



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 408 & 451 OF 2016 (CONSOLIDATED)

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN
THE NATURE OF JUDICIAL REVIEW**

AND

**IN THE MATTER OF ARTICLES 27, 28,32,36,47 AND 48 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO FAIR ADMINISTRATIVE
ACTION, EQUALITY AND FREEDOM, HUMAN DIGNITY AND THE RIGHT TO FREEDOM
OF ASSOCIATION**

AND

IN THE MATTER OF ACCESS TO JUSTICE

AND

**IN THE MATTER OF ULTRAVIRES, PREJUDICIAL, UNWARRANTED, ILLEGAL
OMMISSION OF DULY ELECTED/APPOINTED PERSONS FROM THE BOOK OF
REGISTRAR**

AND

IN THE MATTER OF THE SOCIETIES ACT, CAP 108 LAWS OF KENYA

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF
KENYA**

AND

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES UNDER THE CIVIL
PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF THE INDEPENDENT PENTECOSTAL CHURCH OF
AFRICA&NAIROBI BRANCH**

AND

**IN THE MATTER OF IMPENDING ILLEGAL AND UNWARRANTED ELECTION OF
PERSONS TO THE OFFICE OF THE ARCHBISHOP**

BETWEEN

AMOS MATHENGE KABUTHU.....APPLICANT

SAMUEL MBURU KIMANI}.....APPLICANTS

ANNE WANJIRU KAHORA}

ROBERT NJOROGE NGARUIYA}

SAMUEL WANJOHI MUCHIRI}

STEPHEN MACHARIA}

DAVID MWAURA MWANGI}

PETER KARINGA NGUNJIRI}

VERSUS

THE REGISTRAR OF SOCIETIES.....1ST RESPONDENT

AFRICAN INDEPENDENT PENTECOSTAL

CHURCH OF AFRICA.....2ND RESPONDENT

CENTRAL BOARD OF THE AFRICAN

INDEPENDENT CHURCH OF AFRICA.....3RD RESPONDENT

RULING

1. On 31st October 2016, these two files, Judicial Review No. 408 and No.452 of 2016 were by consent of all the parties' advocates consolidated as they were all in agreement that the subject matters are related.

2. In Judicial Review No. 408/2016, the applicants are Samuel Mburu Kimani; Anne Wanjiru Kahora; Robert Njoroge Ngaruiya; Samuel Wanjohi Muchiri Stephen Macharia, David Mwaura Mwangi and Peter Karuga Ngunjiri whereas the respondents are the Registrar of Societies, AIPCA and Central Board of the African Independent Church of Africa(AIPCA).

3. The exparte applicants in JR 408 of 2016 obtained leave of court on 7th September 2016 to apply for Judicial Review orders of mandamus compelling the Registrar of Societies to officially delete non existing expelled or non qualified officials and publish names of the applicants in their respective offices of both branch level (Nairobi) and Headquarters; An order of prohibition to prohibit the 3rd respondent Central Board of AIPCA, their agents, servants or anyone claiming under them respectively from conducting any functions, exercising authorizing over, or acting on behalf or

as trustees of the AIPCA on or before the execution of Order No. 3 above (mandamus) for an order of certiorari quashing the 1st respondent (sic) of failing to adopt and register the applicants herein as newly elected, appointed officials of AIPCA and AIPCA Nairobi Branch; orders to operate as stay; and costs.

4. In Judicial Review No.451/2016, the applicant is Amos Mathenge Kabuthu whereas the Registrar of Societies is the respondent and vide leave of court obtained on 27th September 2016, the exparte applicant deposes that he is the duly elected Archbishop of the AIPCA. He sought in his notice of motion dated 7th October 2016 Judicial Review orders of prohibition to prohibit the respondent, their agents or servants from gazetting any person to the office of the Archbishop, as the impending election slated for 27th September 2016 is in flagrant disregard of the law.

5. According to the exparte applicant in Judicial Review 451/2016, his term as Archbishop of AIPCA was coming to an end by end of this year but the Central Board extended his term to June 2018 as per the minutes of the meeting held by the Central Board on 27th May 2016. He laments that on 26th September 2016, a notice was put at the Church premises, of an impending elections of persons to the office which he occupies which he considers illegal, ultra vires and null and void since the Central Board had prior extended his tenure to serve as a Archbishop. He therefore sought to prohibit any registration of the purported Archbishop that was to be elected as per the allegedly published notice so that he completes his term.

6. On the other hand, the exparte applicants in Judicial Review No. 408/2016 were alleging that the Registrar of Societies had declined to register them and or publish their names in the Register roll, yet they had been duly elected in accordance with the constitution of the AIPCA church. The exparte applicants also accused the Registrar of Societies for publishing and upholding names of expelled and voluntarily resigned officials from both the Headquarters and branch levels. They therefore wanted the court to order the Registrar of Societies to register them and recognize them as office bearers of the Church (AIPCA).

7. The 2nd and 3rd respondents in Judicial Review 408//2016 filed a Notice of Preliminary Objection dated 21st October 2016 through the firm of Professor Tom Ojienda & Associates contending as follows:

1. The application as filed and canvassed in the applicant's notice of motion dated 15th September 2016 is fatally and incurably defective in law and as such cannot stand be ventilated before this Honourable court.

2. The issue of compensation and registration of members of the AIPCA church is res judicata since the same was settled in a ruling delivered on 15th September 2016 by Honourable Lady Justice Wasilwa In Nairobi Employment and Labour Relations Cause No. 1220/2016.

3. This Honourable court lacks jurisdiction to entertain an appeal from the ELRC in terms of Article 162 (2) of the Constitution.

4. The entire application dated 15th September 2016 is an abuse of the process of this court and ought to be dismissed with costs.

8. On 6th December 2016 the exparte applicants filed reply to the Notice of Preliminary Objection above stating:

1. The Notice of Preliminary Objection is defective and ought to be struck out.

2. That the parties to the Judicial Review No. 408 of 2016 and parties to the ELRC cause No. 1220/2016 are neither similar nor are they claiming for or through or under each other. That the parties to the ***ELRC cause 1220/2016 are Paul Ndungu Ndichuclaimant/applicant Vs Amos Mathenge Kabuthu registered Trustees of AIPCA, Central Board of AIPCA.***

3. That the remedy claimed by the claimant Paul Ndungu Ndichu in ELRC ***1220/2016*** is not similar to the remedy sought herein in JR No. 408/2016. That before the ELRC ***1220/2016***, were orders to compel 1st respondent in that cause Amos Kabuthu Mathenge to retire and cease from active duty as the Archbishop of AIPCA.

4. That the jurisdiction of this court emanates from Article 47 & 165(6) of the Constitution of Kenya and Cap 108 Laws of Kenya and the Societies Act.

5. That Judicial Review Application dated 15th September 2016 is not an appeal against the ruling of 1st September 2016 by Honourable Lady Justice Hellen Wasilwa.

6. That it is absolutely essential that the applicants herein be granted leave for a Judicial Review application as a common question of fact and law exists alongside the reliefs sought by the present applicants.

9. All parties agreed to canvass the Preliminary Objection first as is the practice and they did so orally before me on 6th December 2016.

10. Senior Counsel (SC) Professor Tom Ojienda submitted on behalf of the 2nd and 3rd respondents relying on his bundle of authorities filed on 6th December 2016 and among them is ***ELRC 1220/2016 Paul Ndungu Ndichu Vs Amos Mathenge Kabuthu & AIPCA and the Central Board of the AIPCA.***

11. Further, it was submitted that in the ***ELRC 1220/2016*** cause, Wasilwa J settled all issues involved in these proceedings vide her ruling dated 1st September 2016 which decision has not been appealed against.

12. It was therefore submitted that the motion before this court is incompetent and should be struck out and dismissed.

13. SC Professor Ojienda emphasized that this court is of equal status with the Employment and Labour Relations Court (ELRC) on the issue of the composition of the Central Board and that before the Court of Appeal is a pending application for stay of Honourable Wasilwa J's ruling hence this court cannot determine another matter determined by another Court of equal status as established under Article 162(2) (a) (b) of the Constitution.

14. In response to the preliminary objection as filed and argued by the 2nd and 3rd respondent's counsel, the ex parte applicant's counsel Mr Musyoka submitted that for a matter to be res judicata, parties and the cause of action must be similar. That the claimant in ELRC 1220/2016 is not the same as the applicants herein, that the reliefs sought in ELRC 1220/2016 were to oust the Archbishop of AIPCA but that in this case the applicants are not seeking to disturb Archbishop but to restrain the respondents from interfering with the operations of the AIPCA church. Mr Musyoka on behalf of the ex parte applicants therefore urged this court to strike out the preliminary objection with costs.

15. In a rejoinder, Mr Makokha who jointly represent the 2nd and 3rd respondents with SC Professor Ojienda argued that the court has to look at the question for determination in the ELRC matter.

16. Further, that there was a specific finding by Wasilwa J, in ELRC ***1220/2016***, of membership of the applicants as members of the AIPCA National Delegates Board. That the names to be registered were found to be not members of the Delegates Board eligible for voting or even members of the Central

Board.

17. According to Mr Makokha, what the exparte applicants were doing was to forum shop which is an abuse of the court process and that the motion before this court is intended to embarrass the judiciary.

18. Counsel urged the court to allow the preliminary objection as urged with punitive costs.

Determination

19. I have carefully considered the preliminary objection as canvassed by both parties' advocates. What is not in dispute is that this case as well as ELRC 1220 of 2016 involves the leadership of the AIPCA church.

20. Although the pleadings and proceedings in ELRC 1220/2016 were not availed to this court, I have carefully read the ruling of 1st September delivered by Honourable Hellen Wasilwa J and noted that in the body of the judgment at page 12 thereof paragraph 20, the claimant Paul Ndungu Ndichu claimed that Samuel Mburu Kimani had never been elected as Chairman at any National Delegates Conference and therefore the current Chairman Paul W. Guchu was still serving his five year term which ends in November 2017.

21. Samuel Mburu Kimani is the 1st applicant in these proceedings. At page 10 paragraph 30 of the said Ruling by Honourable Wasilwa J, the learned Judge, after considering the parties positions framed the issue before the court for determination as follows:

“...The issue before this court is who the legitimate members of the church Central Board are. When the applicant claimant appeared before Honourable Justice Nduma on 5th August 2016, they presented a list before the court which the court approved as the legitimate list of the Central Board duly qualified to elect the Archbishop of AIPCA.”

22. The applicants were opposed to the list tabled by the claimants and their contention is that the list is not authentic since some of the members listed are dead or have resigned or are double listed.

23. The learned judge then went on to determine that the list of members eligible to vote were those provided for from the Registrar of Societies as found in Appendix 3a to 4 of the claimants as submitted before Honourable Justice Nderi with exception of any deceased member who in any case will not be present to vote.

24. The learned Judge dismissed the application which had sought to upset earlier orders made by Honourable Nderi J and ordered that those orders of 29th July 2016 be enforced following the list submitted in Appendix 3a to 3d and PNN4 of the claimant's application dated 4th August 2016.

25. The question, therefore, is whether the principle of Resjudicata when taken as a preliminary objection is well taken as a pure point of law. I am guided by the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** in which Sir Charles Newbold rendered himself thus:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

26. The objection raised of *res judicata* is a pure point of law as it has the effect of determining this

matter in limine. The doctrine of *res judicata* is provided for under section 7 of the Civil Procedure Act which states that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

27. The requirements for *res judicata* to arise as stated in the said section are that :

- a. *There must have been a previous suit between the same parties.*
- b. *The issue before the court must have been finally determined in that previous suit.*
- c. *The issue must have been determined by a court having competent jurisdiction.*

28. Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality.

29. The requirements for a successful plea of *res judicata* therefore are that the two actions have to be between the same parties and their successors in title, concerning the same subject and founded on the same cause of action.

30. Further, the judgment giving rise to the plea of *res judicata* has to be a final judgment. The Court notes in this regard that the parties in this matter and in **ELRC 1220 of 2016** are not exactly the same, or demonstrated to be litigating under the same title, or that the applicants in these consolidated proceedings are in privity with the claimants in the ELRC matter.

31. In my humble view, therefore, this matter is not *Resjudicata* **ELRC cause No. 1220/2016**.

32. Furthermore, , the respondents herein have not availed pleadings in the in ELRC 1220/2016 for the court to fully identify the cause of action giving rise to those proceedings since the Ruling of Wasilwa J was in respect of an application in an interlocutory application, seeking to set aside interim orders made by Honourable Nderi J on another interlocutory application.

33. That the Ruling of Honourable Wasilwa J refers to lists in the Appendices and certain annextures which this court has not been availed to consider on the issue of membership to the Central Board and therefore eligible to vote, it would be speculative for this court to establish exactly what those annextures and or exhibits related to.

34. The preliminary objection does not clearly demonstrate how the cause of action in these Judicial Review proceedings and the issues in ELRC 1220/2016 are similar.

35. For a plea of *Resjudicata* to succeed, it is abundantly clear as was held In **Nancy Mwangi T/A Worthin Markets Vs Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd & 2 Others [2014] e KLR**, that:

“ when Resjudicata is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.”

36. The test in determining whether a matter is Resjudicata was also stated as summarized is **Bernard Mugo Ndegwa Vs James Nderitu Githae & 2 Others [2010] e KLR** as follows that;”

1. *“The matter in issue is identical in both suits,*
2. *The parties in the suit are the same;*
3. *Sameness of the title/claim;*
4. *Concurrence of jurisdiction; and*
5. *Finality of the previous decision.*

The more fundamental proposition in the circumstances of this suit and which will determine the issue of Resjudicata without going into the other details is, whether the decision of the court is setting aside the arbitral award is a decision of finality in the sense of Resjudicata.”

37. As was in the above decision, the ruling by Honourable Wasilwa J was in an application for setting aside the interlocutory orders issued by Honourable Nduma Nderi. The main suit (cause) has not been determined and as admitted by Senior Counsel Prof. Tom Ojienda, there is an appeal pending challenging the order by Honourable Wasilwa J.

38. That being the case, this court is unable to find that the ruling by Wasilwa J on the issue of membership to the Central Board was a decision that determined rights of parties to that cause in ELRC 1220/2016.

39. Furthermore, the 2nd and 3rd respondents have not availed before this court the entire pleadings of that cause for this court to ascertain what issues were really in issue for determination, and which issues, in my view, could not and were not fully determined by the interlocutory ruling of Honourable Wasilwa J on whether those issues are the same as the issues in these consolidated cases and or whether the parties are the same.

40. I reiterate that on the face of it, the common thread in this matter and ELRC 1220/2016 is the feud between and among members of the AIPCA Church. However, I am unable to find with certainty and clarity, without the pleadings in the ERLC 1220/2016, whether the parties in this matter are litigating under the same title as those in ELRC 1220/2016 which matter as I have stated is not fully determined and therefore there is no finality of the decision in ELRC 1220/2016 and neither is there clarity of concrete similarity between this matter and ELRC 1220/2016.

41. As was held by Gikonyo J in the **Nancy Mwangi T/A Worthin Markets Ltd** (supra) case, this court is fully aware of the necessity to enforce Resjudicata in adjudication of cases as was held in the case of **E.T. vs Attorney General & Another [2012] e KLR**, that:

“The Courts must always be vigilant to guard litigants evading the doctrine of Resjudicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi V National Bank of Kenya Ltd & Others [2001] EA 177 the court held that- ‘parties cannot evade the doctrine of Resjudicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J in the case of Njangu vs Wambugu and Another Nairobi HCC No. 2340 of 1999 (unreported) where he stated: ‘ if parties were allowed to go on litigating forever over the same issue with the same opponent before the courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of Resjudicata.”

42. However, in the instant case, the 2nd respondents, apart from submitting that this matter is Resjudicata ELRC1220/2016, they did not identify the particular or specific party (s) to these proceedings that are the same as those in the ELRC matter, and what cosmetic face lift those parties have brought to these proceedings the applicant(s) have brought to this court.

43. Merely stating that the question of membership to the Central Board was settled by Honourable Wasilwa J's ruling which ruling did not finally settle the issues between the parties in that cause and that therefore the applicants in this matter have no cause of action is to miss the point.

44. Furthermore, I note that albeit these two matters as consolidated are similar, the court is yet to give directions on the positions of each of the parties to these proceedings. I would therefore be reluctant to find and hold that this matter is Resjudicata ELRC 1220/2016, particularly when the learned Wasilwa J at paragraph 56 of her ruling refers to the list of members eligible to vote being those provided for from records of the Registrar of Societies as found in Appendix 31 to 4 of the claimants as submitted before Honourable Judge Nderi with the exception of any deceased member who in any case will not be present to vote; yet that list of eligible voters or appendix was never availed to this court for perusal and consideration.

45. In my humble view, the issues in ELRC 1220/2016 were not thrashed to the pulp for this court to determine without hesitation that this matter is Resjudicata ELRC 1220/2016. It is therefore better left to this court to hear and determine the merits and demerits of the matters before this court and in such determination, this court is not fettered from establishing whether the applicants in these consolidated matters are seeking orders to undo what had been done in any previous dispute. This will only be possible if all the parties, including the respondents and any other affected party brings forth all material necessary to enable this court fairly and justly determine the matter before it.

46. Accordingly, I find that it has not been demonstrated to the satisfaction of this court that this matter is clearly Resjudicata ELRC 1220/2016.

47. In the end, I decline to uphold the preliminary objection and proceed to dismiss it with no orders as to costs.

48. I direct that parties take directions on the hearing and disposal of this matter to its logical conclusion.

Dated, signed and delivered in open court at Nairobi this 9th day of December 2016.

HON. R.E. ABURILI

JUDGE

In the presence of:

SC Prof Tom Ojienda for the 2nd and 3rd Respondents

Mr Odhiambo h/b for Mr Musyoka for the applicants

Mr Munene for the 1st Respondent on Honourable Wasilwa