



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CIVIL APPEAL NO. 3 OF 2020**

**POPE LAWRENCE OCHIENG KALUL.....APPLICANT**

**JOSEPH ONGAWO ALOO.....APPLICANT**

**PATRICK RACHIER .....APPLICANT**

**VERSUS**

**RAPHAEL OCHIENG OTIENO.....RESPONDENT**

**NASHON O. NYAKONDO.....RESPONDENT**

**NICHOLAS C. OMWERA KEYA.....RESPONDENT**

**RULING**

The plaintiffs, Pope Lawrence Ochieng Kalul, Joseph Ongawo Aloo and Patrick Rachier instituted this suit vide a plaint dated 24/8/2020 and filed in court on 25/8/2020 against the defendants – Rapahel Ochieng Otieno, Nashon O. Nyakondo and Nicholas C. Omwera Keya as the registered Trustees of the Legion Maria of African Church Mission. They sought the following orders:-

- a) A declaration that the Defendants are not the legitimate trustees of the Legion Maria of African Church Mission and their activities on behalf of the Society are null and void.
- b) An order directing the registrar of the Societies and the Cabinet Secretary for lands to regularize and/or rectify the register of officials and trustees of the Society respectively by cancelling the registration of the Defendants as the officials and trustees of the Society.
- c) An order directing the Defendants to release to the Plaintiffs all the Society's properties and documents including the original certificate of incorporation under the trustees (perpetual Succession) Act.
- d) An order of permanent injunction, restraining the Defendants jointly and severally from holding themselves as the officials and/or trustees of the Society as well as restraining them from conducting business of the Society in whatever capacity.
- e) Costs of this suit and interest thereon.
- f) Any further or other relief this Honourable Court may deem just to grant in the circumstances of the case.

The firm of Omonde Kisera filed an appearance and a joint statement of defence on 26/10/2020. Filed simultaneously, with the defence was a notice of preliminary objection which was to the effect that this suit and application dated 24/9/2020 is statute barred by dint of Section 6 of the Civil Procedure Act as a similar suit exists, vide Migori No. 1 of 2020 and that this suit and application are an abuse of the process of this court.

On 4/11/2020, directions were taken that the Preliminary Objection be canvassed by way of written submissions. The Defendants / Applicants filed their submissions on the preliminary objection on 10/12/2020 whereas the respondents filed theirs on 11/3/2021.

The defendant /Applicants submitted that the objection has two limbs, the issue of subjudice and abuse of the court process. It was urged that Section 6 Civil Procedure Act is couched in mandatory terms; that the two suits are in respect of the leadership of Legion Maria

African Church in terms of the papacy, the trusteeship and officials; that though the instant suit has introduced two other plaintiffs, they both support the 1st plaintiff's claim to leadership of the church and hence they have no distinct or separate case from the 1st plaintiff who is the defendant in suit No 1 of 2020. It was urged that the issues in the suits are the same and same parties; that if the first case succeeds, then it would render the 2nd suit res judicata. The applicant submitted that in the event the court is invited to consolidate the two suits, the said invitation should be rejected because it would be a means to avert the sub judice rule.

On the second issue of abuse of the court's process, it was urged that the issues and parties in the two suits being the same, the court should invoke its inherent jurisdiction to protect itself from abuse. Counsel relied on the decision of NRB HC JR E045 of 2020 Republic vs Paul Kihara Kariuki & Another (2020) eKLR where a similar situation was considered.

The firm of Kwanga Mboya, counsel for the plaintiff / respondents, in opposing the preliminary objection, submitted that in HCC 1 of 2020, the 1st plaintiff herein is the only defendant and that the suit is distinguishable from the instant case because the 1st suit seeks to challenge the legitimacy of the papacy of the 1st plaintiff and that the orders sought relate to the papacy wrangles; that this suit is about the Board of trustees; that whereas HCC NO. 1 of 2020 is based on interpretation of Article 4 of the Church Constitution relating to Spiritual Leaders, and specifically Article 4(a) and (b), this suit is based on Article 9 of the Church's Constitution; that Trustees are not covered under Article 4 of the Church Constitution as part of the Spiritual leadership; that the Trustees duties under Article 9 are about Management of the church's property; that though some parties are the same, they are two distinct suits.

On whether this suit offends the subjudice rule, counsel urged that under Section 6 of the Civil Procedure Act, the issues raised in the suits must be directly and substantively in issue. He relied on the analysis of J. Mativo in Paul Kihara Kariuki case (supra) at Para 24 – 27 J. Mativo said-

“24. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the court of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

25. In a fairly recent decision of this court, namely JR NO. 146 OF 2020, which incidentally involved the Law Society of Kenya, I stated that the words “directly and substantially in issue” are used in contradistinction to the words “incidentally or collaterally in issue.” Therefore, sub judice would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject – matter in both the proceedings is identical.

26. Paraphrasing what I said in the above case, the key words in applying sub judice rule is that “the matter in issue is directly and substantially in issue in the previously instituted suit.” The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.

It was further submitted that the issue, facts and relief sought in the two suits are different and that the applicant has failed to demonstrate their allegation by way of evidence or that the judgment in HCC 1 of 2020 will effect the outcome of Mig HCC 3 of 2020. It was further urged that since there is no nexus of issues, facts and relief, there is no abuse of the court process and this court should accord the respondents a fair hearing in terms of Article 51(1) of the Constitution by upholding the rules of natural justice and not lock out some parties. Counsel urged this court to dismiss the preliminary objection for lack of proof of subjudice rule or that this suit is an abuse of the court process. Counsel also urged the court to strike out the entire application for being devoid of merit.

There is no doubt that there exist two suits relating to Legion of Maria of African Church Mission in Migori HCC 1/2020 Raphael Ochieng Otieno, Nahashon Nyakondo, Nicholas Omwera Keya, Timothy Abwao suing as Regional Trustees and officials of Legion Maria of African Church Mission) and the Registered Trustees of the Legion of Maria of African Church Mission (1-5 plaintiffs) vs Lawrence Ochieng Kalul (the defendant). The plaintiffs sought the following orders:-

- a) A declaration that the 1st Plaintiff is the lawful Pope of the Legion Maria of African Church Mission and is therefore entitled to be accorded all the trappings of that office as stipulated in the suit Church's Constitution, Rules, Doctrines and practices.
- b) Declaration that the Defendant is not the lawfully elected Pope of the Suit Church and that no lawful election took place on or about 13th April, 2020.
- c) Permanent Injunction restraining the Defendant, his Agents, Servants or any of his loyalists or otherwise howsoever from interfering with the Plaintiff's execution of their respective official duties or right to worship from the Suit Church's Headquarters at Got Kwer or any other place.
- d) Cost of the suit.

The second suit is the instant one where the 1st plaintiff Pope Lawrence Ochieng Kalul (defendant in HCCC 1 of 2020), Joseph Ongawo Aloo and Patrick Rachier ( 1-3rd plaintiff ) vs Raphael Ochieng Otieno, Nashon O. Nyakondo and Nicholas C. Omwera Keya ( 1 -3rd Defendants). The prayers sought in the instant suit are captured earlier in this ruling:-

The Preliminary Objection was based on Section 6 of the Civil Procedure Act which provides as follows:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

In the two cases, except for Timothy Abwao (4th plaintiff) in HCC 1 of 2020, described as the secretary of this Society, and the two new parties introduced in HCC 3 of 2020 Joseph Ongawo Aloo and Patrick Rachier (2nd and 3rd) plaintiffs, described as members of the Apostolic council, the rest of the parties are the same. These parties are all enjoined to the suit in their official capacities.

As clearly stipulated in Section 6 Civil Procedure Act, for a matter to be sub judice, the issues in the two suits must be directly and substantially in issue in both suits. Both counsel for the parties relied on the decision of Republic vs Paul Kihara Kariuki, AG & 2 others (supra) where J. Mativo dealt with similar issues and Section 6 of Civil Procedure Act. He analysed the phrases “directly and substantially in issues.” I have already quoted paragraphs 24 to 26 of the said ruling.

Drawing guidelines from the above decision, the two issues I need to determine are whether:-

- 1) the subject matter in the two suits is identical
- 2) whether the decision that may be arrived at in the previously instituted suit will operate as Res judicata in the subsequent suit.

Before I go on to examine the pleadings contained in both complaints, both counsel are agreed on the object of the sub judice rule as captured in the Paul Kihara case (supra). It is to prevent a multiplicity of proceedings over the same matter, avoid unnecessary costs, waste of time and also avoid a situation where a court or two courts might come up with contradictory verdicts in respect of the same issue. In the Paul Kihara case, J. Mativo cited the Ugandan case of Nyanza Garage vs AG HCC 450 of 1993 where the court said:

*“In the interest of the parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interests of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice holding up resources that would be available to fresh matters and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”*

Whereas the applicants counsel argued that the issues are identical, the Respondents argued that HCC 1/2020 refers to a papacy dispute whereas HCC 3/2020 touches on the office of Trustees who hold the society’s property; that whereas the office of the Pope is for life, Trustees are appointed for a three year term.

The Respondent’s counsel urged that looking at the prayers sought, it is evident that the issues are different. The question is whether the court should only consider the prayers sought to know the substances of the matter. In the Paul Kihara case, J. Mativo sought guidance from the case of Thiba Min Hydro Co Ltd vs Josphat Karu Ndwiiga (2013)eKLR in which it was held that it is not the form in which the suit is framed that determines whether the matter is sub judice or not. Rather, it is the substance of the claim. As admitted by counsel for the respondent the issue in the HCC 1 of 2020 is about the Spiritual Leadership which involves the papacy. At paragraph 15 of the complaint in HCC 1 of 2020 it is pleaded: -

“After the death of the said Romanus Joseph Ong’ombe, the defendant illegally and arbitrarily elected himself as the Pope of the suit Church on or about 13th day of April, 2021 and has since unlawfully conducted and carried himself as the Pope of the suit church, partakers making etc.”

At paragraph 6 and 12 of the complaint in HCC 3 of 2020 it is pleaded thus “6. The 1st defendant has illegally and without the authority of the plaintiff, irregularly and contrary to the express Provisions of Constitution of the Society conducted himself as the Pope and purports to ordain priests, bishops and cardinals of the Society without jurisdiction and / or powers to do so.

12. the Plaintiff’s claim against the Defendants is for an order of permanent injunction restraining the Defendants jointly and severally from holding themselves out as the Pope and trustees of the Legion Maria Church of African Church Mission respectively as well as restraining them from conducting any business of the Society in whatever capacity.”

From the contents of the pleadings above, it is clear that the disputes in the suits touch on the papacy leadership. Each group blames the other for assuming the property illegally.

Although the appointment of the Spiritual leader, the Pope, is under Article 4(a) and 4 (b), while that of trustees is under Article 9, under Article 9(a), it is the Pope who appoints the trustees. It means that whichever Pope is in power has his appointees in power as trustees too and therefore a dispute over leadership of the Pope cannot be divorced from that of the trustees. If this court were to determine the first suit on the legitimacy of papacy, the same automatically resolves the issue of trustees and how the property of the Society will be held and dealt with. In my view therefore, if HCC 1 of 2020, is determined, the doctrine of res judicata would apply to subsequent suits.

Whether the second suit is an abuse of the court process. Black’s Law Dictionary 6th Edition Continental Ed 1891 – 1991 P960 P10-11 defines an abuse as

“everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when

one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. The situation that may give rise to an abuse of court process are indeed in exhaustive. It involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party....”

In Muchanga Investments Ltd vs Safaris Unlimited Ltd & 2 others CA 25 of 2002 (2009) KLR 229 the Court of Appeal held:

**“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -**

**i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**

**ii Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**

**iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.**

**iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.”**

Guided by the above decision, it is clear that instituting a multiplicity of suits on the same subject matter against the same opponent or same parties is an abuse of the court process as it would be vexing to the other party as well as wasting, the courts precious time and resources.

I observed earlier that, in the later suit, two parties are added but they are not enjoined in their personal capacity but as trustees. I am satisfied that allowing HCC 3 of 2020 to proceed to hearing is an abuse of the court process.

In the two cases, the issues is all about leadership of the suit Church or Society. Once the issue of the papacy is determined, the rest of the leadership issues will follow suit.

In the end, I find that the issues presented in HCC 3 of 2020 are the same issues which are due for litigation in HCC 1 of 2020 and the matter falls within the subjudice rule. Allowing HCCA 3 of 2020 to proceed would be a waste of the court’s precious time and hence an abuse of the court process. I allow the preliminary objection and hereby strike out HCC 3 of 2020 with each party bearing their own costs.

**Dated, Delivered and signed at Migori this 27th day of April, 2021**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

**Mr. Odero holding brief Mr. Adawo for the Plaintiff.**

**Oloo court Assistant**