



1. FREDRICK KARISA SHUNGU
2. DAVID M. DZIMBA
3. DAVID S. MTIPA ULEDI
4. BARON KATANA PHILIP.....PLAINTIFFS/RESPONDENTS

*[suing on their own behalf and on behalf of the other members of the
Anglican Church of Kenya Emmanuel Church, Kisauni]*

-VERSUS-

REV. GEOFFREY GUYO DIDA

[Vicar-in-charge of ACK Emmanuel Church, Kisauni...DEFENDANT/APPLICANT

RULING

The plaintiffs' original plaint, dated **14th June, 2007** sought declaratory and injunctive relief against the defendant; but the amended version of **6th September, 2007** restricted its pleadings to prayers for a declaration, and costs; and this remained so in the further-amended plaint of **15th July, 2009**. Such was the foundation for the *defendant's* application by Chamber Summons dated **12th January, 2010** brought under Order VI, Rule 13(1)(b) and (d) of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The application carries one main prayer:

“THAT the plaintiffs' case against the defendant be struck out and/or dismissed on the grounds that it is scandalous, frivolous, vexatious, bad in law and/or otherwise an abuse of Court process.”

The application rests on the following grounds:

- (a) the defendant is no longer serving as the Vicar of Emmanuel Church, Kengeleni, and therefore the Orders sought in furtherance of the amended plaint cannot be enforced against him;*
- (b) Emmanuel Church, Kisauni is a registered society which should be sued pursuant to the provisions of the Societies Act (Cap.108, Laws of Kenya), and the Diocesan Constitution;*
- (c) Rev. Josephat Murutu who had called for Diocesan elections on 19th April, 2009, is an appointee of the Bishop of Mombasa Diocese, and so cannot be sued in his personal capacity;*

(d) the said elections were held in accordance with the Diocesan Constitution of the Anglican Church of Kenya – and the proper avenues for appeals and complaints have not been exhausted.

Julius Caesar Kalama, the Secretary of the Parish Church of Emmanuel, Kisauni, swore a supporting affidavit on **12th January, 2010**; and in response, the plaintiffs filed grounds of opposition on **22nd February, 2010**, contending as follows:

(i) the deponent of the supporting affidavit has no locus standi in this matter and the same should be struck out;

(ii) the application lacks merit, and is an abuse of the process of the Court;

(iii) the defendant/applicant is, by acquiescence, estopped from challenging the jurisdiction of the Court.

Learned counsel for the defendant submitted that the facts in support of the application were uncontested; he urged that since elections at the Church in question are conducted annually, and the disputed elections took place in **2007**, it follows that the suit has been overtaken by events; as elections have taken place regularly since **2007**, “*the continued pendency of the present case is an abuse of Court process.*” Counsel relied on the persuasive authority of the Uganda Court of Appeal, **Uganda Corporation Creameries Ltd. & Another v. Reamaton Ltd**, Civil Reference No.11 of 1999, which bears this statement:

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

Counsel urged that “any Judgment herein will be for an academic purpose and not to settle [a] dispute between the parties herein”; and “*Orders granted in this case are incapable of being enforced and will be in vain considering that three other elections have been conducted already.*”

Learned counsel submitted that the suit herein violates the provisions of the Anglican Church of Kenya Diocesan Constitution of **2002, Canon XII, Clause 3** of which provides that the parish priest shall ensure that the notice of the Annual General Meeting (showing date, time and venue) is announced on two consecutive Sunday services for each congregation of the parish; and, proper notices had been issued as prescribed.

Counsel submitted that the suit herein is also in breach of **Canon XII, Clause 4** of the said Constitution which provides for the mode of dispute resolution: the party complaining that the election was unfairly conducted writes to the Bishop, who conducts investigations and, where there is merit, orders *fresh elections* to be conducted. Counsel submitted that the plaintiffs had not exhausted such prescribed avenues of conflict resolution before moving this Court by suit.

Counsel further submitted that since the defendant/applicant is a registered society, any suit against the defendant must be lodged against its registered officials and/or trustees: **Jane Nyambura Joshua v. Apostolic Faith Church**, Nairobi HCCC No. 2824 of 1997 (OS) [**Nyamu, J.**] Consequently, counsel urged that the suit be struck out for being bad in law.

Learned counsel, **Mr. Onjoro** for the plaintiff/respondent, apart from contesting the competence of the application’s supporting affidavit, urged that the plaintiff cannot contest the Court’s jurisdiction in this matter as there has been acquiescence in the instant proceedings: “*upon filing a defence they are estopped from challenging the jurisdiction of this Court.*” Counsel urged further that, “in any event, the High Court has *unlimited jurisdiction* to hear any matter in the interests of justice.”

Mr. Onjoro discounted the argument that several cycles of Church election had already taken place since the election which has led to the instant dispute: “*if the plaintiffs are successful it will basically mean that all the subsequent office-bearers are illegally in office since you cannot purport to succeed an official who is improperly in office....*”

It is not disputed that *two* cycles of elections have taken place, *without incident, without challenge*, since the elections being disputed. Naturally, that fact has resulted in a non-disruption of the working of the Church system; and this Court takes *judicial notice* that these subsequent elections have been a basis of *legitimate expectations* in the Church and among its congregations, that their institution *continues to run* as designed. The Court, in exercising its discretion, will take that *reality* into account.

Relying on a decision of the High Court, *Jane Nyambura Joshua v. Apostolic Faith Church*, the defendant has submitted that the grievance herein being *administrative and institutional*, ought to have been lodged against the registered officials or trustees of the Church; but instead, the case was filed against an individual who is no longer the Vicar-in-charge of the ACK Emmanuel Church at Kisauni and who, therefore, *lacks any role* in the decision-making process of that Church. In my opinion, this is a valid point; and the suit is misdirected, as it is not calling upon the right party to effect any redress at all. Were the Court to issue Orders against such an irrelevant party, a vain decision would be the result; which not only departs from a recognized principle regarding the exercise of the Court's jurisdiction, but makes a mockery of the purpose and integrity of Court Orders. This is not to be allowed, as the Judiciary is a foundation-pillar of the Constitution which ensures the efficacy of the conflict-resolution function in all its forms.

Although *Mr. Onjoro* relies on the trite principle that the High Court is vested with unlimited jurisdiction, and so *has* the power to hear and determine the suit, I have to state that this Court does not assume jurisdiction as a matter of course. In the instant matter, there is a comprehensive arrangement under the Church Constitution for *internal remedies*, prior to the invocation of the High Court's jurisdiction. Religious commitments and the related activities, involve peculiarities in respect of which the regular judicial process ought not to be the *first line* of dispute resolution; and this Court will allow room to the play of such internal remedies as may have been provided for. Guided by that principle, this Court will in general, allow for the *exhaustion of internal remedies*, before assuming jurisdiction, in respect of such matters. From the facts of the instant case, it is clear that the plaintiffs invoked the jurisdiction of this Court *before* exhausting the internal remedies; and this disentitles the plaintiffs to partake of the argument that the defendant had acquiesced in resolution by Court process.

From the facts emerging as common cause in this matter, the true gravamen of the plaintiffs now lies in the *past*, having been overlaid with a series of subsequent elections establishing *new reality*. For all practical purposes, the gravamen is spent, even though *Mr. Onjoro* urges that it should be so resolved as to discharge the several later elections, and the new reality which they established. There is no equitable basis for allowing such a prayer, and a Court of equity ought not to allow it.

I will make Orders as follows:

(1)The defendant's application by Chamber Summons dated 12th January, 2010 is allowed.

(2)The plaintiffs' further-amended plaint of 15th July, 2009 is struck out and dismissed.

(3)The plaintiffs shall bear the costs of the application of 12th January, 2010 as well as that of the suit by plaint of 15th July, 2009.

SIGNED at NAIROBI

J.B. OJWANG
JUDGE

DATED and DELIVERED at MOMBASA this 12th day of March, 2012.

.....
M.A. ODERO

JUDGE