



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO. 130 OF 2001

**NOMIYA CHURCH OF GOSPELLERS-
(SUING THRO')**

REV. SAMUEL OGERA CARDINAL BISHOP 1ST APPLICANT

REV. ZEPHANIAH AOL SNR. ARCHBISHOP .. 2ND APPLICANT

REV. JOEL AIMA ARCHBISHOP 3RD APPLICANT

JEREMIAH D.A. OBELLPRINCIPAL

SECRETARY 4TH APPLICANT

VERSUS

**JOEL ACHILA MUMA 1ST
RESPONDENT**

**SOLOMON OIRO OGOMBO 2ND
RESPONDENT**

JUDGMENT

This case is typical of endless controversies and limitless infighting in our religious institution mainly because of the management of the vast resources available to our religious leaders. The primary aim is to control the real property and the property in human beings. Religious leaders are supposed to build cohesion and tranquility in the society but not to foment division and endless acrimony between themselves and the followers of a particular church. The infighting has become a millstone around our Courts thereby consuming precious judicial time. The protagonist in the matter have exhibited limitless emotion in the way they fought their cause of action. It appears religious values and moral fabric of religious leaders have broken down or have been shelved to pursue parochial interest without any consideration to the interest of the public who contribute selflessly to the vast properties that is always at the centre of their infighting.

Nomiya Church of Gospellers is an indigenous church patronized by locals. It has peculiar characteristics in that it allows polygamous marriage and forbids church ministers from marrying divorcees or widows and above all the Minister must always seek the consent of the parents of the woman he intends to marry. The church has its headquarters at St. Samwel's Church Kijana Jerusalem in West Seme Location, within Kisumu District in Kenya. The origin of the church is traced to prophet John Owalo who is alleged to be one of the latest prophets of God and whose mission was to make people to

believe in "One God." The office bearers of the Church is divided into two categories namely:

- 1) The House of Clergy - which is non-elective positions and**
- 2) The House of Leity - which is the elective positions of the Church.**

I understand the two categories are determined by the synod, which is the supreme governing body of the church and is responsible for the management of all affairs of the church and may give directions if and when required. It is clear that the dispute and disagreement in this church has been going on from 1986 and is mainly about the leadership of the church. Since then two factions have emerged with the sole aim of controlling the affairs of the church and may be to give directions in the followers of the church who are mainly Kenyans of indigenous origin.

Rev. Zephania Aol, a Senior Archbishop is seeking a nonelective position and represents the faction that did not participate in the election that took place on 4th August 2001, in which the plaintiffs herein are seeking a declaration to nullify the same. It is alleged that the election which took place on 4th August 2001, was tainted with irregularities and fraud, therefore the Court must declare it so. It was the evidence of Rev. Zephania Aol that election were supposed to be held after every five years. And the election of 4th August 2001 was ordered by the Court through a consent dated 5th July 2001 and in the said consent the two parties were:

- 1) To meet by 14.7.2001 to agree on modalities of election.**
- 2) That the defendant to convene the meeting.**
- 3) Thereafter parties to agree on a settlement and election be held on 4.8.2001.**
- 4) The Provincial Director Social Services Nyanza to be the returning officer.**

It is the complaint of the plaintiffs that the meeting of 14th July 2001 did not resolve the main dispute which was the mode and procedure of filling the non-elective post. It is further alleged by the plaintiffs that before the election could proceed, it was mandatory to first fill the positions of the house of clergy. The plaintiffs allege that the house of clergy was to be appointed as a prerequisite step before the parties could proceed with the holding of election. It is the case of the plaintiff that the first step of appointing the non-elective position was contravened therefore no valid election could have been held on 4th August 2001 and it was the submission of Mr. Aboge Advocate that a party cannot drive a benefit from an act which was irregular and void abinitio.

The plaintiffs boycotted the election of 4th August 2001 because the issue of the appointment of the House of Clergy was not undertaken before the election. It is the evidence of PW1 that Solomon Oiro and Joel Achila opposed to the election of the remaining members of the church. And the position of Deputy Cardinal Bishop and Archbishop Clergy is not provided in the constitution of the church. On cross-examination by Mr. Onsongo Advocate, Mr. Zephania Aol stated:

"It is true that on the date of the election we walked away because there was disagreement between the returning officer and our group. We walked away from the election which was scheduled on 4.8.2001. We were not barred from the venue."

It was the submission of Mr. Aboge Advocate that according to the consent order both factions were to meet on 14.7.2001 in order to work out the modalities of the election that was scheduled for on 4.8.2001. He submitted that the house of clergy had to be appointed before the election could proceed. And on 14.7.2001 the 2nd defendant terminated the proceedings before the crucial requirement of appointing the house of clergy was done. He stated that there was no agreement on that meeting and no settlement was reached. He further asserted that the defendants refused to allow the plaintiff's faction to participate by failing to appoint the house of clergy. Hence he stated that the conduct of the chairman made it impossible for the plaintiff's to participate and they rightly walked out. In his view by reason of

the irregularities perpetrated by the defendants did materially vitiate the consent order of 5th July 2001.

On his part Mr. Onsongo Advocate submitted that there was nothing irregular or fraudulently about the election which took place on 4th August 2001. He stated that the plaintiffs failed to establish the basis of seeking the prayer of declaration. It is not clear whether it was based on the constitution or any other consideration for any action to be irregular, null and void, it must go against the set down or known provisions. In the present matter the plaintiffs were unable to establish the specific provision of the constitution that was violated by the defendants. In his view the election of 4th August 2001 was held pursuant to a consent order and the order was specific and the only way the plaintiff can challenge the election of 4th August 2001 is by challenging the consent entered into between the parties. He further stated that at the meeting of 14th July 2001 the plaintiff's were present and actively participated in that meeting. The chairman accorded them a hearing and told them to avail their representatives to the house of clergy by 4th August 2001.

According to him the issue was whether the election would proceed without there being in place the house of clergy. It is clear in my mind that the plaintiffs are interested in non-elective position in the church. It is also clear to me that the plaintiffs walked away from the election venue after the defendants and the returning officer failed to meet their demand which was the appointment of the house of clergy before election. The plaintiffs must establish that it was a prerequisite condition to appoint the house of clergy before the election could be held. The date of election was mutually agreed and/or at the behest of the court with a view to end this endless dispute so that the followers or members of the church could elect the officials to manage the affairs of the church. The consent was very clear and explicit in that before election could proceed, the parties were given an opportunity to agree and sort out the modalities of election, so that on the election day the only item was to be smooth elections in order to determine the dispute. The parties were given 14.7.2001 to clear all other things, however it appears that on the said date the parties did not clear all the hurdles. It was abundantly clear to both parties after the passage of 14th July 2001, the only remaining thing was to hold election on 4.8.2001.

In my view if a party was dissatisfied with what transpired on 14th July 2001 then the rational or prudent thing was to come back to Court to ventilate their grievances. If the parties did not reach an agreement as to the modality of holding election, then it was a mutual act, which affected both parties to the dispute. The failure by the plaintiffs to challenge what transpired on 14th July 2001 meant that the omission to set the rules and regulation of the election was a mutual consent, which ousted the jurisdiction of the Court in the matter. It was not open to the plaintiff to wait until the election day and now set precondition in their participation of the election. They lost or forfeited that right then they did not challenge the outcome of the meeting of 14th July 2001. The issue of appointing the nonelective position was available to both parties. It was not within the exclusive domain of the defendants at the time of election. The election was independently conducted by a third party therefore the plaintiffs had a duty to participate in the election before crying foul when they did not take part in the said election.

The issue that arose on 4th August 2001 for the presiding officer was whether the election would proceed before the appointment of the house of clergy. And since the plaintiffs walked away from the election it is outside their jurisdiction to pinpoint holes in an exercise in which they did not participate. A party cannot question an act unless he/she was a party or can actually indicate certain rules or steps that was not followed or adhered to, you cannot question the validity of an act which you were not a party. It would be an anticipated illegality which one cannot vouch for without imperical evidence. I agree with Mr. Onsongo Advocates that for an action to be irregular null and void, it must go against specific provision of the constitution or any other set down provision which was bending and which was in the process contravened.

It is my judgment that it was crucial matter to fill the nonelective posts of the church but it has not been demonstrated by the plaintiff that the being in place of the house of clergy was a pre-requisite condition to the holding of the election. The failure to appoint the house of clergy cannot vitiate the election which took place on 4th August 2001. The plaintiffs refused to participate in the election of 4th August 2001 because the position of the non-elective posts was not filled. There is nothing in the consent of 5th July 2001 to show that the appointing of the non-elective posts was to come before the election.

The refusal by the plaintiffs to participate was by choice and they cannot now derive a benefit from their inability to participate in an election which was free and fair. There is no material or evidence to indicate that the election was irregular or null and void. There must be a basis for declaring the election as a nullity. There must be substantiated evidence which can withstand judicial scrutiny. It is not only the plaintiffs who were affected by the election that took place on 4th August 2001, but may followers of the church, therefore it would be extreme travesty of justice to punish thousands of people who participated in that election for the seek of the plaintiff who is interested in a non-elective position and who, was not restricted to participate in the said election.

I have very closely and carefully considered the constitution of the church, and there is nothing to show that the appointment of the house of clergy must come first before election. The constitution is the cardinal documents that binds the church members and its failure to show a clear cut method or procedure means the management could elect a particular method or procedure. And whichever comes first does not vitiate the other. Having looked at the constitution, it is my view that it does not make the appointment of the house of clergy a condition precedent for the holding of elections. The constitution does not indicate that before election can be held, the house of clergy has to be appointed, therefore it is my decision that the election which took place on 4th August 2001 was proper and there is nothing irregular or fraudulent about the said exercise. The official so elected or appointed are properly and constitutionally in office.

Lastly it is my view that even if the elections was irregular, null and void, then the plaintiffs could not succeed in the nullification of the said election as he is seeking a non-elective position. Further a party is only entitled to prayers which he/she is seeking and a Court cannot grant a prayer that is not in the pleadings of the party seeking the intervention of the Court. In the amended plaint the plaintiff are seeking that the election of 4th August 2001 be declared irregular, null and void. And there is no basis for the said orders, since the plaintiff's interest is in the non-elective position. Even the holding of fresh election cannot aid the plaintiff, as he is not seeking nullification of the house of clergy. The law is very clear in that a Court has no jurisdiction to act on an issue which has not been pleaded. And a party is not entitled to relief which he has not specified in his cause of action, therefore the plaintiffs prayers as regards the election of 4th August 2001 is utterly misplaced and wrongly directed.

Now having given this matter my utmost consideration it is my judgment that this church which preaches and adores only one God must be lead by the current officials as elected and/or appointed on 4th August 2001. It is my order that the church of prophet John Owalo must be allowed some peace away from litigation in order to serve the aspiration of the members. **Order:**

The suit is dismissed with no orders as to costs. Dated and delivered at Kisumu this 4th day of August 2004.

MOHAMED WARSAME

AG. JUDGE

Delivered in the presence of:

Mr. Onsongo for the defendants.

Mr. Odongo holding brief Aboge for the plaintiff.