



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 41 OF 2014

PAUL NDUNGU NDICHU. PLAINTIFF/APPLICANT

VERSUS

AMOS MATHENGE KABUTHU. 1ST DEFENDANT/RESPONDENT

REGISTERED TRUSTEES AIPCA. 2ND DEFENDANT/RESPONDENT

AND

STANLEY MBURU MBUGUA. 1ST INTERESTED PARTY

JOHN MAINA MWANGI. 2ND INTERESTED PARTY

R U L I N G

The Plaintiff/Applicant has moved the court by way of Notice of Motion dated the 27th February, 2014 for orders that: -

1. That his honourable court be pleased to certify this application as urgent and do dispense with service of the same and proceed to hear the application ex-parte in the first instance.
2. That his honourable court be pleased to issue a temporary injunction restraining the 1st Defendant from holding the office of Archbishop of the 2nd Defendant pending he hearing and determination of this suit.
3. That this honourable court be pleased to issue a temporary injunction restraining the 2nd Defendant, its servants, agents, officials, trustees or any other person in the employment of the 2nd Defendant from allowing the 1st Defendant from holding the office of Archbishop pending the hearing and determination of this suit.
4. That a temporary order be made in terms of prayer Numbers 2 and 3 above pending the inter parties hearing of this application.
5. That the honourable court be pleased to issue an order of commission for investigation and reporting to court within a limited period for purposes of ascertaining the qualifications of the 1st Defendant under the Constitution and the Standing Orders of the 2nd Defendant
6. That the Honourable Court be pleased to issue an order against the Defendants for inspection of all the

academic documents presented by the 1st Defendant to the 2nd Defendant in the nomination, appointment and ordination of the 1st Defendant as an Archbishop of the 2nd Defendant and an order allowing the Plaintiff entry to the 2nd Defendant's headquarters for purposes of such inspection and an order allowing the Plaintiff to make copies of the academic documents aforesaid.

7. That the costs of this application be provided for.

The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, and Order 40 Rule 1(9) 2(1), Rule 10(1) and Order 28 Rule 7 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law.

Supporting the application, is the affidavit sworn by the Plaintiff, Paul Ndung'u Ndichu, on the 27th February, 2014. It is premised on the ground set out on the body of the same. The deponent avers that he is a member of the 2nd Defendant, who are the registered Trustees of African Independent Pentecostal Church of Africa herein referred to as (A.I.P.C.A) which is duly registered society under the provisions of the Societies Act having been registered on the 14th January, 1970.

He further avers that Article 111 of the 2nd Defendant's Constitution provides for qualification for the appointment of an Archbishop under Part (G) which provides that for one to be qualified to hold the said office, he must have a degree from a recognized theological related field. That in Section 24 Part XII of the 2nd Defendants standing order in the constitution, one must have a form four level of education with minimum Grade D+ equivalent at Form Four and must be fluent in English and Kiswahili language and that a degree from a theological office is an added advantage.

He deponed that though the 1st Defendant is the current holder of the office of Archbishop of the 2nd Defendant, he did not at the time of appointment and subsequent ordination possess the requisite qualifications as required under the 2nd Defendant's constitution or in the standing orders in the constitution as he does not have any degree from a theological related field and he had not attained a grade D+ equivalent at form four level.

That as a result, the 1st Defendant ought not to have been nominated and subsequently appointed as Archbishop of the 2nd Defendant and that the 2nd Defendant intentionally, willfully and by design, failed to interrogate the qualifications of the 1st Defendant but nonetheless went ahead to appoint him so and participated in furtherance of an illegality.

The motion was opposed by the 1st Defendant vide a replying affidavit sworn on the 7th day of March, 2014. He avers that the Plaintiff lacks the requisite legal proof of membership of the 2nd Defendant. He further avers that the Plaintiff ought to have referred the dispute to the National Tribunal pursuant to Section 10(2) of the 2nd Respondents Constitution before filing the case herein. He states that, for this reason, the court lacks jurisdiction to determine this matter and the same amounts to an abuse of court process and that in bringing this suit, the Plaintiff/Applicant has been activated by ill will and malice as there are no sufficient particulars of his membership to the 2nd Defendant. He further avers that the only document that the Plaintiff has annexed being a baptism card, is a forgery as ordinarily such a card has only one signature of the presiding officer and not two as the one exhibited.

He further states that according to the constitution of the 2nd Defendant, there are 45 days after the appointment of the Archbishop to raise objections, prior to his consecration and some 90 days before elections which the Plaintiff failed to do. It is his contention that the suit is not properly before the court as the dispute ought to have been referred to the internal dispute resolution mechanisms.

On behalf of the 2nd Defendant a replying affidavit was filed on the 24th March, sworn by Paul W. Gichu. In paragraph 2 of the said affidavit, he states that he has the approval of his Co-trustees in the church to swear the affidavit. He avers that according to the constitution of the 2nd Defendant the holder of the

office of an Archbishop must meet minimum academic and theological education standards as such a person must possess a KCSE certificate with a minimum of D+ and must have a degree from a recognized theological college.

That according to the preliminary investigations that he has conducted, the 1st Defendant has not met the minimum requirements as required by the constitution of the 2nd Defendant.

Parties agreed to dispose off the application by way of written submissions.

This court has considered the arguments made by the parties herein. The Applicant has sought injunctive orders on the basis that the 1st Defendant is not qualified to hold office contrary to Article 3(b) of the 2nd Defendants constitution.

It is worth noting at this stage that in the course of the proceedings, the interested parties applied and were enjoined as parties to the suit and submissions were filed on their behalf on 30th June, 2016 which the learned counsel for the interested parties has relied on. In the said submissions, it was submitted that the deponent to the affidavit sworn on the 24th March, 2016 is the national chairman and the church constitution is clear on the role of the national chairman during the elections and ordination of the Archbishop. He enthroned the 1st Defendant to the office on the 23rd June, 2013 and he issued him with a certificate.

According to the 1st Defendant and the interested parties, the process of recruiting the 1st Defendant requires the National Chairman, delegates congress and the electoral college of the church to participate in the recruitment which process, he participated in and it would be a great de-service to the church for him to turn round and complain about the same process that he actively participated in.

The court has had a chance of perusing the submissions filed by the interested parties herein and they do not support the application by the Plaintiff. In the replying affidavit sworn by Paul W. Gichu, the 2nd Defendant does not support the application as well only they would wish that investigations be carried out for purposes of ascertaining the qualifications of the 1st Defendant.

The 1st Defendant has raised the issue of validity of the Plaintiff's membership and it has been alleged that the Baptism Card is a forgery. In view of the allegations, the issue can only be determined during the full hearing of this matter after taking evidence. The 1st Defendant has also raised the issue of jurisdiction of this honourable court to hear the matter, the basis of which is that, the constitution of the church provides that any dispute between the members of the congregation should be referred to arbitration or resolution within the AIPCA's mechanisms. With regard to this issue and during the submissions, this court was told that parties herein have tried to resolve the dispute, to no avail in which case, it would serve no purpose to order that the dispute be referred for arbitration. As to whether the arbitration clause ousts the jurisdiction of this court, I am persuaded by the decision of the learned Hon. Waweru J, and I do, thereby hold that this court has jurisdiction to hear the matter herein.

The applicant has sought for an interlocutory injunction. The conditions for granting such a remedy are well settled in East Africa. This court should hasten to state that the granting of such a remedy is an exercise of judicial discretion although the discretion should be exercised judiciously. For the Applicant to succeed, he must show that he has a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not adequately be compensated by an award of damages and lastly, if the court is in doubt, it will decide the application on the balance of convenience.

On the issue of prima facie case, the court notes that the membership of the plaintiff to the 2nd Defendant is disputed. He derives his legal capacity to sue upon sufficient proof of his membership to the church.

As noted elsewhere in this ruling, the document that he has relied on is disputed. This honorable court is

not in a position to make a conclusive finding on the issue of the membership until such a time that evidence is taken during the hearing when his capacity to sustain this case will be determined.

Secondly, on the issue of irreparable loss, the court has noted that the applicant has not shown what loss he shall suffer if the orders are not granted. In fact he has not even alluded to that fact all.

On the third condition, the Plaintiff has sued the Defendants alone. The court takes judicial notice of the fact that AIPCA is one of the oldest churches in Kenya and its membership is widely distributed across the whole republic. The court has further noted that the 1st Defendant was enthroned to the office on 23rd June, 2013 which is over three years ago. The constitution of the church provides for the timelines within which to raise objection in the process of recruitment of the Archbishop. The Plaintiff herein has not told this court why he did not raise the objection within the specified time laid out in Church's constitution and if he was not aware of that provision, when he became aware of the fact that the 1st Defendant is not qualified to hold office.

The interests of the Plaintiff alone cannot override those of all the other members of the congregation and the balance of convenience tilts in their favour.

In the premises foregoing, this honourable court finds that the application dated 27th February, 2014 is devoid of merits and its hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 24th day of November, 2016.

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L NJUGUNA

JUDGE