



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Case 187 of 2009

WYCLIFFE GANIRA ::::::::::::::: PLAINTIFF/APPLICANT
V E R S U S

REV. ELIJAH SHIVAYIRU ::::::::::::::: 1ST DEFENDANT
JOHNSTONE INAWEDI ::::::::::::::: 2ND DEFENDANT
LUKA JALEGA ::::::::::::::: 3RD DEFENDANT
JOHNSON NGONERA ::::::::::::::: 4TH DEFENDANT
ANDREW OKILA ODONGO ::::::::::::::: 5TH DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The suit herein was filed on 10.12.2009 by the Plaintiff church “suing through Reverend Dr. Wycliffe Ganira for and on behalf of its members.” Certain orders were sought but in the meantime, by a Notice of Motion dated the same day as the Complaint, the Plaintiff sought orders inter – alia that the notice of institution of the suit be given by pinning the same on all notice boards of all churches affected by the suit; that **RMCC NO.83/2009 (Hamisi)** be stayed; and that the dispute be referred to the Appeals and Arbitration Tribunal established under Article 28 of the Plaintiff’s constitution. An amendment to the Motion was made on 11.12.2009 and another pending suit in **Maseno SRMCC NO.189/2009** was sought to be stayed.

2. Before me is a Notice of Preliminary Objection dated 7.1.2010 and framed as follows:-

“TAKE NOTICE, that the defendants/respondents shall raise a Preliminary Objection before the hearing of the application 10th December 2009 and before the hearing of the aforesaid suit seeking orders to strike out both the suit and the application on the ground that:-

1. ***The plaintiff Reverend Dr. Wycliffe Ganira is without the necessary Locus Standi to bring this suit and or prosecute the same for and or on behalf of or in the name of Pentecostal Assemblies of God (K) or its members or at all.***
2. ***The suit is bad in law and incompetent for non-compliance with the requirements of Order 1 Rule 8 of the Civil Procedure Rules and the applicable laws.***

3. *The suit together with the application is contrary to and does not satisfy the requirement and or the spirit of Order VII Civil Procedure Rules.*
4. *The suit and the application do not fall within and does not satisfy the Provisions of Arbitration Act No.4 of 1995 or the Laws applicable to arbitration in general.*
5. *This Honourable Court is bereft of the necessary jurisdiction to entertain the application and or the suit nor grant the reliefs or at all save for the powers to strike out the same.*
6. *The suit and the application amounts to an abuse of the process of this Honourable Court.*

3. At the hearing of the Objection, Mr. A. B. L. Musiega, learned advocate for the Defendants/Respondents abandoned grounds 1 and on ground 2, his argument was that Reverend Dr. Ganira should have sought legal authority to file suit under **Order 1 Rule 8 (1)** of the Civil Procedure Rules and once he failed to do so, then the suit was rendered incompetent ab initio and should be struck off.

4. On Ground 3, the argument made was that since in the verifying Affidavit, an admission is made that there are other pending suits in respect of the present dispute, then **Order VII Rule 1 (e)** of the Civil Procedure Rules was breached and the present suit cannot proceed to hearing.

5. On Ground 4, that since other suits exist, and they were filed before the Arbitration Act, 1995 was enacted then the Act cannot apply to the dispute and the orders sought in that regard cannot be granted.

6. The argument on ground 5 is that this court has no jurisdiction to entertain the suit in view of the pending suits and also because there are certain orders of injunction issued in **Hamisi SRMCC 83/2009** and they bind the Plaintiff as well as the 1st – 4th Defendants. That under **Section 6** of the Civil Procedure Act, this court cannot arbitrate on the same dispute while the subordinate courts are also seized of the same.

7. In a nutshell, the Defendants pray that the suit herein and consequently the Application dated 10.12.2009 and amended on 11.12.2009 should be struck off and the Plaintiff should seek a remedy elsewhere.

8. The response by Mr. Aboge, learned advocate for the Plaintiff is that firstly, leave to sue in a representative capacity was given to Rev. Dr. Ganira by Chitembwe J. on 11.12.2009. Learned advocate relied on the decision of Githinji J. (as he then was) in **Brollo Kenya Ltd. vs Ondattu & 3 Others [1989]KLRR 553** and that decision relates to a suit against a Defendant sued in a representative capacity and the decision was that a Plaintiff suing in a representative capacity need not in any event seek leave to institute such a suit.

9. Secondly, that because of the arbitration clause in the Plaintiff Church's constitution, the subordinate courts have no jurisdiction to entertain the suits pending before them and reliance thereon is placed on Section 10 of the Arbitration Act No.4 of 1995 and that only Section 7 of the Act gives the High Court power to give ancillary

relief as an interim measure of protection pending arbitration.

10. Lastly, that the objection is misguided and should be overruled with costs.
11. Guided by the decision in **Mukisa Biscuits vs Westend Distributors Ltd. [1969] E.A. 696**, the issues raised herein are pure points of law which if upheld would put the whole suit to rest.
12. I have therefore read the record in this matter and I note that on 11.12.2009, Chitembwe J. gave orders inter – alia that;

“The applicant is granted leave to institute this suit and should advertise in one of the local dailies as well as posters as prayed in prayer (c).”

13. That order cannot now be challenged by way of a preliminary objection and reading the decision **in Brollo Kenya Ltd** (supra), the provisions of **Order 1 Rule 8 (i)** of the Rules have been complied with and the objection in ground 2 is quickly overruled.

14. On Ground 3, **Order VII Rule 1 (e)** of the Civil Procedure Rules provides as follows;

That a party instituting a suit must make;

“an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.”

15. The above Rule was inserted by Legal Notice 36/2000 and so far as I know, it was intended to deter litigants who in frivolity, file multiple suits in different courts over the same dispute. I have read the Plaintiff in **Hamisi RMCC NO.83/2009** and the dispute in that case relates to the running and management of thirteen P.A.G. churches within Shamakhokho area and the 1st – 4th Defendants are the Plaintiffs therein while the present Plaintiff Rev. Dr. Ganira is named an “Interested Party.”

16. In **Maseno SRMCC NO.189/2009**, the 5th Defendant in this suit is the Plaintiff while the Rev. Dr. Ganira is sued with 4 others on behalf of the church as Defendants. In that suit a Notice of Preliminary Objection was filed on 10.9.2009 seeking to have the dispute referred to arbitration, the same issue being raised in the present suit. The dispute in the suit is with regard to the validity of elections held at Hobunaka P.A.G. – Kenya.

17. With that background in mind can this suit be said to be contravention of the Rule cited above? This suit seeks orders that the two suits pending before the subordinate courts in Hamisi and Maseno respectively should be declared unlawful, null and void and that the dispute be referred to arbitration. That pending such arbitration, the Defendants should be restrained from interfering with the smooth running of the Plaintiff Church in perpetuity.

18. To my mind, the present suit is misguided and contravenes not just **Order VII Rule 1 (e)** but specifically **Section 6** of the Civil Procedure Act which section provides as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue

is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation – The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

19. I have elsewhere above stated that the present suit seeks to declare void the suits pending before the subordinate court and to refer the dispute to arbitration. However, all those issues can be raised and can be addressed by the subordinate courts including on whether those courts have jurisdiction or not. There is no exclusive jurisdiction granted to this court in respect of those matters and yet there is no appeal against any decision of the subordinate courts in the same regard. The interim measures that the High Court can mete out under **Section 7** of the Arbitration Act would be applicable where a party comes for protection “*before or during arbitration proceedings*” but in this case no such direct protection has been sought and I say so because in the Notice of Preliminary Objection before the Maseno SRM’s Court in fact all the issues in contest before me have also been raised there and both the Maseno and Hamisi courts can competently handle the same without this court usurping their lawful roles.
20. My views above would therefore effectively address the issues raised in Grounds 3, 4 and 5 above and that being the case, I can only add that the Plaintiff had more than one remedy in law but chose the wrong route to this court and is now stuck in the mudtracks of the law. What then should I do with the suit?
21. I am convinced that the suit is improperly before this court and to stay it would serve no lawful purpose. Let the Plaintiff address all the pending issues in the subordinate court and in the meantime, I will accede to the objection and strike out the entire suit with costs to the Defendants.
22. Orders accordingly.

Delivered, dated and signed at Kakamega this 15th day of April, 2010

ISAAC LENAOLA

J U D G E