



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 19 OF 2016**

RICHARD OWINO.....1<sup>ST</sup> PLAINTIFF

PASTIOR CHARLES OPIYO.....2<sup>ND</sup> PLAINTIFF

SYLVANUS MILURE.....3<sup>RD</sup> PLAINTIFF

**VERSUS**

ARCHBISHOP RICHARD ABWAO.....1<sup>ST</sup> DEFENDANT

BISHOP ANJELIUS OCHIEW.....2<sup>ND</sup> DEFENDANT

JARED POLA.....3<sup>RD</sup> DEFENDANT

GEORGE OMONDI OSUMA.....4<sup>TH</sup> DEFENDANT

DING'O LANG'O.....5<sup>TH</sup> DEFENDANT

DAVID OUKO.....6<sup>TH</sup> DEFENDANT

DAVID ONYACH.....7<sup>TH</sup> DEFENDANT

JOHN ODHIAMBO ODIRE.....8<sup>TH</sup> DEFENDANT

CHARLES OCHIENG.....9<sup>TH</sup> DEFENDANT

MUSANDA CHRISTIAN CHURCH OF KENYA (*The Society*)....10<sup>TH</sup> DEFENDANT

**JUDGMENT**

1. By a plaint amended on 6th December, 2016 and filed on 9th December, 2016, the plaintiffs claim against defendants is for:-

- i. Injunctive orders to compel the 1st and 2nd defendant to step aside and pave way for investigations during which time they shouldn't carry out business on behalf of the Society**
- ii. Orders compelling the 3rd defendant to declare the 1st and 2nd defendants suspended until the investigations is complete pursuant to the findings of the same**
- iii. Orders compelling the 1st and 2nd defendants to hand over to *the Society* the documents**

**they are illegally holding on its behalf**

**iv. Orders declaring the scheduled meetings illegal and set aside any decisions that will have been made thereunder**

**v. Costs of the suit**

2. In a joint defence filed on 2nd February, 2017, defendants disputed that they had been suspended from the Society and further stated that the 3rd defendant has no mandate to declare the 1st and 2nd defendants suspended.

### **Plaintiffs' case**

3. PW1 **Richard Owino**, who is the 1st plaintiff, testified that he was the Secretary of *the Society* and that the 1st and 2nd defendants were Chairman and Deputy Chairman respectively. It was his evidence that the 1st and 2nd defendants were invited for meetings that were held on 22.5.16, 4.8.16 and 9.10.16 which they failed to attend. The witness produced invitation letters marked **PEXH. 1, 2 and 3** respectively. It was his evidence that in the latter meeting, it was resolved that the 1st and 2nd defendants be suspended from *the Society* as shown in the minutes marked **PEXH. 4**. That by a letter dated 11.10.16 marked **PEXH. 5**, the Registrar of Societies was informed about the suspension.

4. That despite the suspension, the 1st and 2nd defendants have continued to perform their duties and neglected to release *the Society's* official documents that are in their possession. The witness prayed that the court to uphold the suspension of the 1st and 2nd defendants, restrain them from carrying out the duties of *the Society*, compel them to release all *the Society's* official documents in their possession and quashes all their decisions made after 9th October, 2016 when they were suspended.

5. In cross-examination by Mr. Mung'ao, advocate for defendants, the witness conceded that Pastors David Ouko and David Onyach whose names appear on the list of present members to the meeting held on 9th October, 2016 did not attend that meeting. He further conceded that he went to Radio Namulwe and without authority of *the Society* announced that *the Society's* meeting scheduled for 24th to 28th August 2016 would not take place. Plodded further, the witness told court that his action was prompted by the disagreements in *the Society*. He also conceded that there was no evidence to prove that 1st and 2nd defendants had been invited to the meetings that were held on 22.5.16, 4.8.16 and 9.10.16 or that he was selected to chair those meetings. He also conceded that there had been no reconciliation meeting since the plaintiffs and 1st and 2nd defendants fell out in 2015.

6. The witness further confirmed that he had no evidence to prove that 1st and 2nd defendants had been served with a copy of the letter dated 11.10.16, marked **PEXH. 5**, to the Registrar of Societies reporting their suspension.

7. PW2 Pastor Charles Opiyo, the 2nd plaintiff who is also the Assistant Secretary of *the Society* buttressed PW1's evidence and added that the suspension of the 1st and 2nd defendants was based on the provisions of Article 3(a) and 12(i)(e) of *the Society's* Constitution.

8. In cross-examination by Mr. Mung'ao for defendants, the witness conceded that he 1st and 2nd defendants had not collect or misappropriated any funds and were therefore not in breach of 12(e) of *the Society's* Constitution. He faulted the 1st and 2nd defendants for continuing to install bishops after a disagreement arose in the church in 2015.

### **Defendants' case**

9. DW1, **Archbishop Richard Abwao**, the 1st defendant conceded that 1st plaintiff invited him for meetings on phone and he declined to attend. He stated that he did not know why he was allegedly suspended. He stated that there was a disagreement between the 1st plaintiff and the defendants which allegedly arose after the responsibility of collecting money from churches was taken away from the 1st

plaintiff.

10. DW2, **Jared Pola** the 3rd defendant denied that the 1st and 2nd defendants had breached the Constitution of *the Society* to warrant their being suspended. He also stated that there was a disagreement between the 1st plaintiff and the defendants which allegedly arose after the responsibility of collecting money from churches was taken away from the 1st plaintiff.

### **Analysis and Determination**

11. I have considered the evidence on record and submissions filed on behalf of the defendants since the plaintiffs did not file their submissions.

12. Plaintiffs' case rests on the allegation that defendants were suspended from *the Society* following a resolution of a meeting held on 9th October 2016. The reasons for the suspension are pleaded at paragraph 10 of the amended plaint as follows:

- a. Failing to attend meetings held on 22.5.16, 4.8.16 and 9.10.16 without apology**
- b. Promoting bad blood and splitting members within the church**
- c. Failing to chair meetings of office bearers as stipulated in the Registrar of Societies Act**
- d. Using dictatorship to lead the believers and members**
- e. Interfering with the secretary's office through obtaining documents in custody of the secretary**

13. I will now consider each of the issues separately vis a vis the evidence on record as follows:

#### **a. Failing to attend meetings held on 22.5.16, 4.8.16 and 9.10.16 without apology**

14. It is on record that the 1st and 2nd defendants/respondents are chairman and assistant chairman of *the Society*. Plaintiffs' case rests on the allegation that defendants were suspended from *the Society* following a resolution of a meeting held on 9th October 2016.

15. There is no denying that the activities of *the Society* are governed by its constitution of 2007. Article 5 (c) of the constitution of the Society provides that:-

**“The secretary shall deal with the correspondence of the church under the general supervision of the committee. ....**

**He issues notices covering all meetings of the committee and all general meetings and the preservation of all records of proceedings of the church and the committee”.**

16. This article mandates the 1<sup>st</sup> plaintiff who is the secretary of *the Society* to issue notices of all meetings. 1st plaintiff told court that notices dated 1.5.16; 18.7.16 and 12.9.16 marked **PEXH. 1, 2** and **3** respectively calling the defendants for meetings on 22.5.16, 4.8.16 and 9.10.16 respectively were served on them but defendants deny service of invitation letters especially for the meeting of 9.10.16 where they were allegedly suspended.

17. It is trite law that he who alleges must prove and this is well stated in the Evidence Act, Cap 80 of the Laws of Kenya and specifically Sections 107 and 109 thereof which provide that;

#### **Section 107.**

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent**

**on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

Section 109.

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

18. From the evidence on record, the plaintiffs have not demonstrated that the defendants were invited to any of the alleged meetings and particularly the meeting of 9.10.16 where they were allegedly suspended. Procedural fairness has embedded in it the age old natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done. (See Kanda vs. Government of Malaya {1962} AC 322,337(per Denning LJ). Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. Having not invited the defendants to any of the meetings, the plaintiffs’ claim that defendants refused to attend the meetings cannot stand.

**b. Promoting bad blood and splitting members within the church**

19. No iota of evidence as tendered to demonstrate how defendants had promoted bad blood and splitting members within the church

**c. Failing to chair meetings of office bearers as stipulated in the Registrar of Societies Act**

20. I have already held that the 1st defendant who is the chairperson of *the Society* was not invited to the meetings held on 22.5.16, 4.8.16 and 9.10.16. There is therefore no evidence that he failed to chair the said meetings or any other and this claim must therefore fail.

**d. Using dictatorship to lead the believers and members**

21. No evidence was tendered in support thereof

**e. Interfering with the secretary’s office through obtaining documents in custody of the secretary**

22. No evidence was tendered in support thereof

23. I have similarly considered the prayers sought in the plaint *vis a vis* the pleadings. The Court of Appeal in Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others (supra) cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

**“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”**

24. On the first prayer for an injunction, no evidence was led of any investigations being carried out against the defendants, for what they are being carried out and by whom they are being carried out to warrant an order of injunction to pave way for investigations. The 3rd respondent is a member of the Society. No evidence was led to demonstrate his authority to suspend the 1st and 2nd defendants to warrant an order compelling him to do so. In any case, there is no evidence that the defendants have acted in contravention of *the Society’s* Constitution to warrant a suspension. And having declared that the purported suspension of the 1st and 2nd defendants on 9.10.16 was null and void, I equally find no basis

to declare as illegal any meetings and decisions made by them. There is similar no evidence that the 1st and 2nd defendants are illegally holding *the Society's* documents to warrant a compelling order for their release.

### **Orders**

25. From the above analysis; I am satisfied that the plaintiffs' case has not been proved on a balance of probability or at all and the same is dismissed.

26. As costs follow the event; it is the plaintiffs' unreasonable actions that precipitated these proceedings and they are therefore condemned to pay the costs of this suit to the defendants.

**DATED AND DELIVERED THIS 15th DAY OF February 2018**

**T.W.CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix & Carolyne

Plaintiffs - Ms Odhong

Defendants - M/S Wafula/Mr Omondi