



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO. 317 OF 2015

1. **GEOFFREY ASANYO**

2. **DR. CHARLES**

MARANGA.....
.....PLAINTIFFS

VERSUS

1. **JOHN KIRAGU NGUNYI**
2. **JEREMY MARAMBI**
3. **STEPHEN KIOKO**

(ALL SUED AS EXECUTIVE DIRECTOR, EXECUTIVE SECRETARY & TREASURER
RESPECTIVELY OF) **CENTRAL KENYA CONFERENCE.....**
.....1ST DEFENDANT

1. **SAMUEL MAKORI**
2. **ALFRED GITONGA MARUNDU**
3. **NEHEMIAH MAIYO**

(ALL SUED AS EXECUTIVE DIRECTOR, EXECUTIVE SECRETARY & TREASURER
RESPECTIVELY OF) **EAST KENYA UNION CONFERENCE-**
EKUC.....2ND DEFENDANT

1. **KENNETH MAENA**
2. **JAPHETH OCHOROKODI**
3. **DAVID SAND**(ALL SUED AS EXECUTIVE DIRECTOR, EXECUTIVE SECRETARY &
TREASURER RESPECTIVELY OF)**WEST KENYA UNION CONFERENCE-**
WKUC.....3RD DEFENDANT

1. **BLASIOUS RUGURI**
2. **ALAIN CORALIE**
3. **JEROME HABIMANA** (ALL SUED AS EXECUTIVE DIRECTOR, EXECUTIVE
SECRETARY & TREASURER RESPECTIVELY OF)**EAST CENTRAL AFRICA**
DIVISION.....4TH DEFENDANT

RULING

1. For purposes of this ruling, the Plaintiffs shall be referred to as (*Applicants*) while the Defendants shall

be referred to as (**Respondents**). Central Kenya Conference shall be referred to as (**CKC**), East Kenya Union Conference as (**EKUC**), West Kenya Union Conference as (**WKUC**) and East Central Africa Division as (**ECAD**).

2. By an undated plaint filed on 11th September, 2015 by the plaintiffs Geoffrey Asanyo and Dr Charles Maranga against the defendants, the plaintiffs/applicants dispute elections of the leadership in the Seventh Day Adventist Church, Kenya held between 6th and 8th September, 2015.

3. The Church has four (4) level structures of internal administrative entities i.e. the Local Church, a Conference/Mission, a Union and the General Conference at the apex. The SDA Church in Kenya operates under the name SDACEAU and carries out its mandate under the name Kenya Union Mission (**KUM**). The Church, with the opinion that there was growth of Seventh Adventist Church East Africa Union made a resolution in 2013 to dissolve and reorganise KUM into two (2) administrative entities being East Kenya Union Conference and West Kenya Union Conference. On 6th, 7th and 8th September, 2015, elections were held at Karura SDA School Nairobi to fill positions for the Central Kenya Conference. The said elections were officiated by East Kenya Union Conference. It is that election that provoked this litigation between the parties hereto.

4. Simultaneous with the plaint, the Applicants who are members of the Seventh Day Adventist Church filed a Notice of Motion dated 11th September, 2015 contesting those elections and seeking restraining orders. The motion is supported by the affidavit of Dr. Charles Maranga. He deposed that the 1st Respondent conducted its elections on 28th and 30th November, 2010 and the officials elected there from were set to hold office for a period of five (5) years prior to the conduct of succeeding elections which terms were to lapse on 30th November, 2015. He deposed that on 27th May, 2015, before the expiry of the said five (5) years, the 1st Respondent scheduled elections to take place between 7th and 9th September, 2015 and that for the said reason, the elections were premature. It was further contended that the elections were officiated by EKUC which is neither registered as a limited liability company nor as a society and therefore had no capacity to officiate, conduct or even attend election proceedings. That the President of EKUC who presided over the elections did not have the capacity to so do since he passed off as a President of a non-existent entity. That the agents of the 1st Respondent omitted the participation of several churches accredited to CKC in their working document for the purpose of elections. That despite the alleged anomaly being communicated to the purported election officials; no motion was moved on the floor of the Constituent Assembly to effect an amendment to the working document so as to bring on board the omitted churches with the resultant effect of disenfranchising the critical component of the omitted churches. That several delegates were deliberately denied badges facilitative of entry into the Constituency Assembly hall to participate in the proceedings and elections; that no roll call was taken prior to carrying out election of nominees to the nominating committee. It was contended that the participants in the nominating committee were neither vetted nor verified to ascertain whether they were genuine delegates occasioning non genuine delegates to participate in the election of nominees to the nominating committee. It is the Applicants' further contention that prior to the commencement of the impugned elections, the Constituency Assembly had passed and adopted the Constitution and by-laws that were to govern the entire proceedings but that the said by-laws particularly Article IV Section 2 of the by-laws were breached by the presiding officer who allowed two men not entitled to forming part of the nominating committee and that the two men were drawn from an alleged illegal entity (EKUC). It was further contended that the presiding officer dismissed the protestations openly asserting that the illegality had been overtaken by voting. He stated that while the Respondents stand to suffer no prejudice, he is exposed to irreparable loss since **the property is his business and residential home**.

5. The motion was opposed. Dr. Blasious Ruguri who is an ordained Minister of the Seventh Day Adventist Church and the President of EAST CENTRAL AFRICA DIVISION by virtue of the elections concluded in July, 2015 and Samuel Makori who is an ordained Minister of the Seventh Day Adventist Church and recently elected as President of EKUC swore replying affidavits to the Applicants' notice of motion.

6. It was contended by the respondents that EKUC and WCUK are allowed through the church's working

policy and the Seventh Day Adventist Church Manual to promulgate their own Constitutions and by-laws patterned after the model in the General Conference and Division Working Policies, which constitution and by-laws the 2nd and 3rd Defendants promulgated and were adopted. It was particularly contended that the constitution and the by-laws of the 2nd and 3rd Defendants does not necessitate the registration of the said 2 entities, which are said to be purely administrative organisations under SDACEAU and created by the Governing body of the SDA Church, the General Conference and not by church officials to operate as independent entities of the church.

7. It was further contended that the Applicants gave demand but did not give the Defendants sufficient opportunity to respond to the issues in the proceedings; that the Respondents have in place an internal structure and machinery of resolving the issues raised i.e. the Church General Complaint Working Policy and Seventh Day Adventist Manual. That no evidence has been tendered by the Plaintiffs with regard to their allegation that some delegates were denied entry into the constituency assembly hall and contended that in fact all delegates who attended the Constituency Assembly meeting for purposes of the election were duly vetted, signed in and were given badges for purposes of participating in the election process; that no details of the church that was to be incorporated has been given and that all churches were represented in accordance with the rules and by-laws of the church.

8. That the supporting affidavit deals with issues of sin and confession which are purely issues of ecclesiastical law and are not justiciable in the courts. It was also contended that the 1st 2nd and 3rd Respondents are purely administrative entities of the church which is duly registered in Kenya and so require no legal registration to give effect to their daily operations.

9. To the allegation that the elections were carried out prematurely, the Respondents contended that it was not so since the calendar of events of the church are managed by the Annual Council of the General Conference. That the said Council sat in the year 2013 and passed a resolution to split the union into 2 administrative organisations. That the said resolution was done mid-term with a clear understanding that the remainder of the term of any official serving would be subsumed at the next election and that the condition was fulfilled.

10. Those in accordance with the structure of the church administration, the leaders of 2nd and 3rd Respondents are mandated by virtue of their positions to form part of the nominating committee contrary to the allegations of the Applicants.

The Respondents took issue with the *ex parte* interim orders of this court issued in the first instance maintaining status quo prevailing before elections were conducted and stated that the order for status quo is an unwitting cancellation of the validly held elections with far reaching ramifications through deceit cunningly achieved by the Applicants' material non-disclosure of vital information from the court. That the Applicants fully participated in the elections without expressing any reservations upon special invitation. That the Applicants were not regular delegates representing congregations but delegates at large being *ex officio* members. It was contested that it is too late in the day for the Applicants to challenge the elections which the Respondents term as legitimate. That this court's orders will paralyse the entire church activities both spiritual and administrative.

11. On record is also the Respondents' Notice of Motion dated 15th September, 2015. It was agreed that the Notice of motion and preliminary objection by the respondents do form part of their opposition to the applicants' application. In the respondents' notice of motion, they sought to lift, review, set aside, discharge and/or vary this court's orders of 11th September, 2015, to have the Applicants' motion dated 11th September, 2015 dismissed summarily for being an abuse of court process and that the Applicants to provide security for costs. The reasons advanced by the Respondents' for their application is essentially a reiteration of the replying affidavit of Dr. Blasious Ruguri. In their preliminary objection filed on 15th September, 2015, the Respondents objected that the application fails to disclose any actionable wrong or infringed legal right capable of fair adjudication by this court; that the issues in the plaint and the application by the Applicants are not justiciable in law as the subject dispute concerns purely religious matters outside the jurisdiction of the court; that the court lacks jurisdiction to deal with the subject

dispute in the face of an exclusive and binding dispute resolution mechanism expressly set out in the constitution of the Seventh Day Adventist Church and which binds the Applicants being members thereof; that the Respondents are non-suited being administrative structures established within the church with no distinct legal capacity to sue or be sued in their own names; that the Applicants lack locus standi to bring this suit on their own behalf or in a representative capacity without at all following the due process laid down in the binding constitution and that the Applicants' application and the suit as filed is a flagrant abuse of court process without any justifiable cause and is only meant to annoy and vex the Respondents and duly elected officials of the church.

12. Able submissions to these applications and the preliminary objection were tendered orally in court by both counsels for the parties. The said submissions are essentially a reiteration of the averments in the applications, grounds, affidavits and preliminary objection, which I have considered in line with the pleadings, dispositions by the parties, the annexures and the applicable law, including several precedents cited by both parties' advocates.

My interpretation

1. It is now settled that the proper practice is to determine a preliminary objection first especially where such preliminary objections are likely to dispose of the suit or application entirely. A preliminary objection is a point of law when taken would dispose of the suit. It is what was formerly called a "demurrer."
2. A preliminary objection was defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696** as follows:-

"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had 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. The improper practice should stop..." (Emphasis own).

3. In **George Oraro v. Barak Mbaja [2005] 1 KLR 141** J.B. Ojwang (as he then was) stated as follows:-

"The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..." (Emphasis mine).

4. It is therefore important to first consider whether or not the preliminary objection herein raised by the respondents' counsel Mr Rachuonyo meets the threshold set out in **Mukisa Biscuit** (supra) case.
5. I have taken the liberty to read the grounds set out in the preliminary objection. The respondents contend that:

- *The suit and the application as filed fails to disclose any actionable wrong or infringed legal right capable of fair adjudication by this court;*
- *The issues raised in the plaint and the application by the plaintiffs are not justiciable in law as the subject dispute concerns purely religious matter outside the jurisdiction of the court;*
- *The honourable court lacks jurisdiction to deal with the subject dispute in the face of an exclusive and binding disputes resolution mechanism expressly set out in the constitution of the Seventh Day Adventist Church and which bind the Applicants being members thereof.*
- *That the defendants are non-suited being administrative structures established within the church with no distinct legal capacity to sue or be sued in their own names*
- *That the plaintiffs lack the locus standi to bring this suit on their own behalf or in the representative capacity without at all following the due process laid down in the aforesaid binding constitution*
- *That the application and suit are in flagrant abuse of the court process, without any justifiable cause, and is only meant to annoy and vex the defendants and the duly elected officials of the church.*

6. I will consider the first three grounds touching on the questions of jurisdiction and justiciability together then determine whether the suit is an abuse of court process and combine the issues of locus standi of the parties. I will then consider other grounds as contained in the application seeking to discharge the interim injunction granted on an ex parte basis in the first instance and end with security for costs.

7. **On the issue of jurisdiction of the court**, it is trite law that jurisdiction is everything, without which the court acts in vain (see **Owners of Motor Vessel “Lilian S” V Caltex K. Limited**) where Nyarangi JA held:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8. What is complained of here is the elections in the SDA Church, the timing thereof, the manner in which the said elections were conducted and the legal capacity of the entity that presided over the said elections. In other words, the applicants challenge the procedural improprieties and irregularities and malpractices which they claim divested the said election the essential elements of freeness and fairness. They also challenge the legality or locus standi of the entities that presided over the said elections.

9. The Seventh Day Adventist Church Manual annexed as **BR-1B** to the affidavit of Dr Blasius Ruguri, **page 59 paragraphs 2 on safeguarding Unity of the Church** provides inter alia:

“...Christians should make every effort to avoid tendencies that would divide them and bring dishonour to their cause. ...it is the purpose of God that His children shall blend in unity.....

“.....the church should discourage actions that threaten harmony among its members and should consistently encourage unity.....”

Reconciliation of Difference. Every effort should be made to settle differences among church members and contain the controversy within the smallest sphere. Reconciliation of differences within the church should, in most cases, be possible without recourse either to a conciliation process provided by the church or to civil litigation.

.....contentions, strife and lawsuits between brethren are disgrace to the truth. Those who take such a course expose the church to the ridicule of her enemies and cause powers of darkness to triumph.....

10. The said church manual goes further to provide the Biblical foundation for resolving disputes internally—

“they are a disgrace to the cause of truth hence, to void exposing the church to the ridicule of her enemies and cause powers of darkness to triumph. They pierce the wounds of Christ afresh and put Him to open shame. Civil Litigation reveals Human selfishness. It is this kind of adversarial proceedings that must be discouraged by the church that seeks to exhibit the spirit of Christ... 1Cor.6:7 rather than go to law before the unrighteous, and not before the saints” 1Cor 6:1).

11. The said manual acknowledges that whereas there are occasions for seeking decrees of civil courts in the modern world, Christians **should prefer settlement within the authority of the Church and should limit the seeking of such decrees to cases that are clearly within the jurisdiction of the civil courts and not within the authority of the Church or for which the church agrees it has no adequate process for orderly settlement.**

12. The manual further warns that *such suits before civil courts should never become revengeful adversary proceedings but should develop out of a desire to seek arbitration and to settle differences amicably.*

.....

13. On the other hand, the **Working Policy document for 2014-2015 p.57 at B 10 22 on General Conference Authority and settlement of differences between organizations provides that:**

*“All organizations and institutions throughout the world will recognize the authority of the General Conference Session as the highest authority of the SDA Church under God. **When differences arise in or between organizations and institutions on matters not already addressed in the Constitution and By Laws, in the General Conference Working Policy, or General Conference Executive Committee actions at an Annual Council, it is proper to appeal to the next higher organization not directly involved in the matter.....**”*

14. **The question is, would the above provisions oust the jurisdiction of this court to hear and determine disputes such as the one herein respecting elections in the church for reasons that such disputes or differences are not justiciable?**

15. No doubt, church wrangles bring disunity among members of the church. Those wrangles or disputes are detested not only by the SDA Church manual, but by the Bible as has been cited above, and therefore all Christians and not just SDA members are discouraged from resorting to ordinary courts for resolution of disputes unless the internal mechanisms have failed or are non-existent. The said manual, however, gives examples of disputes which members can seek resolution from civil courts and which include, but not limited to-

- *The settlement of insurance claims;*
- *The issuance of decrees affecting the boundaries and ownership of real property;*
- *The deciding of some matters involving the administration of estates; and*
- *The awarding of custody of minor children.*

16. My meticulous reading of the Church Working Policy Documents and Manual on settlement of disputes does not reveal any bar to resorting to civil litigation in Church election matters. The language used by the Working Policy and Church Manual is very permissive such as **“it is proper to appeal” and “discouraged from” “should prefer.” “Every effort”** and not barred or estopped. In other words, members are implored to use the available church machinery for dispute resolution and only resort to civil courts where such machinery are not adequate or the church has allowed by exemption. Being implored has never been a mandate. The writings appeal to one’s conscience as there may be instances where the church machinery may be ineffective depending on the circumstances of each case.

17. It is the same Church Constitution (General Conference Working Policy 2014-2015) at page 462 when referring to mediation and Conciliation Procedures for Volunteers of the Church that it

expressly exempts the application of Mediation and Conciliation Procedures in certain situations including:

- *The settlement of Insurance Claims*
- *Issues arising from marital differences*
- *Awarding custody of minor children*
- *The deciding of matters involving the administration of estates*
- *Debt collection*
- *Matters involving an individual's dispute with civil government or law enforcement agency*
- *Specific theological questions*
- *Questions regarding church discipline and the transfer or reinstatement of membership as recorded in the church manual*
- **Church elections**

18. The above provisions are also followed by elaborate mediation/conciliation procedures under **R20 25; R20 30; R20 35; R20 40** for volunteers.
19. This court notes that the Church Manual is a 2010 version whereas the Working Policy which includes the Constitution and bylaws are updated 2014-2015. In the absence of any express provision in the Constitutive Authoritative document of the church ousting settlement of election disputes before civil courts, and in view of the permissive language used by the said two instruments binding church members regarding the forum for settlement of disputes or grievances among members or between the church and its members, I find that the dispute herein is not excluded from being adjudicated upon by this court.
20. In addition, albeit church leadership disputes are better handled in the church through mediation and conciliation, however, the High Court has unlimited original jurisdiction in civil matters under Article 165 (5) of the Constitution of Kenya 2010, except those matters that fall in the exclusive jurisdiction of the courts contemplated in Article 162 (2) (a) (b) of the said Constitution and those preserved for the exclusive jurisdiction of the Supreme Court.
21. Church election matters are not uncommon and there is sufficient precedent to show that courts have determined such disputes, while encouraging parties to resolve them amicably. This is in the spirit and letter of Article 159 (2)(c) of the Constitution which mandates the courts in exercising judicial authority to promote the use of Alternative Dispute Resolution mechanisms.
22. Revisiting the term justiciability, in order for an issue to be **justiciable**, it must constitute a cause of action in law and it must be an issue concerning a right to property, contract or any other legal right. It must not be a domestic matter that can be dealt with within the law and rules governing a particular body or organization.
23. The rationale and justification for the principle of non justifiability in religious disputes was set out in **Gathima v. African Orthodox Church of Kenya (1982) KLR 358** in which case it was held that in a case with mixed spiritual and temporal characters where matters affecting legal rights are in issue, the court can properly determine those issues. In **Peter Muiruri Kabiru & 2 others V Paul Wandati Kabue Civil Case No. 319 of 2009 (MILIMANI)** the court held that it had jurisdiction in a matter involving disputes between members of a church.
24. This court had occasion to decide the justiciability of disputes between suspended pastors and the church Trustees in **Board of Trustees of Africa Independent Pentecostal Church of Africa v Peter Mungai Kimani & 12 others [2014] eKLR**. Citing with approval the Court of Appeal decision in **Arthur Gatungu Gathuna v Africa Orthodox Church of Kenya, CA 4/1982**. The Court of Appeal in the above case was confronted with the question of whether matters of ecclesiastical law could be determined by courts held that the High Court had jurisdiction to determine such matters depending on each case, pleadings and facts especially in matters of mixed spiritual and temporal character, with temporal consequences affecting the rights. The Court of Appeal further stated that in such matters, the High Court may, in exercise of its discretion, decline to entertain the action for relief or strike them out. The court further considered several High Court decisions where the Courts distinguished between the refusal to decide on matters which are not ordinarily which are not ordinarily justiciable by it and its jurisdiction to step in to correct clear breaches of natural justice if they were shown to exist. See **Solomon v. Presbyterian church of East Africa & Others HCC 2859/77; Cannon Leonard Mbugua – Vs**

- Arch Bishop Habbakuk Olang & the Diocesan Synod of Nairobi HCC 3338/79; Bishop Peter Mwangombe – Vs - Arch Bishop Manaseh Kuria & Another Mombasa HCC 391/80.

25. The High Court also dealt with a dispute involving church elections in HCC 173 OF 2009 **Simon Kimani Mbitiru & 5 others v Joseph Kamau Mwangi & 11 others** challenging elections in the 12 AIPCA Church branches.
26. In the **Constitutional Petition No.14 of 2014-East Africa Pentecostal Churches Registered Trustees & 1754 others v Samuel Muguna Henry & 4 others [2015] eKLR** where the dispute concerned election of Church National Officials and disputes arose after elections leading to a plethora of civil suits contrary to the Church Constitution Article 21 which expressly barred reference of any dispute concerning affairs of the society to a court of law by a member of the society, while providing reference to church organs similar to **B10 22 of the working policy of the SDA Church** herein, and the petitioners argued that those suits and injunctive orders issued had interrupted church services and activities and therefore in effect infringed the member's rights and fundamental freedom of worship as guaranteed by Art 32 of the Constitution of Kenya.
27. The court in the above case found that the issues raised in the various suits though spiritual were not purely of spiritual nature only. And that where matters affecting legal rights are in issue, the courts cannot shut their eyes on such matters and declare as there is one element of spiritual character, the court has no jurisdiction. In doing so, a court shall subject an aggrieved party to injustice system especially where the petitioner is the judge, jury and prosecutor.
28. In **HCC 513 OF 2007 Bishop Silas Yego & 3 others v Daniel Mulei Mburu**, the court held that there was a triable issue regarding dispute between opposing factions of AIC Church, to ensure that natural justice was not breached or threatened.
29. Concurring with the decisions in the above cases, I find that in this case, albeit the Church manual encourages differences in the church to be resolved amicably, but such adequate procedures for orderly settlement of the grievances in regard to elections in the church were not provided to this court, which makes this court conclude that the nature of the dispute is clearly not within the authority or capacity of the church to settle. Nonetheless, that in itself does not mean that the SDA Church has no means of resolving differences as church differences could include church elections.
30. Elections, whether church or civic, are contestable issues and if the church is to be fair and be seen to be fair to all the parties, it must have a very elaborate mechanism for resolving election disputes with an appeals structure, whenever such disputes arise there was none displayed before this court.
31. I find that the dispute herein is one that can be adjudicated upon by the court by application of the law on issues of whether the elections conducted were irregular and or a nullity, and or whether the entity that presided over the elections was recognized by law. To refuse to hear the parties is in essence ousting them from the judgment seat and therefore denying them justice before an established court of law.
32. As stated above, Article 165 (5) of the Constitution of Kenya confers to this court unlimited original and appellate jurisdiction in civil and criminal matters while providing ouster clauses and ecclesiastical or spiritual matters are not part of those exempted cases that this court can hear and determine. Neither has this court been referred to any statute that ousts the jurisdiction of this court from hearing and determining then dispute of this nature. Ordinarily the relevant statute would have been the Societies Act which governs the registration and operations of Societies like the SDA Church, but my perusal of that Act has not revealed any ouster clause.
33. In **Alfred Obuya Obengo & another v Chairman National Nurses Association of Kenya & another [2014] eKLR** Kasango J. held:

“ in my view, members of the NNAK are bound by provisions of the society's constitution. Rules and by laws are not in themselves Acts of Parliament. They are not even subsidiary legislation promulgated under the provisions of the Societies Act or any other Statute. In my view, they are only made to govern the affairs of the society and to regulate dealings between members. Although binding on members, they do not have statutory force and cannot bind persons or institutions outside the society. Can the hands of this court therefore be tied by the NNAK's constitution, rules and by-laws which are not Acts of Parliament or even subsidiary legislation? To put it differently ,can the jurisdiction of this court be ousted by the society's

constitution, rules and by-laws?

34. The learned judge in answering the above questions cited the Court of Appeal decision in **Peter Gichuki Kingara v IEBC and others [2013]eKLR** where the superior court held:

“the election petition Rules and procedures and the question whether rules of procedure can confer jurisdiction must be answered. The issue for determination is whether the jurisdiction of the Court of Appeal or any other court of law for that matter can be created, established, limited or governed by a subsidiary legislation more particularly a regulation and rules of procedure made by the Rules Committee.

Jurisdiction is specified either by the constitution or statute. In Samuel Kamau Macharia & another v KCB Ltd & 2 others- Supreme Court Civil Application No. 2 of 2011, the Supreme Court delivered itself as follows on the issue of jurisdiction:

“a courts’ jurisdiction flows from either the Constitution or legislation or both.”

It is our considered view that a subsidiary legislation or rules of procedure or a rule made by a Rules Committee cannot confer, create, establish, limit or subtract the jurisdiction of any court of law, or tribunal as established by the Constitution or statute....we hold that Rule 35 of the Election Petition Rules being a subsidiary legislation is not a jurisdictional Rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We also hold that the Election Petition Rules cannot limit the jurisdiction of the court as granted under Article 164(3) of the Constitution and as operationalized by section 85 A of the Elections Act. A subsidiary legislation cannot add,, expand, add or reduce the jurisdiction of any court as spelt out in the Constitution or by statute. Jurisdiction is neither derived nor does it emanate from regulations or rules. Jurisdiction is either from the Constitution or a statute. A rule cannot limit the jurisdiction of a court of law.”

35. Of course, the SDA church being a registered society or an association of persons with a common goal having agreed to be governed by their Constitution or rules is not that body or authority with quasi judicial authority referred in Article 165(6) of the Constitution. It is therefore clear that its constitutive instruments are not statutory enactments which can be invoked to oust, add, subtract or limit the jurisdiction of this court, or any other court of law for that matter.

36. In **Speaker of the National Assembly v Karume [2008] KLR 426** the court was categorical that the rules of procedure cannot oust the clear provisions of a statute and the Constitution.

37. The only provision that binds this court with regard to settlement of disputes out of court is Article 159(2) (c) which obligates it to promote ADR which and in such a case, the court has the power to either stay the proceedings until such a time as ADR is pursued by the parties, or bring an end to the proceedings and leave the parties to pursue the alternative remedy.

38. In this court’s view, therefore, Justice can only be done and seen to be done if the parties are left to ventilate their grievances and a determination made by the courts on merits but subject to the Society/Church Constitution. In this case, I find no issue of pure spirituality in elections which are conducted by and involving mortal men. The Church Manual, more so, **at page 60 paragraph 4** calls upon the church to set up procedures within the constraints of legal practice to avoid the type of litigation referred to in 1 Cor. 6, and be constantly on guard against turning from its gospel mission and taking up **the duties of a civil magistrate**. In other words, the church instrument recognizes that some disputes may be beyond the capacity of the church leadership to attempt to resolve or that an efficacious remedy may not be found.

39. I therefore find that the dispute herein is legally recognizable worth adjudication by the court.

40. **The other key question arising from the notice of preliminary objection is the locus standi of the applicants as well as the respondents in this dispute, and whether the application and suit are incompetent and an abuse of the court process.**

41. This court can also decline to hear a suit where the court process especially where the process is being invoked to achieve some ulterior motive and for want of jurisdiction. In addition, there must be parties before it with necessary capacity, to invoke the court’s jurisdiction. The presence of

proper parties before the court is sine quo non exercise of jurisdiction of the court. I am fortified on this point by the holding in **Apex International Ltd & Anglo-leasing & Finance International Ltd v Kenya Anti-corruption Commission** [2012]eKLR citing with approval **GOODWILL & TRUST INVESTMENTS LTD & ANOTHERVS WILL & BUSH LTD**(SUPREME COURT OF NIGERIA), where the court held:

“it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”

42. In other words, there must be a suable party and one who can be sued before the court. A suable party is essential to jurisdiction whether by compulsorily being enjoined or by voluntary submission, since the right to sue and be sued is a legal franchise. See **Richardson v Smith & co. 91885021 Fla.336, 341** cited in **FKF v KPL** case (supra).

43. **So, are the parties to this suit suited or do they have the locus standi to institute or defend suit herein?**

44. The respondents contend that the plaintiffs lack capacity to bring this suit on their own behalf or in the representative capacity without following due process laid down in the Church Constitution. They also contend that the respondents are wrongly sued as they are not a registered society.

45. Examining the plaint dated 11th September, 2015, the plaintiffs are described as adults of sound mind and disposition residing within NAIROBI a County within the Republic of Kenya. The plaintiffs have not in the said pleadings specifically contended that they are suing in any representative capacity or on behalf of any entity. In addition, and as I have stated before, there is no singled out express Church Constitutional provision that bars them as members of the SDA Church from suing the church or fellow church members as individuals in their own right. Further, Article 50(1) of the Constitution of Kenya is clear that any person who has a dispute which can be adjudicated upon by the application of the law shall be accorded a fair hearing. It therefore follows that the objection on the plaintiff's legal standing is not well founded and the same is dismissed.

46. **On whether the defendants are suited to be parties to this suit, being administrative structures established within the church with no distinct legal capacity to sue or be sued in their own names.**

47. Order 1 rule 3 of the Civil Procedure Rules provide that:

“all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

48. Under **Order 1 rule 9 of the CPR:**

“no suit shall be defeated by reason of misjoinder or non joinder of parties, and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

49. It will be noted that the defendants though described in the plaint as organizations involved in activities of Adventism, those organizations are sued through the officials' whose names which are given. That being the case, this court finds that in view of the serious contest on the legality or otherwise of the defendant organizations/institutions, which contestation invites this court to find that there is a triable issue, the same cannot be disposed of at the preliminary stage and the plaint could still be amended with leave of court, since the organizations could not have been sued in their own names even if they were registered societies.

50. There is a plethora of decisions churned out by this court on issues of whether or not a society can sue and be sued in its own name and the case of **FKF & another v KPL & 2 others [2015] eKLR** is instructive. Thus, even if the organizations described in the plaint as defendants were registered societies, they would still not be capable of suing and being sued in their own names since such unincorporated bodies have in the absence of statute no legal personality distinct from their members. As stated above, locus standi before the court for bodies other than natural beings is a corporate franchise. The fact that natural persons who are said to be the officials have been enjoined on behalf of the said organizations clothes them with sufficient capacity to be recognized by this court as competent parties.

51. I find the defect to be that of misdescription or misjoinder of parties which is a procedural technicality that cannot defeat the substance of a suit. I also find that no prejudice will be occasioned to the defendants herein who are named together with entities which are said to be unincorporated. The court is entitled to determine issues between parties actually before it, since under Order 1 rule 12 of the Civil procedure rules 9 and Order 2 rule 14, no suit shall be defeated for misjoinder or non joinder and no technical objection shall render a suit invalid. This is further supported by Article 159(2)(d) of the Constitution which abhors procedural technicalities at the expense of substantive justice.

52. **On whether or not the suit herein is an abuse of the process of court in view of all the other objections to justiciability and or want of jurisdiction**, this court is alive to the principle of law espoused in the **DT Dobie & Company (K)Ltd v Muchina (1982) KLR 1** wherein Madan J expressed himself:

“the court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before missing a case for not disclosing a reasonable action, for being otherwise an abuse of the process of court. At this stage, the court ought not to deal with any merits of the case for that function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with merits. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption.....a court of justice ought not to act in darkness without the full facts of the case before it.”

53. In the said circumstances, I find that the preliminary objection does not meet the legal threshold and is therefore not sustainable at this stage.

54. **The next issue is whether or not the applicants have satisfied this court the conditions for granting of interlocutory injunction and if so, what orders should this court make.**

55. This court has to decide on several questions in line with established law and precedent. The primary provisions for application for interlocutory injunctions is Order 40 rule 1 of the Civil Procedure Rules that:

a temporary injunction may be granted where “it is proved by affidavit or otherwise:-

- a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit.”

56. Under section 63(e) of the Civil Procedure Act empowers the Court to make any other interlocutory orders as may appear to the Court to be just and convenient. Further, Section 3A of the Civil Procedure Act merely codifies the Court's inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, while sections 1A and 1B of the Act mandate the court to give effect to the overriding objectives of the Act in the interpretation of the Act and rules made there under to ensure proportional, cost effective and just decisions are arrived at and in an expeditious manner.

57. The principles guiding the grant of interlocutory injunction are well settled. A party needs to show that they have a prima facie case with a probability of success; that they stand to suffer irreparable

- damage that cannot be compensated by an award of damages and that the balance of convenience having regard to the circumstances of the matter tilts in favour of the applicant. These principles were established in the celebrated case of **Giella v Cassman Brown & Co Ltd (1973) EA 358**.
58. In the instant case, the court will be concerned with the allegations that the elections held by the Respondents were illegal, null and void on all fours and the illegality shall occasion the Applicants irreparable loss which would not be compensated by damages. In the event the court is in doubt, the application will be decided on a balance of convenience. see also **EA Industries v. Trufoods (1972) EA 420**.
59. The court in exercising its discretion in determining whether or not to grant the interlocutory injunction sought is enjoined to consider the overriding principle of proportionality under sections 1A and 1B of the Civil Procedure Act which objective the court is enjoined to give effect to in exercise of its powers under the Civil Procedure Act and Rules.
60. **In deciding whether a prima facie case** has been established, the court does not necessarily determine the merits of the case with finality on all fours. **Black's Law Dictionary, 8th Edition** defines *prima facie* as ***"sufficient to establish a fact or raise a presumption unless disproved or rebutted."*** This definition is fortified by the Court of Appeal's pronouncement in **Mrao Ltd v. First American Bank Ltd & 2 Others (2003) KLR 125** where it was stated:-

"In civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

More recently, the Court of Appeal in the case of **NGURUMAN LIMITED VS JAN BONDE NIELSEN & 2 OTHERS , CIVIL APPEAL NO 77 OF 2012 (2014) eKLR** held that:

"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

61. Applying the above principles to the instant case, whereas the Applicants claim that the elections were illegal and have justified by annexing the last 3rd Quinquennial session meeting report for the November, 28th -30th 2010 and contend that the Constitution of the church provides for succeeding elections are to be conducted after (5) years and that the next elections are due from 28th-30th November, 2015, the Respondents rebuttal is that the calendar of events of the Church are managed by the Annual Council of the General Conference which sat in 2013 and passed a resolution to split the union into two, which was done mid-term with a clear understanding that the remainder of the term of any official serving would be subsumed at the next election and that this condition was fulfilled. The respondents however, did not annex any part of that resolution on the management of the church calendar.
62. I have perused the church General Conference working policy document which comprises the model constitution and by-laws being the 2014-2015 edition and which binds all the parties hereto. The said edition incorporates the changes made by the 59th General Conference Session (2010) and subsequent Annual Councils. It supersedes all previous editions. The instrument is the

authoritative voice of the church in matters relating to administration of the work of denomination in all parts of the world and is to be adhered to by all denominational organizations

63. The applicants maintain that the elections were premature as the Church Constitution provides that elections were to be conducted after every five years, the last Quinquennial session and elections having been conducted on 28th -30th October 2010 at Karura SDA Church School as per **annexture CM1**. I have read the Constitution and bylaws of the Church. Article V of the Constitution and Articles II A and VII of the By-laws for the Union mission model operating policy thereof which provides:

“sec.1.General Conference: sec 1. The G/C shall hold Quinquennial sessions at such time and place as the GC Executive Committee shall designate and announce by a notice published in the Adventist Review and Adventist World in three consecutive issues at least four months before the date for the opening of the session.....”

Sec 2. The GC EC may call special sessions of the GC at such time and place it considers proper, by means of a notice as provided for in sec 1 and the transactions of such special sessions shall have the same force as those of the regular sessions.

64. **By laws Article II: Sec 1.regular Meeting:** this Union of Churches shall hold a regular Quinquennial Constituency meeting at such time and place as the Executive committee of the Union of Churches shall designate. In the event that the union executive committee fails to call a regular constituency meeting **within the Quinquennial** period, the ...Division Executive Committee, or General Conference Executive Committee in the case of unions directly attached to the General Conference, may give notice for such a meeting and designate the time and place.....
65. From the above clear provision of the Church Working policy document, the wordings used are **within and not after.** With the last session having been held on 28th-30th October, 2010, the impugned elections/session held on 6th-8th September 2015 were no doubt held **within 5 years and moreso, in the fifth year.**
66. There is no mandatory requirement for the session to be held on the same dates as the previous sessions and therefore, in my view, the elections and session having been held in the 5th year, the averment that they were held prematurely is a barren argument. The court also notes that from the Church working policy document, elections are just one of the agenda at the scheduled Meeting. What is surprising is that the applicants have not challenged the holding of the session being premature. They are only challenging the holding of elections as being pre mature, without demonstrating to court that the session could be held at a different time from the impugned elections.
67. Albeit in the submissions of counsel, it is alleged that the Special Constituency Meeting that resolved to create the two controversial entities did not have authority to do so, there is no **pleading in the plaint seeking for declarations to nullify that meeting which created the two entities.** Secondly, albeit the applicants content in their submissions that the two entities are illegal and are operating as if they are independent entities of the church with similar structures, their own annexture **CM7** is a verification letter from the Registrar of Societies to the effect that the two entities EKUC and WKUC and their respective officials were created and voted during the Special Constituency meeting held in 25th-27th November 2013 by a resolution.
68. The said letter from the Registrar of Societies confirms that the two entities do not exist separately and are not independent of each other and only exist as entities under the Seventh Day Adventist Church East Africa. It was further confirmed that therefore there was no registration of either entities as societies. Parties are bound by their pleadings. If by legality then the applicants mean being legally recognized as entities, then in my view, those entities meet the threshold since they were noted in the Register as being devolved administrative entities operating under the umbrella SDA church.
69. It cannot, therefore, be possibly true as alleged by the applicants that the said two entities are separate illegal entities operating as societies on the whims and caprice of their leadership and are therefore bereft of capacity to transact any activity in the name of and for the benefit of the

- Adventists who constitute the membership of the church.
70. I note that the applicants are ardent followers of the Adventist church and being elders thereof, must have been aware of the Special Constituency meeting of 25-27th November 2013 and the resolutions therein, annexure marked **BR 5**. And **annexture SM-2 of October 25th 2013**. They have never taken the liberty to challenge those proceedings and or the resolutions or seeking to bar the notification of the two entities in the register by the Registrar of Societies, made almost two years ago.
71. In addition, the notice for the scheduled meeting of the 4th Quinquennial Session elections of 6-9th September 2015 was issued on 27th May 2015. See annexure **SM5**. With an addendum for change of dates issued on August 7th 2015 see annexure **SM 6**. Article 2 of the Constitution of the Church provides that 4 weeks' notice must issue before date of elections. This was complied with.
72. Elections are not a one off event. It is a process that commences with adequate preparations including identification of the presiding officer and the venue and delegates who are eligible to vote or participate in the elections being known before hand. There is no evidence that the impugned elections were a surprise or came as an ambush.
73. The applicants who were delegates at large were present at the venue and therefore observed the elections as ex officio delegates. They waited until the elections were over is when they retained their advocate on 9th September 2015 a day after conclusion of the session and elections to demand nullification on the grounds among others, that the entity presiding over them was illegal and that the process denied delegates and participating churches the rights to free and fair elections. That in my view is a sign of bad faith and an afterthought of sorts. Whoever seeks the discretion of the court in the form an equitable remedy such as an injunction must demonstrate good faith which the applicants have not.
74. This court cannot be used in the circumstances of this case, to determine how churches and other organizations should organize themselves for as long as they comply with their established procedures and practice.
75. Even the Civil democratically elected Government and its organs organize themselves beyond the constitutionally recognized units and those units are essential for effective and efficient service delivery to the citizenry. I cannot phantom, for example, a suit challenging the establishment of directorates or divisions in the Ministries/Government departments simply because the Constitution does not recognize them.
76. In the same vein, the Constitution of the SDA church recognizes that there is church growth and therefore, creation of those administrative units under the church is essential for effective and efficient spiritual nourishment to its growing members. This court had occasion to read the Working Policy Document and Church Manual and was unable to find such provisions expressly barring establishment of administrative units or entities as the ones impugned herein. The church instruments indeed are in favour of church unity being fostered. At page 59 of the Church Manual:

“although all members have equal rights within the church, no individual member or group should start a movement or form an organization or seek to encourage a following for the attainment of any objective or for the teaching of any doctrine or message not in harmony with the fundamental religious objectives and teachings of the church.....”

- by. In the instant case, it has not been demonstrated that the respondents are those movements or organizations seeking to encourage a following for the attainment of ulterior objectives contrary to the fundamental religious objectives and teachings of the church, or seeking to fragment the church. For if that were the case, the said entities would not have been established by the Declaration of the Conference and neither would they have been notified to the Registrar of Societies.
- bz. The legal burden to prove that the establishment of the two entities was unauthorized by the constitutive church instruments lies with the applicants who allege, for this is the established law. The entities have nonetheless discharged their burden by demonstrating how they were established which fact is not controverted by the applicants by any other evidence to the contrary.
- ca. I also note that preliminary objections were raised by Mr Nyambega to the effect that there was no authorization for Mr Ruguri to swear affidavit on behalf of all other defendants and neither is Mr Samuel Makori's affidavit sworn on any person's behalf. I have considered that preliminary issue

- and dismiss it for the following reasons: that all the deponents of the affidavits filed on behalf of the defendants are parties to these proceedings and therefore they swore affidavits in their own right. In addition, there is no legal requirement that all the parties to the suit must all swear separate affidavits in response to or in support of their positions particularly where the facts that they seek to introduce are not establishing a different cause of action.
- cb. They defendants/ respondents herein are sued in their individual as well as in their joint capacity and therefore failure to state that one is authorized to swear an affidavit on behalf of the other does not vitiate the pleadings or affidavit evidence before court. The court will have to treat the affidavits as evidence by and for the deponents who are also parties hereto in their own right. In my view that is a procedural technicality which cannot be sacrificed at the altar of substantive justice.
- cc. Furthermore, the applicants heavily relied on those affidavits to challenge the contentions by the respondents on the issues of legality of the impugned entities and elections.
- cd. The applicants also challenged the returns made on 16th April 2015 as they did not show who signed them. In my view, since returns are made to the Registrar of Societies, if the applicants had any reason to doubt the genuineness of the said returns, they had the liberty to verify from the Registrar of societies which they did not.
- ce. Moreover, the issue of returns only came in the submissions. It was never the reason for the suit and complaint herein. In addition, looking at annexure SM 1B also from the Registrar of Societies, dated December, 31, 2014, it is signed at the bottom a like the one of 16th April 2015 and the same applies to annexure **CM8** of 31st December, 2013 produced by the applicants, being Annual returns. The names of officials in all the returns are at the top while the returns which is a form has a place at the near bottom for signatures. The names in the latter document are written by hand and signatures appended thereto. It has not been shown that those signatures of 16th April, 2015 are not for the genuine officials of the SDACEAU as Registered.
- cf. I have also perused the pleadings by the applicants. I reiterate that I have not seen any substantive prayer seeking to quash the decision of the Special Constituency Meeting and or of the KUM Excom Meeting of October, 23, 2015 to establish and officially launch/ geographically reorganize the two impugned entities. The Constitution of the Church permits the holding of special sessions of the General Conference, **and the transactions of such special General Conference have the same force as those of the regular sessions**. In addition, Art II of the by- laws, page 174 sec. 2 allows for Special Constituency meetings.
- cg. Under the Policy Working Document, **B- ORGANIZATION AND ADMINISTRATION-P51**, the primary building blocks of global SDA Church organizations are the local church, the local conference/mission, the Union conference/mission and the General Conference. Each of the above organizational units has a defined membership called a constituency, and therefore enjoys the privilege of participating in the deliberations and decision making of that particular organizational unit...various institutions, authorized and established in harmony with General Conference /and or division policies, also have defined constituencies.....organizational membership and status are entrusted to entities that meet certain qualifications, including faithfulness to the SDA Fundamental Beliefs, compliance with denominational practices and policies, demonstration of adequate leadership and financial capacity and responsiveness to mission challenges and opportunities. Membership and status can be reversed, revised amended or withdrawn by the level of organization that granted it.
- ch. Under **B-65:25 ON ORGANIZING NEW MISSIONS/CONFERENCES/UNIONS**, the working policy document recognizes that there may be need to organize a new Union Conference from an existing Union Mission or from the territory of an existing Union Conference, or to organize a Union of Churches into a Union Conference, and that the division officers shall initiate a preliminary consultation with General Conference officers to assess the general merit and implications of such a proposal. If such consultation results in a decision to study the matter further, the proposal shall be considered by the respective Division Executive Committee at its midyear or yearend meeting or at a Division Council.
- ci. The Church working policy document also permits division of existing Union Conference/Missions at **B80-10 CRITERIA FOR DIVIDING EXISTING UNION CONFERENCES/MISSIONS**; at **B80-15 DIVIDING A UNION CONFERENCE/MISSION-1-8**; and at **B90-DISCONTINUANCE OF ORGANIZATIONS**

- cj. All the detailed provisions under the paragraphs highlighted above permit the creation of new entities from the existing ones and or division of the existing established entities into more. The elaborate provisions also provide for the criteria to be used in such creation and division more specifically for this case, the creation of a Union/Mission or Conference from an existing one is allowed.
- ck. The applicants did not refer the court to any of those provisions which i have alluded to above neither did they submit on their applicability in the creation of WKUC and EKUC. They have not challenged the process through which those two entities were created.
- cl. Having perused the Church Policy document on the division and or creation of entities such as the WKUC and the EKUC, Iam satisfied that the impugned entities whose creation was notified to the Registrar of Societies are not fictitious and neither has it been demonstrated that they are operating as independent entities outside the church organizational framework. They were established in accordance with the church policy instruments and resolutions which have not been challenged and therefore, the applicants' bare contestations have no basis. Further, the church instruments submitted by the defendants are in favour of church unity being fostered. At page 59 of the Church Manual that: ***“although all members have equal rights within the church, no individual member or group should start a movement or form an organization or seek to encourage a following for the attainment of any objective or for the teaching of any doctrine or message not in harmony with the fundamental religious objectives and teachings of the church.....”***
- cm. In the instant case, it has not been demonstrated that the respondents are those movements or organizations seeking to encourage a following for the attainment of ulterior objectives contrary to the fundamental religious objectives and teachings of the SDA church, or seeking to fragment the church.
- cn. The legal burden to prove that the establishment of the two entities was unauthorized by the constitutive church instruments and or was in violation of the Societies Act lies with the applicants who allege, for this is the established law.
- co. *Section 20 of the Societies Act provides:*
1. *No registered society shall-*
 - b. *Amend its name, or its constitution or rules, or*
 - c. *Become a branch of or affiliated to or connected with, any organization or group of a political nature established outside Kenya; or*
 - d. *Dissolve itself, except with prior consent of the Registrar, obtained upon written application to him signed by three of the officers of the society.*
2. *An application by a society to do any of the things specified in subsection(1) of this section shall be accompanied by a copy of the minutes of the meeting at which the resolution to do that thing was passed, certified as a true copy by three of the officers of the society, and the application shall be delivered to the Registrar within 14 days after the day on which the resolution was passed.*
3. *Any registered society which contravened this section shall be guilty of an offence.*
94. It should be noted that the society that is registered with the Registrar of Societies and for which Annual returns and searches were conducted and filed herein is –BR4 is SEVETH DAY ADVENTIST CHURCH OF EAST AFRICAN UNION (SDACEAU) vide certificate of registration number 5276 of 27th March 1969.
95. None of the defendants/respondents in this suit are sued in their capacity as officials of that registered society. According to section 20 of the Societies Act as reproduced above, it is a registered society that is barred from carrying out any of the prohibited things outlined therein without written authority of the registrar. In this case, we are dealing with entities which are not registered as societies, but nonetheless, natural persons are sued together with those entities.
96. It was not shown that the SDA Church as registered, and whose registered officials are not parties to this suit in their capacity as officials of the society, had amended its name, constitution or rules or become a branch of, or affiliated to or connected with, any organization or group of a political nature established outside Kenya or even dissolved itself without the written authorization of the Registrar of societies.
97. Annexure CM 7 a letter from Registrar of Societies dated 10th September, 2015 that **the society**

- had been in good standing**, listing its registered officials from 27th November, 2013 does confirm that position. Furthermore, that search never sought to know whether the society in creating the two impugned entities at its Special Delegates Meeting of 25th-27th November, 2013 ever sought for the authority of or obtained the authority of the Registrar of Societies. The registrar's letter is also clear that the two entities EKUC and WKUC are not independent units but operate under the society.
98. It is my humble view therefore that it has not been shown that the Societies Act, section 20 thereof was breached by the respondents herein.
99. The respondents on their part have discharged their burden by demonstrating how the impugned entities were established and the mandate to establish them emanating from the Church Constitutive Instruments as implemented by the Special Conference meeting which is authorised by the Church working policy document, which fact is not controverted by the applicants by any other evidence to the contrary.
100. From the foregoing exposition, this court is not satisfied that a prima facie case has been established by the applicants with a probability of success.
101. **As regards the second limb of Giella v Cassman Brown decision of whether the applicants shall suffer irreparable harm that cannot be compensated by an award of damages** if the injunction sought is not granted, which limb also emphasises that once a party establishes that a defendant has breached an applicant's right, an injunction should issue, the above principle was expounded in the case of **Loldiaga Hills Ltd & 2 others v. James Wells & 3 others (UR)**, it was held that:-

“Be that as it may, I hold the view that it is not always mandatory that where damages are an adequate remedy an injunction should not issue. In HCCC No. 33 of 2011 Payless Car Hire and Tours ltd –vs- Imperial Bank Ltd (UR), I held that:-

“On the second limb of Giella –vs Cassman Brown, the Defendant has asserted that as a financial institution, it is capable of compensating the Plaintiff and therefore damages are an adequate remedy. As already stated above, I have never understood the law to be that a wronged party cannot obtain an injunction because the wrongdoer is capable of compensating such party with damages. More so, when the act complained of is an illegal act that blatantly flouts the law a court of equity cannot fold its hands and condone the flouting of the law on the basis that damages are an adequate remedy. Whilst I am alive to the fact that the 2nd limb of Giella –vs- Cassman Brown is to the effect that an injunction will normally not be issued where damages are an adequate remedy, I venture to suggest that that principle is not couched in mandatory terms. The East African Court of Appeal in laying down the test in Giella –vs- Cassman Brown put the 2nd limb in a permissive form as opposed to the 1st limb. His Lordship Stry V.P delivered himself thus in Giella –vs- Cassman Brown (1973) EA 358 at 360:-

*‘First an applicant **MUST SHOW** a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.’*

As it can be noted from the quotation above, whilst the East African Court of Appeal in its wisdom couched the 1st limb in mandatory terms, the court couched the 2nd limb in permissive terms:-

‘... an injunction will not normally be granted’ it is my understanding of the said portion of the Court of Appeal for East Africa’s holding to mean that there may be circumstances where although damages may be adequate but nevertheless an injunction would issue. Each case has to be dealt with according to its own peculiar circumstances.’

In Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207 Ringera J (as he then was) held at page 216:-

“I would for those reasons alone accede to the Plaintiff’s prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”

102. Then in Waithaka –vs- Industrial and Commercial Development Corporation (2001) KLR 374 Ringera J (as he then was) once again delivered himself thus at page 381:-

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal Couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy..... if the adversary has been shown to be highhanded or oppressive in its dealings with the applicant this may move the court of equity to say: ‘money is not everything at all times and in all circumstances and don’t you think you can violate another citizen’s rights only at the pain of damages.’ In the instant case, although I have found myself in doubt as to the existence of a prima facie case. I have said enough to show that the Plaintiff has an arguable case and that the Defendant’s conduct may be regarded as high handed and probably unfounded in law.”In Joseph Siro Mosioma –vs H.F.C.K and 3 others Nairobi HCCC No. 265 of 2007 (UR) Warsame J on his part held that:-

“On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

103. That is how the Courts in this country have dealt with the issue of damages, in the 2nd limb of Giella –vs- Cassman Brown (supra), where there has been express breach of statutory provisions. Probably, if the East African Court of Appeal was dealing with a case of blatant breach of statutory provisions, it would have supported the views expressed above. I do recognize that Ringera J, and Warsame J were dealing with properties being threatened to be sold by banks exercising their statutory power of sale but the important factor was that the Courts were concerned with the breach of the express provisions of the law thereby opting to issue injunctions notwithstanding damages being an adequate remedy.

104. Elsewhere on an issue of Contract in Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus:-

“Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in Giella –vs- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover Internationale made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:-

“ A fundamental principle ofthat the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’”

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –vs- Cassman Brown, the Court has had to consider the following questions before granting injunctive relief.’

- i) *is there a prima facie case*
- ii) *does the applicant stand to suffer irreparable harm.....*
- iii) *on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....*

If granting the applicant's prayers will support the motion towards full hearing, then I should grant those prayers. I am unable to say at this point in time that the applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly, there would be a much larger risk of injustice if I found in favour of the defendant than if I determined this application in favour of the applicant."

105. The then Court proceeded to grant the injunctive reliefs sought. It is clear in that case, Ojwang Ag. J (as he then was) did not find any prima facie case but on the ground of applying the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after the hearing of the case find that a greater injustice has been occasioned.
106. Finally, the Court of Appeal has considered this issue in the case of **Aikman –vs- Muchoki (1984) KLR 353** wherein at page 359 Madan J.A held that:-

"First, the appellants being lawfully in possession of the estates under the authority of the debentures executed by Mbo and Loresho, and the Defendants having unlawfully seized and continuing in possession of the estates, the appellants had shown a clear and overwhelming prima facie probability of success; the Court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful titles of others and brazenly admits it ought to be restrained by injunction..... equity will not assist law breakers.... I will not subscribe to the theory that a wrong doer can keep what he has taken because he can pay for it." (emphasis mine)

I will likewise reiterate here that I will not subscribe to the theory that since the Defendants are capable of compensating the Plaintiffs an injunction should not issue. I will rather subscribe to the theory and venture to hold that although a Defendant may be capable of fully compensating an applicant, where it is established on a prima facie basis such as in this case, that a Defendant is acting illegally and in breach of express provisions of the law, an injunction will issue against such a Defendant notwithstanding that such a Defendant can pay damages. A Defendant should not be allowed to continue to retain a position of advantage acquired in contravention of the law."

107. Applying the above principles to this case, I reiterate that from the onset, the applicants as individual members of the church have a right to choose the officers of the state conference. Delegates are chosen by the state conference who in turn choose the officers of the union conferences, and delegates chosen by the union conferences choose the officers of the general conference. By that arrangement, every conference, every institution, every church and every individual, either directly or indirectly –through representatives, has a voice in the election of the men who bear the chief responsibilities in the General Conference. -see **page 29 of the church manual**.
108. It therefore follows that the applicants have their individual rights as members of the SDA church to choose their leaders and they may not agree with the decision made by the church and therefore institute civil litigation as individual members of the church and demonstrate their interest and or right to vote that has been infringed by the impugned process.
109. In this case, the applicants have alleged several irregularities which include the elections being

- held prematurely, the said elections being presided over by illegal entities and the disenfranchisement of genuine delegates and local churches in the manner in which the elections were conducted including failure to verify the delegates in the register and denial of badges to some delegates thereby allowing non delegates to vote. They also claim that they have a right to elect pastors of their churches and to challenge any irregularities. Nonetheless, it is on record and an undisputed fact that the applicants at the meeting were ex officio delegates with no voting power at the said Session.
110. Although the applicant's counsel submitted that the applicants are entitled to the reliefs under Article 22 of the Constitution, this court notes that the claim herein was not filed claiming for breach of fundamental rights and freedoms as required under the said Article and Rules made under Article 23 for enforcement purposes. The right to move to the High Court under Article 22 of the Constitution is for purposes of enforcement of fundamental rights and freedoms contained in the bill of rights. The provision is not intended to be an avenue for resolution of ordinary civil disputes that can be settled through normal process applicable to specific disputes as this one. Furthermore, there was no pleading of breach of the applicants' fundamental freedoms and or rights.
111. In matters brought under Article 22 of the Constitution, the court follows strictly, the rules made under Article 23 and addresses specific allegations of violations that relate to violations and grants relief under Article 23 thereof. In the instant case, the applicants made very ambiguous claim of irreparable loss. **“the property is his business and residential home.”**
112. Article 40 of the Constitution guarantees the right to property. The applicants never established any proprietary interest or right acquired through the existing legal framework.
113. In addition, the applicants have made serious sweeping statements concerning disenfranchisement of genuine delegates who were entitled to vote. The applicants are not saying they were disenfranchised, but that churches, individuals and delegates were disenfranchised. Those individuals, churches and or delegates are not parties to this suit. Neither is this suit instituted in representative capacity to warrant this court make orders in favour of those parties who are disenfranchised.
114. This court does appreciate that the meeting was a Quinquennial event and besides elections, there were other agenda. However, as far as the elections were concerned, If the applicants were observers then their roles as observers in the elections was limited to observation of elections and making independent reports to the church on how the elections were conducted, including recommendations for future improvement, and not to descend into the arena of elections and claim that their rights were violated, which violation, in my view, has not been demonstrated.
115. I do not find that the right of the applicants to observe those elections on the material day as delegates at large where they had no vote were infringed or at all, and If there be any irreparable loss or any loss at all, then the same has not been disclosed to this court or demonstrated. It has also not been demonstrated that the acts complained of were illegal acts that blatantly flouts the law, for if that were the case, this court as a court of equity would not fold its hands and condone the flouting of the law on the basis that *damages are an adequate remedy*. As *i9 have stated before*, I do not find any breach of the Societies Act or even the Constitutive instruments of the SDA Church by the respondents or any of them.
116. In addition, it is trite law that no order of the court can be made in favour of or against a non party except in enforcement of a court order. The court would be acting in vain, and in violation of the principles of natural justice. In the **AIPCA** case (supra), cited by the applicants, the pastors who were injuncted had been suspended by the church yet they adorned themselves as church ministers pending resolution of the dispute. They were using church property to preach and hold meetings. That case can be distinguished from the instant one where the allegations are that the newly elected pastors will embark on the management of affairs/accounts of the church. Leadership comes with management of affairs of the organization. Those who were in office prior to the impugned elections have not raised any voice of dissatisfaction with the process of electing new church officials.
117. Under Order 1 rule 8 of the CPR, ***one person may sue or defend on behalf of all in same interest***, but there must be compliance with rule 13 thereof requiring ***authority by any other of them to appear, plead or act for such other in the proceedings, which authority shall be in writing signed by the parties giving it and shall be filed in the case.***

118. That was not the case here. The applicants by their own pleadings sued in their own names and own behalf. What injury, therefore would the applicants suffer as individuals and members of the SDA Church? This court can only conclude that if there be any injury then it is self-inflicted since no law permits the applicants to represent veiled/shadow litigants who are not named in the plaint whether as individuals or corporate and whose authority is not filed herein. The applicants have not demonstrated what it is that they were deprived of as individuals and as a group, if at all.
119. In addition, the arguments by the applicants that the elections rules and criteria were breached are an allegation that was not substantiated from pleadings, affidavits and submissions. No evidence was shown as to how the 20 delegates for Nairobi was arrived at since Page 166 of the annexure CM4 on representation as read with **Article IV sec 2** of the Constitutive bylaws shows that each church would have one delegate and where there are more than 500 members in a church, they would be entitled to 1 additional delegate for every additional 500 members, subject to a maximum of 4 delegates per church. Document was annexed to show the breach and how that breach prejudiced the outcome of the elections.
120. In the Ugandan Court of Appeal decision **Civil Reference No. 11 of 1999 in Uganda Corporation Creameries & another v Reamaton Ltd**, the Court held:

“it is a well-known principle of law that courts adjudicate on issues which actually exist between litigants and not academic ones.”

The applicants further argued that there was a circulation of SMS to show sanitization of the chaotic process. None of those authentic SMS messages were produced in court to show their relevance and or that they emanated from any of the respondents or their agents.

There was also a submission on the allegation that NLC had stopped some land transfer transactions, which submission which this court finds irrelevant to the issues before hand.

121. In this case, what would happen if the injunction sought and granted in the interim remains in force until this suit is heard and determined on its merits? The answer is obvious. That the former church officials will remain in office, yet they are not parties to this suit to ventilate their grievances, simply because someone else has litigated for them and on their behalf, without their authority. Those former church officials have not challenged their ouster and therefore this court will be issuing orders compelling them to remain in office, thereby compelling non -parties who are not enforcement officers of court orders to obey its orders.
122. On the other hand, the court will also be restraining those church officials who were elected from assuming the respective elective positions yet they are not parties to this suit and dispute. They have not been given a chance to be heard. The law frowns on high handed oppressive orders that are only intended to bring chaos. The court will thus be making orders at large, which orders, in my view, will not meet the ends of justice and neither will they serve the purpose of resolving the dispute and or achieving justice for the parties, but escalating the dispute to greater levels. Were this court to issue such orders against non-parties parties to this suit, a vain decision would be the result, which is a departure from recognized legal principles of exercise of courts’ jurisdiction and makes a mockery of the purpose and integrity of court orders. It would also result in an injustice to the elected officials who have not been given an opportunity to be heard thereby condemning them unheard, thus going against the rules of natural justice. For a court of law has no jurisdiction to do injustice.
123. As was held in the case of **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** (supra), **there would be a much larger risk of injustice if the court found in favour of the applicant, than if it determined this application in favour of the respondent.**
124. From the above exposition, I find that the balance of convenience tilts in favour of the respondents whose mandate as church leaders is to ensure that the legitimate spiritual expectations of the church congregants are met and the institution of the church continue to run as designed without any interruptions. As no prejudice will be suffered by the applicants herein if the orders sought are denied, and which prejudice or loss has not been demonstrated, this court finds that there is no equitable reality basis established for the exercise of its discretion in favour of the applicants, and no court of equity ought to allow it.

125. Accordingly, I dismiss the applicants' application for interlocutory injunction against the respondents. I also dismiss the preliminary objection and the application seeking to set aside, vary or discharge the interim ex parte order of injunction granted in the first instance, which orders have automatically lapsed with the determination hereto.
126. On costs, I note that the dispute herein is between members of the same church and therefore in the spirit of promoting reconciliation among them, while imploring them to embrace Alternative Dispute Resolution mechanisms as espoused in Article 159 (2)(c) of the Constitution of Kenya and the SDA Church Constitutive Instruments; and in order to demolish the wall of partition which has been created by this very unfortunate dispute, I make no orders as to costs.
127. Finally, I graciously acknowledge the respective parties' learned counsels Mr Mose Nyambega and Mr Rachuonyo for their able representations of their clients' causes, being ardent members of the SDA church as admitted during submissions. I implore them to assist their respective clients to avoid any foster of a divisive spirit in the church, as commanded by the church manual at page 59 that: "*the church should discourage actions that threaten harmony among its members and should consistently encourage unity, for it is the purpose of God that His Children shall blend in unity. Do they not expect to live together in the same heaven?*"
128. It is for those reasons that I also decline to grant the respondents' prayer for security for costs as sought. In any event, it was not shown that the applicants intend to leave the jurisdiction of this court.

Those are the orders of this court.

Dated, signed and delivered in open court at NAIROBI this 28th day of September, 2015

ROSELYNE E. ABURILI

JUDGE