



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 OLENDU.....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 REGISTERD TRUSTEES,

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

MEMBERS OF THE PENETECOSTAL ASSEMBLIES OF GOD CHURCH KENYA

(PAG) APPEALS.....4TH INTERESTED PARTY

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

RULING

1. On 15th July 2019 the petitioners herein filed a Notice of Withdrawal of the suit herein with no orders as to costs. The said notice is dated 12th July 2019.

2. When the matter came up on 24th July 2019, for delivery of a ruling by Njagi J, after the said delivery, and after the advocates on record for the other parties sought directions on which and how the pending applications were to be dealt with, the three petitioners, all now acting in person, informed the court that they had filed a notice to withdraw the matter, through a notice that they had filed in court and served on the other parties. That prompted responses to the notice to withdraw from the other parties, who made lengthy oral submissions thereon.

3. Mr. Henry Wasilwa, the advocate for one of the respondents, submitted that under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, also known as the Mutunga Rules, in as much as a petitioner had a right to withdraw a petition, the court may proceed with the hearing of the case in spite of the wish by the petitioner to withdraw the petition. He cited *Stephen Mbugua Mwangi vs. Chief Land Registrar & 4 others, Rosemary W. Njau & 2 others (Interested Parties)* (2019) eKLR. He added that where the substratum of the petition did not reside in the party who wished to withdraw then that substratum must survive the withdrawal. Mr. Wasilwa submitted that the petition herein concerned governance of a church body and the withdrawal of the petition by the petitioners could not in any way resolve the indivisible polarity in the church, and thus those outstanding issues survived the withdrawal. Mr.

Wasilwa further submitted that the 1st respondent could not be permitted to withdraw from the proceedings as he held the highest office in the church, adding that other parties could be allowed to walk away from the suit but not the 1st respondent.

4. Mr. Oginga, for one of the other respondents, associated himself with the submissions by Mr. Wasilwa, and referred the court to *Peter Makau Musyoka & 19 others (suing on their own behalf and on behalf of the Mui Coal Basin Local Community) vs. Permanent Secretary, Ministry of Energy and 4 others* (2014) eKLR. He stated that the 1st respondent had been sued in a representative capacity and that the consolidated suits consisted of various parties. He submitted the complaints raised touched on the affairs and the constitution of the church. He further submitted that under Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a party could withdraw proceedings but only with the leave of court, and, in determining whether to allow such leave, the court had to consider the juridical effect of the withdrawal, such as public interest and whether it would suffer should the court all withdrawal of the suit. He added that should public interest override the interests of the petitioners, then the only option left for the petitioners was to withdraw from the proceedings and let other interested parties take over the proceedings. Mr. Oginga further contended that the court should also consider whether there was abuse of the court process in the filing the petition.

5. Mr. Mokuia, for some of the other parties, associated himself with the submissions by Mr. Wasilwa and Mr. Oginga, and added that the matter was comprised of several suits and thus could not be withdrawn by one party. He stated that there was an application for contempt pending, and that that application took precedence over other applications, including the one for withdrawal of the petition. He added that the instant cause was a public interest litigation where several members of the church are affected and have an interest in the petition. He further submitted that there was no application to withdraw the petition as required by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules).

6. The 3rd petitioner submitted that they filed the petition as pastors of the church and not on behalf of the church. He added that the petition was consolidated together with Petition No. 8 of 2018 and Petition No. 421 of 2018, but that it was only the cause in Petition No. 6 of 2018 which they intended to withdraw. The 1st and 2nd petitioners associated themselves with the submissions of the 3rd petitioner stating that they had a collective agreement on the withdrawal of the petition. The 1st respondent also concurred with the petitioners and urged the court to allow the withdrawal of the matter.

7. Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides as follows:

“27. Withdrawal or discontinuance

(1) The petitioner may—

(a) on notice to the court and to the respondent, apply to withdraw the petition; or

b) with the leave of the court, discontinue the proceedings.

(2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.

(3) Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.”

8. The petitioners complied with the procedure set out in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 of seeking to withdraw the suit herein by notifying the court, as evidenced by the Notice of Withdrawal dated 12th July 2019, filed in court on 15th July 2019 and notifying the respondents, as evidenced by affidavit of service sworn by Boniface Ouma Ondiegi, on 19th July 2019.

9. As per Rule 27(1) (b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a petition can only be withdrawn and proceedings discontinued with leave of court. In sum, it is not automatic that proceedings can be withdrawn by merely serving notice to the court and the respondents. Leave of court has to be sought and as per Rule 27(3) of the said Rules, whereupon the court can, with recorded reasons, decide to proceed with the hearing and determination of the petition in as much as the petitioners wish to withdraw the same. See *Harry John Paul Arigi & 2 others vs. Board, Kenya Ports Authority & 2 others* [2016] eKLR.

10. Mr. Wasilwa, Mr. Mokuia and Mr. Oginga submitted that this is a public interest suit and that withdrawal of the same would have adverse juridical implications. The petitioners, on the hand, submitted that they filed the instant petition as pastors and not on behalf of the church.

11. The question is, what amounts to a public interest suit? “Public interest” is defined in *Black’s Law Dictionary*, 10th edition, as:

“1. The general welfare of a populace considered as warranting recognition and protection. 2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.”

12. The Supreme Court of Kenya, in *Hermanus Phillipus Steyn vs. Giovanni Gnechchi–Ruscone*, Supreme Court Application No.4 of 2012, said that the meaning of “matter of general public importance may vary depending on the context. The apex court considered Article 163(4) (b) of the Constitution and stated that:

“... a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

13. The Court of Appeal in *Kenya Hotel Properties Limited vs. Willisden Investments Limited & 4 Others*, Nairobi Court of Appeal, Civil Application 24 of 2012, said, on the same subject, that:

“Turning to the issue of whether the Appeal raises an arguable point of “public interest”, we wish to pause (sic) a question as to when public interest is put in motion. In the case of *East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board And Another* [2007] eKLR, the Court of Appeal indicated situations where public interest should take precedence in the following words:-

“We think that in the particular circumstances of this case, if we allowed the Application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mills, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.”

14. The crux of the petitioners’ suit revolves around conduct of elections to pick leaders of the church and governance of the PAG church in general. I find that the issues in the instant petition transcend the personal interests of the petitioners, and that any orders that may ultimately be made by the court, in these proceedings, would affect and have consequences on the rights of other members of the PAG church, including the petitioners herein. It is not in doubt that the issue of the church’s elections, governance structure and constitution have been emotive and hotly contested, as evidenced by the plethora of suits from different members of the church. The multiplicity necessitated the consolidation of similar suits, which were to be heard together with the instant petition. The pleadings on record suggest that this is not a matter that can easily be wished away, without some finality being brought, either by the court making orders that give direction to the church on these issues or by the parties themselves resolving the matter through alternative dispute resolution mechanisms. It is, therefore, my finding that this is a matter of public interest and of specific public importance to all members of the PAG church, and not just to the petitioners herein alone.

15. In *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others* (supra), the Court of Appeal held that the court has inherent jurisdiction to stop withdrawal of a petition if the proposed withdrawal constitutes abuse of the process of court. I have noted that the petitioners did not give any reason or reasons for withdrawing the petition, something which, in my views, suggests abuse of the court process.

16. For the reasons stated above, I find that the application for withdrawal of the suit is not merited, and ought to be disallowed. I hereby decline to allow withdrawal of the suit herein. However, as I cannot force unwilling parties to remain in a suit, particularly so the persons who initiated the cause, I shall allow the petitioners the liberty to withdraw from the proceedings, to pave way for other individuals, who may be interested in prosecuting the matter to its logical conclusion, to take it over. The 1st respondent has been sued, he cannot get out of the matter unless he applies formally to the court to have his name removed as respondent. It is so ordered.

RULING IS DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE