



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 908 of 2006

VERY REV. PETER KARANJA ..... 1<sup>ST</sup> APPLICANT/ 1<sup>ST</sup> DEFENDANT

ALL SAINTS CATHEDRAL CHURCH....., 2<sup>ND</sup> APPLICANT/ 2<sup>ND</sup> DEFENDANT

**versus**

ALICE WAHITO NDEGWA ..... RESPONDENT

**RULING**

This is an application by way of a Notice of Motion brought under section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules praying for the following Court orders: -

- “ 1. **THAT this suit be stayed and the issues arising in the suit be referred to arbitration or mediation.**
2. **THAT the arbitrator(s) be appointed in such manner as may be agreed upon by the parties.**
3. **THAT all necessary and consequential orders and/or directions be given.**
4. **THAT the costs of this application be in the cause.”**

The application is filed by the two Defendants in this suit. The Respondent is the Plaintiff in the suit. Although the Notice of Motion has avoided use of the terms “**Applicant**” and “**Respondent**” I will herein after in this ruling be referring to the two Defendants as the “**Applicants**” while referring to the Plaintiff as the “**Respondent**” Much has been said by both counsel, Mr. P.M. Gachuhi for the Applicants and Mr. S.W. Ndegwa for the Respondent, during their respective submissions before me at the time of hearing this application and I am very grateful to the two learned counsel. I have, however, decided to be brief in this ruling and this means that I will not have to touch on every point they raised.

This application is filed in a civil suit filed by the Plaintiff against the Defendants in this court

because the Applicants feel the Respondent should not have taken the relevant dispute to a secular court of law. Instead she should have gone for a settlement of the dispute by “**wise and experienced members within the Christian Fellowship**” in accordance with Article XXVI 2 (c) of the Anglican Church of Kenya Constitution otherwise known as the Provincial Constitution.

There is no dispute that the Respondent considers herself as a member of the Anglican Church of Kenya. It is therefore the contention of the Applicants that as a member of the Anglican Church, the Respondent is bound by the provisions of the Provincial Constitution which bars members from going to secular law courts against one another and provides that all disputes between Christians should be settled by wise and experienced members within the fellowship. The Applicants believe that in light of the facts arising from the Respondent’s pleadings and the aforesaid provisions of the Anglican Church constitution, secular law courts lack the jurisdiction to determine the issues arising between the parties in this suit.

It is submitted by applicants that the suit in which this application is filed arises from the Respondent’s allegations that she was barred from reading the scriptures at a Sunday service on 25<sup>th</sup> April, 2006 at the second Respondent Church. According to the Applicants therefore, scripture reading at a Church service is a solemn act of worship. It concerns spiritual observance and conduct. Such matters, or the consequences that may flow from the actions taken by a priest, ought to be dealt with in accordance with the church’s constitution, laws and regulations.

In her plaint filed in this court to kickstart this suit, the Respondent states that on or about 25<sup>th</sup> April, 2006, she was barred from reading the church readings despite her name appearing on the day’s church bulletin and her being present in the church ready to go and read. While admitting that she is bound by provisions of the Provincial Constitution, the Respondent says that compliance with that constitution should be done only “**in so far as the same are in consonance with the laws of the land;**” that although the church constitution is in place, the same should be subject to the laws of the land, in particular, the constitution, to protect the dignity of private citizens such as the Respondent. She avers that “**it is unconstitutional for the defendants to purport to oust the jurisdiction of the court**” and the Respondent therefore vigorously opposes this application submitting that if granted, the result will create a situation where the prosecutor will be the Judge, at the same time, in the same subject matter, thereby resulting into a failure of justice.

Parties blame each other for having failed to respond quickly or appropriately to previous correspondence or steps taken aiming at an amicable settlement. Some of the letters have been exhibited, the effect being the present situation – where, clearly the parties, now in a secular law court, do not agree that this case be stayed and the issues arising be referred to arbitration or mediation. The parties do not agree.

But as I take everything that was brought to my attention into consideration, I find there is no dispute that the current constitution of this country exists and that all Kenyans ought to owe allegiance to that constitution. The said constitution recognizes that when it comes to matters of faith or religion, the ecclesiastical law will be observed. That is why there is freedom of religion or belief protected in section 78 of that constitution. There should be no conflict. Matters of faith in the Anglican Church should therefore be dealt with by the Anglican Church.

To avoid conflict between the law of the land and ecclesiastical law, however, there is need to distinguish what is a matter of faith from what is not a matter of faith. Simply saying that a dispute is between Christians or between faithfuls and should therefore be dealt with under the concerned faith’s law is not sufficient. What is not a matter of faith, even if it is a dispute between Christians of a particular denomination, should not be dealt with under that denomination’s ecclesiastical law.

I have in mind one example. A member of the Anglican Church in Kenya murders another member of the Anglican Church in Kenya. Is the case dealt with under the Anglican Church Provincial Constitution? Clearly the answer is negative and it is because that act of murder is not a matter of faith between those two members of the Anglican Church.

In the instant case therefore the parties, and I say this with all due respect, ought to be careful in distinguishing what is a matter of faith from what is not a matter of faith. When I say parties I am not excluding their advocates. In fact advocates come to the forefront.

Before looking at another important issue of whether or not the jurisdiction of secular courts of law is being ousted by the constitution of any religion, an issue I am not going to discuss in this ruling, simply look at the plaint the Respondent has filed. Clearly what she talks about in paragraph five of the plaint dated 22<sup>nd</sup> August, 2006 is a matter of faith. It states as follows:-

**“On or about the 25<sup>th</sup> day of April, 2006, the Plaintiff was barred from reading the Church Readings despite her name appearing on that day’s Church Bulletin and the Plaintiffs being present in Church.”**

To that, the Applicants in paragraph three of their affidavit dated 6<sup>th</sup> September, 2006 in support of this Notice of Motion (the Application), have correctly responded as follows:-

**“THAT scripture reading at a church service is a solemn act of worship. It concerns spiritual observance and conduct. I verily believe such matters or the consequences that may flow from the actions taken by a Priest ought to be dealt with in accordance with the Church’s constitution, laws and regulations.”**

In view of the contents of that quotation, Mr. Gachuhi stated as follows in ground number three supporting the Notice of Motion:

**“Whether the plaintiff should have been barred or not from reading the scriptures is solely a spiritual matter and this court lacks jurisdiction to determine it.”**

All that having been said on the part of the Applicants, the Respondent when before me seemed to have lost his ground and seemed agreeing with the Applicants that the question or issue the court was going to determine in this suit was: -

**“Whether or not the Respondent should have been barred from reading scriptures in the second Applicant Church”**

If that were the position, my opinion would have been that this is a matter of faith and the Respondent ought to have complied with the provisions of the Anglican Church Provincial Constitution. My problem would, however, have been how to handle this case, the Respondent having filed the case in a secular court of law, without complying with the Provincial Constitution, She is a party who, having come to the secular court of law, is not even willing to have the secular court refer the case for arbitration or mediation by wise and experienced members within the Anglican Church fellowship.

Although the learned counsel for the Applicant was submitting that provisions of the Arbitration Act (Cap 49 Laws of Kenya) could be applied by the court, the provisions of Order XLV Rule 1 of the Civil Procedure Rules are clear that the court has power to refer a case, before it, to arbitration or mediation only where the parties in the case consent to do so. It means that where there is no consent like in this suit, the court has no power to refer the case to arbitration or mediation and therefore this notice of motion may not, in those circumstances, have been granted and this suit may have remained in a secular court of law even if the Respondent is bound by the Provincial Constitution.

Would the secular court, then, have had no jurisdiction to entertain and determine that suit? I said I was not going to discuss that issue, but let me remark briefly that the current constitution of this country guarantees the rights of access to courts of law for legal redress.

Going back to the subject matter of this suit, it is my finding that the secular court of law handling this suit is not being, and ought not be, required to determine

**“whether or not the Respondent should have been barred from reading scriptures in the second Applicants Church.”**

This is because, looking again at the plaint, what is the correct cause of action? What is the correct question or issue to be determined?

**“It is whether the Applicants defamed the Respondent.”**

That is the question or issue to be determined. That is the cause of action in this suit. Look at prayer (a) in the plaint which has prayer (a) as the main prayer, the second and only other prayer being (b) merely asking for costs. In the main prayer, the Respondent is saying that she prays that judgment be entered against the Defendants for

“(a) General damages for slander and malicious falsehood.”

Her allegations for that “*slander*” and “*malicious falsehood*” arise from the allegations she makes in paragraph six of the plaint. That, in my view, is not a matter of faith and is not, strictly speaking, covered by the Anglican Church Provincial Constitution. What happened as stated in paragraph five of the plaint, was not a pre-condition for what was said, as alleged in paragraph six, to have been uttered. In fact, during the hearing of the main suit, it may emerge that the allegations as contained in paragraph six were made long or days before the 25<sup>th</sup> day of April, 2006. The contents of paragraph six in the plaint are not a matter of faith. They constitute a question of defamation, always, properly and lawfully handled and determined by secular courts of law, and in doing so the court may, at any stage before judgment – is pronounced, lawfully have the benefit of arbitration or mediation where there is consent of the parties for such arbitration or mediation as the way remains open to further discussions between the parties with a view to reconciliation for the purpose of having the settlement recorded by the court as a judgment of the court.

From the aforesaid therefore, this Notice of Motion cannot stand. Accordingly, the same is hereby dismissed but –costs of the Notice of Motion be in the cause to try and encourage a reconciliatory attitude between the parties.

Dated this 8<sup>th</sup> day of March, 2007.

**J.M. KHAMONI**

**JUDGE**

Present:

Mr. Gachuhi for the Applicants

Mr. Njeru holding brief for Mr. Ndegwa for the Respondent