



Kinyua & 29 others v Omae (Sued in his capacity as the Presiding Bishop, Redeemed Gospel Church Incorporated) & 2 others; Munyi (Interested Party) (Miscellaneous Petition E001 of 2024) [2024] KEHC 3606 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS PETITION E001 OF 2024**

LM NJUGUNA, J

APRIL 16, 2024

**IN THE MATTER OF CONTRAVENTION AND THREATENED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 22, 23 AND 48 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 7 OF THE
ARBITRATION ACT CAP 49 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF SECTIONS 12(1)(G), 19(1) AND 29(1)
(B) OF THE SOCIETIES ACT CAP 108 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF PROTECTION OF THE BILL OF RIGHTS
UNDER ARTICLES 47 OF THE CONSTITUTION OF KENYA**

CHARLES KINYUA.....1ST PETITIONER
EZEKIAH NGWERE.....2ND PETITIONER
JAMLECK MUGO.....3RD PETITIONER
LUCY NGUU.....4TH PETITIONER
JEREMIAH MUNENE.....5TH PETITIONER
JOHN NJERU NJUE.....6TH PETITIONER
PATRICK IRERI NDWIGA.....7TH PETITIONER
DAVID NJERU NJIRU.....8TH PETITIONER
MARTIN MUGENDI.....9TH PETITIONER
LINUS MUGENDI.....10TH PETITIONER
JOSEPH GITONGA.....11TH PETITIONER



JACOB N. MURIGI.....	12TH PETITIONER
ELIKANA BENSON.....	13TH PETITIONER
BENJAMIN MURIMI.....	14TH PETITIONER
CHARLES MUTHEE.....	15TH PETITIONER
CYPRIAN MYAGA.....	16TH PETITIONER
PETER MURIUKI.....	17TH PETITIONER
JAMES NJAGI.....	18TH PETITIONER
DANIEL NEWTON.....	19TH PETITIONER
ROBERT NJIRU.....	20TH PETITIONER
DANIEL NTHAKANIO.....	21ST PETITIONER
EVANSON KATHURI.....	22ND PETITIONER
MERCY WAMBUI.....	23RD PETITIONER
JAMLICK MUGANE.....	24TH PETITIONER
MUNENE NJIRU.....	25TH PETITIONER
WILSON MUCHANGI.....	26TH PETITIONER
AMON IRERI.....	27TH PETITIONER
CACHERIE NJOKI.....	28TH PETITIONER
PETER NJIRU.....	29TH PETITIONER
IGNATIUS NYAGA.....	30TH PETITIONER

VERSUS

KEPHA OMAE (SUED IN HIS CAPACITY AS THE PRESIDING BISHOP, REDEEMED GOSPEL CHURCH INCORPORATED).....	1ST RESPONDENT
STEPHEN KANYIA (SUED IN HIS CAPACITY AS GENERAL SECRETARY, REDEEMED GOSPEL CHURCH INCORPORATED).....	2ND RESPONDENT
NELSON NGUTU(SUED IN HIS CAPACITY AS NATIONAL TREASURER, REDEEMED GOSPEL CHURCH INCORPORATED)	3RD RESPONDENT

AND

DR. SAMUEL MUNYI.....	INTERESTED PARTY
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BETWEEN

CHARLES KINYUA	1 ST PETITIONER
EZEKIAH NGWERE	2 ND PETITIONER
JAMLECK MUGO	3 RD PETITIONER



LUCY NGUU	4 TH PETITIONER
JEREMIAH MUNENE	5 TH PETITIONER
JOHN NJERU NJUEJOHN NJERU NJUE	6 TH PETITIONER
PATRICK IRERI NDWIGA	7 TH PETITIONER
DAVID NJERU NJIRU	8 TH PETITIONER
MARTIN MUGENDI	9 TH PETITIONER
LINUS MUGENDI	10 TH PETITIONER
JOSEPH GITONGA	11 TH PETITIONER
JACOB N. MURIGI	12 TH PETITIONER
ELIKANA BENSON	13 TH PETITIONER
BENJAMIN MURIMI	14 TH PETITIONER
CHARLES MUTHEE	15 TH PETITIONER
CYPRIAN MYAGA	16 TH PETITIONER
PETER MURIUKIPETER MURIUKI	17 TH PETITIONER
JAMES NJAGI	18 TH PETITIONER
DANIEL NEWTON	19 TH PETITIONER
ROBERT NJIRU	20 TH PETITIONER
DANIEL NTHAKANIO	21 ST PETITIONER
EVANSON KATHURI	22 ND PETITIONER
MERCY WAMBUI	23 RD PETITIONER
JAMLICK MUGANE	24 TH PETITIONER
MUNENE NJIRU	25 TH PETITIONER
WILSON MUCHANGI	26 TH PETITIONER
AMON IRERI	27 TH PETITIONER
CACHERIE NJOKI	28 TH PETITIONER
PETER NJIRU	29 TH PETITIONER
IGNATIUS NYAGA	30 TH PETITIONER

AND

KEPHA OMAE (SUED IN HIS CAPACITY AS THE PRESIDING BISHOP, REDEEMED GOSPEL CHURCH INCORPORATED)	1 ST RESPONDENT
STEPHEN KANYIA (SUED IN HIS CAPACITY AS GENERAL SECRETARY, REDEEMED GOSPEL CHURCH INCORPORATED)	2 ND RESPONDENT



**NELSON NGUTU(SUED IN HIS CAPACITY AS NATIONAL TREASURER,
REDEEMED GOSPEL CHURCH INCORPORATED) 3RD RESPONDENT**

AND

DR. SAMUEL MUNYI INTERESTED PARTY

RULING

1. The Petitioners filed the instant miscellaneous constitutional petition dated 25th March 2024 under certificate of urgency together with 2 supporting affidavits sworn by the 1st petitioner and the interested party. Through the miscellaneous constitutional petition, the petitioners seek the following orders:
 - a. That a temporary injunction be issued restraining the respondents from convening the installation and consecration meeting/service scheduled for 26th April 2024 pending hearing and determination of this miscellaneous petition;
 - b. That a temporary injunction be issued restraining the respondents from convening the installation and consecration meeting/service for Rev. Linus Muriithi as the regional Bishop Mt. Kenya South Region pending hearing and determination of this miscellaneous petition;
 - c. That a temporary injunction be issued restraining the respondents from convening the installation and consecration meeting/service of any Regional Bishop pending hearing and determination of this miscellaneous petition;
 - d. That a temporary injunction be issued restraining the respondents from convening the installation and consecration meeting/service for Rev. Linus Muriithi as the regional Bishop Mt. Kenya South Region pending hearing and determination of this dispute by an Arbitrator to be appointed under Article 8.10(d) of the Church Constitution;
 - e. That a temporary injunction be issued restraining the respondents from convening the installation and consecration meeting/service of any Regional Bishop pending hearing and determination of this dispute by an Arbitrator to be appointed under Article 8.10(d) of the Church Constitution;
 - f. Costs of this petition be provided for; and
 - g. Any other order that the honourable court deems fit to grant.
2. It is the petitioners' case that in accordance with Article 9.3(f)(vii) of the Church Constitution, the interested party who is the outgoing Regional Bishop of Mt. Kenya South Region forwarded the names of Rev. Irungu Kiiru Munya of Embu North, Rev. Arthur Murungi Mutiga of Mbeere South and Rev. Jobson Murimi Njogu of Kirinyaga to the Church Governing Council recommending them for consideration as his successor and deputy as the council shall decide from amongst the choices. That the recommendation was not opposed on any ground but on 27th May 2023, the respondents, without consulting with the 12-member Church Governing Council, chose and recommended one Rev. Linus Muriithi as the incoming Regional Bishop of Mt. Kenya South Region and forwarded his name to the Archbishop Arthur Kitonga for further action. That the Archbishop Arthur Kitonga acted on the respondents' recommendation and appointed the said Rev. Linus Muriithi as the incoming Regional Bishop of Mt. Kenya South Region.



3. That the petitioners are aggrieved with this decision because the respondents acted ultra vires in recommending, without the involvement of the Church Governing Council, Rev. Linus Muriithi who was not on the list of proposed candidates as advised by the interested party herein. That on 3rd August 2023 Rev. Linus Muriithi who is the sub-regional overseer Embu Central sub-region convened a meeting for all the sub-regional reverends and threatened to revoke their marriage officiating licences if they did not support his appointment. That the happenings of the said meeting were documented in a letter dated 28th August 2023 and sent to the interested party who still holds the office of Regional Bishop of Mt. Kenya South Region.
4. That the petitioners also wrote a letter dated 20th September 2023 to the 1st respondent, expressing their dissatisfaction with how the incoming Regional Bishop of Mt. Kenya South Region was handling the transition in leadership. That a section of the petitioners also wrote a letter dated 14th February 2024 to the 1st and 2nd respondents citing the outright violations of the church constitution but there was no response to the letter. That on 25th February 2024, the 1st respondent issued a notice through WhatsApp inviting the church leaders to a meeting on 29th February 2024 in Runyenjes but the said communication did not state the agenda for the meeting and so there was no quorum.
5. That the petitioners through their advocates, wrote a letter dated 27th February 2024 to the 1st respondent demanding that, inter alia, the incoming Regional Bishop of Mt. Kenya South Region should not be installed into office. That the demand letter was responded to through Akhaabi Advocate on behalf of the Redeemed Gospel Church in a letter dated 08th March 2024 through which they did not contest the fact that the church constitution had been violated. That nonetheless, the respondents have proceeded to organize a consecration service, albeit against the provisions of Article 14.13 of the Church constitution, on 26th April 2024 at Redeemed Gospel Church Huruma for 12 regional Bishops including Rev. Linus Muriithi, none of whom were interviewed as required.
6. The petitioners claim that their rights to fair administrative action under Article 47 of *the Constitution* of Kenya have been violated since the respondents have refused to adhere to the provisions of the church constitution which was registered on 27th September 2019. That the actions of the respondents have exposed the church to possible deregistration by the Registrar of Societies due to non-compliance with its own constitution as provided under section 12(1)(g) of the *Societies Act*. That the actions of the respondent have also caused the church to be held in disrepute. That articles 9.3(f)(viii), 14.13, 9(2)(d), 10.13(a) have been violated.
7. The respondents filed a notice of preliminary objection dated 06th April 2024 challenging the jurisdiction of this court to hear and determine the matter since the dispute resolution mechanisms set out in the church constitution have not been exhausted. It was also their contention that the miscellaneous petition herein offends the doctrine of constitutional avoidance and that the orders should have been sought through a convention application by way of notice of motion or chamber summons as dictated in Rule 2 of the Arbitration Rules and Rule 19 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013.
8. The respondents also filed a replying affidavit stating that the petitioners are strangers to the church as they have not demonstrated their membership in the church. That the church is not properly before this court because the Board of Trustees of Redeemed Gospel Church Inc. and/or the Apostolic Bishop have not been included as parties. That as a result of the petitioners' lack of locus standi, they had no authority to even institute the alleged arbitration proceedings under section 7 of the *Arbitration Act*. They deposed that even if the petitioners were members of the church, the issues raised should be referred to Arbitration under Article 8.10(d) of the Church Constitution and not through this miscellaneous petition. That the petition offends the doctrine of constitutional avoidance and that



neither the petitioners nor the interested party have commenced the process of arbitration as provided in the church constitution.

9. It was their averment that this court does not bear jurisdiction to grant any of the orders sought as the same are sought under the church constitution. That furthermore, the court cannot issue substantive orders sought through a miscellaneous petition as there is no provision in law supporting filing of a miscellaneous petition, thus it is fatally defective. That the orders sought under section 7 of the Arbitration Act have not been sought by way of summons or notice of motion as provided under Rule 2 of the Arbitration Rules (Legal Notice No. 58 of 1997) and Rule 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.
10. That the contentious issue is the procedure taken by the Apostolic Bishop in appointing the incoming Regional Bishop of Mt. Kenya South Region. That article 9.1 of the church constitution provides for membership in the International Apostolic Council, Governing Council and Regional Councils in accordance with article 14 thereof. That a regional bishop is also a member of the Governing Council of the church and that the interested party is being hypocritical in his averments. They deposed that according to article 9.3 of the church constitution, it is the duty of the Regional Council to recommend ministers to be appointed from the region. That articles 10.13 and 10.14 of the church constitution provide for qualifications of a person who may be appointed as Regional Bishop who may be chosen through appointment and elections, being above the local church.
11. That article 14.6 of the church constitution allows the leadership of the church to override the procedure where the most preferred candidate falls outside the list of recommended candidates. That in meetings held on 20th and 21st July 2022, the Governing Council, where the interested party was a member, met to deliberate on transition of the outgoing Regional Bishops, including the interested party, and appointment of their successors. Minutes of the said meetings were produced as evidence. That at the meetings, it was recommended that the Regional Bishops would forward the names of 3 candidates (potential successors) to the Presiding Bishops for onward transmission to the Archbishop. In the present case, the interested party forwarded to the 1st respondent his list of recommended candidates, one of whom would succeed him.
12. That the decision of the Governing council on the procedure for appointing incoming Regional Bishops was reached in the presence of the interested party at the said meetings and his averments are disingenuous. That the 1st respondent only transmitted the 3 names to the Archbishop according to the recommendations made at the meetings, and the appointments were done. It was their averment that the petitioners have not raised prima facie grounds to warrant the grant of injunctive orders. That the Archbishop is the leader of the church and he appoints or changes terms of service for the Regional Bishops. That owing to jurisdictional and procedural lapses, the miscellaneous petition ought to be dismissed and they urged the court to do so.
13. Further, that the petitioners have not demonstrated the amount of prejudice they are bound to suffer if the orders are denied. That the miscellaneous petition does not disclose any cause of action and the same has been brought too late in the day. It is their case that if the orders are granted, the church will suffer significant reputational harm and embarrassment since the event scheduled for 26th April 2024 is set to be graced by local and international guests who are not the subject to the complaints herein. That in light of the preparations that have gone into planning the event, the same will go to waste if the orders are granted and yet the petitioners have not offered any undertaking for damages in the event that the orders are granted. That the petitioners have approached the court with unclean hands and if the orders sought are granted, the bona fide members of the church will be denied a chance to enjoy their rights and privileges.



14. When the miscellaneous petition was placed before the Judge, she noted the urgency of the matter, given that the consecration service is scheduled for 26th April 2024. It is on this basis that she directed the parties to file and exchange their submissions by close of business 11th April 2024 to enable her retreat to make a finding. As of the said date, only the petitioners and interested party had complied with the direction to file written submissions. The respondent's submissions were filed after the said date but in the interest of justice, the court will consider the same.
15. In their submissions, the petitioners and interested party stated that the Judiciary, in furtherance of the intentions of Articles 22 and 23 of *the Constitution*, added new heads for filing cases with its digitization campaign. That the head of Miscellaneous Constitution and Human Rights Petitions was added to the new e-filing system which was rolled out on 11th March 2024 to enable expeditious access to justice. That the same is in line with Rule 13 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.
16. It was their submission that this court is obligated to protect *the constitution* and the bill of rights and they cited Articles 22, 23, 47 and 48 of *the Constitution*. They relied on section 7 of the *Arbitration Act* which empowers the High Court to issue interim orders before or during arbitral proceedings. Further reliance was placed on Sections 19(1), 12(1)(g) and 29(1)(b) of the *Societies Act* which provide for registration of the society, circumstances that would lead to its deregistration and meetings of the society, respectively. They also cited provisions of the church constitution thus: articles 9.3(f) which duties of the regional council, article 10.13 which provides for the office and qualifications of a Regional Bishop, article 14.13 which provides for appointment of a Regional Bishop.
17. They submitted that it was the role of a Regional Bishop to administratively oversee the process of filling the office of a Regional Bishop who may only undertake the duties of the office after consecration and installation. They relied on the case of National Bank of Kenya Ltd & 2 Others v. Sam-con Ltd (2003) eKLR in which the case of Giella v. Cassman Brown (1973) EA 358 was cited. That the petitioners and interested party seek temporary injunctive orders to maintain status quo and give way for Arbitration under article 8.10 of the church constitution.
18. That the petition presents a prima facie case with a probability of success before the arbitrator and that their rights under Article 47 of *the Constitution* have been violated. That the loss that they are bound to suffer cannot be compensated by way of damages and that if the consecration event is left to continue, they will have no chance for further reprieve since the offices of Regional bishops will have already been filled and the subject matter will become invalid. That if the court should choose to consider the balance of convenience, the balance tilts in favour of the order being granted.
19. It was also their argument that the respondents alleged that the petitioners were not members of the church but did not produce any proof. That according to the case of Communication Commission of Kenya & 5 Others v. Royal Media Services Ltd & 3 Others SCOK (2014) eKLR the doctrine of constitutional avoidance dictates that a court will not determine a constitutional issue where a matter may be properly decided on another basis. They argued that the principle is not applicable in this case because no substantive constitutional issue has been brought for determination, rather, the orders are for injunctive reliefs. That Rule 2 of the *Arbitration Act* is not applicable on grounds of ambiguity and procedural technicality in the face of Article 22(3)(d) and Article 159(2)(d) of *the constitution*. That the miscellaneous petition is not a formal application under Rules 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 but Rule 13 breathes life into Articles 22 and 23 of *the constitution*.



20. In their submissions, the respondents challenged the petitioners' locus standi and relied on the case of *William Muthee Muthami v. Bank of Baroda* (2014) eKLR where the Court of Appeal held that only a party aggrieved may bring a civil suit seeking a legal or equitable remedy. That onus is on the petitioners to prove that they are indeed members of the church before the respondents are called upon to provide the list of members. Further reliance was placed on the cases of *Peras Limited v. Esso (K) Limited* (1997) eKLR and *City Council of Nairobi v. Wilfred Kamau Githua t/a Githua Associates & Another* (2016) eKLR in support of their argument that the petitioners did not have any sort of agreement or relationship with the church.
21. It was their submission that the petition offends the doctrine of exhaustion. That article 8.10(d) of the church constitution provides for dispute resolution mechanisms outside the court system yet the petitioners went straight to court with a dispute that should have been the subject of arbitration. For this argument, they relied on the cases of *Geoffrey Muthinja Kabiru & 2 Others v. Samuel Munga Henry & 1756 others* (2015) eKLR, *Andrew Inyolo Abwaza v. Board of Trustees of Pentecostal Assemblies of God-Kenya & 3 Others* (2009) eKLR, *Hinga & Another v. PCEA Through Rev. Njoya & Another* (1966) eKLR and *Nzioki v. Machakos Regional Church Council- AIC Kenya & 4 Others* (2023) eKLR. They stated that in as much as this court bears unlimited original jurisdiction, the issues before it are to be referred to arbitration and may not be determined by the court in the first instance.
22. They submitted that the temporary injunctions sought through this miscellaneous petition should have been sought through a notice of motion or chamber summons. Reliance was placed on the cases of *Joseph Kibowen Chemor v. William C. Kasera* (2013) eKLR, *In the Matter of the Estate of Geoffrey Meitamei Lonina- Deceased* (2012) eKLR and *Norah Ndunge Henry & Another v. Abednego Mutisya & Another* (2022) eKLR. That Rule 2 of the Arbitration Rules and Rule 19 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013 are couched in mandatory terms and they lay down the procedure for seeking reliefs.
23. That section 7 of the *Arbitration Act* can only apply once the parties have established their right to commence arbitration proceedings. They relied on the case of *Safaricom Limited v. Ocean View Beach Hotel Limited & 2 Others* (2010) eKLR and stated that neither the petitioners nor the interested parties have sought to invoke the arbitration clause per article 8.10(d) of the church constitution and so orders sought are premature and misconceived. Further reliance was placed on the case of *Carzan Flowers (Kenya) Ltd & 2 Others v. Tarsal Koos Minck B.V. & 4 Others* (2009) eKLR where the court held that the protections envisioned under section 7 of the *Arbitration Act* are intended to ensure that no party suffers prejudice at the arbitration proceedings but such a party must demonstrate that they are at risk of suffering irreparable damage. These sentiments were echoed in the cases of *CMC Holdings Limited v. Jaguar Land Rover Exports Limited* (2013) eKLR, *Highland carriers limited v. National Oil Corporation of Kenya Limited*, *Seven Twenty Investments Limited v. Sandhoe Investments Kenya Limited* (2013) eKLR, *Mwangi v. Playstreet Kindergarten Limited* (2023) eKLR and *Talewa Road Contractors Limited v. Kenya National Highways Authority* (2014) eKLR.
24. That the miscellaneous petition does not disclose whether the arbitration proceedings are under threat, or that the orders should be granted based on special circumstances or the timeline for commencement of the intended arbitration proceedings has been defined. They relied on Section 107 of the *Evidence Act* and the case of *Mbuthia Macharia v. Annah Mutua & Another* (2017) eKLR. That the impugned procedure was undertaken in accordance with the church constitution and that there are no exceptional circumstances to warrant granting of injunctive orders. They relied on the cases of *Associated Construction Company (K) Limited v. Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works & Another* (2021) eKLR, *Joab Mehta Oudia v. Coffee Development Board of Trustees* (2014) eKLR, *Joseph Ntombura v. Godfrey Simiyu & 4 Others*



(2018) eKLR, Joseph Hinga Gati v. Barclays Bank (K) Ltd (2001) eKLR and Chatur Radio Service v. Pronogram Limited (1994) eKLR.

25. They argued that the timelines for the temporary injunctive orders have not been provided in the petition and they relied on the case of CMC Holdings Limited v. Jaguar Land Rover Exports Limited (2013) eKLR (supra). They concluded by stating that the petitioners have come to this court with unclean hands and they are undeserving of the orders sought. That if the court grants these orders, the bona fide members of the church will be held at a disadvantage. They urged the court to dismiss and/or strike out the miscellaneous petition with costs.
26. From the foregoing, I deduce the issues for determination to be as follows:
 - a. Whether the preliminary objection has merit; and
 - b. With reference to Section 7 of the *Arbitration Act*, whether the orders should be granted based on the principles laid down in the case of Giella v. Cassman Brown (1973) EA 358.
27. Through the preliminary objection, the respondent raised several issues which must rank highest in priority. These are:
 - a. Whether the petitioners have locus standi;
 - b. Whether the court has jurisdiction to determine the issues raised herein;
 - c. whether the petitioners are members of the church (Redeemed Gospel Church Incorporated) and if they are, what their rights are under section 7 of the *Arbitration Act*;
 - d. whether it is proper that the petitioners approached the court through a “miscellaneous constitutional petition”; and
 - e. whether the miscellaneous petition offends the doctrine of constitutional avoidance.
28. It was the respondents’ case that the petitioners are strangers to the case since they have not proved that indeed they are members of the church. From a reading of the petition, the petitioners have introduced themselves to the court as holders of the offices of Pastors and Reverends within the Mt. Kenya South Region whose rights have been or are threatened to be violated. To the supporting affidavit to the petition, there is an annexure marked ‘CK5’ being an undated letter signed by all the petitioners to the 1st respondent raising their grievances. Annexure marked as ‘CK6’ is a letter dated 14th February 2024 to the 1st respondent signed by 15 out of the 30 petitioners.
29. The demand letter by Munene Njiru & Company Advocates dated 27th February 2024 written to the 1st and 2nd respondents on behalf of the petitioners also raises their grievances as stated in the petition. The respondents, through Akhaabi Advocates on instruction from the church, responded to the petitioners’ demand letter through a letter dated 08th March 2024 wherein they responded to the petitioner’s issues with familiarity. In as much as the respondents stated that the petitioners are not members of the church and lacked locus standi, onus was on them to prove their allegations. The standard of proof in this case is on a balance of probabilities. From the available evidence, there is sufficient proof that the petitioners are indeed members of the church and therefore they have locus standi to sue.
30. The second, third and fourth issues raised through the preliminary objection are that the court lacks jurisdiction to determine the petition. The basis for their contention is that according to article 8.10(d) of the church constitution, the issues should be placed before an arbitrator in the first instance. In the same breadth, the respondents also challenged the form taken by the petitioners in seeking the



orders herein and whether the ‘miscellaneous constitutional petition’ is the best form through which the petitioners should seek injunctive orders under section 7 of the *Arbitration Act*. Section 7(1) of the *Arbitration Act* provides:

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

In the same breadth, Rule 2 of the Arbitration Rules provides thus:

“Applications under sections 6 and 7 of the Act shall be made by summons in the suit.”

31. Article 8.10(d) of the church constitution provides:

“where a dispute arises between the parties within the church coming from a final decision of an administrative process as contained in this constitution and the code of conduct manual, the dispute shall be resolved through arbitration process. The venue of the arbitration shall be close to the city where the dispute arose and where it is not clear the arbitration process shall take place in Nairobi. The arbitrator shall be agreed between the parties in default of which the same shall be appointed by the chairman of the Institute of Chartered Arbitrators”

32. There is no doubt between the parties that the dispute at hand arises from the cited provision of the church constitution. However, the respondents deposed that the orders sought herein can be determined before an arbitrator. Section 7(1) of the *Arbitration Act* allows parties to seek interim measures of protection before or during arbitration proceedings. Furthermore, the petitioners have expressed that they intend to pursue arbitration proceedings. If this be the case, it means that this court bears jurisdiction to issue interim orders pending or during arbitration proceedings. Therefore, it is my view that even though the issues raised herein could have been placed before an arbitrator, the circumstances of the case allowed the petitioners to seek the temporary reliefs from this court, rightly so, even though the procedure as provided for under Rule 2 of the Arbitration Rules, is arguable.

33. The fifth issue arising from the preliminary objection is that the miscellaneous constitutional petition offends the doctrine of constitutional avoidance. Constitutional avoidance has been defined by S Woolman & M Bishop, *Constitutional Law of South Africa* (2013) 3-21 as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. In the case of *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor*, 2001 (2) ZLR 501 (S), the South African Court held thus:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.”



34. In another South African case of *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Krentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
35. Similarly, in the case of *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936), the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of. Both these cases were mentioned in the Supreme Court decision in the case of *Communication Commission of Kenya & 5 Others v. Royal Media Services Ltd & 3 Others* SCOK (2014) eKLR.
- (see also the case of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR))
36. Looking at the issues before the court, their source is the church constitution, the provisions of section 7 of the *Arbitration Act* and Rule 2 of the Arbitration Rules. The petitioners unsuccessfully attempted to link their grievance to Article 47 of *the Constitution* of Kenya which provides for fair administrative action. From this point of view, the petition seems farfetched and does not raise issues of infringement of the bill of rights. In my view, the temporary orders sought herein can be, and could have been, determined but not in a constitutional petition.
37. The petitioners have not demonstrated a threat or infringement of any of their constitutional rights under the fundamental freedoms in the Bill of Rights. Under ordinary circumstances, the form taken by a petitioner where they decry infringement of their rights under *the constitution*, is immaterial, that is, the form does not matter so long as the issue is raised before the High Court. Rule 10(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules provides thus:
- “(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.”
38. If the issues raised by the petitioners pointed this court towards infringement of their rights under the Kenyan Constitution, the court could have considered the miscellaneous petition in the spirit of Rule 10(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. The respondents argued that Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules should guide the form to be taken by the petitioner’s herein. This Rule provides for the procedure of formal applications where the rules prescribe the use of a formal application. In this case, the issue of infringement of the bill of rights could have taken any form and so Rule 10(3) is more relevant to the petitioner’s case. However, even then, it is not clear to the court as to which of the petitioners’ fundamental rights and freedoms have been infringed.
39. For the avoidance of doubt, I should point out that from the petition filed, the particulars of violations listed on pages 7-8 are violations of the petitioner’s rights under the church constitution. At paragraph 23 of the petition, the petitioners scantily detailed that their rights under Article 47 of *the Constitution*



have been violated. Article 47 of the Constitution provides for the right to fair administrative actions as follows:

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.”

- 40. Article 47(3) of the Constitution as stated hereinabove culminated into the Fair Administrative Actions Act under which petitions for violations under this provision are filed. This provision of the constitution envisions fair administration in the context of public administration of state and non-state organizations (see section 3 of the Fair Administrative Actions Act).
- 41. Even Assuming that the petitioners are eligible for the sought for remedies, their grievances lie elsewhere in law but not through a miscellaneous constitutional petition. Furthermore, even the discretion of this court as bestowed to it under Article 159 of the constitution, cannot cure these flaws.
- 42. In determination of the first issue, and with regard to the foregoing, I find that the preliminary objection dated 06th April 2024 is meritorious and it is hereby allowed purely on the point that the miscellaneous petition herein offends the doctrine of constitutional avoidance.
- 43. On the second issue for determination, the petitioners stated that they seek orders to stop the upcoming consecration ceremony after they saw that the service has been scheduled to take place on 26th April 2024. Having determined that the miscellaneous constitutional petition is not the appropriate way to approach the court in light of section 7 of the Arbitration Act, it is my view that it is immaterial to determine whether or not the principles laid down in the case of *Giella v. Cassman Brown* (1973) EA 358 should apply since the court is not properly approached.
- 44. I have considered the pleadings and arguments made in this matter and I have applied the relevant law to find that the miscellaneous petition lacks merit and it is hereby struck out.
- 45. I make no order as to costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

.....for the Petitioners

.....for the Respondents

.....for the Interested Party

