



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 1 OF 2016**

**REV. GEOFFREY MUTHINJA AND 4 OTHERS.....PLAINTIFF**

**VERSUS**

**REV. SAMUEL MUGUNA HENRY & 2 OTHERS .....DEFENDANT**

**RULING**

1. The career of this file in court continues to portray and exhibit a chequered face and justice dictates that all efforts be made to return on its track toward conclusion.
2. On the 23/8/2021 the court referred the matter to court annexed mediation with the appreciation that the dispute is over the running of a Christian faith based church whose foundation is that members ought to talk to each other. In fact the constitution of the church mandates that all disputes be referred to arbitration. That concern had been with the court as early as the 19/3/2021 as shown in the last paragraph of the ruling of that date.
3. However, while the court awaited the mediation report, the plaintiff filed yet another application dated the 24/01/2022 and seeking in the main that the respondents be restrained from calling elections for national officials of the church scheduled for the 28/8/2022. He equally sought for a notice to show cause to be issued to the respondent to attend court and show cause why they should not be committed to civil jail for failure to comply with the court orders of 23/8/2021.
4. The grounds disclosed to the premise the application appear to be that while the matter is still pending determination by mediation by the registrar of Societies, the respondent in calling the election is subverting the mediation and conclusion of the matter contrary to the court orders and towards rendering any orders by the mediator nugatory. The affidavit sworn in support of the application reiterated the same grounds then annexed the court directions referring the matter to mediation and the calendar of elections issued by the church.
5. When served, the respondents opposed the application by the Replying Affidavits sworn by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The gist of the opposition is that while the matter was duly referred to mediation by the court, parties did attend a session before the mediator, it was the respondents and not the applicant who pushed to have the process progress and that when the mediation was convened, the applicant subverted the process by calling upon the mediator to address the question of splitting the church contrary to the terms of reference set by the court. It is contended that the applicant put road blocks against mediation as a consequence of which no agreement was reached and the mediator promised to make a report to court.
6. The applicant was faulted for harboring no desire to have the matter concluded and to forestall church election which are by constitution obligated to be held every five years. It was stressed that the last elections were conducted 8/2/2017 pursuant to a court order issued in this file hence the next elections as scheduled are due in accordance with the law and the church's constitution. It was contested that unless the elections are held there would be a lacuna in the leadership of the church and the legitimacy of the office bearers will itself be brought into question. To the contrary, it is the mandate of the current office bearers to call and arrange elections and that there was now a well-known and predicable practice of coming to court whenever elections were called yet all disputes in the matter had been resolved when the court directed that the elections be called and that the pleadings now on record did not disclose the elections of national officials as an issue for determination by the court.
7. The respondent denied any disobedience of the court orders and asserted having complied with the orders of 23/8/2021 by seeking the orders to be extracted and served upon the mediator and thereafter attending the mediation sessions which was forestalled by the applicant.
8. When the matter came to court for hearing on the 2/2/2022, the three counsel offered brief oral submissions. In those submissions it emerged as common place that in deed the mediator met the parties but no agreement was reached. While counsel for the applicant was urging that the court grants the orders sought, she was also gracious to concede that no pleading exist in the plaint as to reveal a dispute over the legality or propriety of elections due for the 28/2/2022. She equally conceded that there is no prayer for a permanent injunction in the

plaint to premise an order for temporary injunction in the interim.

9. I have since obtained the mediators report dated 01/12/2021 which confirms that there was no agreement reached and gives one reason for failure to engage meaningfully, in the following word:

***“Both parties are hesitant on discussing issues not listed in the court order dated 23<sup>rd</sup> August 2021 despite the office being limited to provide a report on the two issues listed in the said order. Mr. Felix Mukuvi insisted that the meeting be adjourned.”***

10. In referring the matter to court annexed mediation, the court was merely postponing its appreciation of the law that where there exist a chosen dispute resolution adopted or agreed by the parties the court is to exercise restraint and wait for that mechanism to be exhausted before accepting to entertain the dispute. Being a dispute between people disclosed and addressed as reverend, persons ordained for religious duties in the Christian church, I am not restrained from quoting to them the words of the bible in 1corinthians Chapter 6 verse 1. The holy Christian book says:

***“If any of you has a dispute with another dare he take it before the ungodly for judgment instead of before the saints?” (NIV)***

11. That must be the appreciation the founders of the church had when articulating Article 21 a of the constitution of the church. The constitution of the church forbids difference to the court in the following words:

***“21(a) No dispute concerning the affairs of the Society shall be referred to or instituted in a court of law by a member or members of the society but shall be dealt with by the following church organs namely, the board of elders, the parish council, the district executive committee and the national committee.***

***c) The decision of the National committee on any dispute referred to it whether in the first instance or on appeal, shall be final.”***

12. Where, as here, the parties are bound by their constitution to handle their dispute in a particular way, they, while exercising party autonomy, chose to deny and oust the jurisdiction of the court to intervene between them. That choice must be respected by all including the court. This is what the Supreme Court determined to render the dispute justiciable<sup>[1]</sup>. It must be noted that while such choices are normally subject to minute scrutiny by the court when found in a statute, here it is a voluntary decision by the church, as founded in their right to a religious belief, that it retains the mandate to deal with its dispute in house. I find that a member of an association or indeed a faith based organization make a deliberate decision to join or remain a member. When such a decision is made, it follows that the member agrees and offers to play by and within the rule of the organization.

13. In the orders of the supreme court in *Modern Holdings (EA) Ltd Vs Kenya Ports authority (2020)eKLR* alternative dispute resolution, far from denying a party an opportunity to enforce a right, enables the party to expeditiously and more efficiently enforce its rights.

14. With the dispute resolution clause in the churches’ constitution, I do find that this matter when filed, was premature and contrary to the principle of exhaustion or ripeness. I find that the court’s jurisdiction has been ousted and when so ousted the court lacks jurisdiction to deal with it. The court in these circumstances down its tools by striking out the matter to enable the parties go to their ordained forum.

15. Being a faith matter between brethren and with the appreciation that alternative dispute resolution is designed to restore relationships, I order that each party shall bear own costs.

**DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF FEBRUARY, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**IN PRESENCE OF**

**MISS MBOGO FOR THE 1ST DEFENDANT**

**MR. MURIUKI FOR 2ND AND 3RD DEFENDANT**

**MISS KIOME FOR THE PLAINTIFF**

**PATRICK J.O OTIENO**

**JUDGE**

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<sup>[1]</sup> Judges and magistrate’s vetting Board & 2 others Vs Centre for human rights and democracy (2014) eKLR

