



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 17 OF 2016

STEPHEN K. WANG'OMBE.....1ST PLAINTIFF/APPLICANT

JORAM THEURI MWANGI.....2ND PLAINTIFF/APPLICANT

ELIJAH MWAI MWANGI.....3RD PLAINTIFF/APPLICANT

VERSUS

ARCHBISHOP A. KABUTHU.....1ST DEFENDANT/RESPONDENT

PATRICK K. KAHORO.....2ND DEFENDANT/RESPONDENT

NICODEMUS GICHANGA.....3RD DEFENDANT/RESPONDENT

RULING

The applicants and respondents are members of the African Independent Pentecostal Church of Africa (herein the AIPCA) which is registered as a society under the **Societies Act, cap 108**. By a letter dated 16th September, 2016 the first respondent, who described himself in that letter as the spiritual head of the church, wrote to the third applicant informing him that it had been brought to his attention that he, the third applicant, had been illegally and irregularly ordained apparently as the Archdeacon of one of the church's branches at Munyange, more particularly the Munyange AIPCA church. Based on this information, the first respondent's letter served to suspend the applicant from preaching in any of the AIPCA's churches including that of Munyange. On the same date, the first respondent wrote another letter to the first applicant suspending him from the AIPCA church leadership in any position because he had participated in the ordination of the third applicant.

On 14th October, 2016, the first respondent wrote another letter to Munyange AIPCA church communicating his decision to dissolve the church committee and appointing a commission apparently to run the affairs of the church; in the same letter, he appointed seven persons as members of the commission; among these members was the third respondent.

Following the first respondent's actions, wrangles erupted amongst the brethren of Munyange AIPCA church pitting the commission and those members of the church who supported it against the rest of the members of the same church who have aligned themselves with applicants. With the emergence of these two rival factions, the peace and tranquility that has hitherto existed in the Munyange church has dissipated and because of the acrimony amongst the members of the church, it has been difficult for them to worship together because one faction has locked the other out of the church.

It is against this background that the applicants filed in this court a motion dated 27th October, 2016 seeking in the main for an interim injunction to restrain the respondents, their agents or any other person acting under them from interfering with the running of the Munyange AIPCA church by the church committee and the applicants and in particular to stop them from interfering with the applicants' access to, worshipping and the use of the church premises pending the hearing and determination of the suit they have filed against the respondents. They also asked this court to order the officer in charge of Munyange police station to ensure compliance with this court orders, should they be granted.

In the affidavit in support of the motion, the first applicant swore that he is the chairman of the Munyange church while the second applicant is his deputy. The third applicant is the Archdeacon of the same church and was ordained in that capacity on 10th September, 2016 by the Bishop of the diocese under which this church falls.

The first applicant has sworn further that on the 16th October, 2016, the applicants together with other church members were barred by the respondents from accessing the church for their usual church service by the respondents. According to the applicants, the respondents and other strangers barricaded the church entrance; they were armed with crude weapons. A confrontation ensued between the two groups and the police had to intervene to restore order. Since then, the applicants have not been able to access the church for worship and meanwhile the operations of the church have been stalled.

The applicants contend that the respondents' actions are contrary to the church's Constitution and in any event, the first respondent did not have powers to suspend anybody from the church since the Employment and Labour Relations Court had ruled in **Nairobi Cause No. 1220 of 2016** that the first respondent had retired from his position as the head of the AIPCA church.

The second respondent swore a replying affidavit on his own behalf and on behalf of the rest of the respondents opposing the applicants' application. He swore that he is the chairman of the African Independent Pentecostal Church of Africa Mukaro south diocese and that the first respondent is not only the titular and spiritual head of the AIPCA but that he is also the acting bishop of Mukaro South Diocese and as such he cannot be restrained from performing his spiritual duties in Munyange AIPCA church. He admitted that the first respondent wrote the letters suspending the first and third applicants from their respective duties.

According to the respondents, a preacher can be ordained by the Bishop in charge of a particular diocese only with the approval of the Archbishop and the Central Board of the AIPCA. The ordination is organised by the diocesan committee and it is usually advertised in all the local churches within the diocese 12 weeks preceding the ordination ceremony. On the ordination day, the local churches and the church members together with their preachers and pastors attend ordination at the diocese's headquarters.

As far as the respondents are concerned, the third applicant has never applied to be an Archdeacon and neither has he been approved as one. On the contrary, the first applicant has formed a splinter group within the Munyange AIPCA church and that on 8th October, 2016 this group locked the church and barred the central board from accessing it when it visited the church to deliberate on the existing stalemate.

The respondents admitted that indeed the first defendant appointed a commission and also dissolved the existing church committee on account of illegal ordination of the third applicant and the leadership wrangles that had thereby arisen. Further, on 23rd October, 2016, the same splinter group also barred a pastor who had been deployed to discharge pastoral duties at the church from accessing the church. Due to the confrontation, the pastor, together with the assistant chief and the officer in charge of Munyange police station resolved that the church should be closed pending further directions by the central board of AIPCA.

At the heart of the submissions by the parties' respective counsel on the dispute between them is the interpretation of constitution of AIPCA. The accusations and counter-accusations between the contesting

parties is that either of them has in one way or another breached the constitution. If I can summarise the positions they have adopted, while the applicants contend that the first respondent has no powers under the constitution to relieve the first and third applicants of their duties or to dissolve a church committee and appoint a commission in its place or to restrict a section of the worshippers from accessing the church, the respondents have, on the other hand, retorted that the process of the ordination of the third applicant as an archdeacon was contrary the provisions of the constitution and therefore he is not legally in office. The suspension of the first applicant and the dissolution of the church committee are in effect the collateral damage the applicants and the committee have had to suffer for their role in what the respondents have described as the illegal ordination of the third applicant. Other consequences that have ensued, which I suppose are unintended, are the schisms that have cropped up amongst the worshippers and the acrimony that has characterised their relationship culminating in the closure of the church. In summary, this is the case before me.

This being an interlocutory application, I need not delve into details and make any conclusive remarks on the merits of either party's case but I will only go as far as stating whether the applicant has made out a case for the interim orders they have sought. As I have stated before, the linchpin of the application before court is the interpretation of the constitution of AIPCA. One provision that I consider a useful guide in determination of the applicants' application and on which both counsel submitted relatively at length is **Article VII sub article 10** thereof that creates tribunals for, among other things, resolution of disputes amongst members. For better understanding of this article, I find it necessary to reproduce that part of the constitution here; it is couched as follows: -

10. CHURCH TRIBUNALS

Section 1

There shall be establishment of a church in dispute settlement tribunal herein after called Church Tribunal.

Section 2

The church tribunal shall be an independent organ of the church to enable it work independently to be free and fair without any interference, discriminative, tribal or race(sic).

a. The church tribunal shall consist of nine members as follows;

i. Three (2) (sic) bishops

ii. One (1) clergy

iii. Two (3) (sic) layperson(sic)

iv. One (1) church chancellor

v. Two (2) nominated the members by the Archbishop, the spiritual head. The total number shall be nine members approved by the central board. Where they shall have a chairperson and vice chairperson and the secretary and six members of the committee.

b. The tribunal shall seek a resolution through negotiation, mediation and arbitration.

c. Provided that where this process is impracticable, the tribunal shall hear the parties and make a formal decision.

d. The tribunal shall be constitutional with the security of tenure of office of all its members.

e. There shall be a proposal of the constitutional amendment where need be and agreed in the

central board and bishop synod.

f. The Archbishop national chairman and secretary general shall have the powers of signing any amendment.

The process

- 1. No member or an organ of the church shall refer any dispute relating to the church and its members to any court of law unless such a dispute has been first referred to and determined by the National tribunal.*
- 2. The church as an institution is a body itself established under the Societies Act Cap 108 of the Laws of Kenya which falls under section 6 of the Arbitration Act of 1995 as a parliamentary act.*
- 3. Section 6 (1) of the Arbitration Act is worded in mandatory terms.*
- 4. It provides that the court “shall” stay the proceeding pending the resolution of the dispute by arbitration.*
- 5. Every member of the church regardless of his status “shall” first of all exhaust the arbitration option before going to any further step any court of law.*
- 6. The church shall not give any sufficient leeway to a church member of ventilate the dispute that the member has with the church and its officials.*
- 7. The officials of the tribunal will hear and determine the dispute in all AIPCA dioceses and be guided by the Chancellor to arrive at a fair judgement.*
- 8. ALL CHURCH MATTERS concerning any dispute or the interpretation of the church constitution or the church bylaws or guidelines or subject to any legal affairs between a church and its members shall be referred to the church tribunal for arbitrations.*
- 9. All AIPCA church members must honour the decisions made by AIPCA church tribunal and any appeal will be done to the executive board officials.*
- 10. Any member wishing to take the church or its members to court must get rid the clearance letter signed by the church/Chancellor.*

The draftsman of the constitution may not have been quite proficient and perfect in grammar but it is still possible to tell from his language the church’s preferred options and processes in resolution of disputes amongst its membership; negotiation, mediation and arbitration are clearly the choice processes and resort to court is, for all intents and purposes, the last option. Perhaps for this reason, counsel for the respondents submitted that this suit is not properly before court because the applicants have not exhausted the internal disputes resolution mechanisms. As a matter of fact, counsel argued that the proceedings herein should be stayed pending the determination of the dispute by the arbitral tribunal established by the church constitution. I will take him at his word.

Section 6 of the **Arbitration Act, cap 49** provides for such stay of proceedings; a court before which the proceedings are brought is enjoined to stay the proceedings upon an application of the party sued and refer the parties to arbitration unless the arbitration agreement is null and void, inoperative and incapable of being performed or the issue or issues in the suit are not subject to arbitration. It is appropriate to reproduce that provision here; it states: -

6. Stay of legal proceedings

- (1) A court before which proceedings are brought in a matter which is the subject of an*

arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds— (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

The respondents may have a point that the appropriate forum to determine the dispute between them and the applicants is an arbitral tribunal considering that there is what appeals to me to be an arbitration clause in the constitution of the society in which they are members. However, they have not taken the right step and applied to stay the court proceedings pending the resolution of the dispute by the arbitration tribunal; they have instead entered appearance and gone further to file a defence against the suit. By taking this course, the respondents have embraced and acquiesced to the jurisdiction of this court and therefore they cannot be heard to argue that this court is deprived of the authority to determine the dispute before it.

However, as much as this honourable court is competent to determine the dispute before it, I would rather give effect to the intention of the parties and refer the dispute to the arbitral tribunal which has been established under the AIPCA constitution. I take this course because the rationale behind the creation of an internal disputes resolution mechanism to resolve disputes amongst church members is no doubt noble and not least because it is informed by biblical precepts to which the contestants supposedly subscribe. According to the book of **1Corinthians 6:1-3 (KJV)** Christians are admonished to resolve their differences in love and not to subject them before what the scriptures refer to as “the unjust”. They are reminded that they are, by their very calling, saints who shall judge not only judge the world but also the angels. “The unjust” whom Paul the apostle was referring to when he wrote to the church in Corinth were the non-believers in the new faith at the time of the early church but who, incidentally, controlled institutions of governance including the courts to which the new converts were apparently submitting their disputes. The relevance of Paul’s advice in the present age is that while nothing stops Christians from submitting themselves to courts of law, they should be hesitant to find answers to their internal disputes from the law of man which by its nature, is fallible and subservient to the divine and perfect law of God. The apostle should not be mistaken to have passed a blanket verdict on judges that they are inherently unjust; indeed he could not have been passing such a harsh verdict when the judges’ role in God’s plan for mankind since the times of Moses the prophet is all too well documented to be assailed.

Accordingly, I direct the AIPCA church tribunal to resolve the dispute in Munyange AIPCA church within sixty days of the date hereof. Meanwhile, the *status quo* ante should subsist; by this I mean, Munyange AIPCA church should be reopened for worship and accessible to all its members; its committee is hereby reinstated and similarly the applicants are reinstated to their respective positions. Accordingly, the commission created by the 1st respondent in place of the church committee is hereby suspended. This is an interim measure that is premised on **section 7** of the Arbitration Act which provides as follows:

7. Interim measures by court

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

The application by the applicant is obviously consistent with **section 7(1)** which also clothes this court with the authority to grant an interim measure such as the one the applicants are seeking for; I would therefore allow prayer 3 of the motion dated 27th October 2016, in so far as this prayer is consistent with the directions I have given elaborating the *status quo ante* pending the determination of the dispute between the parties by the church tribunal. I make no order as to costs.

Signed, dated and delivered in open court this 24th March, 2017

Ngaah Jairus

JUDGE