REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 12 OF 2019

ARCHBISHOP DR. HESBORN NJERA

JONATHAN ONYANGO OCHARE

(Suing as the Arch-Bishop and Trustees of **ST. MESHACK'S FELLOWSHIP**

CHURCH..PLAINTIFFS/APPLICANTS

VERSUS

TOBIAS OCHOLA .... 1ST DEFENDANT/RESPONDENT

JULIUS ODUNDO .... 2ND DEFENDANT/RESPONDENT

RULING

This Ruling is on the Preliminary Objection dated 13th August 2019, pursuant to which the Defendants made the following assertions;

> ***" 1. THAT the court has no jurisdiction to preside over this matter.***
>
> ***2. THAT this suit is sub-judice and should therefore be dismissed as there is an identical suit pending before this Court.***
>
> ***3. THAT the plaintiff has not exhausted the dispute resolution mechanism envisaged in Article 23 of the Church Constitution and Canon Rules, which is a binding and governing document for St. Meshack's Fellowship Church."***

1. In the light of those grounds, the Defendants asked the court to strike out the entire suit.

2. Both parties are in agreement about the well-established status of the jurisdiction of courts.

3. For the completeness of the record, I will restate here, the words of the Supreme Court in the case of **SAMUEL KAMAU MACHARIA Vs KENYA COMMERCIAL BANK LIMITED & 2 OTHERS, APPLICATION NO. 2 OF 2011**;

> ***"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 upon it by law."***

4. The Supreme Court made it absolutely clear that the Courts of Law cannot expand their jurisdiction through craft or innovation or at all.

5. The Defendants submitted that a court will not make declarations in a dispute which is not justiciable.

6. They pointed out that the dispute herein was of a domestic nature, as it was not founded on contract, or land or any other legal right. It was the understanding of the Defendants that the dispute fell squarely within the domestic jurisdiction of the church.

7. That would mean that the court did not have jurisdiction to handle the issue at all.

8. However, the Defendants also pointed out that the reason why the court ought not to inquire into or arbitrate in the matter was because

the Plaintiffs had not yet exhausted the laid down dispute resolution mechanism.

9. I hold the view that if the position was that it was premature for the court to handle the dispute because the church's dispute resolution mechanism had not been exhaustively utilized, that would be different from a situation in which the court could never be called upon to adjudicate in the matter.

10. In a situation where there is a laid down procedure within the Constitution of the Church, it is incumbent upon the parties to follow the said procedure.

11. Such a procedure would be applicable whether or not the matters in issue were justiciable. In other words, just because an issue was justiciable, would not provide a licence for a party to choose to ignore the laid down procedure, if such a procedure stipulated that disputes arising between the Church and its members or between members of the church or even between leaders of the church, ought to be resolved through the internal mechanisms established within the church structure.

12. In this case, the grounds of the Preliminary Objection did not raise the question as to whether or not the matters in dispute were justiciable. Therefore, that question does not fall for determination before me, at least not at this stage.

13. The Plaintiffs concede that there exists an internal mechanism for dispute resolution within the church.

14. In the case of **SPEAKER OF THE NATIONAL ASSEMBLY Vs KARUME CIVIL APPLICATION NO. NAI. 92 OF 1992**, the Court of Appeal said;

> ***"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

15. The question might arise whether such a procedure ought to be followed if it was embodied in the Constitution of a church or society, as opposed to being the Constitution of the Republic of Kenya or in an Act of Parliament.

16. In the case of **EAST AFRICA PENTECOSTAL CHURCHES REGISTERED TRUSTEES & OTHERS Vs SAMWEL MUGUNA HENRY & 4 OTHERS, CONSTITUTIONAL PETITION NO. 14 OF 2014**, Makau J. said;

> ***"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."***

17. The learned Judge made the following position clear;

> ***"That Article 21 of the East Africa***
>
> ***Pentecostal Church (EAPC) Constitution does not oust the jurisdiction of the courts to entertain disputes between members of the church after the laid down resolution procedure has been followed strictly, and more in case of a dispute thereafter."***

18. In the case before me, it has been indicated that **Article 25 (5) (l)** of the Church's Constitution reads as follows;

> ***"It is the duty of the church to remind all its members from time to time, of the injunction that they should not go to secular law courts against one another, especially before unbelievers, and that all disputes between Christians should be settled by wise and experienced members within the fellowship. (See Mathew 18:15-17 and 1 Corinthians 6:1-11).***
>
> ***As far as possible, Christians should refrain from entering into litigation even against those who are not Christians, though they must do their duty in supporting the forces of order, when public welfare demands it."***

19. As to whether or not that constitutional provision stipulates a dispute resolution mechanism is a matter for consideration, in the event that it arises.

20. Meanwhile, the Plaintiffs submitted that prior to instituting these proceedings, they had exhausted all the dispute resolution mechanisms as required by the church constitution.

21. In the circumstances, there would be need for the parties to lead evidence, before the Court could determine whether or not the Plaintiffs had exhausted the dispute resolution mechanisms laid down in the Church Constitution.

22. In the circumstances, the matters of fact, upon which the Preliminary Objection were founded, are neither agreed upon nor settled.

23. In the case of **MUKHISA BISCUITS MANUFACTURING COMPANY LTD Vs WEST END DISTRIBUTORS [1969] E.A. 696**, at page 701, Sir Charles Newbold P. said;

"A preliminary objection is in the nature of what used to be a demurrer.

It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion."

24. If we are to presume that the Plaintiffs had first exhausted all the laid-down procedures for in-house dispute resolution within the church structure, then the Plaintiffs cannot be barred from instituting these proceedings.

25. Even if the court had to first ascertain whether or not the Plaintiffs had, indeed, exhausted the dispute resolution mechanisms set out in the Church Constitution, it would not be open to the defendants to raise the alleged failure to utilize those mechanisms as a ground for preliminary objection.

26. I also find that if there was already another pending case in court, between the same parties, and in respect to the same or similar issues as raised in this case, that would need to be verified, factually,

27. The Defendants have said that the existence of such a pending case rendered this new case sub-judice.

28. But the Plaintiffs have indicated that the only case which had been filed earlier had already been withdrawn.

29. If indeed the said case had already been withdrawn, the foundation for the second preliminary objection would be non-existent.

30. In the final analysis, and bearing in mind the fact that pursuant to **Article 165 (a)** of the **Constitution of the Republic of Kenya**, which vests the High Court with unlimited original jurisdiction to adjudicate in any criminal and civil matters, I find no merit in the Preliminary Objection. The same is thus overruled, and I order the Defendants to pay to the Plaintiffs, the costs of the Preliminary Objection.

DATED, SIGNED at **DELIVERED** at **KISUMU**

This **29th** day of **April** 2020

FRED A. OCHIENG

JUDGE