



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION No. 02 OF 2020

IN THE MATTER OF ARTICLES 21 22 23 25 27 32 33 47 48 159 165 (3) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SOCIETIES ACT, CAP 481 LAW OF KENYA

AND

IN THE MATTER OF THE RIGHT TO WORSHIP AND ASSOCIATE BY MEMBERS OF GOSERE STATION, SOUTH KENYA CONFERENCE, SEVENTH DAY ADVENTIST CHURCH

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE PROCEDURE RULES, 2013

EVANS ONSASE AND 72 OTHERS..... 1ST PETITIONER

VERSUS

THE EAST KENYA UNION CONFERENCE,

SDA CHURCH NAIROBI.....1ST RESPONDENT

THE SOUTH KENYA CONFERENCE,

SDA CHURCH NYANCHWA, KISII.....2ND RESPONDENT

PASTOR SAMUEL MAKORI.....3RD RESPONDENT

PASTOR JULIUS BICHANGA..... 4TH RESPONDENT

RULING

1. This ruling is in respect of the Petitioners' application dated 11th May 2021 and filed on even date. The application is brought pursuant to **Order 46 Rules 1 and 2 of the Civil Procedure Act, Regulation XIV (SDA Church Conflict Resolution Guideline Section 1(c)** of the **Constitution** of the **South Kenya Conference of Seventh Day Adventists** and all other enabling provisions of the law. It is based on the grounds set out in the application and an affidavit sworn by Alloyce Mokono Omwame. The orders sought in the application are that;

- a. The dispute be referred to arbitration by pastor BLASIOUS RUGURI the president East-Central Africa Division of the Seventh Day Adventist Church or any other arbitrator appointed by the court;*
- b. Any other suitable orders be issued as the Honorable court may deem proper and just; and*
- c. The costs of the application be in the cause.*

2. A brief background of the petitioners' case is as follows; the Petitioners filed the petition before this court in their capacity as practicing

members of the Seventh Day Adventist (SDA) Church from various churches forming the Gosere Station, under the management of the 2nd respondent. They claimed that in the year 2014, there were discussions to subdivide the 2nd respondent primarily due to the increase in membership. In 2016, an 8-person commission was created to work out the modalities of the subdivision. It was agreed that the boundary separating the South Kenya Conference and South East Field was going to be River Kuja but according to the respondents, the commission started handpicking certain preferred churches to join the South Kenya Conference and South East Field. When the respondents declined to address their concerns, the petitioners felt compelled to approach this court.

3. In their application dated 11th May 2021, the petitioners urged the court to submit the dispute to arbitration in accordance with the constitution of the South Kenya Conference. They claimed that as a last procedure in dispute resolution, Pastor Ruguri who is the president of the East-Central Division of the SDA Church, had sought the permission of the court to arbitrate over the matter. The petitioners averred that it would be in the best interests of justice if the application was allowed and the matter settled quickly and amicably.

4. The respondents filed grounds in opposition to the application on 21st May 2021. They contended that the Petitioners' application had been overtaken by events as the Court had heard oral representations from the parties on whether they could resolve the issues in dispute by way of Alternative Dispute Resolution Mechanism, and when no consensus was reached by the parties, it directed that the matter to proceed for determination. The respondents stated that they had already complied with pre-trial directions and were ready for final determination of the suit based on the pleadings filed.

5. According to the respondents the proposed referral of the matter for resolution through Arbitration was likely to be a ploy to waste precious judicial time as a similar process had been initiated by the Court *suo moto* through the Court Annexed Mediation, which process did not achieve any desired result and only culminated in more disagreements.

6. The respondents claimed that the proposed Arbitrator, Pastor Blasious Ruguri had been approached unilaterally by the Petitioners and in a letter dated 30th March 2021 and the said Pastor advised the parties to follow the internal church dispute resolution mechanisms. Had the petitioners taken the advice, they would have commenced the process by engaging the Executive Committee of the 2nd Respondent, thereafter, if dissatisfied they would have appealed to the Executive Committee of the 1st Respondent and thereafter if no resolution was arrived at they would have appealed to Pastor Blasious Ruguri (the proposed Arbitrator) who is the President of the East-Central Africa Division (ECD) of the Seventh Day Adventist Church. Pastor Blasious Ruguri who the Petitioners proposed as the Arbitrator would then handle the appeal at the highest level of the church.

7. The respondents asserted that there existed an internal dispute resolution mechanism, which had not been exhausted before the Petition was filed and the entire suit should be dismissed.

8. They accused the deponent to the Supporting Affidavit, Mr. Alloyce Mokono Omwame, of concealing the fact that he was party to the process through which the reorganization of the 2nd Respondent was carried out and approved and all proceedings up to the inauguration of South East Kenya Field, which he had never complained about.

9. The respondents insisted that the Petitioners' suit was filed prematurely as they were required to exhaust the internal dispute resolution mechanisms as provided in the operating documents of the SDA Church before escalating the matter in controversy to the secular process or civil courts.

SUBMISSIONS

10. Learned counsel for the petitioners submitted that the petitioners had lodged complaints at various offices under the 1st respondent and feeling that their constitutional right to worship had been violated by the conducts of the respondents, they sought the court's intervention. He dismissed the argument that there was a dispute resolution mechanism provided for within the respondents' organization. In his view, the mechanism would be contrary to the provisions of Article 48 and 50 of the Constitution of Kenya for the respondents to be jury over a complaint against them.

11. Counsel submitted that Pastor Ruguri was well versed with all the operations of the church and he would be best suited to assist in the arbitration process. He submitted that Rule 1 and 2 of Order 46 of the Civil Procedure Rules conferred upon the court powers to refer any dispute to be determined through an alternative mode of dispute resolution. He argued that under Regulation XIV Section 1(c) of the Constitution of the South Kenya Conference of SDA Church the parties were under a duty to refer any dispute affecting their membership or organization for arbitration. He therefore urged the court to refer the matter to arbitration as a way of determining the dispute before proceeding before this court as a last resort.

12. For the respondents it was submitted that the Petitioners' application was unfit for the purposes of Order 46 of the Civil Procedure Rule since **Order 46 Rule 1** of the **Civil Procedure Rules** provided;

"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference"

13. Counsel submitted that under the above Rule, the first qualification was that the party applying for the Order were not to be under a disability, and the second qualification was that the party applying for the Order had to be in agreement with the other parties in the suit that an order was necessary to have a matter referred for Arbitration.

14. Counsel submitted that the petitioners had not provided any evidence to prove that the process of negotiation was invoked and whether mediation took place after failed negotiations, if any, and whether the process was successful or not in order to pave way for the process of

Arbitration as provided under the SDA Church Regulations. He argued that under the Church Regulations, the Petitioners were required to demonstrate that a fourteen (14) day Notice was issued requiring the parties herein to seek an amicable resolution before the designated and authorized representatives of the SDA Church which the petitioners did not do. He argued that the Petitioners had also not demonstrated that the mediation, if any, took place in a denominational facility as per the requirements of the Church Regulations. Counsel submitted that the Church Regulations provided that a team of mediators or arbitrators was to be formed after consultations between the Church and the complainant and did not recognize the appointment of an Arbitrator through an application made in Courts as sought by the Petitioners. Counsel added that under section 7 of the Church Regulations, an Arbitrator or team of Arbitrators could only be constituted by the Executive Committee of the 2nd Respondent and not the Court. That the petitioners were the architects of their own misfortune as the 2nd Respondent which was mandated under the Church Structure to provide the Petitioners with a solution to their problems was one of the parties sued and the Petitioners had refused to negotiate with the 2nd Respondent.

15. Counsel argued that the petitioners had not demonstrated that they had complied with the provisions of **Order 46 Rule 5(1)** of the **Civil Procedure Rules** and **Section 12(3)(4)** of the **Arbitration Act** which provide guidelines on the action to be taken by an aggrieved party in the event of failure to agree on an Arbitrator. That the said Pastor Ruguri in his capacity as the President of the East-Central Africa Division would not be an Arbitrator unless the Petitioners had commenced the process by invoking the various levels of the Church. At the first instance at the Local Conference Executive Committee, if dissatisfied, they would appeal to the East Kenya Union Conference Executive Committee and thereafter if dissatisfied they would further appeal to the East Central Africa Executive Committee where the said Pastor Blasious Ruguri is the President. Counsel cited the case of **Everett Aviation (Charter) Limited Vs Jubilee Insurance Company Limited Milimani Misc. Civil Application No. 165 of 2018** in support of his submissions that the application ought to be dismissed.

ANALYSIS AND DETERMINATION

16. Having analyzed the application, the response to the application and the parties' submissions, I find that the main issue arising for determination is whether the petitioners have made out a case for reference of this matter to arbitration.

17. One of the guiding principles in the exercise of judicial authority as provided under Article 159 (2) (c), is the promotion of alternative forms of dispute resolutions including arbitration. **Rule 31 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides that the Court may refer a matter for hearing and determination by alternative dispute resolution mechanism.

18. The petitioners moved this court to refer the matter to arbitration pursuant to **Order 46 Rule 1 and 2** of the **Civil Procedure Rules** which provide as follows;

(1) Where in any suit all the parties interested who are not under disability agree that animotor in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

(2) The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

19. For the court to allow an application for reference of a dispute to arbitration under the above provision, the parties must consent. The parties who agree to have the matter referred to arbitration should not be under a disability. In this regard, I concur with the decision of the court in **Kenya Pipeline Company Limited v Kenol kobil Limited [2013] eKLR** which held;

32. Under Order 46 Rule 1 of the Civil Procedure Rules, 2010 which deals with arbitration under an order of the court and other alternative dispute resolution, duty is bestowed upon the parties in a suit pending in court for determination to apply to have the matter referred to arbitration.

34. It is clear that it is only where other methods of alternative dispute resolution are concerned that the court can on its own motion, refer a matter under such methods. On the other hand, referral of a matter to arbitration that is in court must be by the consent of the parties. If the court had the power to refer matters pending in court for arbitration suo moto, nothing would have been easier than for the drafters of the legislation to have explicitly stated so.

35 For the simple reason that arbitration is a consensual process, it therefore obtains that unless the parties in this matter consent to proceed for arbitration under Order 46 of the Civil Procedure Rules, 2010, they have no option but to submit themselves to the jurisdiction of this court until the very end of the proceedings.”

20. The court in the case of **Martin Otieno Okwach & Charles Ongondo Were T/a Victoria Clearing Services v Kenya Post Office Savings Bank [2014] eKLR** also held:

“Unless, parties consent to have the matter referred to arbitration under Order 46 Rule (1) of the Civil Procedure Rules, 2010, they are firmly stuck in the court system. “

21. The respondents in the instant case are strongly opposed to the reference of the dispute to arbitration for the reason that the petitioners did not exhaust the Church's dispute resolution process before coming to court.

22. The dispute between the parties concerns matters relating to the administration of the SDA Church and in particular churches that form part of the South Kenya Conference. The parties agree that **Regulation XIV of the Constitution of the South Kenya Conference of SDA Church** provides a conflict resolution strategy for disputes arising in the churches that fall within the SDA South Kenya Conference. The Regulations provide;

Sec.1. A dispute shall be deemed to exist once a party notifies the other/s in writing of the nature of the dispute and requires it to be resolved under these provisions. The parties must refer any dispute to be resolved by:

a. Negotiation; failing which

b. Mediation; failing which

c. Arbitration

Sec. 2 Within (14) days of notification, the parties must seek an amicable resolution to the dispute by referring it to designated and authorized representatives of each of the parties to negotiate and resolve it by the parties signing an agreement resolving it within (14) days.

Sec. 3 Should negotiation fail, the parties must refer the dispute for resolution by mediation. The place of mediation shall be a denominational facility. ...

Sec. 4 If, and to the extent that, any such dispute controversy or claim has not been settled pursuant to the mediation within (21) days of the commencement of mediation, it shall upon the filing of a Requested or Arbitration by either party, be referred to and determined by arbitration in accordance with (SDA Church Conflict Resolution Guideline for Seventh-day Adventist members as provided for in the Church Manual and General Conference Working Policy.

Sec. 5 In the event that any dispute shall require resolution by a team of mediators or arbitrators the church may in consultation with the complainant form a team of mediators and/or arbitrators as may be agreed by the parties depending on the nature and magnitude of the dispute to deal with the matter in controversy. The place of arbitration/mediation shall be as agreed by both parties. The language to be used in the arbitral proceedings shall be English. The dispute, controversy or claim referred to arbitration shall be decided in accordance with SDA church conflict resolution guidelines for Seventh-day Adventist members.

Sec. 6. The periods for negotiation or mediation may be shortened or lengthened by written agreement between the parties.

Sec. 7. South Kenya conference to have a team of arbitrators voted by the executive committee, and such team to be constituted/formed or organized from time to time as such dispute shall arise and the number of members forming such team shall depend on the nature and magnitude of the dispute.

23. According to the dispute resolution mechanism reproduced above, an aggrieved party is required to notify the other party of the nature of the dispute and the parties would commence negotiations within 14 days of the notification. If negotiations, failed the parties would refer the matter for resolution by mediation. If the dispute was not resolved within 21 days of commencing the mediation process, the parties could at that point refer the matter to arbitration. The team of mediators or arbitrators would be formed by the church in consultation with the complainant. The regulations require that anyone with an issue and who is a member of the SDA Church should first exhaust the internal dispute resolution mechanisms as prescribed in the operating documents of the SDA Church including the Church Manual and the General Conference Working Policy before escalating any matter in controversy to the secular process or civil courts.

24. The exhaustion of internal mechanisms is a concept that is also stressed under the law. In the case of **Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others Civil Appeal No. 10 of 2015** the Court of Appeal emphasized that internal dispute mechanisms had to be exhausted even where the authority of the organs before whom the dispute was to be placed was being challenged as in this case. The Court stated;

“it is imperative that where dispute resolution mechanism exists outside court, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as it is bound to happen. 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 prosecution of his own interest within the mechanisms in place for resolution outside of courts. This accords with article 159 of the constitution which commands courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellant herein what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiff’s disputes had they filed them within the church set up. And there was always the right acknowledged by the Learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to so, and quite apart from the force of the apprehension, the appellant effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.”

25. The Court in the case of **East Africa Pentecostal Churches Registered Trustees & Others vs Samwel Muguna Henry & 4 Others, Constitutional Petition No. 14 of 2014** similarly held;

“That though the court has jurisdiction to deal with the Plaintiff’s complaints, it is premature as they did not strictly follow the Church Constitution providing for dispute resolution mechanism. The Plaintiffs having failed to pursue their grievance as provided for in the Church Constitution, they should be allowed to proceed with their dispute resolution mechanism as church members, before pursuing claims before a court of law.”

26. On 16th July 2020, the parties through their counsels, indicated to the court that they had agreed to have the matter referred to a mediator

and informed the court that they had each chosen their preferred mediator. In accordance with the parties' agreement this court referred the matter to court annexed mediation on 28th July 2020.

27. In *Serah Njeri Mwobi v John Kimani Njoroge CIVIL APPEAL NO. 314 OF 2009 [2013] eKLR*, the Court of Appeal held as follows on agreements reached by parties in the course of court proceedings;

It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.

28. The respondents in this case chose to forego the negotiating process, which would have allowed them to reach an agreement without the involvement of third parties. Having agreed to have the matter referred to the mediation process, the respondents are estopped from going back on their consent or critique the process. On completion of the mediation process facilitated by the appointed mediator Benson Nyairo Sanduku, the parties did not reach a settlement.

29. The Church's conflict resolution guidelines reproduced above provide that if any dispute is not settled within twenty-one (21) days of the commencement of mediation, it shall be referred to arbitration. The regulations also stipulate that the church is to constitute a team of arbitrators in consultation with the complainant and with the agreement of the parties, depending on the nature and magnitude of the matter in controversy. The guidelines state that the South Kenya Conference should constitute the team of arbitrators to resolve disputes when they arise. However, where the conflict involves large groups of members, the higher ranking organization should intervene to resolve the dispute. The guidelines state;

“In case of unique conflicts that involve large groups of members and which may not necessarily follow the above stipulated model, then the next higher organization in consultation with the lower level shall intervene to resolve the dispute.”

30. The church setting in the SDA Church is as follows;

- i. Local Church Board
- ii. Local Church Business Meeting
- iii. Local Conference Executive Committee
- iv. East Kenya Union Conference Executive Committee
- v. East Central Africa Division Executive Committee
- vi. General Conference Executive Committee

31. The 2nd respondent, which is the Local Conference, is a party to the dispute. The East Kenya Union Conference Executive Committee which is higher in rank to the 2nd respondent is also a party to the dispute. The body that comes next in rank is the East Central Africa Division Executive Committee, which would be best suited to constitute a team of arbitrators in consultation with the petitioners and the respondents.

32. I concur with the finding of the court in *Seca Africa Ltd v Kirloskar Kenya Ltd & 3 others [2005] eKLR* that courts *should allow non-judicial procedures of conflict settlement* to take effect where the parties express themselves to be likely to be better served by those processes. At this point, it is quite clear, that attempts by the parties to resolve the matter amicably have failed. Any further delay in the case is likely to aggravate the parties' already strained relationship. Since this matter concerns the SDA Church, it is my considered view that it would be best solved by a body well versed with the matters of the church.

33. The application dated 11th May 2021 is therefore allowed in the following terms;

- a. The proceedings herein are hereby stayed and the matter referred to arbitration;
- b. The East Central Africa Division Executive Committee is hereby directed to constitute a team of arbitrators in consultation with the parties within 14 days of the date of this ruling;
- c. The team of arbitrators constituted by the East Central Africa Division Executive Committee in (a) above shall hear and determine the dispute herein within 60 days of the date of appointment. The matter will be mentioned after 60 days to find out the outcome of the arbitration.
- d. The costs of the instant application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF SEPTEMBER 2021.

R.E. OUGO

JUDGE

In the presence of;

Mr. Nyambati for the Applicant

Mr. Onyango for the Respondent

Ms. Rael Court Assistant