



**Alushula & 2 others (All suing on their behalf and on behalf of the Apostolic Fellowship Church of Kenya/Victorious Harvest Ministries) v Ngota & 4 others (Civil Case E008 of 2022) [2022] KEHC 16035 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16035 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E008 OF 2022  
MW MUIGAI, J  
NOVEMBER 30, 2022**

**BETWEEN**

**ALFRED ONIANGO ALUSHULA ..... 1<sup>ST</sup> PLAINTIFF**

**DOUGLAS ESALANO ..... 2<sup>ND</sup> PLAINTIFF**

**CAROLINE AMENYA ..... 3<sup>RD</sup> PLAINTIFF**

**ALL SUING ON THEIR BEHALF AND ON BEHALF OF THE APOSTOLIC  
FELLOWSHIP CHURCH OF KENYA/VICTORIOUS HARVEST MINISTRIES**

**AND**

**PAMELA WIKHALA KYAYEMBA NGOTA ..... 1<sup>ST</sup> DEFENDANT**

**REUBEN LUBANGA ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF SOCIETIES ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**DAVID MAINA WA GAITHURU (SUED AS AN EXECUTOR FOR THE ESTATE  
OF BISHOP PHILIP NGOTA ASTON (DECEASED)) ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

**Preliminary Objection**

**Pleadings**

1. The genesis of the matter pending before this Court is the Complaint dated 12<sup>th</sup> day of July, 2022, and amended on September 22, 2022 the Plaintiffs who outlined their version of the history and formation



of Apostolic Fellowship Church of Kenya (AFC) & Victorious Harvest Ministries (VHM). The Plaintiffs filed together with the Plaint Certificate of Urgency and sought interim orders.

2. The Chairman, Bishop Aston Ngota died on April 5, 2021 and the Plaintiffs allege unlawful ouster from the leadership of the Church, the unlawful list of officials that were registered, official records were tampered with, amendments were irregularly made to the Constitution, the unlawful purported termination of 1<sup>st</sup> Plaintiff, alleged mismanagement and/or misappropriation of funds and/or property of the Church. The Plaintiffs sought the following prayers: -
  - a. The records of Apostolic Fellowship Church of Kenya/Victorious Harvest Ministries; society Number 36891; certificate of Registration No 22786 (hereinafter referred to as AFC/VHM) with the Registrar of Societies be reinstated as it was as at April 5, 2021.
  - b. The AFC/VHM Constitution dated November 4, 2004 be declared irregular/fraudulent and be quashed and expunged; and the current list of officials (alleged by the Defendants) declared irregular and be expunged.
  - c. The 1<sup>st</sup> Plaintiff; Pastor Joseph Kuta of Syokimau Church; and pastor Francis Okombo of Ekatsombelo Church be reinstated to their positions as at May 5, 2021; and the banners and names of Churches within AFC/VHM be reinstated as they were as at April 5, 2021.
  - d. That it is in the interest of justice that this Court be pleased to:
    - i. Grant to the plaintiffs leave to commence contempt of Court Proceedings against the both Plaintiffs herein.
    - ii. Commit both the Defendants to civil jail to a maximum period of six (6) months and or any other sanction Civil as this Court may deem fit and appropriate.
  - e. To safeguard the propriety interests of AFC/VHM:
    - i. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants be compelled to provide the record of finances/accounts of AFC/VHM;
    - ii. There be a forensic Audit of the VHM/AFC property;
    - iii. That there be a clear demarcation and distinction of church property from personal property; and
    - iv. Caveats do issue on properties of AFC/VHM.
  - f. A declaration be and is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the lawfully elected officials.
  - g. Alternatively there be an election for the office Bishop/Chairman of AFC/VHM within 30 days (April 5, 2021).
  - h. A declaration that the following estates and properties are estates and properties of the Plaintiff church:LR 12715/428 at Syokimau in Machakos CountyLR No 126/174 Kamulu Farm Three in Machakos CountyLR No Mavoko Town Block 3/7666 in Machakos CountyLR No E Bunyore/Ekusamia/2558 in Vihiga County (Ekatsombelo Church)LR No Kisa/Wambulisho/2357 in Kakamega CountyKapenguria church in West Pokot County (AFCK)Kisumu AFCK church in Kisumu CountyNambale AFCK church in Busia CountyMwandakha widows project and water projectBukhwaku Church (LR No Marachi/Bujumba/613



- i. Any such other or further relief as this Court may deem appropriate.
- j. Costs of this suit together with interest thereon at such rate and for such period of time as this Court may fit to grant.

### **Replying Affidavit by 1<sup>st</sup> Defendant**

3. The 1<sup>st</sup> Defendant outlined the beginning of Apostolic Fellowship Church of Kenya/Victorious harvest ministries and deposed she is Co-founder of the Church when Bishop Philip Ngota Aston was Senior Pastor of UPCK Church.
4. The 1<sup>st</sup> Defendant outlined the leadership of the Church as at 2000 was under the 5<sup>th</sup> Defendant and later went on its own under the name Apostolic Fellowship Church of Kenya (AFCK) and new leadership from 2001-2004. The 1<sup>st</sup> Defendant deposed the purchase of land and registration of the church was by her late husband Bishop Philip Ngota Aston.
5. The 1<sup>st</sup> Defendant filed High Court Civil Suit E 018 of 2021 and sought to resolve the matter out of Court and therefore withdrew the matter.

### **Replying Affidavit by 5<sup>th</sup> Defendant**

6. The 5<sup>th</sup> Defendant filed his Replying affidavit sworn on September 19, 2022 filed on September 20, 2022 deposed that;
  - i. that he met Bishop Philip Ngota Aston and his family whose estate is subject to these proceedings having met during the year of our Lord 1994 until his demise on April 5, 2021;
  - ii. that the said Bishop joined the 5<sup>th</sup> Defendant Inter Christian Churches Denomination (ICCD) which later crystalized into (ACCI) Assembly for Christian Churches International an umbrella body and Trustee to other several other ministries in the year 1998;
  - iii. that they worked together with the said Bishop Ngota with him acting as Deputy Treasurer and the 5<sup>th</sup> Defendant as the Secretary General and despite him being the founder of Apostolic Fellowship Church of Kenya/Victorious Harvest Ministries, he continued being a member of the said ACCI by affiliation and has paid such affiliation fees up to the Year 2004.
  - iv. That with the year 2020 or thereabout they agreed that each of them would draw a Will so as to safe guard the personal property and other properties in the names of each one of them whether being utilized for the works of glorifying God or otherwise.
  - v. That the 5<sup>th</sup> Defendant is currently in the process of distributing the estate in line with the Courts directions and shall exercise his duties to the latter of the Will.
  - vi. That the 5<sup>th</sup> Defendant is disputing the jurisdiction of this Court as according to the ACCI Constitution and more specifically Article 17 in respect to settlement of disputes;

“when a dispute arises between a member and the Executive committee, a member and or organization or members of the Executive Committee it shall be adjudicated by the Tribunal established under Article 18 of this constitutions provided that he decision of the Tribunal shall not be final and the matter may further be refined to an independent arbitrator for review”



### **Further Affidavit by the 1<sup>st</sup> Plaintiff Filed on October 14, 2022**

7. That the proceedings herein are not about Bishop Philip Ngota Aston (deceased).
8. That the legitimate Constitution of the Plaintiff's Society (the church) of date September 9, 2003 does not provide for the Society's affiliation with 5<sup>th</sup> Defendant as alleged by Bishop Gaithuru and it is his own creation and is null and void.
9. That the properties, estates, assets, plots, land and buildings of the Plaintiff society are not and have never been properties of the late Bishop Philip Ngota Aston (Deceased), and could not have been included in his Will as alleged by Bishop Gaithuru or at all. This Will invoked by Bishop Gaithuru can only be a forgery.
10. That the purported constitution of the alleged Assembly of Christian Churches International (ACCI) does not give the Bishop or a church the authority or right to Will away the properties, assets, plots, buildings etc.. of the church.
11. That this suit is not an interchurch dispute hence the purported dispute resolution mechanism of the alleged Assembly of Christian Churches International is not relevant herein.

### **Preliminary Objection Dated September 19, 2022**

12. At the close of pleadings by parties through Counsel filed Preliminary Objection to the following effect;

“The 5<sup>th</sup> Defendant herein raised a Preliminary Objection on a Point of Law to the extent that this Court has no jurisdiction to entertain this suit by virtue of Article 17 & 18 of the Assemblies of Christian Churches International (ACCI) Constitution.’

### **5<sup>th</sup> Defendant's Skeletal Submissions Dated November 1, 2022**

13. That this Court has no jurisdiction to hear and determine the matter before it based on Article 17 of the Assemblies of Christian Churches International (ACCI) herein after referred as Constitution which states that;

“When a dispute arises between a member and the Executive committee, a member and or organization or members of the Executive Committee it shall be adjudicated by the Tribunal established under Article 18 of this constitutions provided that the decision of the Tribunal shall not be final and the matter may further be refined to an independent arbitrator for review”

14. That the Victorious Harvest Ministries (VHM) is a member church and an Affiliate of ACCI, Article 4 of the ACCI Constitution states that;
  - i. The Assemblies of Christian Churches International (ACCI) shall comprise of those churches and Christian organizations in Kenya that express a desire to join its membership and that accept its basis and abide by this constitution.
  - ii. Members may be received in the following categories
    - a. Church membership
    - b. Fraternal membership



15. That the Constitution further states that church members may either be full membership or associate membership. Full membership are churches with a voice and a vote in the General Assembly, in this instant case the deceased was Deputy Treasurer of ACCI and a representative from Victorious Harvest Ministries.
16. That the affiliation Certificate of Victorious Harvest Ministries is valid until 2024. ACCI also acts as the Head Trustee of its member church as per Article 11 of the Constitution that states;-
 

“ All land, building and other immovable property, investments and securities which shall be acquired by the Association shall be vested in not less than 5 Trustees who shall be members of the Association and shall be appointed at an Annual General Assembly shall have the power to remove any other trustees and all vacancies occurring by removal, resignation or death, shall be filled at the same or next General Assembly”
17. That the dispute before this Court is one of property ownership, the assets of the church are owned by the church or in trust for the church and not by an individual hence this suit should not have been filed against an individual but against the church or the Church Committee. The wrangles therefore shall be subjected to the rules applied in the Constitution of ACCI.
18. That the Applicant/5<sup>th</sup> Defendant is sued in his capacity as an executor to the estate of the late Bishop Philip Ngota Aston who happens to be the founder of ACCI thus has full knowledge of the dispute before this Court.
19. That it was the deceased’s wish as per his Will to have all matters resolved peacefully and amicably either by tribunal or arbitration. The said deceased’s wish and Article 17 of the Constitution compelled the 1<sup>st</sup> Defendant to withdraw Civil Suit No E18 of 2022 as per the withdrawal notice dated May 24, 2022 which she had filed against the 1<sup>st</sup> Applicant and sought to have the matter solved out of Court.
20. That the 5<sup>th</sup> Defendant therefore prays that this Preliminary Objection be upheld and case directed for Arbitration.

**Plaintiff’s Skeletal Submissions Dated October 25, 2022**

21. Article 4 of the said Constitution provides for membership of the ACCI to be;
  - a. Churches (Full Membership and Associate Membership).
  - b. Christian Organizations who subscribe to the aims and objectives of the ACCI (Fraternal Membership).
23. That individual members of a Church or a Christian Organizations are not members of ACCI, even by virtue of their churches or organizations being members.
24. The term ‘member’ in Article 17 of ACCI Constitution does not refer to individual members of a member church, but to churches and/or Organizations that are members of ACCI.
25. That the instant dispute is an intra-church dispute or a dispute between a church and the Executive committee of ACCI, as to occasion reference to a tribunal of the ACCI.
26. That the 5<sup>th</sup> Defendant in this case is sued in his capacity as the Executor of the last Will of the late Bishop Philip Ngota Aston (deceased) and not as an Executive of ACCI.
27. That the present dispute in this Court is an intra – church dispute which is outside the disputes envisaged in Article 17 of the ACCI.



28. That the 5<sup>th</sup> Defendant cannot successfully exclude the jurisdiction of this Court from adjudicating and determining in this dispute.
29. That the 5<sup>th</sup> Defendant's Preliminary objection has no merit.

### **Determination**

30. The issue that is presented for determination is the Preliminary Objection that raises the issue whether this Court has/lacks jurisdiction to hear and determine the dispute by the parties.
31. The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors* (1969) EA 696. At page 700, Law, JA stated that:

“..... 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 the contract giving rise to the suit to refer the dispute to arbitration.”

### **Jurisdiction**

32. Jurisdiction- ‘ refers to the rights or authority by which a specific court is able to judge a case. Jurisdiction may either be original or appellate or even both.’
33. In *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd* (supra) Nyarangi JA held:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”
34. In the same vein, the Supreme Court in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, explained that:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



35. The Supreme Court reiterated the same in its decision *in Re The Matter of Interim Independent Electoral and Boundaries Commission* [2011] eKLR where it held that:

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent... jurisdiction flows from the law, and the recipient- court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors.”

36. The jurisdiction of the High Court as spelt out in the Constitution of Kenya is as follows;

37. Article 165 (3) of the *Constitution* provides:-

“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;

38. Sub-Article 5 of the Article provides;

(5) The High Court shall not have jurisdiction in respect of matters—

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2)..”

39. The 5<sup>th</sup> Defendant relies on Article 17 of the Assemblies of Christian Churches International (ACCI) herein after referred as Constitution which states that;

“When a dispute arises between a member and the Executive committee, a member and or organization or members of the Executive Committee it shall be adjudicated by the Tribunal established under Article 18 of this constitutions provided that the decision of the Tribunal shall not be final and the matter may further be refined to an independent arbitrator for review”

40. The Court makes the following observations from filed pleadings;

- a. The parties’ dispute has been simmering since April 5, 2021 after the demise of founder of the Church the late Bishop Aston Ngota.
- b. The parties were in Court vide Machakos HCCC E18 of 2021 under Certificate of Urgency and the Court granted maintenance of status quo as parties pursued out of Court negotiations and /or Court annexed mediation.
- c. At the time the parties were aware of the cited Clause in the Constitution ousting the jurisdiction of the Court but nevertheless approached the Court filed their matter obtained orders of maintenance of status quo to try and resolve the matter amicably by /through negotiations and/or Court- annexed mediation



- d. The parties through Notice of withdrawal filed on May 26, 2022 withdrew the pending suit after grant of interim orders to maintain status quo as parties sought to resolve the dispute amicably.
- e. The parties have not implemented Clause 17 and/or 18 of Assemblies of Christian Churches International (ACCI) established a Tribunal under Section 18 of the Constitution. Seemingly, there is an impasse and stalemate and dispute remains unresolved.
- f. Whereas, the Court in exercising judicial authority one of the guiding principles is as espoused by Article 159 2 (c) of the Constitution, that provides for;  
alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); the parties have not engaged in any of the above dispute resolution options.
- g. The dispute involves contest by the parties over various issues among them are, church leadership and suspension and/or termination of Church officials, church board and Trustees elections, amendments to the Constitution, tampering of public records, finances and accounts and properties.
- h. The Court notes that there is Succession Cause E 2505 of 2021 in the matter of the estate of Bishop Phillip Ngota Aston (Deceased) which is not for hearing and determination in the instant matter and the Court and parties are bound by pleadings filed.

### **Disposition**

1. The 5<sup>th</sup> Defendant submitted that Victorious Harvest Ministries (VHM) is a member church and an Affiliate of ACCI by virtue of Article 4 of the ACCI Constitution.
2. The 5<sup>th</sup> Defendant, further submitted that the Constitution further states that church members may either be full membership or associate membership
3. The Plaintiffs object to the claim and posits that individual members of a Church or a Christian Organizations are not members of ACCI, even by virtue of their churches or organizations being members.
4. According to the Plaintiffs the term ‘member’ in Article 17 of ACCI Constitution does not refer to individual members of a member church, but to churches and/or Organizations that are members of ACCI.
5. The Plaintiffs further submit that the instant dispute is an intra-church dispute or a dispute between a church and the Executive committee of ACCI, as to occasion reference to a tribunal of the ACCI.
6. This Court finds Article 17 of the Assemblies of Christian Churches International (ACCI) which provides for dispute resolution and seemingly ousts the jurisdiction of the Court is part of the contested Constitution due to alleged irregular amendments. Therefore, the same is not relied on as it one of the issues pending for determination.
7. Article 17 of ACCI is open-ended and not time-bound and of concern it does not provide for situations where there is a deadlock among various church factions. Does it mean that the dispute remains unresolved in perpetuity with the imminent risk of warring parties taking the law into their hands?
8. From the observations outlined above, this Court finds that it is clothed with requisite jurisdiction to hear and determine the pending matter /dispute by virtue of Article 165 (3) of the Constitution.



9. To actualize the overriding objective espoused by Section 1A 1B & 3A of CPA, Parties/Counsel may engage in any of the alternative dispute resolution mechanisms under Article 159 2 (c) CoK 2010 to unlock the deadlock and pursue amicable resolution of the church dispute within 60 days before the matter is set down for hearing.
10. Further mention for directions after 60 days on February 7, 2023 and Parties/Counsel be served.
11. The preliminary objection is hereby dismissed.

**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2022 (VIRTUAL/PHYSICAL CONFERENCE).**

**M. W. MUIGAI**

**JUDGE**

**In the Presence of:**

Mr. Okwaro - For the Applicants

No Appearance - For the 1<sup>st</sup>, 2<sup>nd</sup> & 5<sup>th</sup> Respondent

Mrs Githu A.G's Office for the 3<sup>rd</sup> & 4<sup>th</sup> Respondent – present

Geoffrey/Patrick - Court Assistant(s)

