



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU
Civil Case 107 of 2008

DR. JULIUS OKELLO KUNGU

HESBON OTHIENO OMANJO

(Suing on behalf of the members of1ST PLAINTIFF

Evangelical Christ Church of Africa) 2ND PLAINTIFF

VERSUS

JOHN HENRY TULU 1ST DEFENDANT

MESHACK TUJU ROCHE 2ND DEFENDANT

MARGARET ADHIAMBO MBASA 3RD DEFENDANT

CLERKSON ODHONG JIENDA 4TH DEFENDANT

MAURICE OKELLO 5TH DEFENDANT

NELSON OCHIENG MARIMU6TH DEFENDANT

ANDIEGO ODHIAMBOZ 7TH DEFENDANT

PAUL ABUTO MAINA 8TH DEFENDANT

RULING:

The plaintiffs are officials of the Evangelical Christ Church of Africa [ECCA] in which the defendants are members.

It is contended that the church is registered under the Societies Act and that the plaintiffs are its vice-chairman and treasurer authorized by other officials to file this suit on behalf of the church. It is further contended that the church is governed by a constitution which provides that the retirement age of all clergy shall be 75 years except the presiding bishop who shall retire at the age of 80 years provided that the diocesan welfare committee shall come up with proposals, on how to handle retirement benefits for all clergy. Consequently, the executive committee of the church gave a notice to the first, fourth and sixth defendants that their retirement age had matured and on the 24th September 2008 the governing council of the church resolved that the said defendants and specifically the first defendant go on a 30 days leave pending retirement. However, the first defendant declined and engaged in unlawful activities in resistance and with the connivance of the rest of the defendants.

The plaintiff therefore filed this suit praying for a declaration that the first, fourth and sixth defendants have attained the

retirement age and must retire by 1st January 2009, a permanent injunction restraining the said first, fourth and sixth defendants from acting or holding themselves as clergy and officials over the Evangelical Christ Church of Africa (ECCA) and an order that the defendants actions are *ultra-vires* the constitution and they should be compelled to return all the property of the church.

At the time of filing the suit, the plaintiffs also filed a chamber Summons for a temporary injunction to issue against the defendants restraining them from conducting, carrying on transaction, presiding over, controlling or in any way running the business and the works of church pending hearing and determination of the application.

The said chamber summons was filed on 10th November 2008, but is undated and unsigned. However, there is a pending application by the plaintiff's dated 2nd December 2008, to have the irregularity corrected.

The court granted interim orders in favour of the plaintiffs on the 10th November 2008, and the same were extended on 24th November 2008 to the 8th December 2008, when the Court ordered that the status quo be maintained pending the hearing of a preliminary objection filed on the 5th December 2008, by the first second, fourth, fifth and eighty defendants who filed a statement of defence dated 20th November 2008, denying the allegations made against themselves by the plaintiffs and most importantly denying this Court's jurisdiction to try the suit.

The preliminary objection from the submissions made by Mr. P. Otieno appears to be grounded on paragraph 11 of the defence which indicates that the jurisdiction of this court is expressly ousted by Article XVI and XVII of the material church Constitution. Mr. Otieno urged this court to uphold the objection and have the suit struck out. He relied on the decisions in **Hinga & Another Vs. P.C.E.A thro' Rev. Dr. Njoya and Another (1986) KLR 317, Kimani Ngunjiri Vs. David Manyara Civil Case No. 59 of 2005 at Nakuru and Raytheon Aircraft Credit Corporation & Another Vs. Al-Faraj Ltd. C (Appl. No. 29/99 C/A Nbi.**

In response, the plaintiffs through Mr. Mwamu argued that the Church' Constitution annexed to their application does not contain the said Article XVI and therefore the jurisdiction of this Court is not ousted. In any event, Mr. Mwamu argued, that the preliminary point raises issues of fact and not law and that this court has jurisdiction to hear and determine this suit. He relied on the following decisions to fortify his arguments and contention that the issues raised herein are justiciable: **Gathura VS. African Orthodox Church of Kenya (1982) KLR 357, His Holiness the 2nd Pope Wilson Petro Owino Obimbo & Others Vs. Cardinal Dean Lawrence Pius Chiaji & Others HCCC No. 161 of 1999 (KSM) and Nomiya Church of Gospellers Vs. Joel Achila Muma & Another HCCC No. 130/01 (KSM).**

Basically, the practice of raising preliminary objections has always been frowned upon by the Courts.

Indeed, in the well known case of **MUKISA BISCUITS MANUFACTURING CO. LTD. VS. WEST END DISTRIBUTIONS LTD [1969] E.A. 696,** the following was stated:-

“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 raised a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has 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 issues, this improper practice should stop.”

In this case, however, the point raised by the defendants regards the jurisdiction of this court to deal with the dispute. The point is paramount and capable of disposing off the matter without the necessity of a hearing. It is often said that jurisdiction is everything. It is the power which enables the court to deal with and adjudicate on a matter at hand. The defendants' challenge of this court jurisdiction to deal with the present matter is premised on facts which would necessarily require evidential proof and more so, considering the plaintiff's contention that the constitution of the Evangelical Christ Church of Africa (ECCA) on which the preliminary objection is based does not contain the alleged Articles XVI and VII which allegedly have the effect of ousting this court's jurisdiction in the matter. The plaintiff's annexed a copy of the Constitution in their application dated 10th November 2008, which copy runs upto thirteen (13) pages and contain the last Article XII (12). It is marked annexure “JOK 2”.

In their replying affidavit dated 21st November 2008, the defendants annexed another copy the Constitution (annexure marked “T-1”) running upto twenty six (26) pages and containing the last Article XXIII. This is the copy containing the material Articles XVI and XVII (16 & 17) indicated in paragraph eleven (11) of the statement of defence and forms the foundation of the preliminary objection.

The validity or otherwise of any one of the two sets of the Constitution of the Evangelical Christ Church of Africa is a

matter of evidence at the full hearing of the suit. To that extent, the present objection was unnecessary and a waste of costs.

Nonetheless, the said Article XVI provides for a tribunal to adjudicate on any dispute or complaint relating to a Bishop, Priest, Deacon or any lay person.

Article XVII provides for the discipline of the Church and makes it clear that the disciplinary action of the church has nothing to do with the jurisdiction of an earthly court.

Under Article XVI, the tribunal would be setup by the Diocesan synod which determines its composition, rules and procedures or the service of ecclesiastical discipline.

In effect the aforementioned articles establish a system and mechanism of resolving disputes involving members arising within the church.

The present dispute ought therefore fall within the ambit of the church's tribunal if the constitution exhibited by the defendants is the correct and lawful document. However, whereas this Court would subscribe to the notion that internal or domestic disputes involving a church body or any other body would best and conveniently be left to the body's dispute resolution mechanism, the Court is not prepared to accept the notion that it lacks jurisdiction to handle such matters as this would be going contrary to S.60(1) of the Constitution of Kenya which grants the High Court unlimited jurisdiction to adjudicate on any matter arising in God's good country of Kenya.

The existence of internal mechanism for resolving disputes would not bar an aggrieved party to resort to the earthly courts so long as the dispute is justiciable.

Whether or not the present suit is justiciable may become apparent at the hearing stage.

A society registered under the Societies Act (Cap 108 LOK) would invariably come under the purview of this court's jurisdiction. Consequently, the defendant's present objection is unmerited and dismissed with costs.

Read and Signed this 23rd day of January, 2009.

Order:

Interim Orders extended accordingly.

J. R. KARANJA

JUDGE

J.R.K./mo