the joinder of the Scheme as an interested party in these proceedings, are listed in the charge sheet as witnesses, that is to say, James Ogendi at number 2 and Nathan Ondego at number 3.

14. From the material that I have recited, in paragraphs 12 and 13, here above, it would appear that the deponents of the supporting affidavits are perhaps correct when they aver that they were in the leadership of the entities that are seeking to be joined to these proceedings. One of the entities is named as complainant in the charge sheet, the other entity is not named as such but some of its officials are listed as witnesses. How the second entity is related to the first entity or the dispute at hand is of no consequence at this stage of considering the question of joinder, for I believe these are issues that should come up to be dealt with at the hearing of the substantive Motion for judicial review or at the hearing of the criminal matter itself, should the matter get to that stage.

15. The *ex parte* applicant has said, in his replying affidavit, that Elisha Kimaiyo was no longer a Pastor in the Church, and ostensibly no longer Treasurer of the Church, and James Ogendi was no longer a member of the Board of Trustees of the Church. That could be so, but the relevant period for the purposes of the criminal case is not the present but January 2016, when the two claim to have been in office, and to have initiated the complaint with the police.

16. I believe that there is sufficient material for the applicants in the two applications to be added to these proceedings as interested parties, and I hereby allow the said applications.

17. Under Order 53 Rule 4(3), every party to the proceedings is required to supply any other party with copies of the affidavits that they propose to use. That would presuppose that parties that the court has caused to be added to the proceedings, not being original parties, are entitled to file affidavits. The two applicants herein have already done so, and I trust that what they have filed is sufficient, noting that they are not principal parties, and they have come in only to bolster the case for the respondent. But there is liberty to apply, although it should be emphasised that the role of the interested parties should be limited, for they should not been seen to upstage the principal players, and they should only be allowed, beyond the affidavits that they have placed on record, to make legal arguments limited to the issues in controversy.

18. The substantive Motion shall be disposed of by way of written submissions, which shall be substantive, complete with relevant authorities, and oral highlighting of the submissions shall not be permitted. Directions on the timelines shall be given either at the delivery of this ruling or on 31st January 2022when the other related matter came up, depending on whether the interested parties intend to file further affidavits. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JANUARY, 2022**

**W. MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Mr. Mokua, instructed by Messrs. Zablon Mokua and Company, Advocates, for the first proposed interested party.**

**Mr. Oginga, instructed by Messrs. Ochieng Oginga & Co., Advocates, for the second proposed interested party.**

**Dr. Oloo, instructed by Messrs. Oloo & Oloo, Advocates, for the *ex parte* applicant.**