



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 173 OF 2009

**JOSEPH KAMAU MWANGI &
OTHERS.....PLAINTIFFS**

VERSUS

**SIMON KIMANI MBITIRU &
OTHERS.....DEFENDANTS**

RULING

Coram: Mwera J.
Kamau for Plaintiff/applicants
Kariuki for Defendant/respondents
Court Clerk Kajuju

The plaintiff/applicants moved the court under sections 3, 3A of Civil Procedure Act for orders:

- i) that the court do order that elections be held of the Kiambu Branch of the African Independent Pentecostal Church of Kenya, including elections for the Local Branches, the Parishes and the Branch forthwith in accordance with the Church's Constitution.
- ii) that those elections be supervised by the Registrar of Societies or his duly appointed representative.

It was laid out in the grounds that on 11.12.09 the defendants were restrained by a court injunction from holding out or acting as officials of the Kiambu Branch of African Independent Pentecostal Church of Kenya, until the final determination of this suit. Consequently, the said Kiambu Branch has had no elected officials and that has affected the operations of the local churches – 30 of them in all. That the defendants filed an interlocutory appeal against the injunction order, C.A 30/2010, which has been pending since. Their stay application pending appeal was dismissed by the Court of Appeal, so for upwards of 2 years, the church membership in Kiambu has not had representatives duly elected by them at all. With a likelihood that court proceedings may take long, may this court order that there be elections.

One Karanja Mukiri (5th plaintiff) swore a supporting affidavit in line with the grounds above, only

adding that the injunction restraining the defendants from acting as if they were officials of the Kiambu Branch was made by Abida Aroni J. on 11.12.09. And that the stalemate at Kiambu has meant that that branch has no representation in what was called, the Central Board. The election by which the defendants purportedly came into office had since been nullified by the Registrar of Societies because the Church constitution had not been followed. And that was the basis of the injunction. All the plaintiffs are asking for are elections to bring in validly elected officials. May that be ordered now.

In a replying affidavit by George Njuriba Mukura (5th defendant), the court was told that the defendants were wrongly sued in their personal capacities and so this application was misconceived. Under the Church's constitution only the Central Board, not a party here, can call for elections. And with the injunction against the defendant still in place, there can be no elections or participation therein, without committing contempt of court. So the applicants should have those orders reviewed or set aside first to clear the way for election. The elections would then be held with fully affiliated churches and paid-up members participating. That the applicants had not demonstrated that they were paid up members of the church. In any case it is the duty of the applicants to hasten the final determination of this case. And no attempts had been made for an amicable solution.

In short submissions, each side appeared to reiterate what was contained in the affidavits.

In this court's opinion, it is the duty of the plaintiff/applicants to take the lead in seeing to a quick and final determination of the suit herein. It is not said that the appeal against the injunction orders has come in the way of preparing the suit for trial. There is no evidence on record or file that steps have been taken in line with Abida – Aroni Judge's injunction.

Then there is that injunction in place. The defendants' view which this court appears to agree with, is that any elections conducted or activity done will likely militate against that injunction. And that may land somebody in contempt of court. But of most crucial importance is the claim, not refuted, that only the Central Board of the Church, and not any of the litigating parties, can call elections. No party placed before this court or referred to the church's constitution's provision in that regard. But because the plaintiffs did not refute the position put forth by the defendants, the court is inclined to accept that only the Central Board can call elections. And that being so, and this court ever inclined to let private bodies run their affairs according to their governing instruments, it should be very slow to intervene e.g. in ordering the holding of elections.

The better option in this matter, and so that the Kiambu Branch Church membership does not continue to have no elected officials, is the one by which the plaintiffs take course to have injunction orders herein vacated/discharged, desirably by consent, then move the Central Board to call the elections needed in accordance with their constitution. This court is minded to believe that the Central Board must be watching with wonderment and concern the court wrangles going on in the Kiambu Branch and should be anxious to see them resolved for the good and benefit of the Kiambu church followers. And such anxiety and concern would come to an end for the benefit of all, if the parties ended their court cases and approached the Central Board to call/conduct the desired elections. And so it is recommended that the above course be adopted and put in place in the next 60 days i.e. the course of withdrawing the suit or, if not, vacating/discharging the injunction order so that all gives way to the Central Board to deal with the issue of elections.

Orders accordingly. And since the litigants belong to the same church and should not be seen to drift apart but should always try to come closer, each side will bear its own costs.

Delivered on 28.6.11.

J. W. MWERA

JUDGE