REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 6 OF 2018

REVEREND JOHN JUMA.....1ST PETITIONER

REVEREND SIMON ALOVI.....2ND PETITIONER

REVEREND TOM OLENDO.....3RD PETITIONER

VERSUS

REVEREND PATRICK LIHANDA.....1ST RESPONDENT

REVEREND PATRICK OYONDI.....2ND RESPONDENT

AND

REVEREND ZEDEKIAH ORERA.....1ST INTERESTED PARTY

REVEREND ELISHA KIMAIYO.....2ND INTERESTED PARTY

THE REGISTERED TRUSTEES,

PENTECOSTAL ASSEMBLIES OF GOD.....3RD INTERESTED PARTY

MEMBERS OF THE

PENTECOSTAL ASSEMBLIES OF

GOD CHURCH KENYA (PAG) APPEALS.....4TH INTERESTED PARTY

THE CHURCH COUNCIL.....5TH INTERESTED PARTY

RULING

1. On 18th June 2021, I delivered a ruling in which I found the 1st respondent guilty of contempt of court, and fixed a date when he was due to attend court for mitigation and sentence.

2. The ruling of 18th June 2021, had prompted the filing of the Motion, dated 25th June 2021, which I am now called upon to determine. The prayers as set out in the Motion are rather vague, for they appear to be a mixture of prayers and grounds. The principal prayer seems to be for review and setting aside of the orders in that ruling, on grounds that there was an error apparent on the face of the record and that the court did not consider crucial proceedings and rulings which were on the court record that could have led the court arrive at a different finding. The second prayer is that the 1st respondent be granted opportunity to apologize and, if necessary, purge the contempt. The third prayer is for adoption of the mediation settlement and ordering of amendments to the Constitution of the Pentecostal Assemblies of God Church. The fourth prayer is that the court drops the names of the three original petitioners. The final prayer is for directions on the amendment of the church Constitution.

3. The grounds upon which the Motion is premised are set out on the face of the application. The 1st respondent states that his advocate had advised him that there was no need for the filing of the mediation settlement agreement for adoption by the court, and that that advocate did in fact file an application for adoption of the mediation settlement agreement, which he subsequently withdrew without instructions from the

1st respondent, and proceeded to advise the church to go ahead with elections. It is averred that the said advocate advised that the mediation settlement agreement be respected and implemented through calling elections. It is further averred that the purported judicial review proceedings against the mediation were non-existent, and if they were not, then they should have been consolidated with the instant petition. It is averred that it would be in the interest of justice that the 1st respondent be granted opportunity to bring information that was not cited by the court for the purposes of the court arriving at a different conclusion, and in any case, should the court arrive at the same conclusion, the 1st respondent was willing to purge the contempt prior to mitigation and sentence.

4. Two affidavits were sworn and filed in support of the application, one is by Rev. Tom Olendo and the other is by Rev. Patrick Lihanda, 1st respondent sworn on 25th June 2021 and 28th June 2021, respectively.

5. In his affidavit, Rev. Olendo largely dwells on what transpired around the mediation process, and the final outcome, which was the mediation settlement. The principal point that he appears to make is that he was not party to the applications dated 14th March 2019 and 26th August 2020, which were basis upon which the orders against the 1st respondent were made. He states that the affidavit in support of the application dated 14th March 2019 was not his, and that his name and signature were used without his consent. He further avers that the applicants in the application dated 26th August 2020 had withdrawn from the case as at the date of the filing of the said application against the 1st respondent.

6. On his part, 1st respondent avers that he was aware of the order finding him guilty of contempt of court, and of the mediation settlement agreement. He avers that that all the parties to the instant petition, were party to the mediation settlement, and there was no other party at that time. He avers that there was no record of judicial review proceedings against the mediation settlement agreement that he was aware of, neither was the same placed before the court nor consolidated with the instant petition. He avers he acted as per the terms of the mediation settlement agreement, based on advice from his technical advisors, who included the second respondent and their advocate, and, therefore, it cannot be said that he acted alone, and, therefore, suggesting that the two ought not have been absolved. He avers to be ready to purge the contempt and prays that he be given an opportunity to do so. He also expresses willingness to comply with whatever court orders that would facilitate revision of the church Constitution and conduct of fresh elections. He prays that the court adopts the mediation settlement agreement, and order for court supervised constitutional amendments and elections. He has attached affidavit, copies of documents relating to the mediation settlement, and of the application dated 14th March 2019.

7. The petitioners in Petition No. 8 of 2018 filed grounds of opposition, dated 4th July 2021, and filed herein on 7th July 2021. They aver that the applicant had not stated a case that warranted review of the orders on contempt, and that there was no error apparent on the face of the record. Secondly, they aver that some of the issues raised in the application were *sub judice*, for they related to the purported mediation, which was the subject of Kakamega HCJR No. 2 of 2019, in which the applicant is a party, where the mediation in question is challenged. There is also an affidavit in reply sworn by Fred Aluhano, on 4th July 2021, which largely expounds of the grounds of opposition. He has also attached a large body of the pleadings filed in some of the matters now consolidated.

8. The 1st to 5th interested parties also filed grounds of opposition, dated 5th July 202, which are largely a replica of the grounds by the petitioners in Petition No. 8 of 2018. They state that the applicant was approbating and reprobating, as he had filed an application dated 29th January 2019, for adoption of the mediation settlement agreement, which he later abandoned and withdrew. They submit that the applicant had not disclosed that the mediation was done without involving other parties in the consolidated suits.

9. Anthony Kenyakisa swore an affidavit on 6th July 2021, filed herein on 7th July 2021. He avers that he was not invited to the mediation, even though he was a party to the matter. He then goes on to try to impeach or deconstruct Rev. Olendo, by referring to some of his previous affidavits, and activities. On the mediation, he points out that there was a pending judicial review application challenging the authenticity of the mediation process. He avers that the 1st respondent had not presented material to demonstrate that he conducted elections against a court order on the basis of advice from his technical advisers. He concludes by stating that the application was *res judicata* and *sub judice*.

10. The parties were directed that the application would be canvassed by way of written submissions. They complied with the said directions, by filing written submissions, which I have read through and noted the arguments made.

11. There are several elements to the application: review of the contempt orders, offer to purge the contempt, orders to allow review of the Constitution and conduct of elections.

12. I will start with the review. Review of court orders made by a court exercising a civil jurisdiction, is provided for under Order 45 of the Civil Procedure Rules. Review is available on two key grounds: discovery of new and important matter which was not available when the order sought to be reviewed was being made, and error apparent on the face of the record. There is also the omnibus ground, any other sufficient reason.

13. The application appears before me to be grounded on error apparent on the face of the record. I have very closely perused through the Motion as against the two affidavits sworn in support of it, and I have not found any error apparent on the record elaborated in them. In the affidavit of Rev. Olendo, what could pass as anything close to it is his claim that he was not party to the contempt application dated 14th March 2019, and that the affidavit in its support was not his, as his name and signature were used without his consent. Is that an error on the face of the record? I do not think so. He does not point at any mistake at all on the part of the court. I dealt with the application which was before me, and which was dated 14th March 2019. It happened that Rev. Olendo was one of the applicants, or persons who had sworn affidavits in support of the application. Between March 2019 when that application was lodged in court and June 2021 when I made the impugned ruling, no one, least of all, Rev. Olendo, came forward to say that their name was being used in the application without his consent, or that the signature in the affidavit was not his, or that he signed that affidavit unaware of its contents. I find it suspect that he is now coming forward to make these claims after the court has found the 1st respondent guilty of contempt of court. He did not make any application to withdraw the application, or to have his name expunged from the record as a party to that application. He does not state that he

had ceased to be party to the proceedings as at the time the affidavit in question was sworn and the application filed. It cannot be said that he has just discovered the fact that he was an applicant in that application now, or that there was an affidavit purported to have been sworn by him in support of the application. The same would apply to the application dated 26th August 2020. There is no demonstration of any error on the face of the record, or of discovery of any new evidence with relation to it. Rev. Olendo avers that the applicants in that application had withdrawn from the matter, that is to say Rev. Dr. James Ogendi, Isaiah Kipsang and Oluhano, but he has not placed anything on record as proof of that.

14. With regard to the affidavit by the 1st respondent, I have not seen anything that suggests that there is any error on the face of the record or discovery of new evidence of significant importance. He has dwelt at some length on the fact that in conducting the elections in March 2019, which culminated in his being cited for contempt, he was not working alone, for he relied on technical advice from the 2nd respondent, Rev. Patrick Oyondi, and their advocate then, Mr. Musiega, and he appears a little surprised that he was condemned alone. Both the 2nd respondent and Mr. Musiega were subject of the contempt applications. Contempt proceedings are quasi-criminal in nature, for the penalty for it is what is available in the criminal realm, imprisonment, fine and sequestration of property. Being quasi-criminal, a court is bound to examine the evidence placed before it to assess the culpability of each of the persons proposed for citation for contempt of court. Specific allegations were made against each of the three with relation to the alleged acts of disobedience of court. The culpability of each one of them had to be founded on the specific allegations against them. I addressed that in my ruling of 18th June 2021, and found that the material before me established culpability against the 1st respondent but not against the 2nd respondent and Mr. Musiega. I dealt with that at paragraphs 42, 43, 44 and 45 of the ruling. It was a matter of evidence, and presentation of material. Whether these individuals advised the 1st respondent was not before me when the application was filed and argued, and I had no basis upon which I could hold them to account without evidence. There cannot be any error on the face of the record nor discovery of new evidence with regard to that.

15. Overall from, the affidavits sworn in support of the application, there is no material whatsoever, upon which I can exercise discretion to review the orders of 18th June 2021, for no error on the face of the record has been demonstrated nor discovery of new evidence that the applicant was not able to table before the court before those orders were made. Neither can it be said that there is some other sufficient reason, from the facts deposed in the affidavits, to warrant review of the said orders.

16. The second issue is with respect to purging the contempt. Purging of contempt arises where a party acknowledges the contempt in the first place. Where the party says, yes, it is true that the order in question was not complied with or was contravened or disobeyed, and that the party is sorry and is ready to make amends. Is that the case here? I am not sure about that. There appears to be a disconnection between the prayers and grounds on the face of the Motion and the affidavits sworn in support. Reading the two affidavits closely, I do not sense any desire by the two deponents, and especially the 1st respondent, to have review, for he appears to say that the elections were conducted on advice from his technical team, which might have been erroneous, and he is ready to atone for it, save that he appears to say he should not be condemned alone, for he could not have acted alone. The Motion on the other hand alleges that there were errors apparent on the face of the ruling, which have not been pointed out by the person found to be in contempt. Secondly, it says that there were crucial proceedings and rulings that were not considered, but the said proceedings and rulings have not been pointed out. The Motion is built around the notion that the court was wrong to find the 1st respondent in contempt for there were errors on the face of the ruling and there were proceedings and rulings that the court did not consider. A person cannot be said to be genuine if they claim that they accept that something went wrong, and they are ready to make amends for it, while, at the sometime, they are arguing that their being found to be in contempt was not proper because the court made errors on the face of its ruling or did not consider some material. The two cannot possibly stand together. It's either that there were errors on record and material was not considered, and, therefore, the orders on contempt be set aside; or that the 1st respondent was contrite, for he acknowledges that he did not obey court orders, and he is ready to purge the contempt. One cannot press for review and setting aside of orders, while at the same time expressing contrition and readiness to obey the orders. It is what is called doublespeak, or speaking with both sides of the mouth. Its either that a party would like the orders reviewed and set aside or that they are ready to comply with them. It cannot be both.

17. I understand, of course, that the 1st respondent is pleading that he acted on advice of his advocate then, that there was no need for adoption of the mediation settlement agreement by the court, and that the application for the adoption of the mediation settlement agreement was withdrawn by the advocate without instructions. These are the things that a party who is contrite brings out when a contempt application is brought forth. The 1st respondent ought to have presented these arguments at the hearing of the contempt application. He did not, he asserted then that he was not guilty, as the orders that he was accused of violating had been resolved by the mediation settlement agreement. In any event, he is still contesting the findings by the court by saying that the court was wrong, and the orders ought to be reviewed set aside.

18. On the judicial review proceedings that I alluded to at 39 of the ruling of 18th June 2021, the said judicial review proceedings are not before me, and I am not seized of them, and they are not among the matters consolidated with the instant matter. I picked the matter of the existence of those proceedings from this very record. The issue of the pendency of those judicial review proceedings came up on 11th February 2019 and 7th March 2019 before Njagi J., and copies of the pleadings relating to it have been exhibited in a number of affidavits that are in the files before me, being Kakamega HCJR Application No.2 of 2019. The matter may not be before me, but I do not believe that the said proceedings are fictitious or a phantom.

19. On whether I should allow amendment of the Church Constitution and conduct of fresh elections, I have a very short answer, that the ongoing oral hearings turn on these issues. I cannot venture to make orders in an interlocutory application when the main hearings are going on the same issues. I agree, the matter is *sub judice*. If the parties would like a shorter route towards that goal, the best thing would be for them to compromise the suit. Adoption of the mediation settlement agreement is an issue that should go together with amendment of the Constitution and conduct of fresh elections, given that that was what the mediation process was intended to achieve.

20. A section of the grounds on the face of the application talk about the 1st respondent being allowed to bring information which was not cited by the court when it made the contempt orders. None of the prayers in the Motion ask for leave for the applicant to bring such information, and none of the averments in the two affidavits in support allude to the 1st respondent requiring leave to bring such information. I have no idea where that information is, and why leave is required to bring it on board. Where a review application is grounded on an error apparent on the face of the record, it is presumed that the material is already on record, and all what a party needs to do, in its application, is

to point out the error. It is not about introducing fresh material into the record to demonstrate the alleged error on the record. If it is about discovery of new important evidence, what the applicant ought to do is to place that new information before the court, and say here you are, this is the new information that we have just discovered, review your decision after taking this new information into account. It is not about being allowed to bring the information later, it should have been presented in this application, for me to assess whether it was new evidence, which the 1st respondent did not have at the time I made my order, and whether that information could have made a difference.

21. I understand this to be an application by the 1st respondent, and therefore I do not understand the basis upon which it is sought that the names of the original petitioners be removed from the record. I do not know whether he would be the right person to seek those orders. However, I do agree, those names ought not to be featuring in the matter since they are no longer parties. To tidy up the record, it is important that the current petitioners amend their papers, and file amended petitions without the names of the parties who have cased to be parties, and introduce the names of the parties who were allowed to take their place.

22. Overall, I do not find any merit in the Motion dated, 25th June 2021, for the reasons given above, save for the direction in paragraph 21 above, on amendment of pleadings to remove the names of the parties who have withdrawn and to include the names of those who have substituted them. The said Motion is hereby dismissed. Costs shall be in the cause. I shall allocate a date for the sentencing hearing at the delivery of this ruling. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE

In the presence of:-

Erick Zalo – Court assistant

Mr. Odego/Mr. Wasilwa for petitioners

Mr. Ambani for interested parties

Mr. Ambani for Mr. Oloo for applicant

Mr.Oginga for other petitioners