REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO 394 OF 2017

IN THE MATTER OF AN APPLICATION BY CHANCELLOR MOSES KIRIMA, ARCH BISHOP SAMSON MUTHUTI AND ARCH BISHOP FREDRICK WANGOMBE FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF REGISTRAR OF SOCIETIES, ARCH BISHOP JULIUS NJOROGE GITAU AND PAUL WATORO GICHU

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF SOCIETIES, KENYA.....1ST RESPONDENT

ARCH BISHOP JULIUS GITAU NJOROGE.....2ND RESPONDENT

PAUL WATORO GICHU.....3RD RESPONDENT

EX-PARTE

CHANCELLOR MOSES KIRIMA

ARCH BISHOP SAMSON MUTHURI

ARCHBISHOP FREDRICK WANGOMBE

RULING

Introduction

1. By a Notice of Motion dated 3rd July, 2017 the ex parte applicants herein seeks the following prayers:

    1. **An order of Certiorari to remove into the High Court and quash the decision of the**

Registrar of Societies to cancel the agreement and reconciliation dated 3/4/2017

2. Costs.

Applicants' Case

2. According to the applicants, on 3rd April, 2017, an agreement and reconciliation accord was made by the African Independent Pentecostal Churches of Africa (AIPCA) whose purpose was to record how power would be shared between the two warring factions of the church.

3. It was averred that the main issues in the agreement included the following;

i. Reconciliation of the different functions currently existing

ii. Relooking at the articles of the church constitution which should be addressed in the agreement and an accord for the purpose of reconciling the AIPCA Congregation.

iii. Creation of the offices in order to accommodate those outside the current leadership and expanding those already existing.

iv. Creation of (4) four ARCH-DIOCESE to accommodate the ordained and consecrated clergy.

v. Registration of additional officials.

vi. Alternative Dispute Resolution Mechanisms

4. In line with the said accord, it was averred that the following became the newly registered officials of the African Independent Pentecostal Churches of Africa (AIPCA) (hereinafter referred to as "the Church):

1.	Arch Bishop	Julius Njoroge Gitau
2.	Chairman	Paul Watoro Gichu
3.	Member	Samson M'Tuaruchiu
4.	Member	Fredrick Wang'ombe Ndiritu
5.	Vice Chairman	Samuel Mburu Mwangi
6.	Secretary	Stanley Mburu Mwangi
7.	Assistant Secretary	Benard Maina Mwangi
8.	Treasurer	Japheth Gikunda M'Nkanata
9.	Vice Treasurer	Berthat Nyambura Mwangi
10.	Adm. Secretary	Stanley Muthomi
11.	Member	Janet Wanjiru Mwaura
12.	Member	David Muturia Gichuru
13.	Member	Samuel Wanjohi Muchiri
14.	Member	Nicholeta Waithira

5. It was however averred that vide a letter dated 26th May, 2017, the 1st Respondent purported to cancel the said agreement and reconciliation accord. It was disclosed that the parties have attempted dispute resolution at their levels.

6. The applicants contended that decisions of Societies affecting membership are resolved by either an Annual General Meeting or a Special General Meeting or a court order. However, no such Annual General Meeting or a Special General Meeting was held and there has been no court order ordering the same changes.

7. It was therefore the applicants' position that the decision to cancel the said agreement and reconciliation was made in bad faith by the 1st respondent and ultra-vires the ***Societies Act***, Cap 108, Laws of Kenya is a kin to an error of law, is unreasonable and amounts to an abuse of power. Further, the said decision goes against the principles of public participation and legitimate expectation.

1st Respondent's Case

8. The 1st Respondent herein, Registrar of Societies (hereinafter referred to as the Registrar), opposed the application.

9. According to the Registrar, the Church has been experiencing leadership wrangles culminating in several lawsuits being:-

(a) ELC cause No 1220 of 2016

(b) JR No 408 of 2016 consolidated with JR No 451 of 2016

(c) JR No 14 of 2017

10. It was averred that by a court order by the **Hon. Lady Justice Hellen Wasilwa** in Employment and Labour Relations Cause No 1220 of 2016 dated 27th October 2016, the Church was ordered to hold elections to elect a new Archbishop within two months from the date therein and that the Registrar of Societies to supervise and report back to court after the expiration of the said period. The Registrar of Societies attended and supervised the elections on 9th January 2017 wherein **Joseph Njoroge Gitau** was elected as Archbishop of the society. Despite the elections the leadership wrangles still continued culminating into another case Judicial review Case No 8 of 2017 at Kiambu High Court which case was dismissed on March 13th 2017.

11. It was averred that in an effort to find a lasting solution the different factions of the society met on 3rd April 2017 in which the agenda of the discussions was the reconciliation of the different warring factions that existed. As a result of the said discussions which involved the ex parte applicants and the 2nd and 3rd Respondents herein, an Agreement and Reconciliation Accord dated 3rd April 2017 was signed. However, the Office of the Registrar of Societies was not party to the said Agreement and Reconciliation Accord nor was it involved in the discussions leading up to the agreement. The Registrar of Societies received a letter dated 4th April 2017 from the National Chairman of the Society, a **Mr. Paul Watoro Gichu**, forwarding a copy of the Agreement and Reconciliation Accord whilst requesting the Registrar of Societies to confirm the Office Bearers of the society's headquarters as agreed therein. To this the Registrar responded vide a letter dated 5th April 2017 confirming the society's Office bearers as per their signed Agreement and Reconciliation Accord.

12. However, the society through the National Chairman wrote a letter dated 18th April 2017 in which they sought to revoke the registration of one **Frederick Wang'ombe** and **Samson Muthuri** as members of the Executive Board of the society as well as cancel the Agreement and Reconciliation Accord based on a Central Board meeting by the Church held on 12th April 2017 at Gathaithi Church, Kiambu Diocese. As a result of the foregoing the Registrar of Societies wrote a letter to the society dated 26th May 2017 in

which the confirmation letter of 5th April 2017 was canceled effectively reverting the position of the society's office bearers as before the Agreement and Reconciliation Accord.

13. **Being aggrieved by the** said letter by the Registrar of Societies the ex parte applicants instructed the firm of Ojienda & Company Advocates to address the Registrar as to the circumstances in which the confirmation letter of 5th April 2017, registering the Officials of the society in line with the Agreement and Reconciliation Accord was revoked to which the Registrar of Societies responded vide a letter dated 27th June 2017 in which it was clearly put to the ex parte applicant's advocate that the confirmation letter by the Registrar dated 5th April 2017 was revoked following the letter by the society dated 18th April 2017 which canceled the Agreement and Reconciliation Accord. Further the firm was advised that the said Agreement and Reconciliation Accord was neither conducted at an Annual General Meeting or a Special General Meeting. Despite the clear explanation by the Office of the Registrar of Societies the ex parte applicants filed this suit in bad faith seeking to advance their unilateral interests before the interests of the society.

14. It was the Registrar's position that the Agreement and Reconciliation Accord not being a contractual document and not having been conducted at an Annual General Meeting or a Special General Meeting is not a binding document and this cannot be afforded any protection under the law governing societies. To the Registrar, she does not interfere in the affairs of societies and only acted in the best interests of the Church hence the ex parte applicants have no reasonable grounds to bring this suit and are merely casting aspersions against the Office of the Registrar of Societies.

15. It was therefore the Registrar's case that the present suit by the ex parte applicants herein lacks merit and should be dismissed with costs to the 1st Respondent.

2nd and 3rd Respondents' Case

16. On their part the 2nd and 3rd Respondents filed a notice of preliminary objections in which the following grounds were raised:

> **1. That the application is fatally and incurably defective for failure to attach the decision sought to be quashed as mandatory required in law.**
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> **2. That the issue of who is a national member of the 3rd respondent and thus eligible for registration as Ventral Board members of the Africa Independent Pentecostal Church of Africa is *res judicata* since the same was settled in a Ruling delivered on 1/9/2016 by Hon. Lady Justice Wasilwa in Nairobi Employment and Labour Relations Cause No. 1220 of 2016**
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> **3. That the question as to the leadership of the Africa Independent Pentecostal Church of Africa is *sub judice* as the same is pending before Justice Abuodha in Nairobi Employment and Labour Relations Cause No. 445 of 2017, and therefore any agreement between conflicting parties in respect of the leadership of the church should be raised thereto.**
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> **4. That the application is incompetent, bad in law, misconceived and an abuse of the honourable court's process.**

Determinations

17. The matter before me is a ruling arising from the aforesaid preliminary objections.

18. The first issue for determination is whether the application is fatally and incurably defective for failure to attach the decision sought to be quashed as mandatorily required in law. Order 53 rule 7(1) of the ***Civil Procedure Rules, 2010*** provides as follows:

> ***In the case of an application for an order of certiorari to remove any proceedings for the***

purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

19. It is therefore clear that what the rule requires is that a copy the decision which is being challenged be lodged and verified by an affidavit before the hearing of the motion. In this case as the motion has not been listed for hearing the objection is premature in my view. This was the position of **Tanui, J** in **Republic vs. Land Disputes Tribunal Siaya District Ex Parte Allan Mwalo Wambani Kisumu HCMisc Application No. 45 of 2003** where he held that Order 53 rule 7(1) of the ***Civil Procedure Rules*** envisages that before the hearing of an application for judicial review which seeks an Order of Certiorari, the applicant shall have lodged with the registrar a copy of the document sought to be quashed, verified by an affidavit and therefore where the hearing date is yet to be fixed the issue of lodgement of the document has not arisen. I therefore hold that the objection is unmerited.

20. The next issue is whether these proceedings are *res judicata* since the same were settled in a Ruling delivered on 1st September, 2016 by **Wasilwa, J** in Nairobi Employment and Labour Relations Cause No. 1220 of 2016.

21. But before I deal with the issues herein it is important to determine whether or not *res judicata* can be raised as a preliminary objection. In **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** it was held that:

> **"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."**

22. I therefore hold that the doctrine of *res judicata* was properly taken in these proceedings. However, it can only be successfully raised where the pleadings and the decision in the former suit are part of the record. It is therefore important to revisit the legal principles guiding the applicability of the doctrine of *res judicata*.

23. In **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

> **"The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".**

24. In **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** the former East African

Court of Appeal stated as follows:

> **"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."**

25. In **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

> "**A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments".**

26. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the ***Civil Procedure Act***, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

27. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

> "However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:
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> > **"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only**

way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application."

28. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

29. I have perused the decision of **Wasilwa, J** in the said suit dated 1st September, 2016. In the said matter, the learned Judge was clear at paragraph 30 that the issue before her was who the legitimate members of the Church Central Board were. In the instant case, what is being challenged is the power of the Registrar of Societies to cancel the agreement and reconciliation dated 3/4/2017. That issue could not have been raised before **Wasilwa, J** for the simple reason that at the time the learned Judge was dealing with the matter the said agreement and reconciliation had not been reached. Therefore the cause of action in the instant matter cannot be substantially the same as the cause of action in the former suit. That is enough to dispose of the said objection.

30. The second objection was that the question as to the leadership of the Africa Independent Pentecostal Church of Africa is *sub judice* as the same is pending before **Abuodha, J** in Nairobi Employment and Labour Relations Cause No. 445 of 2017, and therefore any agreement between conflicting parties in respect of the leadership of the church should be raised thereto.

31. Section 6 of the ***Civil Procedure Act*** provides as hereunder:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

32. Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

33. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 of 1993 - **Nyanza Garage vs. Attorney General** in which the Court held that:

"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

34. It was therefore held in **Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012]eKLR** that:

"…"….if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the

Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties. My view is that the circumstances obtaining in 1953 when the Jadna Karsan –vs- Harnam Singh Bhogal was decided are completely different from the circumstances obtaining now. The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the Civil Procedure Act were that there is constraint in judicial time and therefore a lot of pressure on the courts to expedite resolution of civil disputes. My view therefore is, if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the previous judicial resources."

35. In this case whereas it may be true that the issues in both suits may not be directly and substantially in issue, it is however clear that no matter how one looks at the dispute, the resolution thereof will ultimately depend on the determination of the question of the leadership of the Africa Independent Pentecostal Church of Africa. Even if this Court was to find that the cancellation of the subject agreement and the reconciliation by the Registrar was improper, the issue as to the leadership of the Church would still remain at large pending the determination of the other suit, assuming this suit would be determined earlier. On the other hand if that other suit were to be determined before these proceedings, the setting aside of the decision of the Registrar subsequent to the determination of the leadership of the Church would only cause confusion and chaos in a matter which is already riddled with a plethora of litigation. It was in this light that in **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR** the Court opined that:

"It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit and looking at the pleading in both cases."

36. In my view this is an appropriate case for the invocation of the overriding objective principle. Dealing with the said principles, the Court of Appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. NAI. 6 of 2010** held *inter alia* that:

"**The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view *this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met.* It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."** [Emphasis provided].

37. It is therefore my view that to prolong this litigation when its determination will not bring the substantial matter to an end while there in fact exist a suit in which a final determination is likely to be made, militates against the overriding objective principle. It is therefore my decision that these proceedings ought to be brought to an end in order to pave way for a determination to be made on the substantive rights of the parties which is the subject of Nairobi Employment and Labour Relations Cause No. 445 of 2017.

38. This Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* and *sub judice* would be inapplicable. Accordingly, the order which commends itself to me and which I hereby grant pursuant to the inherent powers of this Court is that these proceedings be and are hereby struck out but with no order as to costs.

39. It is so ordered.

Dated at Nairobi this 23rd day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Kabuchoru for the 1st Respondent

CA Ooko