



Ogosi & 5 others v Registered Trustees, Evangelical Lutheran Church in Kenya (ELCK) & 6 others (Constitutional Petition 22 of 2016) [2024] KEHC 8287 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION 22 OF 2016**

TA ODERA, J

JUNE 12, 2024

BETWEEN

**BISHOP RICHARD AMAYO OGOSI 1ST PETITIONER
BISHOP THOMAS ASIAGO NYAGATO 2ND PETITIONER
BISHOP SOSPETER OKONGO NYANDIKO 3RD PETITIONER
REV. MESHACK NGARE 4TH PETITIONER
REV. DAVID CHUCHU 5TH PETITIONER
REV. THOMAS AGWATA NYABWANGA 6TH PETITIONER**

AND

**REGISTERED TRUSTEES, EVANGELICAL LUTHERAN CHURCH IN KENYA
(ELCK) 1ST RESPONDENT
CHURCH COUNCIL-EVANGELICAL CHURCH IN KENYA 2ND
RESPONDENT
ARCH. BISHOP, DR. WALTER OBARE 3RD RESPONDENT
BENJAMIN LEMOSL LEARKA 4TH RESPONDENT
JOSEPH L. ONYANGO 5TH RESPONDENT
REGISTRAR OF SOCIETIES 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT**



RULING

Introduction

1. The Applicants herein filed a notice of motion dated 7th June, 2023 seeking orders that Pursuant to the consent order entered on 18th September, 2018, the 1st to 4th Respondents be directed to pay the Petitioner/ Applicants' Advocate fees duly taxed at Kshs. I 0,225,320/= together with the interest thereon until payment in full and in default execution to issue against them and the costs of the application be provided for.
2. The Application was based on the grounds that were set out on the Affidavits sworn by REV. THOMAS AGWATA NYABWANGA and KENEDY BOSIRE GICHANA. The Applicants through REV. THOMAS AGWATA NYABWANGA averred that they duly instructed the firm of Bosire Gichana Co. Advocates to file a Constitutional Petition against the Respondents herein. The said petition was filed and served upon the Respondents who filed their responses. The parties reached an out of court settlement and a dated 4.9.18 was duly filed in this court and adopted on 18th September, 2018. In the consent order, the issue of Petitioners' Advocates fees was to be placed before the immediate next meeting of the Church Council for consideration. According to the applicants this was done sometime in the year 2019 and the fees was duly approved for payment. However, the payment was not honored due to the effects of COVID-19. Sometime in the month of September, 2019, the Applicants were served with the Advocate-Client Bill of Costs from their advocates on record. The Applicants contended that clause 3 of the consent provides that their advocates fees costs were to be paid by the Church and further that clause 5 of the said consent order allowed a party to apply and/or seek legal remedy in the event of non-compliance.
3. They insisted that the costs of their advocates' fees was to be paid by the church and thus urged the court to compel them to comply. They stated too that all other terms of the consent have been complied with save for the issue of the Petitioner's advocates costs.
4. Mr. Kennedy Bosire Gichana advocate in his Affidavit reiterated the averments of the Applicant and added that after the parties failed to pay him legal fees, he proceeded to file an advocate-client bill of cost dated 8th September, 2022 (KISII MISC NO. E238 of 2022) which was taxed and certified at Kshs. 10,225,320 on 11th May, 2022 by the Deputy Registrar of the High court. He reiterated that the according to the consent their legal fees was expected to be placed before the primary organ of the 1st Respondent which is the 2nd Respondent. He disclosed that in view of clause 3 of the consent, the Bill of cost was served upon the 1st to 4th Respondents who through their Advocates filed an Application and sought to be removed from the proceedings and the Deputy Registrar allowed their Application and they were removed from the Taxation proceedings.
5. The learned counsel averred that the 1st Respondent through Archbishop Joseph Ocholla kept promising to have their legal fees paid since 2018 year until mid-2022 when he informed the applicants that the church was not ready to pay the fees necessitating the filing of the Bill of cost which was ultimately based on a party to party costs. He decried that the delay in filing the bill of cost was necessitated by the endless promises by Archbishop of the willingness to pay.
6. The Respondent opposed the Application through the grounds of opposition dated 6th November, 2023 as well as the Replying affidavit of one Rev. Andrew Ngweiywa. In the grounds of opposition, the Respondents averred that;



- a. The application is in contravention of an express term of clause I of the consent order 18th September 2018 that provided as follows, namely:
 - i. "THAT the cases listed in paragraph 4 herein stand wholly and entirely terminated and / or discontinued as against the 1st - 4th Respondent at the respective stages at which they are as at the date of this order. No party shall pursue against and / or take out any further claims or processes or proceedings as the other in connection with or arising out of the said cases."
- b. The issue in dispute herein relates purely to an advocate-client Bill of Costs thus ordinarily falling under the jurisdiction of the Registrar or Deputy Registrar of this court.
- c. The issue in this Application is res judicata as it had been determined by the court of competent jurisdiction in Kisii HC Misc App. No. 238 of 2022 (Bosire Gichana and company advocates =Versus= Bishop Richard Omayo Ogosi & 5 Others) where the court ordered that the parties listed as 1st to 4th Respondents had nothing to do with the Advocate-client bill of costs (therein]. The court held thus:
 - i. "THAT declaration is hereby issued that there having been no advocate-client Relationship between the applicant herein and the Registered Trustees Evangelical Lutheran Church in Kenya, Church Council - Evangelical Lutheran Church in Kenya Arch Bishop, Dr. Walter Ohare and Benjamin Lemosi Larka, the said Registered Trustees Evangelical Lutheran Church in Kenya, Church Council-Evangelical Lutheran Church in Kenya, Arch Bishop, Dr. Walter Ohare and Benjamin Lemosi Larka have nothing to do with the Advocate-Client Bill of Costs herein."
- d. The respondents were not the advocate's clients and they were not parties to the advocates Bill of Costs. The 1st to 4th respondents were not and have never been under obligation to pay the applicants' advocates costs as alleged at paragraph 11 of the advocate's Supporting Affidavit or at all.
- e. The application is mischievous and an abuse of the court process, as it is, in fact, the applicant's advocate's case disguised as the applicant's case. Moreover, the application is driven by malice and bad faith.
- f. The application is incompetent and bad in law, as the applicants advocate herein is not party to the contract embodied in the consent order herein dated 18th September 2018 and is, thus, not privy to the contract between the applicants and the 1st to 4th respondents herein.
- g. The application has not specified the non-compliance that has triggered the application herein.
- h. The 1st to 4th respondents have duly complied with clause 3 of the terms of the consent order herein dated 18th September 2018 as the issue of the respondent's advocate's legal 'fees was duly placed before the Church Council that was held on 19th March 2019 where the issue was considered and resolved.
- i. The consent order dated 18th September 2018 speaks for itself. Nowhere does the consent order dated 18th September 2018 express that the 1st to 4th respondents were to be liable to pay the applicants' advocates legal fees.
- j. Through their application herein, the applicants have misinterpreted and read into the said consent order foreign words that are not part of the express terms of the consent.



- k. The application herein is speculative, as it is based upon unsubstantiated allegations.
 - l. The application is incompetent and incurably defective.
 - m. It is in the interest of justice that the Notice of Motion application herein dated 7th June 2023, but filed in court on 12th July 2023 be dismissed and the costs thereof be awarded to the 1st to 4th respondents.
7. In his affidavit Rev Ngweiya averred that having read through the consent dated 4th September 2018 that was entered into between the applicants and the 1st to 4th respondents and the subsequent consent order dated 18th September 2018 he did not establish any express provision therein that the 1st-4th Respondents were to be liable to pay the petitioners' advocates legal fees.
 8. He deposed that it was not true that the Church Council approved any payments as alleged at paragraph 6 of the said Supporting Affidavit of Rev, Thomas Agwata Nyabwanga or at all. To the contrary, he deposed that the Church Council considered the issue of the legal fees of the applicants 'advocates and resolved that the church would not assist in paying the applicants advocates legal fees. He annexed a copy of an extract of the relevant minutes of the Church Council meeting as evidence.
 9. He insisted that the 1st to 4th respondents have duly complied with clause 3 of the terms of the said consent order herein dated 18th September 2018, as the issue of the Petitioner's advocate's legal fees was duly placed before the meeting of Church Council that was held on 19th March 2019 where the issue was considered and resolved as aforesaid.
 10. He observed that at paragraph 13 Supporting Affidavit of applicant's advocate, Kennedy Bosire Gichana confirmed that the Archbishop communicated to him the Church Council's resolution aforesaid. He contended that it appeared that applicants are simply unhappy with the aforesaid outcome and feedback from the Church Council's consideration of the issue and so the applicants were using the application herein to vent their anger and/or dissatisfaction.
 11. He insisted that it was clear on the face of the consent order that the applicant's advocates legal fees was to be placed before the Church Council not for payment as alleged at paragraph 8 of the advocate's said Supporting but for consideration as per clause 3 of the said consent order. He contended too that the expressions "for payment" and "for consideration are two different expressions and mean two different things.
 12. He disposed too that he had not seen any concrete promise on the part of Archbishop Joseph Ochola to have the applicants advocates fees paid since the year 2018 as the advocate Kennedy Bosire Gichana has alleged at paragraphs 13 and 14 of his said Supporting Affidavit. Further that Archbishop Joseph Ochola had no power to make any promises or give any undertaking on behalf of the Church Council as the consent order dated 18th September 2018 had expressed that the issue of the applicants advocates fees was to be placed before a Church Council meeting but not before the Archbishop.
 13. He disclosed the issue that has been raised by the applicant's Application had previously been determined by the court in Kisii HC Misc. Application No. 238 of 2022 (Bosire Gichana and Company Advocates Versus- Bishop Richard Omayo Ogesi & 5 Others) where the court ordered that the parties listed herein as the 1st to 4th respondents had nothing to do with the Advocate-Client Bill of Costs therein.
 14. The court ordered that the Application be disposed of by way of written submissions and directed the parties to file their submissions. The Applicants filed their submissions on 23rd January, 2024 while the 1st to 5th Respondents filed their submissions on 13th February, 2024.



ISSUES FOR DETERMINATION

15. Having considered the Application herein, the Responses filed by the 1st to 4th Respondents as well as the submissions filed by their parties I find that the sole issue of determination is whether the 1st to 4th Respondents should be compelled to pay the Applicants' legal fees.

ANALYSIS AND DETERMINATION

16. It is not contested that the parties entered into a consent which was adopted as a judgment of this court on 18th September, 2018 by Justice Majanja. The consent was adopted in the following terms;
1. That the cases listed in paragraph 4 herein stand wholly and entirely terminated and /or discontinued as against 1st to 4th Respondents at the respective stages at which they are as at the date of this order. No party shall pursue and/or take out any further claims or processes or proceedings as against the other in connection with or arising out of the said cases.
 2. That the defrocked status of the petitioners shall be tabled before the immediate next meeting of the church council for review.
 3. That the issue of the legal fees of the petitioners' advocates shall be placed before the immediate next meeting of the Church Council for consideration.
 4. That this order do apply to the following Civil matters and Appeals: -
 - a. Civil Cases:-
 - i. Kisii Constitutional and Human Rights Petition No. 22 of 20 t 6 between Thomas Asiago & 5 others Versus Registered Trustees Evangelical Lutheran Church in Kenya & 6 others.
 - ii. Kisii CMCC No. 62 of 2011 between Thomas Agwata Nyabwanga – VS-Registered Trustee Evangelical Lutheran Church in Kenya and 8 others.
 - iii. Kisii CMCC No. 384 of 2014 between Registered Trustees., Evangelical Lutheran Church in Kenya Versus James Otete and Another.
 - b. Appeals
 - i. Kisii HCCA No. 17 of 2012 between Evangelical Lutheran Church in Kenya and Others VS Thomas Asiago and 2 others.
 - ii. Kisii HCCA No. 70 of 2014 between Thomas Asiago and 2 Others of 2014 between Thomas Asiago and 2 Others Vs Registered Trustees Evangelical Lutheran Church in Kenya and 8 others.
 5. In the event of non-Compliance, any Party shall be at liberty to seek legal remedy.
17. It is not a contested fact that the issue of the Petitioners' advocate's legal fee was placed before the council and deliberated upon sometime in the year 2019. However, the parties are at variance as to whether the church council approved payment of the said fees. At paragraph 6 of the supporting Affidavit of Rev. Thomas Agwata Nyabwanga, The Applicants contended that the members of the council indeed deliberated upon the matter of their advocates fees and the same was approved for payment. On the contrary the 1st to 4th Respondents contended that the issue of the Applicant's legal fees was duly placed before the meeting of Church Council that was held on 19th March 2019 and the



members of the council resolved that the council was not going to pay the said fees as the Advocates did not represent them. The 1st to 4th Respondent annexed an extract of the minutes of the said Meeting. Further, there seems to be a serious battle regard as what the consent meant when it stated that the issue of the Petitioners fee was to be placed before the church council for consideration under clause 3. The learned counsel for the Applicant's in his submission submitted the words "for consideration" as used in the consent meant "for payment". The learned counsel for the 1st to 4th Respondents on the contrary submitted that the words "for consideration" and "for payment" meant two different things and insisted that the 1st to 4th Respondents did not undertake to pay the Applicants' advocates legal fees in the consent adopted by this court.

18. I have carefully evaluated the application the supporting affidavits, the replying affidavits, the consent and the able submissions by both parties herein. Rev. Nyabwanga's claim in his affidavit in support of the Applicants case alleged at paragraph 6 of his affidavit that council approved the payment in their 2019 meeting. He however did not tender any evidence to prove such claim. Rev. Ngweiya in his replying affidavit on the other hand averred that the council in its meeting held on 19th March 2019 refused to approve payment of the Applicants' advocate legal fees and provided an extract of the minutes of the said meeting. Considering the positions of the two deponents, it is outright that the Applicant did not tender any evidence that the church council in its deliberation approved the payment their advocate's fees. It is equally clear that minutes of the meeting that deliberated the issue and declined to approve the payment of the legal fees produced by the 1st to 4th Respondent was not contested in any way by the Applicants. In fact, the Applicants' advocate in his affidavit conceded that Arch Bishop Joseph Ochollo informed him the council did not approve the payment of his fees which information pushed him to file an advocate client bill of cost. He owned up that the bill of cost was only determined by the Deputy Registrar against the Applicants given that the Respondent successfully moved the Deputy Registrar that there existed no advocate-client relationship between them and the Applicants advocate. It has thus emerged that the payment of the advocates fees was not approved by the church council.
19. On whether clause 3 of the consent provides for costs to the applicants. clause 3 of the said consent provides that " THAT the issue of the legal fees of the petitioners" advocates shall be placed before the immediate next meeting of the Church Council for consideration " The applicants submitted that consideration in the said consent was legal fees of the applicants while respondents submitted that by consideration it was meant that the church counsel was liable to pay the legal fees of the applicant's advocates. The Black's law dictionary defines consideration as "something bargained for and received by a promisor from a promise; that which motivates a person to do something especially a legal act. "The Collins English Dictionary defines consideration as a deliberation or a promise or object made given by one party to persuade another to enter into a contract. It is clear and as correctly submitted by the 1st to 4th Respondents that the meaning words "for consideration" could not be stretched further than its plain and ordinary meaning. It is trite law that the courts cannot rewrite an agreement between the parties as submitted by the applicants and I find no ambiguity in clause 3 of the consent.
20. Though clause 5 of the consent says that parties have a right to legal remedy in case of non -compliance, this relates to issues which were clearly agreed upon and stated by the parties in the consent. The word consideration was used in the consent in the context of deliberation by the church council and it cannot be construed to mean payment of costs in favour of the applicants.
21. It is therefore my finding that the payment of the Applicants advocates legal fees was solely pegged upon the deliberation of the council which deliberation took place in 2019 and the church council declined to pay. There was no commitment by the Respondents to pay the legal fees of the Applicants legal fees. The church council having held deliberations as directed in the consent whatever the outcome of the



same was, I find the 1st to 4th respondents did not breach clause 3 of the consent to warrant grant of a remedy in form of compelling the Respondent to pay the Applicants fees. The Parties having left the issue of determination of the said fees on the council, the Applicant should have anticipated that the outcome of the deliberations could mean payment or refusal to pay.

22. Further as pointed by the Respondents Advocate in his submissions, the Deputy registrar of this court was confronted with this issue while determining the advocate-client of Bill cost. The Deputy Registrar declared that the 1st to 4th Respondents did not have anything to do with the said costs because the advocate therein did not have any advocate-client relationship with them. The Deputy Registrar went ahead to determine the bill of cost against the Applicants. As correctly submitted by the learned counsel for the 1st to 4th Respondents, the Deputy Registrar having taxed the Bill of cost against the Applicants, this court cannot in its original jurisdiction compel the respondents to pay costs that Deputy Registrar of this court had excluded them from. The Decision of the Deputy Registrar regarding the liability of the Respondents in so far as the taxed bill of cost has not been challenged and as such I agree that with the 1st to 4th Respondents that the claim raised by the Applicant is res-judicata.
23. From the forgoing therefore, the consent of the parties adopted in this court on 18th September, 2018 having left the decision to pay the Applicants Advocate fees on the church council, the council having decided not to pay the Applicants fees and the Deputy Registrar having placed the duty to pay on the Applicants and this case has no role to play rather than downing my tools.
24. In any event the consent of the court having been adopted as judgment of this court, this court became functus officio in the matter and therefore the court has no jurisdiction entertaining the Application.
25. To this end I dismiss the application with costs to the 1st to 4th Respondents.
26. It is so ordered.

T.A ODERA

JUDGE

12.6.24

DELIVERED VIRTUALLY VIA TEAM PLATFORM IN THE PRESENCE OF:

Bosire Gichana for Petitioners Applicants

Ochich for 1st to 4th Respondents

Court Assistant Oigo

Bosire: We seek leave to appeal

Ochich: No objection

Order: Leave to appeal is granted.

T.A ODERA

JUDGE

12.6.24.

Constitutional Petition No. 22 Of 2016

