



**Local Church Council Goodnews Church Pumwani Branch (Suing Through
Kaunda the trustees Pumwani LCC) v Raphael Kituva (Being Chairman
of the Central Church Council) & 4 others (Petition E375 of 2021)
[2022] KEHC 11093 (KLR) (Constitutional and Human Rights) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E375 OF 2021**

HI ONG'UDI, J

MAY 31, 2022

BETWEEN

**LOCAL CHURCH COUNCIL GOODNEWS CHURCH PUMWANI
BRANCH (SUING THROUGH KAUNDA THE TRUSTEES PUMWANI
LCC) PETITIONER**

AND

**RAPHAEL KITUVA (BEING CHAIRMAN OF THE CENTRAL CHURCH
COUNCIL) 1ST RESPONDENT
OCS KAMUKUNJI 2ND RESPONDENT
DEPUTY OCS KAMUKUNJI 3RD RESPONDENT
INSPECTOR GENERAL OF POLICE 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. The petitioner moved this Court by way of a Petition and Notice of Motion dated September 17, 2021. The same are supported by his sworn affidavit.
2. A preliminary objection dated October 8, 2021 was filed by the 1st respondent. It raises the following grounds:-



- a. That the petition and application fall short on the doctrine of Subjudice as there are suits on the same subject matter pending determination in Milimani Civil Suit No. E3984 of 2020 and Nairobi HCCA No. E 136 of 2021.
 - b. That the petition and application offends the Doctrine of Exhaustion since the petitioner has not utilized the internal dispute mechanisms as provided for by the Church Constitution.
 - c. That the petition dated September 17, 2021 and filed herein is in substance fatally defective for non-compliance with the provisions of *the Constitution* as it neither states nor demonstrates how the provision of *the Constitution* have been violated.
 - d. That based on the aforesaid reason the jurisdiction of this court has been improperly and prematurely invoked.
 - e. That in the premises, the Application and the Petition dated September 17, 2021 respectively and field and supported by the said of one Joseph Kaunda is an abuse of the process of the Court and the same should be dismissed with costs to the 1st respondent.
3. Directions were given on October 12, 2021 that parties file written submissions. This was in the presence of counsel for the petitioner and 1st respondent. The 2nd – 5th respondents were absent. As at the time of giving the Ruling date it is only the 1st respondent who had complied by filing submissions. This was on March 21, 2022.
 4. The Petitioner and the 2nd – 5th respondents did not file any response to the preliminary objection. Basically the same is not opposed.
 5. The 1st respondent’s submissions dated November 16, 2021 were field by Muma & Kanjama advocates. On the competence of the preliminary objection counsel referred to the case of *Mukisa Biscuits Manufacturing Ltd v. West End Distributors Ltd* 1969 EA 697 where it was held:-

“A preliminary objection is in the nature of what used to be called demurrer. It raises pure point of law, which is argued on the assumption that all the facts pleaded 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 Objection does nothing but unnecessarily increase costs and on occasion confuse issues.”
 6. He also referred to the cases of:-
 - i. *John Mundia Njoroge and 9 others vs. Cecilia Muthoni Njoroge and another* [2016] eKLR
 - ii. *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR Based on these decisions counsel submits that the grounds raised in the preliminary objections are pure points of law hence the competence of the objection.
 7. The 1st respondent also raised issue with the failure by the petitioner to comply with the doctrine of exhaustion. He made mention of the fact the under Clause 7 of the Church’s Constitution there is provision for internal appeals mechanisms which were not exhausted. He cited the case of *Geoffrey Muthinja Kaburu & 2 others v. Samuel Munga Henry & 1756 others* [2015] eKLR where the court held:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine



is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute.”

8. Also see:-
 - i. Sections 9(2) (3) and (4) of the *Fair Administrative Action Act*
 - ii. *Speaker of the National Assembly v. Njenga Karume* Nairobi C.A No. 92 of 1992.
 - iii. *Republic v. Ministry of Interior & Coordination of National Government & another Ex parte ZTE* JR 442/2013. Among many others.
9. Referring to article 32 of *the Constitution* Counsel submits that matters of religion & conscience should have their autonomy respected and not subjected to determination of the court. On this counsel referred to the cases of *Regina Williamson & others v. Secretary of State for Education & Employment* [2005] 2 AC 246; *Hinga & another v. P.C.E.A. through Rev. Dr. Njoya & another* [1986] KLR 317.
10. Counsel next argued on the doctrine of subjudice. He referred to section 6 of the *Civil Procedure Act*. He submitted that:-
 - i. In Milimani Civil suit No. E3984 of 2020 the parties are the same as in this petition save that in this suit the petitioners hid under the umbrella being the local church council where as they are the 9th to 15th defendants in the said suit and the 9th to 14th Appellants in Nairobi E 136/2021.
 - ii. That the Petitioners acknowledge the existence of the above suits. Further that the matters refer to the court order of August 24, 2020 in Milimani Civil Suit No. E3984 of 2020. The declarations sought refer to this order which is claimed to have lapsed.
11. Its counsel’s submission that the petitioner is aware that his claim is of a civil nature yet he dresses it as a constitutional issue. He cited the case of *Patrick Mbau Karanja v. Kenyatta University* (2012) eKLR where Lenaola J (as he then was) stated:-

“I should only say this as I conclude; in Francis Waithaka – vs. Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang vs. Ariong (1987) LRC (const.) 517* where it was held as follows;-

“Dealing now with the questions, can a private individual or individuals for breach of fundamental rights provision of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. *The Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by *the Constitution* under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owned by an individual or group of individuals to another individual under the fundamental rights provisions of *the*



Constitution no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold.”

Lenaola J (as he then was) went ahead to observe as follows:-

“I maintain this position and it is important that simple matters between individuals which are of a purely civil or Criminal nature should follow the route of Article 165(3)(a) and be determined as such. To invoke the Bill of rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of rights”.

12. I have carefully considered the issues raised by the 1st respondent which have not been rebutted by the petitioner who was served. The issues raise serious points of law as enunciated in the Mukisa Biscuit Manufacturing case (supra). It is not clear why the petitioner who is aware of similar civil matters pending before the Lower Court and High Court should come and file this petition. It displays dishonesty of the highest order. No wonder he has kept away from responding and filing submissions to the preliminary objection. On this point of sub-judice alone, this matter cannot go anywhere.
13. It has been revealed that the petitioner (Church) has internal appeals mechanisms which have not been exhausted.
14. I am satisfied that the 1st respondent has clearly laid out the reasons as to why this matter cannot continue before this court. Let the petitioner pursue the other matters. I find that this suit is sub-judice and I strike it out and dismiss both the Petition and Notice of Motion dated September 17, 2021 with costs to the 1st respondent.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

