REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 6 OF 2018

(AS CONSOLIDATED WITH PETITION NO. 8 OF 2018 AND OTHERS)

REVEREND JOHN JUMA.....1ST PETITIONER

REVEREND SIMON ALOVI.....2ND PETITIONER

REVEREND TOM OLENDO.....3RD PETITIONER/RESPONDENT

VERSUS

REVEREND PATRICK LIHANDA.....1ST RESPONDENT/APPLICANT

REVEREND PATRICK OYONDI.....2ND RESPONDENT/APPLICANT

AND

ELIJAH KATHIARI MIKWA.....1ST PETITIONER/RESPONDENT

MARK KAKAI NANGALAMA.....3RD PETITIONER/RESPONDENT

AND

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

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

THE REGISTERED TRUSTEES PENTECOSTAL

ASSEMBLIES OF GOD.....3RD INETRESTED PARTY

THE MEMBERS OF THE PENTECOSTAL ASSEMBLIES

OF GOD CHURCH KENYA (P.A.G) APPEALS

& ARBITRATION TRIBUNAL.....4TH INTERESTED PARTY

REVEREND REUBEN SABATIA ASAMBU AND

462 OTHERS.....5TH INTERESTED PARTY

RULING

1. By its rulings dated 8th November, 2018 and 5th December, 2018 this court issued orders suspending the elections for the Pentecostal Assemblies of God Church – Kenya and referred the matter to mediation. Thereafter a mediator filed a settlement agreement which was however challenged by **Mr. Ochieng Oginga**, advocate acting for some respondents Elijah Kathiari Mikwa and Mark Kakai Nangalama. The settlement was also challenged by **Mr. Mokua**, advocate acting for some petitioners in the consolidated petition.

2. After the filing of the settlement in court the applicants Rev. Patrick Lihanda and Rev. Patrick Oyondi conducted elections for the church on the night of 3rd and 4th March, 2019. Mr. Oginga then filed an application dated 14th March, 2019 citing the applicants for contempt of court. The court issued exparte orders dated 18/3/2019 in which it granted leave to Mr. Oginga's clients to cite the applicants and their counsel Mr. Musiega for contempt.

3. Upon the issuance of the orders dated 18/3/19 **Mr. Begi advocate** for the 2nd applicant Rev. Oyondi filed an application dated 3rd April, 2019 seeking that the court's orders issued on 18/3/19 be stayed and or vacated. **Mr. Musiega** for the 1st applicant Rev. Lihanda on the other hand filed a preliminary objection dated 2nd April, 2019 seeking to have the application dated 14th March, 2019 struck out and or dismissed. It is the application dated 3rd April, 2019 and the preliminary objection dated 2nd April, 2019 that are the subject of this ruling. The two were heard together.

4. Mr. Begi's application is based on the grounds that mediation was carried out as ordered by the court and a mediation agreement filed with the court. That the matter was therefore settled through a mediation agreement which this court ought to have admitted as a judgment of the court. That the court had no power to re-open the matter and entertain strange parties thereof. That the exparte adverse orders made by the court on 18th March, 2019 when there was already a mediation settlement agreement duly filed with the court which the court ought to have adopted as a judgment of the court were irregular. That the orders therefore ought to be set aside and or vacated.

5. The preliminary objection by Mr. Musiega dated 2nd April, 2019 was based on the grounds that the filing of the mediation settlement agreement in court and by dint of the operation of Section 59 (B) (4) and (5) of the Civil Procedure Act, this court is bereft of the required jurisdiction to entertain the application dated 14th March, 2019 and any other proceedings save for proceeding to enforce the mediation agreement as judgment of the court. That there are no valid proceedings in Petition No. 6 of 2018 which are pending and capable of being protected and or enforced through the application dated 14th March, 2019 as this petition and other cases that were pending in court concerning PAG – Kenya were withdrawn by the filing of the mediation agreement. Further that this court was rendered *functus official* by reference of the dispute to court annexed mediation and the subsequent filing of the mediation settlement agreement which became enforceable.

6. The application and the preliminary objection were opposed by Mr. Oginga's clients on the ground that they are meant to defeat the contempt proceedings filed herein and to circumvent the orders of the honourable court. Further that there was no compliance with the Mediation Rules in the matter.

Submissions –

7. The advocates for the respective parties filed written submissions. Mr. Begi urgued that the mediation agreement provided that all pending cases and orders in the said cases on elections and the Constitution of the Church PAG Kenya be withdrawn and marked as settled. That the mediation agreement was filed with the court. That matters affecting the elections and the Constitution of the PAG church Kenya having been withdrawn by the dint of the mediation agreement dated 6/1/2019, there were no orders to be breached by the respondents which would give rise to the contempt proceedings herein. That it follows that the orders issued by the court on 18th March, 2019 were irregular in that they were made without regard to the mediation agreement dated 6/1/2019. That they were issued in a matter that had been withdrawn and marked as settled by dint of the mediation agreement and that they were made in an application which by dint of Section 7 of the Civil Procedure Act was *res judicata*. Therefore that the court lacks jurisdiction to re-open the matter.

8. Counsel also urgued that the petitioners led the respondents to believe that they had withdrawn all suits and orders made in relation to the elections and constitution of PAG church Kenya. That they are estopped from averring otherwise by dint of the provisions of Section 120 of the Evidence Act.

9. Mr. Musiega submitted that there is no requirement to pursue adoption of the settlement through additional application as adoption is a routine duty of the court. That adoption of the settlement is unnecessary. Mr. Musiega submitted that Section 59 (B) sub sections (4) and (5) of the Civil Procedure Act only requires for the mediation agreement to be registered with the court and does not require adoption before enforcement of the award. That it means that once the agreement is registered with the court it becomes enforceable as if it were a judgment of the court. That the order of 5th December, 2018 died on the date of the filing of the mediation settlement and was not an order capable of being disobeyed by the fact of holding elections after the filing of the mediation agreement. That the agreement became judgment of the court upon being filed. That all suits earlier filed were accordingly withdrawn upon the filing of the mediation agreement and they cannot form the basis of the contempt application that is before the court. That the effect of referring the matter to mediation rendered the court *functus officio* until when enforcing the mediation settlement agreement. That the mediation settlement agreement remains the judgment of the court until reviewed and or set aside upon application.

10. It ought to be noted that Mr. Musiega had initially filed an application for adoption of the settlement but he subsequently withdrew it on realization that adoption of a settlement is not necessary.

11. **Mr. Athunga** advocate for some interested parties supported the submissions made by Mr. Musiega.

12. Mr. Odinga on his part submitted that the court annexed mediation is a process supervised by the court. That Rule 2.3.3. of the Judiciary Mediation manual grants parties in mediation the liberty to file any applications as may be appropriate in law. That Rule 4.3 requires a mediation settlement agreement to be placed before the court for adoption as a judgment or order of the court. The advocate submitted that the adoption is to be done in the presence of the parties so that the court is to record any such objections that may be raised.

13. **Mr. Wasilwa** for the 3rd respondent submitted that the preliminary objection filed by Mr. Musiega does not stand the test set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd (1968) EA 696**. That the application dated 3rd April, 2019 raised issues that ought to be canvassed in response to the Judicial Review challenging the mediation process.

Analysis and Determination –

14. The questions for determination in the application and the preliminary objection are:-

(1) Whether the reference of a matter to mediation renders the court *functus officio* during the pendency of mediation.

(2) Whether adoption of a mediation settlement agreement is mandatory or routine function of the court.

(3) Whether the court has jurisdiction to entertain contempt proceedings filed herein.

15. Article 159 (2)(c) of the Constitution of Kenya provides as follows:-

"In exercising judicial authority, the courts shall be guided by the following principles:-

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)."

16. Under Section 59 C of the Civil Procedure Rules Cap 21 (laws of Kenya), it is provided that:-

"1. Any suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral.

2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order. .."

In addition, under Order 46 Rule 20 (1) of the Civil Procedure Rules, 2010, it is stipulated as follows:-

"Nothing under this order may be construed as precluding the court from adopting and implementing of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act."

17. The Judiciary Mediation Manual provides as follows:-

3. Clause 1.3 (f) that:

"The Court may at any stage of court proceedings, make an order requiring parties to participate in additional mediation."

4. Clause 1.5 that:

"There shall be a Mediation Judge in each Division/Court. The Mediation Judge will handle interlocutory applications arising when the mediation process is ongoing."

5. Clause 1.7 of the *Judiciary Mediation Manual* provides for the role of the Deputy Registrar assigned to handle mediation matters which include *inter alia*:

d) Place interlocutory applications before the Mediation Judge.

i) Place the Mediation Report before the Judge for action as may be required.

j) Place the mediation agreement before the Judge for adoption.

6. Clause 2.3.3. provides that:

"a) Parties to a case referred for mediation, are at liberty to file application(s) as may be appropriate in law.

b) Applications filed therein shall be placed before the Judge/ Magistrate or Kadhi for consideration."

7. Clause 4.3 that:

"Upon receipt of the Mediation Settlement Agreement:

a) The Deputy Registrar or Magistrate or Kadhi shall file the Agreement in the Court file.

b) The file shall be placed before the Judge or Magistrate in charge or Kadhi in charge for adoption of the Agreement as a Judgment or Order of the Court."

8. Clause 4.5 that:

"The Agreement adopted shall be enforceable as a Judgment or Order of the Court."

18. Section 12 of the *Practice Directions [As amended in the Practice Directions on Court Annexed Mediation (Amendment) 2018]* provides that:

(a) Where there is an agreement resolving some or all of the issues in dispute, such agreement shall be in the prescribed Form 8, duly signed by the parties and shall be filed by any of the parties, with the Deputy Registrar or Magistrate or Kadhi as the case may be within ten (10) days of conclusion of the mediation.

(b) Any agreements filed with the Deputy Registrar or Magistrate or Kadhi as the case may be shall be adopted by the Court and shall be enforceable as a Judgement or order of court.

19. It was submitted by Mr. Musiega that adoption of a mediation settlement agreement is not necessary. He argued that once a settlement is filed as per the rules it assumes to be a judgment of the court and that any adoption by the court is only a formality.

20. I am unable to buy the urguement by Mr. Musiega that adoption of a settlement is a mere formality. Though Section 59B of the Civil Procedure Act does not provide for the adoption of the settlement by the court this is complemented by Rule 12 (b) of the Judiciary Mediation Manual Practice Directions (Amendment) 2018 which provides that:-

"Any agreements filed with the Deputy Registrar or magistrate or Kadhi as the case may be shall be adopted by the court and shall be enforceable as the judgment or order of the court."

21. It is clear from Rule 12 that for a settlement to be a valid judgment of the court it has to be adopted by the court. In my view a settlement only becomes a judgment upon being adopted by the court and where it has not it cannot be enforced as a judgment or order of the court.

22. The Supreme Court addressed a similar issue as in this case in the case of **Geoffrey M. Asanyo & 3 Others –Vs- Attorney General (2018) eKLR** where one of the judges of the Court of Appeal had declined to deliver his judgment on the ground that the court was *functus officio* in the matter because the parties therein had filed a consent settlement before the judgment of the court was delivered. The Supreme Court held that:-

"This Court has had an opportunity to make a determination as to what a judgment of a court is. In Richard Nyagaka Tong'i v. Chris Munga N. Bichage & 2 others SC Petition No. 17 of 2014; [2015] eKLR, the Court interrogated the existing legal regime: The Civil Procedure Act, the Appellate Jurisdiction Act and the Supreme Court Act as well as the prevailing case law from the Court of Appeal and concluded thus:

[45] From the foundation of current case law, we would hold that a 'Judgment' is a determination or decision of a Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court."

[71] Having so determined, what a Judgment of the Court should be is not the crux of the current dispute before us but instead, the Court is invited to answer the question; how should a Judgment of the Court [of Appeal] be delivered? This is crucial because a 'Judgment' only becomes valid and binding when finally delivered in accordance with the law. It is also trite that for a Judgment of the Court to be valid, it must be dated signed and delivered in open Court. The High Court, Makhandia, J, (as he then was) aptly stated in South Nyanza Sugar Co. Ltd v. Elijah Ntabo Omoro Civil Appeal No. 60 of 2005; [2011] eKLR that, "[i]t is a mandatory requirement that for a judgment of the court to be valid, it must be dated, signed and delivered in open court… Thus a judgment that is neither dated nor delivered in open court is a nullity." We agree.

23. In the premises a settlement agreement that has not been adopted by the court cannot amount to a judgment of the court. A settlement agreement if not adopted remains only that - a settlement. The Supreme Court in the above cited case spelt out what a judgment is. It is my considered view that the adoption of the judgment has to be done in open court with notice to all the parties.

24. Can the court then decline to adopt a settlement once it has been filed with the court? In the above cited case the Kenyan Supreme Court quoted with approval a Nigerian case where the Supreme Court of that country held that a court can decline to record the terms of settlement in a matter where the terms are vague, ambiguous and unascertainable. In the Kenyan case cited above our Supreme Court held that a consent can be set aside on the grounds of fraud, misrepresentation or abuse of the process of the court. If a consent can be set aside on that basis it is my view that a court can decline to adopt a settlement if there is evidence to prove that the same was obtained, inter alia, through fraud, misrepresentation or abuse of the process of the court. It is therefore not automatic that a settlement once filed with the court has to be adopted. The argument that adoption of a settlement is not necessary cannot stand as the court has a discretion of refusing to record a settlement agreement.

25. From the foregoing, it is clear to me that the court has jurisdiction over a matter pending mediation for purposes of hearing and determining interlocutory applications between parties. A mediation matter is deemed to be settled only after the settlement has been adopted as a judgment of the court. Only after that can the court be said to be *functus officio* over the matter. The urguement that the court becomes

functus officio on referring the matter to mediation does not hold water. The Judiciary Mediation Manual envisages that disputes may crop up during the mediation process that may need to be determined by the court. Hence the provision that parties have liberty to file applications they deem to be appropriate during mediation. The court cannot be said to have washed off its hands from a matter on referring it to mediation. That is why the process is referred to as "*court annexed mediation*". This is because the mediation is done under the supervision of the court.

26. In the foregoing there is no substance in the urguement that the court's orders made on 5th December, 2018 came to an end on the filing of the settlement agreement. There is no substance in the urgument that the pending cases stood withdrawn on the filing of the settlement agreement. There is no substance in the urguement that the orders of the court made on 18th March, 2019 were irregularly issued. The said orders remain in force until when the settlement is adopted by the court as the judgment of the court. The urguement that the contempt proceedings are res judicata is not tenable. There is thereby no ground for setting aside the orders of the court made on 18th March, 2019. The application for contempt of court dated 14th March, 2019 is competently before the court and the court has jurisdiction to hear and determine it. I agree with Mr. Oginga that the instant application and the preliminary objection thereto are simply meant to defeat the contempt proceedings filed herein and to circumvent the orders of the court issued on 18th March, 2019.

27. The upshot is that the application dated 3rd April, 2019 and the preliminary objection dated 2nd April, 2019 have no merit and are thus dismissed with costs to the respondents.

Delivered, dated and signed in open court at Kakamega this 24th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Wasilwa, Mr. Oginga and Mr. Mokua

Applicants – Rev. Lihanda and Rev. Oyondi

Respondents – Rev. Olendo

Court Assistant - George

30 days right of appeal