



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.48 OF 2019

MIRIAM MUTWIRI.....APPELLANT

VERSUS

EAPC MERU CENTRAL DISTRICT WOMEN MINISTRY SUIING THRO

PAUL GIKUNDA KINOTI.....1ST RESPONDENT

LUCY K. BUNDI.....2ND RESPONDENT

JUDGMENT

The Appeal herein arises out of a ruling on a preliminary objection delivered by Hon E. A Mbicha SRM in Meru Chief Magistrates Court C.C. No. 51 of 2019 dismissing the said Preliminary Objections raised by the appellant herein.

The Grounds of Appeal raised are:-

The grounds of Appeal are:-

- a) The Learned Senior Resident Magistrate erred in law and in fact in dismissing the Preliminary objection raised by the appellant regarding the court's jurisdiction to entertain the respondents' suit.
- b) The learned Senior Resident Magistrate erred in law and fact in failing to find and old that the respondents suit before court violated the express provisions of Articles 21 of the constitution of the East Africa Pentecostal Churches which provides for exhaustion of an internal dispute resolution mechanism before going to court.
- c) The learned Senior Resident Magistrate misapplied the law and misdirected himself into holding that the appellants preliminary objection on jurisdiction was not found or grounded on a point of law.
- d) The learned Senior resident magistrate erred in law and fact in failing to submit himself to the general rule of *ratio decidendi* and the principle of *stare decisis et non quieta movere*
- e) The learned Senior Resident Magistrate further erred in law and fact in failing to find that the respondents suit offended the provisions of order 1 rule 13 of the Civil Procedure rules.

The appellant had argued in the Preliminary objection that the court lacked requisite jurisdiction to entertain the suit in court for non-exhaustion of the dispute resolution mechanism set out under Article 21 of the plaintiff church. The authority in Nyeri Civil Appeal No. 10 of 2015 Geoffrey Muthenya & Another vs Samuel Muguna Henry & 1000 others Held:-

“A dispute touching on affairs of church cannot be instituted in a court of law without exhausting the set out mechanisms in the church. The plaintiff counsel on the other hand argued that the defendant didn't belong to the plaintiffs organization and therefore the provisions of Article 21 of the churches constitution does not apply.”

EAPC Meru Central District Women Ministry has sued the defendant through Paul Gikunda Kinoti and Lucy K. Bundi who described in the Fast track Plaint dated 13th March 2019 as adult males of sound mind residing and working for gain in Meru County within the Republic of Kenya.

The defendant is sued as a registered member cum official of a sub branch of the plaintiff church and her address is given as EAPC Kirunga. The prayers sought by the plaintiffs are:-

- a) An order of permanent injunction restraining the defendant, her agents, employees and/or servants from negatively interfering with the plaintiff activities and other in the good character of the plaintiff elected officials.
- b) Costs of the suit and interest at the court rates.
- c) Any other or better relief this honourable court may deem fit to grant to meet the ends of Justice.

Accompanying the plaint is a notice of motion under order 40 Rules 1, 2, and 3 of the Civil Procedure Rules 2010 under certificate of urgency seeking an order of:-

- a) Temporary injunction to issue against the defendant by herself, her employees, servants and/or anybody else claiming under her from interfering with lawful activities of the plaintiff church and in particular the Kirung'a branch pending the hearing and determination of the application and
- b) Pending hearing and determination of the main suit.
- c) That the OCS Meru Police station be served with the order of the court for compliance. Costs of the suit were also sought for. On 20.3.2019 Exparte orders were made in terms of prayer 2 pending interpartes hearing was due to take place. The defendant/Respondent filed a Replying Affidavit to application dated 13.3.2019 and filed on 3.4.2019. while application dated 13.3.2019 was pending hearing interpartes the plaintiffs lodged a further application dated 26.3.2019 and filed on 8.4.2019 under certificate of urgency seeking orders of temporary injunction to issue to close and stop all operations of the church and interfering with the lawful activities of the church and in particular the Kirung'a branch pending the hearing and determination of the application interpartes;
- d) That an order of temporary injunction issue against all members, defendant by herself, her employees, servants and/or anybody else claiming under her from interfering with the lawful activities of the church and in particular the Kirung'a branch pending the hearing and determination of the main suit.

The OCS Meru Police station was to ensure compliance of the order. Application dated 26.3.2019 was allowed in terms of prayer (b) & (d) exparte pending interpartes hearing. Hearing interpartes was set for 24.4.2019. the defendant filed an application dated 10.4.2019 seeking that orders issued on 8.4.2019 be discharged, varied and/or set aside henceforth and that costs be awarded.

The application was certified urgent and an order made that same be served for interpartes hearing on 24.4.2019 same date application dated 26.3.2019 was to be heard interpartes.

On 24.4.2019 the Preliminary Objection was 1st argued and a ruling was delivered on 2.5.2019 over ruling the same on account that the church's constitution and content thereof are issues of fact to be addressed as evidence and thus is not a point of law capable to dispose a suit at the preliminary stage while the applications in Meru CMC. C.C No. 51 of 2019 were pending hearing and determination of 3 applications and a preliminary objection, the plaintiffs/Respondent therein lodged Meru C M CC No. 129 of 2019 against the same defendant accompanied with an application dated 21st May 2019 seeking for reopening of EAPC Meru Central District church to allow faithful to continue with its operations from 26th May 2019 and restrain the defendant not to interfere with the operation of the church pending the hearing and determination of the application as well as hearing and determination of the suit herein. Again prayers 2 & 4 were granted exparte with an order that application be served for Interpartes hearing on 29.5.2019.

On 29.5.2019 the trial magistrate ordered that Meru CMCC. No. 51 of 2019 be brought before any further orders could be made and when the defendant filed an application dated 29.5.2019 seeking to have the suit in C.C. No. 129 of 2019 struck out as orders in it were used to interfere with status quo order issued in C.C. No. 51 of 2019. Interestingly the plaintiff had not served the defendant despite the fact they were ordered to serve for interpartes hearing on 29.5.2019. The trial Magistrate by an order made on 29.5.2019 struck out the suit and application in C.C. No. 129 of 2019 for same having been obtained fraudulently and for being an abuse of court process.

The appeal herein was canvassed by way of written submissions. It is instructive to note that the plaintiff's counsel had not responded to Preliminary objection by the time it came up for hearing and thus oral arguments submissions were made.

Having perused the trial courts file as well as Meru CMC C No. 129 of 2019 the issue that this court should consider is whether there was a dispute as to the constitution referred to in the preliminary objection by the appellant herein. The plaintiffs/Respondent didn't deny that the document annexed to defendants Replying affidavit as MM1 is the church's constitution. They didn't dispute that Article 21 in that document governs how disputes within the church should be resolved within the church.

This court agrees with the finding of the trial court that a preliminary objection as defined in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 consists of a pure point of law but also undisputed facts that don't require proof of evidence. The plaintiffs if indeed they represent the church whose constitution is annexed by the defendant ought to have told this court whether the dispute mechanism of the church had been exhausted before the matter was brought to court.

The Respondents counsel argued that the appellant, defendant was a busy body having been excommunicated by the church vide annexures to their applications dated 13th March 2019 and 26.3.2019 as well as application filed in Meru CMCC No. 129 of 2019.

The opinion of this court is that the capacities of the plaintiffs/Respondent as representing the church and its membership as well as alleged ex-communication of the defendant of the defendant is what is in dispute.

The conduct of the 1st plaintiff in filing multiple applications and suits concerning the same subject matter is what is wanting and it appears that he is drawing the entire church in a personal issue between him and the defendant and that he has come with unclean hands.

The perusal of the 2 files the pleadings, applications and affidavits doesn't exhibit anything to show he represents any member of the church. The Fast Track plaintiffs in both suits describe the defendant as a registered member cum official of a sub-branch of the plaintiff church her address is given as EAPC Kirunga Church. This description brings her into the ambit of the constitution of the church (plaintiff herein).

EAPC-Meru Central District women Ministry is purported to be suing through the 1st and 2nd Plaintiff but there is no proof they are members of the said Ministry and there is nothing to show they had authority to sue on behalf of the Ministry.

In paragraph 4 of the plaint it appears that it is the character of one Zablun Mathenge Itewa which was assassinated but the said Zablun has not sued. The particulars of the malice are not specified. The particulars of loss to the church have not also been specified. This court finds that this cause was nullity ab initio and can't see the light of day considering especially that the plaintiffs jumped the que instead of addressing their issues through the church's dispute resolution mechanism. The court is guided by the holding in the Court of Appeal case of Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others Civil Appeal No. 10 of 2015 that

“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 do 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.

The Learned Judge correctly found as we do, that Article 21 of the Church's Constitution did not oust the jurisdiction of the courts.”

The Appeal is therefore allowed. Meru CMC C. No. 51 of 2019 is hereby struck out with costs to defendant therein. The cause of Appeal shall also go to the Appellant.

HON A. ONG'INJO

JUDGE

JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 27TH DAY OF JUNE 2019.

In the presence of :

C/A: Kinoti

Mr Kariuki Advocate for Appellant

Appellant present in person

Ms Gachango Advocate for Respondent

1st Respondent present in person

2nd Respondent –N/A

HON A. ONG'INJO

JUDGE

Ms Gachango

I pray for certified copy of the judgment.

Order: Respondent to pay for certified copy of judgement.

HON A. ONG'INJO

JUDGE