



**Pentecostal Assemblies of God Kenya (Through Its Registered Trustees) & 3 others v Elegwa & 4 others (Land Case 134 of 2017) [2022] KEELC 3500 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3500 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
LAND CASE 134 OF 2017  
FO NYAGAKA, J  
JULY 26, 2022**

**BETWEEN**

**PENTECOSTAL ASSEMBLIES OF GOD KENYA (THROUGH ITS REGISTERED TRUSTEES) ..... 1<sup>ST</sup> PLAINTIFF**  
**BERNARD AYEKA ..... 2<sup>ND</sup> PLAINTIFF**  
**ALLAN LIDAMBITSA ..... 3<sup>RD</sup> PLAINTIFF**  
**JOHN JUMA ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**JOSEPHAT OGOLE ELEGWA ..... 1<sup>ST</sup> DEFENDANT**  
**MICHAEL WAMALWA NALWELISIE ..... 2<sup>ND</sup> DEFENDANT**  
**RUTH SIKOLIA MAKONJO ..... 3<sup>RD</sup> DEFENDANT**  
**MARGARET MASITSA MUHALIA ..... 4<sup>TH</sup> DEFENDANT**  
**HUMPHREY MWOLE EGOSANGWA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

**The Application**

1. On January 12, 2022, the defendants filed an application by way of motion on notice dated January 7, 2022. They brought it pursuant to section 3A, 63(e) of the *Civil Procedure Act*, section 65(1), 67 and 69 of the *Evidence Act*, section 5 of the *Judicature Act* and article 50(1) of the *Constitution* of Kenya 2010, seeking the following prayers:
  - a. spent



- b. An order removing Kidiavai & Co Advocates from record herein as the advocate of PAG (K) the supposed 1<sup>st</sup> plaintiff without ever having been appointed or formally appointed by the executive committee of PAG (K).
- c. An order striking out from this suit the name of PAG (K) and/or the entire suit as all the documents and pleadings purportedly filed herein on its behalf, for reason of the suit having been filed without the knowledge and/or requisite authority of the executive committee of PAG (K).
- d. An order directing PW1 herein Patrick Lihanda to personally attend this honourable court and explain on oath whether when he attend this honourable court on February 16, 2021 and testified as the PAG (K) general superintendent, there were in force court orders by Hamisi PM's court (Hon Ogal, SRM in Hamisi SPMCC No 15/2019) and the High Court of Kenya (Musyoka, J in Kakamega High Court Constitutional Petition No 6 of 2018 and Kakamega Civil Appeal No 7 of 2020) barring him and 4 others (Richard Obwogi, Julius Rono, Parick Oyondi and Bowers Lihanda) from acting as officials of PAG (K), holding themselves out as official of PAG (K) or accessing and entering into the PAG (K) mission at Nyang'ori.
- e. An order finding that the said Patrick Lihand's attendance in this honourable court on February 16, 2021 as PAG (K) general superintendent and oath in his testimony introducing himself to this honourable court as the PAG (K) general superintendent amounted to perjury as well as disobedience of the aforesaid court orders: and whether the High Court at Kakamega (Musyoka J) by a ruling delivered on June 18, 2021 in Kakamega High Court constitutional petition No 6 of 2018 found that said Patrck Lihanda to have disobeyed the said court order and accordingly convicted him of contempt of court.
- f. An order reviewing and/or setting aside the consent order made by this honourable court on February 16, 2021 allowing the said Patrick Lihanda (as PW1) to produce in this court as exhibits, photocopies other than the original documents that was on the pretended ground that by the time he left Nyang'ori for Kitale in the morning the person with the key to his office at the PAG (K) headquarters has not arrived.
- g. An order directing one Antony Kenyakisa and one Patrick Oyondi to personally attend this honourable court regarding their letters herein to this court's deputy registrar dated April 21, 2021 and May 19, 2021 respectively, and state on oath the actual stand of PAG (K) (the supposed 1<sup>st</sup> plaintiff) on this suit, on the authority to file this suit in its name of PAG (K), on who are the current officials of PAG (K), and on being in force court orders by the Kisumu Chief Magistrate's Court (Hon Odawo, RM in Kisumu CMCC No 543 of 2018), the Kakamega Chief Magistrate's Court (Hon Wandere SPM in Kakamega CMCC No 100 of 2019) and the Hamisi PM's court (Hon Ogal, SRM in Hamisi PMCC No 15/2019).
- h. An order find that the said Patrick Lihand's (PW1) action of attending this honourable court on February 16, 2021 in the capacity of general superintendent of PAG (K), holding himself out to this court as the general superintendent of PAG (K), and testifying in this court as general superintendent of PAG (K) was in contravention, disobedience and contempt of court orders of the Kisumu Chief Magistrate's Court (Hon Odawo, RM in Kisumu CMCC No 543 of 2018) and the Kakamega Chief Magistrate's Court (Hon Wandere SPM in Kakamega CMCC No 100 of 2019).
- i. On the basis of prayer (g) (sic) but (h) above, an order punishing the said Patrick Lihand for lying on oath and committing perjury or directing the Director of Public Prosecution



and the Directorate of Criminal Investigation to charge him with the offence of perjury and disobedience to court order i.e court orders by Kisumu Chief Magistrate's Court (Hon Odawo, RM in Kisumu CMCC No 543 of 2018) and Kakamega Chief Magistrate's Court (Hon Wandere SPM in Kakamega CMCC No 100 of 2019).

- j. Costs of this application be in the cause.
2. The application was premised on twenty three (23) grounds on its face and further supported by the Michael Wamalwa Nalwelisie, the 2<sup>nd</sup> defendant's affidavit sworn on January 7, 2022. The grounds were that on February 16, 2021 one Patrick Lihanda attended and presented himself as the general superintendent of PAG (K) which is the purported 1<sup>st</sup> plaintiff herein and testified as PW1. Later on, by a letter dated April 21, 2021 signed by one Antony Kenyakisa the secretary of the PAG (K) church caretaker committee wrote informing the court that this suit was secretly filed by the said Patrick Lihanda through the firm of Kidiavai & Co Advocates and not the church's appointed advocates Ms Zablon Mokuva Advocate, appointed by the church on March 17, 2010.
  3. By the said letter the church wished to withdraw this suit. Following the said letter, one Patrick Oyondi wrote a letter dated May 19, 2021 signed by him as the general administrator of the PAG (K) church informing the court that the said Antony Kenyakisa was not an official of the church and that the said Patrick Lihanda was the general superintendent of the church. He then stated that the notice of intention to withdraw the suit be disregarded and Antony Kenyakisa be barred from interfering with the suit.
  4. The other ground was that the said Patrick Oyondi wrote the letter dated May 19, 2021 in total disregard of orders in Kisumu CMCC No 543 of 2018, Kakamega CMCC No 100 of 2019 and Hamisi PMCC No 15 of 2019 all of which barred Mr Patrick Lihanda, the said Patrick Oyondi and many others from transacting the business of the church. More particularly, in Kisumu CMCC No 543 of 2018 the court barred Patrick Lihanda from carrying on duties in and/or pertaining the PAG (K) church. In Kakamega CMCC No 100 of 2019, the court issued a permanent injunction against the said Patrick Lihanda from performing, operating or carrying out any duties on behalf of the PAG (K) as general superintendent, and that his and his co-defendants were unfit to hold office. In Hamisi PMCC No 15 of 2019, on August 5, 2020 the court barred Patrick Lihanda and his co-defendants from accessing and or entering the PAG (K) mission.
  5. Before then, the said Patrick Lihanda conducted elections of the church in defiance of the court orders. It was then contended that the said Patrick Lihanda and his co-defendants were contemptuous of court orders one of which was the one of February 16, 2021.
  6. It was argued further that on June 18, 2021 the High Court judge Musyoka J sitting in Kakamega Petition No 6 of 2018 found the said Patrick Lihanda to have disobeyed the court orders and convicted him of contempt of court. Thus, his actions kept undermining the authority of the court, circumventing justice and abusing judicial process, including telling lies on oath and performing perjury.
  7. The applicant then implored this court to find that disobedience of court orders was rampant and warranted stern action by the court. It was contended that Mr Patrick Lihanda testified on February 16, 2021 while clearly knowing that there were orders barring him from acting on behalf of the church. The other argument was that the said Patrick Lihanda did not present any single document in the original to the court since he knew that had since left Nyang'ori headquarters of the PAG (K) church.
  8. The applicant then pleaded with the court to establish the truth between the conflicting communication to court by Antony Kenyakisa and Patrick Oyondi so as to know who among the



authors was restating the true position of the PAG (K) church. The applicant called on the court to punish both Patrick Lihanda and Patrick Oyondi, for failure to disclose to the court that the said Patrick Lihanda had since left the PAG (K) headquarters and was barred by court orders from testifying in this or any other matter. They then urged this court to find that litigants must approach it with clean hands and good faith.

9. As stated, the supporting affidavit was sworn by Michael Wamalwa Nalwelisie. It repeated the contents of the grounds in support of the application. Thus, it is not necessary to repeat the same in terms of indicating the dispositions in the affidavit.

### **The Response**

10. The plaintiffs opposed the application in its replying affidavit sworn by one Aggrey Lucas Kidiavai on March 21, 2022 and filed on the same date. He deposed he was instructed by the general superintendent of the 1<sup>st</sup> plaintiff, the PAG (K). He annexed a copy of the instructions letter dated January 25, 2017. It was then that the suit was filed pursuant to the instructions. He then responded that the 1<sup>st</sup> plaintiff neither removed his office from the record nor moved the court to strike out its name from the suit. He then deposed that the defendants did admit in their pleadings that they were not an affiliate of the 1<sup>st</sup> plaintiff hence could not know the goings-on in the 1<sup>st</sup> plaintiff's affairs. He then stated that the defendants had no duty or right in law to choose for the plaintiff which advocates to represent them.
11. Again, one Rev Patrick Lihanda swore an affidavit on March 21, 2022 and filed it the following date. He stated in it that he was the general superintendent of the PAG (K) which was the 1<sup>st</sup> plaintiff. He stated that he was elected to the position in 2013 and his term was to lapse in 2018, after five (5) years. He then stated that in the 2018 election, there was a fierce contest and dispute. He then stated that he held the position by virtue of article 12 of the constitution of the church in a transitional manner. He attached to the affidavit a copy of the constitution and marked it as PL 1. He then stated that his mandate would come to an end when a new general superintendent would be elected.
12. He produced records from the Registrar of Societies to show that he still held that position and that by virtue of the constitution he was the spokesperson of the church. He stated that he had been condemned of perjury and contempt of several court orders and accused of lying on oath hence the instant application. He then relied on the principles of natural justice that that he needed to be given opportunity to defend himself. He then deposed that the application for contempt ought to be treated in a different way, equivalent to criminal processes. He relied on the constitutional protection under article 50 when one is presumed innocent until proven guilty, is accorded adequate time and facilities to prepare for his defence and choose to be represented by an advocate.
13. The said Patrick Lihanda stated that the acts complained of had been overtaken by events. He stated that the cases mentioned by the applicants occurred during his tenure. In relation to Kisumu CMCC No 543 of 2018, the court appointed a caretaker committee to take over the running of the PAG (K) church and resolve governance issues. The committee's mandate was to run for six (6) months, between August 3, 2019 and September 7, 2019 and it did nothing. That after the period lapsed the executive committee of the church resumed its duties to date.
14. In relation to Hamisi PMCC No 15 of 2019, the court restrained the respondents who included the deponent and their agents from entering into the PAG (K) missions station. He stated that the relief was that the ordered were to last from the date of institution of the suit until when it would be transferred to the Kakamega High Court Petition No 6 of 2018. That upon the transfer, the orders lapsed immediately. He urged this court to find that the applicant ought not to enjoy non-existent orders. He then deposed that by the time he testified on February 16, 2021 the Kakamega High Court



had rendered directions in the Petition No 6 of 2018 and the orders had become stale and incapable of being implemented.

15. In relation to the orders referred to in Kakamega CMCC No 100 of 2018 the deponent stated that he filed an appeal in Kakamega High Court Civil Appeal No 33 of 2020 and in the Appeal the judge stayed the orders. He attached to the Affidavit and order dated July 17, 2020 and marked it as PL 4. He explained that the order had neither been appealed against nor reviewed or set aside. He accused the applicants of lying and fabrications.
16. The deponent then accused the applicants of stating a fact that did not exist that there was anything of the sort of a caretaker committee under the PAG (K) church. About the contempt in Kakamega petition No 6 of 2018 he stated that the contempt the court found them guilty of was breach of an order barring them from carrying out any election.
17. He then stated that no court had barred him exercising the duties of the general superintendent. He accused the applicants of plotting with fraudsters to steal the property of the church. He accused the applicants of bringing the application in bad faith. He urged the court to dismiss the application.

### **Further Affidavit**

18. The 2<sup>nd</sup> defendant, with authority of the co-defendants, filed further affidavit on May 9, 2022 dated May 6, 2022. In it he deponed that the affidavit of the respondent only went to show their allegations about the commission of contempt by the respondent, having been convicted by the High Court in Kakamega. He then annexed to the affidavit the proceedings of the court on February 16, 2021. He stated that from the proceedings, it was clear that the applicant misled the court that he was the general superintendent of the PAG (K) and also that he denied on oath that there was an injunction subsisting preventing him from acting as general superintendent.
19. He accused the said Patrick Lihanda of being a serial contemnor. He then asked the court to summon Rev Patrick Lihanda, Patrick Oyondi and Rev Kenyakisa to court to clarify the correct position of the church. He stated that Patrick Lihanda did not oppose the application for summoning him to court. He then insisted that the said Patrick Lihanda having been convicted in Kakamega petition No 6 of 2018, he should not have continued acting as the general superintendent of the PAG (K) church. He accused Patrick Lihanda of forum shopping. He stated that his application was only designed to maintain the integrity of the court. He stated that disobedience of the court orders was a recipe for chaos.

### **Submissions**

20. Parties disposed of the application by way of written submissions. The defendants' submissions were filed on May 10, 2022 and further submissions on June 17, 2022. Rev Patrick Lihanda's submissions were filed on June 12, 2022. One Patrick Lihanda submitted that the issues raised in the said applications were basically whether he was general superintendent of PAG Kenya, and whether his appearance in court on February 16, 2021 and testifying on behalf of the PAG Kenya amounted to contempt of court.
21. Regarding the first issue, he stated that the position of the general superintendent was established by article 12(1) of the PAG Constitution. Article 12(5) sets out the term limit for the said office. He then relied on the transitional provisions about the transition of leadership from one office bearer to the other. He restated how he was elected in 2013 and his term ended in 2018 but continued to be an interim superintendent until a new officer was elected. He relied on the records held by the registrar of societies.



22. Patrick Lihanda submitted that the contempt finding in petition 6 of 2018 at Kakamega was in relation to the election that was conducted in the year 2018 when there was an order that barred the conducting of the election. It never in any way touched on his capacity of as the general superintendent or to hold the position. He then repeated what he had deposed in relation to Kisumu CMCC No 543 of 2018 *Tom Olendo v Patrick Lihanda*, Hamisi PMCC No 15 of 2019 *Stephen Karigu & another v Patrick Lihanda & Another* and Kakamega CMCC No 100 of 2018, *Gideon Kivisi & 3 others v Patrick Lihanda & 4 others*.
23. The defendants/applicants submitted repeating the contents of the affidavits in support and the grounds thereof of the application. I will not restate the submissions but will refer to them as I determine the application.

### **Analysis and Determination**

24. I have considered the application, the law relied upon, the affidavits both in support and opposition to the application. I have also considered the law and the submissions on record. The following issues arise for determination:
  - a. Whether the law firm of Ms Kidiavai & Co Advocates should be removed from record as advocates for PAG (K), the 1<sup>st</sup> plaintiff.
  - b. Whether name of the 1<sup>st</sup> plaintiff PAG (K) and the entire suit should be struck out.
  - c. Whether one Antony Kenyakisa and Patrick Oyondi should attend court personally to state who between them had authority to state the stand of PAG (K) on authority to file suit
  - d. Whether one Patrick Lihanda was in contempt of the court, testified against orders of the court and should be summoned and punished therefor
  - e. Who to bear the costs?
25. It is not gainsaid that the application prayed for a number of orders. In my view, some of them are outside the jurisdiction of this court to determine while others had the effect of condemning one or two parties or persons without them being heard. That would amount to breach of the principles of natural justice. To the extent that some of the persons named are being condemned unheard, the respective prayers that call for them to be punished or explain to the court what their position is should fail. I am not prepared to have individuals who were not enjoined as parties to the proceedings to be condemned unheard. Sad shall be the day when in the legal system shall be used to go against the all-important principle of natural justice that a party shall not be condemned unheard. Others are with considering on merit. Thus, I start with the ones wherein this court considers that they go to the jurisdiction of thereof.
  - a. Whether one Antony Kenyakisa and Patrick Oyondi should attend court personally to state who between them had authority to state the stand of PAG (K) on authority to file suit
26. I chose to begin with this issue because from the facts of the application before me, there appears to be a serious wrangle in the leadership of the church, by name PAG (K), as at the time of wringing this ruling. I used to read in the bible, and I do to date, that God advises his flock (the followers) that they ought to solve their disputes amongst themselves before they get to court (read Mathew 5:25). But I am beginning to understand and think that these are the last days of earth's history when selfishness shall rule even in the church and the love of many will wax cold: these are perilous times indeed (2 Timothy 3:1-5). Why the people who are led by the spirit of God, (if it is the same spirit) cannot sit and agree that the church needs to be united one and that it is God who appoints leaders and abases



some, more particularly in his church, the body of christ (1 Cor 12:27), is something left to all the leaders wrangling herein and in many other cases in Kisumu and Kakamega to ponder over. Woe unto the shepherds who destroy the flock and scatter the sheep (for their selfish interests) (Jer 23:1): their reward awaits them and their families.

27. That aside, to begin with I note that this suit was filed on July 28, 2017. That was long before the suits given as Kisumu CMCC No 543 of 2018, Hamisi PMCC No 15 of 2019, Kakamega CMCC No 100 of 2019 and Kakamega High Court Pet No 6 of 2018 were filed. Thus, as to whether or not the plaintiffs had authority to institute this suit, and thereby qualifying the allegation by the defendants/ applicants in their second ground that this suit was filed by the plaintiffs secretly and not by the church's appointed advocates by name Zablun Mokuwa advocate is a matter that predates the argument and can only be determined at the hearing on merit of the issue in the right forum - the court with the proper jurisdiction of the matter.
28. I thus, return to the issues before me. First, it was urged that one Antony Kenyakisa and one Patrick Oyondi be ordered to attend court to shed light as to the letters which they wrote regarding who among those they referred to and even between them had authority to carry out the instructions of the 1<sup>st</sup> plaintiff, PAG (K) church. It appears to me that this church has a number of problems in its leadership that need to be solved before the issue of property come in. This is from the myriad and speeds of cases filed about the leadership (as noted in the previous paragraph). It should be borne in mind that this court does not have jurisdiction to determine the leadership wrangles in the 1<sup>st</sup> plaintiff. That is a matter of the High Court and the subordinate courts thereto.
29. The jurisdiction of this court is clearly determined and provided for under section 13 of the *Environment and Land Court Act*, Act No 3 of 2012. Nothing in the provision clothes this court with jurisdiction to determine as to who between the wrangling parties has the authority to act for and on behalf of the 1<sup>st</sup> plaintiff and thereby to write or not to write letters in that behalf. As was stated in the case of *Peter Lai Muthoka v Standard Group* [2017] eKLR
- “Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of *The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR 1. Where Nyarangi J A held as follows:
- ‘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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’”
30. Since this issue about who has or does not have authority to act in this matter is all about leadership and the constitution of the 1<sup>st</sup> plaintiff, I cannot do anything more than down my tools in regard to prayer No (f) (sic) of the application dated January 7, 2022 but which should have been numbered as prayer No (g). I therefore do not find myself with the authority to summon the two persons named and determine who between them should or should have not authored the letters dated April 21, 2021 and May 19, 2021.
- b. Whether name of the 1<sup>st</sup> plaintiff PAG (K) and the entire suit should be struck out
31. This issue is directly related to the previous issue that I have determined. As I stated earlier on, this suit was instituted before the numerous cases pending before the Kisumu and now Kakamega courts were



instituted. The suits relate to the leadership of the church. From the material placed before me, it is unclear whether or not Kisumu CMCC No 543 of 2018 and Kakamega High Court petition No 6 of 2018 have been determined. To make finding on who had or did not have authority to institute this suit and thus strike out the name of the 1<sup>st</sup> plaintiff or the suit itself would be tantamount to this court wading into areas or jurisdiction that it does not have. The waters in that side are murky as it appears. Let the courts that have enough dredgers by way of proper jurisdiction deal with those issues. I therefore decline to determine this issue, whether at this stage or even hereafter. This court shall determine only the environment and land issues of the 1<sup>st</sup> plaintiff as and when they will be presented before it. I thus decline prayer No (b) of the application dated January 7, 2022.

c. Whether the law firm of Ms Kidiavai & Co Advocates should be removed from record as advocates for PAG (K), the 1<sup>st</sup> plaintiff

32. The determination of this prayer is simple. It flows from the previous two issues that I have considered. First, as to whether a party can or cannot determine which law firm appoints another party to represent them or the adverse party can choose to represent it, it is a matter that goes to the root of the constitutional principle of the right to be represented by counsel of choice. Article 50 (2) which provides for the rights of an accused person, and which includes, at sub-article 2(g), the right to choose and be represented by an advocate had been held to apply to civil matters. This was in the case of in *Tom Kusienya & others v Kenya Railways Corporation & others* [2013] eKLR, where Mumbi Ngugi J as she then was stated as follows:-

“However, I believe that the right to legal representation by counsel of one’s choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly articles 48, 50 (1) and 159(2)(a) of the *Constitution*, and it is only in exceptional circumstances that this right should be taken away.”

33. The Court of Appeal in *Delphis Bank Limited v Channan Singh Chatterjee and 6 others* observed as follows:

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.

34. I agree as much, with their lordships and ladyships. A party has the sole right to choose an advocate of their choice, unless it is expressly clear that there is a conflict of interest may arise by having the advocate on record. In this matter, it is only the 1<sup>st</sup> plaintiff which has the sole right to determine which lawyers should represent them. It is not open to the defendants to so do and it cannot be the case lest it be taken that the defendants want to appoint for the plaintiffs an advocate whom they will compromise or have acting as a puppet to just control at their whims. Again, as found in issue numbers (a) and (b) the issues of who had authority to represent the 1<sup>st</sup> plaintiff or not is a matter that squarely revolves around the issue as to who is the right party or official to represent the 1<sup>st</sup> plaintiff and thereby give instructions to counsel to represent the said party. Those are not issues that lie within the jurisdiction of this court. For the foregoing reasons, I decline to make a determination on prayer No (b) of the application. Consequently, I decline the grant of the prayer.

(d) Whether one Patrick Lihanda was in contempt of the court, testified against orders of the court and should be summoned and punished therefor



35. Since the prayers in relation to this issue revolve around allegations of disobedience of court orders, it would be apt to first look at the meaning, the provisions and import of the term contempt of court.
36. The applicants prayed that this court grants orders that one Patrick Lihanda attends this court in person to explain on oath whether when he testified in court when there were orders barring him and 4 others from doing so on behalf of the PAG (K) was not in contravention of the orders, a perjury and in disobedience of them hence contempt of court. He also prayed for an order setting aside the consent order made by this court on February 16, 2021, allowing the said Patrick Lihanda to produce copies of the documents he had as exhibits.
37. The prayer for setting aside the orders of February 16, 2021 was basically dependent on two points, that the said Patrick Lihanda did not have capacity to tender evidence and or was barred from testifying in this or other matter on behalf of the PAG (K) church, and that he pretended that on the morning he came to testify in court the person who had the keys to the office where the originals were had not arrived to open for him to take them. In my view, no material has been placed before me regarding the second limb of the argument to justify the contention that the said witness PW1 pretended that the person who had keys to the office had not arrived by the time the witness came to testify before the court. The first limb of the argument will depend on whether or not the court finds that the said Patrick Lihanda did not have permission to give evidence on behalf of the church. This court will delve into that shortly from now. Be that as it may, regarding setting aside of consents, the law is clear that it can only be done if it is shown that the same was procured by fraud, mistake, illegality or error that goes to its root. On this, I am guided by the case of *Kericho Guest House Enterprises Limited v Kenya Breweries Limited* [2018] eKLR which cited with approval other Court of Appeal decisions. I reproduce the relevant text therein as follows:

“23...in *S M N v Z M S & 3 others* [2017] eKLR, the Court of Appeal stated as follows:

“17. There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.”

24. The court went on to cite with approval various cases on grounds for setting aside consent judgment and orders as follows:

“18. We may highlight a few of the authorities to illustrate the approach attendant to the issue at hand:-

In *Flora N Wasike v Destimo Wamboko* [1988] eKLR this court stated:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*”

In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons..”.



See also *Hirani v Kassam* (1952) 19 EACA 131, at Page 134; *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 at 269 and *Seaton on Judgments and Orders* (7th Edn), Vol 1, at Page 124.

19. In *Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd* [1982] KLR 485, Harris, J correctly held, *inter alia*, that -

“1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

25. In *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR, the Court of Appeal stated as follows:

“A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of court.”

26. Finally, in *Setton on Judgments and Orders* (7<sup>th</sup> Edn), Vol1 pg 124 the author states that:

“*prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

38. In essence, the point to be drawn from the long extract of the ruling by my sister Mumbi Ngugi J (as she then was) is that for a party to successfully apply to set aside consent orders or judgment he/she has to bring himself within the framework or parameters of setting aside a contract. These include meeting the requirement of showing that the consent was obtained by obtained by “...fraud, or collusion or by an agreement contrary to the policy of court.” This has not been demonstrated by the applicant, at least regarding the reason they gave that PW1 pretended. Pretence is not any one of those parameters. In any event it was not successfully demonstrated that the said witness pretended before the court that he did not try to access the office but the person with the keys was absent.

39. Turning to the allegation of Patrick Lihanda being in contempt of court, I start by defining the term “contempt of Court”. In Brian A Garner in *Black’s Law Dictionary* (Eleventh Edition) Thompson Reuters, 2019 the term is defined contempt of court as:-

“contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

40. In the case of *Hadkinson v Hadkinson* (1952) 2 All ER 567, it was held that:

“It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.



The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.” (also see the case of *Katsuri Limited v Paurchand Depar Shah* (2016) eKLR).

41. It is well settled and is clear that every person to whom a court order is directed should obeyed as it is. He can only be excused if he comes back to the court and is given express permission not to, by virtue of the order being varied or set aside. Absent of that he has to obey it irrespective of how hard it is to do so. One has to obey it, regardless of whether it is or is not regular. He can only obey and raise a challenge to it if he so wishes or he successfully applies to stay the same.
42. The power to punish for contempt of court, in courts of this level, is generally provided for under section 5 of the *Judicature Act*, chapter 8 of the Laws of Kenya. However, the legislature has tried to give the courts established under specific statutes the power to punish for contempt of court. There exists an avalanche of case law on the powers of the court to punish such conduct. For this court, the power is given under section 29 of the *Environment and Land Court Act* which stipulates:

“....Any person who refuses, fails or neglects to obey an order or direction of the court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
43. It goes then that any party, whether served with a court order or not, is bound to obey it provided that he has knowledge of the existence of the order. A court of law does not issue orders in vain: such orders ought to and must be obeyed, respected and or fulfilled.
44. Regarding the obedience of orders of the court, in the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR the court emphasized as follows:

“Article 159 of the *constitution* recognizes the judicial authority of courts and tribunals established under the *constitution*. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the *constitution* and the law (article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.

In *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015). Nkabinde, j observed that:-

“The rule of law, a foundational value of the *constitution*, requires that the dignity and authority of the courts be upheld.

This is crucial, as the capacity of courts to carry out their functions depends upon it. As the *constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere



mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

In the case of *Canadian Metal Co Ltd v Canadian Broadcasting Corp*(No 2) [1975] 48 DLR(30), the court stated that;

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrong can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in *Carey v Laiken* [2015] SCC17 that;

“contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect”

It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (*Louis Ezekiel Hart v Chief George 1 Ezekiel Hart* (-SC 52/2983 February 2, 1990). And in *Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another* [2014] eKLR, the court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.”

45. Therefore, I am guided by the wisdom in the above holding. And therefore, having laid the basis for understanding why courts in Kenya can punish for contempt of court orders, I now turn to address the issues raised herein.
46. I must then consider the issue before me now with analyzing the merits of the application, the facts in relation to the three suits that the applicants complain that the orders that were issued therein that the respondent is alleged to be in contempt of needs to be carefully scrutinized. I have looked at annexure PL 4 of the affidavit sworn by Rev Patrick Lihanda on March 21, 2022. It is an order emanating from the High Court in Kakamega Civil Appeal No 33 of 2020. It was given on March 17, 2020. Paragraph 2 thereof states that “The proceedings in Kakamega CMCC No 100 of 2019 stand stayed.” It follows that if there was any order that emanated from Kakamega CMCC No 100 of 2019 which affected the



status and position of the said Patrick Lihanda in PAG (K) church, the same was stayed and could not be capable of being breached.

47. In regard to the alleged orders given in Hamisi PMCC No 15 of 2019, it is my view that, first, the said order which was issued on August 5, 2019 and annexed to the application before me was clear. I reproduce the relevant part thereof, “2. To maintain the substratum of this suit, it is hereby ordered that pending the transfer of this suit to the High Court in Kakamega, the defendants are hereby restrained from accessing and or entry into PAG mission station whether by themselves and or through their agents. ... 4. The matter be mentioned on the September 24, 2019 to confirm compliance with the above orders.” All that was stated in the order was that the injunction was to last the process of transfer of the suit to the High Court in Kakamega. In any event the suit was to be mentioned on September 24, 2019 to confirm compliance. The questions that arise from the order are? Was the file ever transferred to the High Court in Kakamega? Was the said suit mentioned before the court on September 24, 2019? If so, what further orders were given by the court? The applicant did not answer these questions by presenting to the court enough material to sufficiently support their application so as to firm their allegation of the conduct of one Patrick Lihanda being in breach of the order. In law, he who alleged proves. Thus, the applicant failed to prove that allegation. However, even assuming that whatever scanty evidence the applicant placed before this court called for an answer from the respondent, the affidavit sworn by Patrick Lihanda on March 21, 2022 provides an answer sufficient to dislodge the allegation of breach of the court order. At paragraphs 24 of the Affidavit, he states that the Hamisi PMCC No 15 of 2019 court file was transferred to the Kakamega High Court and bound with the High Court Petition No 6 of 2018.
48. This court is prepared to and does believe the deposition by Mr Lihanda for two reasons. First, it was not responded to through and in the further affidavit sworn by one Michael Wamalwa Nalwelishe on May 6, 2022 and filed on May 9, 2022. All that the said deponent did was to go on an untargeted attack on the averments by Rev Patrick Lihanda that he was being in constant contempt of court, among other improprieties. Secondly, the suit in Hamisi PMCC No 15 of 2019 was to be mentioned in September. There is no indication whether or not the orders issued earlier by the said court were extended on that date. This court is left to imagine that such orders would be in existence from then to February 16, 2021 and therefore that the said file was never transferred to Kakamega High Court. It would be stretching the imagination of this court too far to think and hold so.
49. The last of the order allegedly breached by Rev Patrick Lihanda was the order issued in Kisumu CMCC No 543 of 2018. The order was annexed and marked as MWN 3. It was issued on March 8, 2019. I have carefully considered the orders issued by the court in the suit. To me the orders were clearly condition upon fulfillment of the 3<sup>rd</sup> condition in the order. While the said orders referred to being in force pending the hearing and determination of the suit, the 3<sup>rd</sup> condition stated as follows, “for avoidance of doubt, to the complete exclusion of ..... the exclusive caretaker executive committee for a period not exceeding six months from the date hereof..... and shall exercise such powers as those conferred to the executive committee of the PAG committee until further orders of this court.”
50. I consider the orders of the court issued on the material date from the prism of two perspectives: namely, that the court itself was clear that it appointed a committee to manage the affairs of the church for a period “not exceeding” six months. What happened after the six months? Was the life of the caretaker committee extended or it expired? If it expired, and the suit still pends, then which body was mandated to conduct the affairs of the church? Secondly, was the injunction to be permanent one? I mean to ask whether it was to be eternal in nature. In my view, an injunction was issued on March 8, 2019. Order 40 rule 6 of the *Civil Procedure Rules, 2010* applicable in the circumstances. It reads, “Where a suit in respect of which an interlocutory injunction has been granted is not determined



within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.” Given that the 3<sup>rd</sup> limb of the orders of the court was conditional upon the caretaker committee running the affairs of the church for six months and after that the court was to issue “further orders”, it was incumbent upon the applicant to show to this court, in the application, what further orders of the court were issued after the six months or thereafter so as to demonstrate that the injunction was in place by the February 16, 2021 when the said Rev Patrick Lihanda testified before this court. In any event, as would be said from order 40 rule 6, above cited, an injunction once issued lasts for only or lapses after the end of 12 months unless for any sufficient reason the court orders otherwise. The applicant did not place before this court material to make this court find that the court in that matter was given sufficient reason to order otherwise than that the injunction lapsed. What this court is stating is that the applicants did not show that the lower court extended the injunction beyond 12 months. And 12 months ended on the March 7, 2020. This was almost a year before Rev Patrick Lihanda testified before the court. Thus, I am unable to hold that the said Patrick Lihanda breached the orders of the court in as given in Kisumu CMCC No 543 of 2018 when he testified on February 16, 2021. I am also unable to be prepared to set aside the orders of consent of February 16, 2021 as prayed for in prayer No (e) (sic) of the instant application.

51. The upshot is that the entire application dated January 7, 2022 is wholly unmeritorious, vexatious, an abuse of the process of the court and is hereby dismissed with costs to the respondents.
52. This suit shall be mentioned on October 6, 2022 for directions regarding further hearing.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 26<sup>TH</sup> DAY OF JULY, 2022.**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

