



REPUBLIC OF KENYA



KENYA LAW
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**Lihanda & 5 others v Obuba & 6 others (Civil Suit E001 of 2024)
[2024] KEHC 8823 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E001 OF 2024**

HM NYAGA, J

JULY 19, 2024

BETWEEN

**PATRICK MUSUNGU LIHANDA 1ST PLAINTIFF
NEBERT MISIGO MUDAKI 2ND PLAINTIFF
MOSES MOGITA ANYEGA 3RD PLAINTIFF
LUKA KIMELI KIPKEMOI 4TH PLAINTIFF
BEDINAH KAGEHA MALEA 5TH PLAINTIFF
LYDIAH WANJIAH (SUING AS BOARD OF TRUSTEES OF PENTECOSTAL
ASSEMBLIES OF GOD KENYA) 6TH PLAINTIFF**

AND

**NEMWEL OBUBA 1ST DEFENDANT
CORNELIUS MOMANYI KIRIAMA 2ND DEFENDANT
BOAS ONYANCHA 3RD DEFENDANT
CALEB SAGUA 4TH DEFENDANT
BETTY MBAYA 5TH DEFENDANT
NATHAN OMANGA 6TH DEFENDANT
WEKESA TALIA 7TH DEFENDANT**



RULING

1. The Defendants/Applicants through an application dated 10th February, 2024 brought under Article 159(2) (c) of the Constitution, Section 6(1) of the Arbitration Act, Section 1A, 1B, & 3A of the Civil Procedure Act, Orders 46 Rules 1 and 51 Rule 1 of the Civil Procedure Rules, seek the following orders: -
 - a. That there be a stay of further proceedings.
 - b. That the dispute herein be referred to the Internal Dispute Resolution Mechanisms prescribed by the Constitution of the Pentecostal Assemblies of God Church.
 - c. That the costs of this Application be provided for.
2. The application is supported by an Affidavit of Rev. Dr. Nemwel Obuba sworn on even date and supported by grounds that; all the parties herein are members of the Pentecostal Assemblies of God Church; that the Constitution of the Pentecostal Assemblies of God Church bars members from bringing disputes between and among them to Court without first exhausting the Dispute Resolution Machinery provided therein; that the Constitution of the Pentecostal Assemblies of God Church has set up structures and mechanisms for the Internal Resolution of all disputes arising within the Church; that the Plaintiffs have not invoked any of the Internal Dispute Resolution Mechanisms provided for under the Constitution of the Pentecostal Assemblies of God Church and hence the prescribed Alternative Mechanisms have not been exhausted; that the Court should not assume jurisdiction over the dispute without the Plaintiffs first exhausting the prescribed Alternative Dispute Resolution Mechanisms; and that no Party to this suit will be prejudiced if the Orders prayed for are granted.
3. The Plaintiffs/Respondents are opposed to the Application dated 10th February, 2024 and in doing so filed Preliminary Objection setting out the following grounds: -
 - a. The Application is incompetent and bad in Law as it does not disclose any reasonable cause of action that falls within Section 6(1) of the Arbitration Act and Order 46 Rule 1 and 20 of the Civil Procedure Rules, 2010.
 - b. The Application is an abuse of the court process as it seeks to validate acts which are ultra vires the very constitution of Pentecostal Assemblies of God Kenya.
 - c. The Application is intended to circumvent the overriding objective as stipulated in Sections 1A and 1B of the Civil Procedure Act.
4. The Plaintiffs/Respondents also filed grounds of oppositions dated 13th March, 2024 reproduced verbatim as follows: -
 - a. The Application is incompetent and bad in law for failure to disclose any reasonable cause of action pursuant to the provisions of Section 6(1) of the Arbitration Act and Order 46 Rule 1 and 20 of the Civil Procedure Rules, 2010 as read together with Article 159(2) (c) of the Constitution of Kenya.
 - b. The Applicants have not shown existence of any dispute or nature of the dispute.
 - c. The Applicants have not shown that there is any written complaint duly signed by the complainants to any of the Disciplinary Arbitration, Restoration and Counselling Committee (DARC) under Article 22-28 of the Constitution of Pentecostal Assemblies of God Kenya.



- d. The Application is an abuse of the court process.
 - e. There has never been any dispute between any member, pastor or official of Egerton Pentecostal Church of God within the meaning of Article 22 of the Constitution of Pentecostal Assemblies of God Kenya.
 - f. The Applicants' action of 25th January, 2024 were beyond the Constitution of Pentecostal Assemblies of God Kenya, illegal and actionable in Law.
 - g. The Application is intended to delay the hearing and determination of this suit defeating the overriding objective of court as stipulated in Sections 1A and 1B of the [Civil Procedure Act](#).
 - h. It is in the interest of justice that the Application is dismissed with costs to the Respondents.
5. The Application was canvassed through written submissions. For clarity since I am dealing with both the application and the preliminary objection I will refer to the parties as the plaintiffs and defendants.

Defendants' Submissions

6. With respect to ground 1 of the Preliminary Objection, the defendants argued that the suit has been commenced by the Plaintiffs because they perceive that a dispute exists between them and the defendants, hence their contention that the suit has been instituted prematurely.
7. Additionally, they submitted that under Order 51 Rule 10 of the [Civil Procedure Rules](#), an application shall not be refused for omission to cite the provisions under which it is brought as that is a technicality that does not affect the substance of the Application.
8. Regarding grounds 2 and 3 of the Preliminary Objection, the Applicants submitted that the same do not raise pure points of law and as such they should be rejected. In support of this position reliance was placed on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696
9. The defendants further submitted that the Plaintiffs' grounds of opposition do not address any legal issues at all, and have not filed a replying affidavit their averments remained unchallenged. To this end, reliance was placed on the case of [Mereka & Company Advocates v Invesco Assurance Co. Ltd](#) [2015] eKLR.
10. In supporting their application, the defendants also argued that it was incumbent upon the plaintiffs to exhaust the Internal Dispute Resolution Mechanisms set out under Articles 22-28 of the [Constitution](#) of the Church before moving to Court but they chose not to do so, and as such it is evident that this suit was instituted prematurely.
11. They posited that the Court ought not to assume jurisdiction over the dispute until the plaintiffs meet all the conditions precedent to properly instituting the suit before the Court.
12. In the circumstances they prayed that the entire suit be struck out with parties bearing their own costs.
13. In buttressing their submissions, the Applicants relied on the following cases: -
 1. [Wilson Shisia Nyangweso v Church of God in East Africa \(K\)](#) [2016] eKLR
 2. [Central Board of the African Independent Pentecostal Church of Africa \(Suing Through the National Executive Members Julius Njoroge Gitau & 3 Others v Registrar of Societies & 3 others; Registered Trustees v African Independent Pentecostal Church of Africa Registered Trustees](#) [2019] eKLR



3. [Muema Ndungi & another v. Raphael Kituva & 7 others](#) [2020] eKLR
4. [Geoffrey Muthinja & 4 another v Samuel Muguna Henry & 2 others](#) [2022] eKLR.
5. [Nzioki v Machakos Regional Church Council- AIC Kenya & 4 others](#) (Constitutional Petition E001 of 2023) [2023] KEHC 25651 (KLR) (22 November 2023) (Ruling)
6. [Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 Others](#) [2015] eKLR
7. [Geoffrey M. Asanyo & 3 others v. Attorney General](#) ([2019] eKLR

Plaintiffs' Submissions

14. Citing the provisions of Section 6 (i) of the [Arbitration Act](#), the plaintiffs submitted that the defendants have not shown this court that there has been any dispute between the parties to justify their initial action of aggression, and that if it ever existed they were enjoined under Article 22 of the Constitution of Pentecostal Assemblies of God-Kenya to lodge a complaint in writing to the Disciplinary Arbitration, Restoration and Counselling Committee (DARC) but they did not do so.
15. The Respondents submitted that the Application is an abuse of the court process as the defendants have come to court with unclean hands seeking to oust the jurisdiction of the court to hear and determine this matter yet they have acted against the [Constitution](#) of Pentecostal Assemblies of God-Kenya.
16. They posited that the Application is intended to undermine the overriding objection provided under Sections 1A & 1B of the [Civil Procedure Act](#). They contended that there will be no justice in allowing a party illegally in office to hold the same indefinitely.
17. In bolstering their submissions, the Respondent relied on the case of [County Government of Kirinyaga v African Banking Corporation Ltd](#) [2020] eKLR.

Analysis & Determination

18. I have very carefully considered the application, affidavit in support, the Preliminary Objection (P.O) & the grounds of opposition, as well as the parties rival submissions. From the above the following issues arise for consideration: -
 1. Whether the Respondents' Preliminary Objection raises pure points of law and whether the same is merited.
 2. Whether the dispute should be referred to Arbitration.

Issue No.1

19. The starting point is to define what a preliminary objection is. Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

20. The case of *Mukisa Biscuits v West End Distributors Ltd* (1969) E.A. 696 held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may



dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...

Justice Newbold in the said suit argues that

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

21. Further in the Court of Appeal case of *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR the principle was expounded as follows:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the 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...”

22. With respect to the first ground of P.O, the plaintiffs raise issue that the Application is incompetent and bad in law as it does not disclose any reasonable cause of action that falls within Section 6(1) of the *Arbitration Act* and Order 46 Rule 1 and 20 of the *Civil Procedure Rules*, 2010.

23. This is an issue that has been challenged by the defendants. They posited that the suit herein has been commenced by the plaintiffs as they perceive that a dispute exists between them.

24. This is a factual issue that needs to be ascertained by the court before making a determination on the same and is therefore not a pure point of law that can terminate the hearing of the defendant’s Application at a preliminary stage. It is thus my position that this ground cannot be determined through a P.O.

25. I’m persuaded by the case of *Mehuba Gelan Kelil & 2 Others v AbdulKadir Shariff Abdirhim and 4 Others* [2015] e KLR, where the Court held that: -

“The Preliminary Objection raised herein apart from the same being blurred and marred with factual issues; it is also vague. An averment that the suit is bad in law, misconceived and disclosed no reasonable cause of action cannot be entertained and sustained through a Preliminary Objection.”

26. With respect to grounds 2 and 3 of the P.O, I am of the view that the same are not pure points of law to be canvassed by way of a Preliminary Objection as they would require copious explanations and probing of evidence to unravel the correct position.

27. In light of the above, I do find that the plaintiffs’ P.O is unmerited and I hereby dismiss it.

Issue No.2

28. Section 6(1) of the *Arbitration Act* provides as follows: -

“Section 6(1) - A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings refer the parties to arbitration unless it finds –



- (a) That the arbitration agreement is null and void, inoperative or incapable of being performed, or
 - (b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
29. The rationale for respecting the parties’ agreement was explained in the case of *Eunice Soko Mlagui v. Suresh Parmar & 4 Others* [2017] eKLR, where it was held that;
- “Section 6 of the *Arbitration Act* is a specific provision of a statute that provides for stay of proceedings and referral of a dispute to arbitrating where parties to the dispute have entered into an arbitration agreement. The conditions under which the court can stay proceedings and refer a dispute to arbitration are prescribed by section 6 and in our view, the purpose of that provision is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution.”
30. The role of the Court in matters arbitration was explained in the case of *Kenya Pipeline Company Limited v. Datalogix Limited and Another* Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193, where Warsame, J (as he then was) held that:
- “It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration...Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter.”
31. The Pentecostal Assemblies of God-Kenya Constitution (PAG-K) has been availed to the court. Under Articles 22 & 23 of the said constitution provides as follows: -
- 22.1 No Member, Pastor or Official of the Church shall take any matter or dispute involving a member, pastor, official, organ of the Church or the church to a court of Law or any tribunal without first exhausting the Dispute Resolution Machinery provided hereinafter.
 - 22.2 (a) & (b) All members of the church are encouraged to follow the scriptural pattern found in Matthew 18:15,16 before bringing their complaint to one of the committees. If the matter is not resolved, or is inappropriate, then the relevant committee may be contacted, following Mathew 18:17, 18.
 - 22.3 The provision in 22.2 shall not be in the following cases where the offended is: underage, mentally or physically infirm and psychologically under the control of the offender.
 - 22.4 The Committee will listen to such cases faithfully causing a record of statements made in case to be kept and take appropriate action.



- 23.1 There shall be Disciplinary, arbitration, restoration and Counselling Committee (DARC) at the Assembly, District and Executive Level whose main functions shall be: To correct, restore to fellowship and where necessary discipline those who yield to all manner of temptations. To reconcile or arbitrate in disputes and differences arising between and among any of the following: members, pastors, assemblies, districts and officials of the Executive Committee.
- 23.2 (b) The member complained against shall be advised in writing and invited to appear before the committee at which he/she will be asked to answer verbally to the complaint.
- (c) If there is an admission of guilt and if contrition, sorrow and repentance are evident, the DARC shall decide what action to take, which may include to Order restitution, reimbursement of the Complainant's costs, order removal, removal of privileges, compensation, demand an apology and issue reprimand other action of the committee.
- 23.3 In the event that he/she does not admit to the complaint, a date shall be set for a hearing before the committee in the presence of the complainant when both the complainant and the person complained against together with their witnesses will be heard and a verdict given.
32. From the above provisions it is clear that a dispute involving a member, pastor or official of the church should not be referred to court before exhausting the dispute resolution machinery provided in the Constitution.
33. The defendants' averment that the parties herein are members of the PAG-K has not been controverted by the plaintiffs. In the plaint the latter are inter alia challenging the election of the 2nd defendant as a pastor and the 3rd – 7th defendants as members of the church board. They claim that Benard Mogusu Obwocha, Kennedy Ogise, Christopher Karani, Jairus Obbayi, Grace Lavai, William Ondieki and Tom Isiaho constitute the proper leadership of Egerton PAG church for the remainder of the term unless legally removed in accordance with the Constitution of PAG-K. They prayed for an order of permanent injunction against the defendants restraining them or their agents from usurping the leadership of Egerton P.A.G church, conducting services, handling finances, management, operations or in any manner interfering with the running of the said church affairs. It is thus patent that issues herein were internal affairs of the aforesaid church.
34. On consideration of Articles 22 & 23 of the PAG-K constitution and the issues raised above, it is clear that the church has a provision for internal disputes resolution mechanism which is available and has well laid down procedure for resolution of the disputes, which the plaintiffs could have considered before invoking the jurisdiction of this Honourable Court.
35. The plaintiffs are members of the church and had an obligation to exhaust the dispute resolution provisions provided for before instituting the present proceedings.
36. Section 3 of the *Arbitration Act* defines an arbitration agreement as follows:
- “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not.”
37. Further Section 10 of the *Arbitration Act* provides for minimal and specific instance of intervention or no interference by courts in matters that concern arbitration unless provided for in the Act as



was enunciated in the case of *Kenyatta International Convention Centre (KICC) v. Greenstar Systems Limited* [2018] eKLR where the Court held:

“Indeed, Section 10 of the *Arbitration Act*, No. 4 of 1995 expressly stipulates that: “Except as provided in this Act, no court shall intervene in matters governed by this Act.”

38. The plaintiffs contend that the defendants have not shown existence of any dispute or the nature of the dispute and that there has never been any dispute between any member, pastor or official of Egerton Pentecostal Church of God.
39. However, considering the parties herein are all members of PAG-K and from the facts pleaded, it is clear that there is a dispute between them and the plaintiffs believe that they are rightful members of the Egerton Pentecostal Church of God. The plaintiffs have expressly averred that the defendants’ acts of declaring themselves officials of Egerton PAG Church and blocking the lawful members and the pastor from accessing the church are ultra vires the Constitution of PAG-K.
40. In view of a clear provision of a statute, I find that the first port of call for the parties was to exhaust the internal dispute resolution mechanism.
41. Having stated the above, the question that arises is- does the said mechanism also offer protection to a party who are apprehensive of illegal acts detrimental to them are being carried out or are about to?
42. To me, the preservation of a particular status, pending resolution of a dispute, can only be done by a court of law, even though the said dispute is to be resolved elsewhere. In that instance, it cannot be argued that this Court cannot purport to exercise jurisdiction to deal with the matter, even where there is an arbitration clause in the Constitution. This is exactly why section 7 of the *Arbitration Act* is in place. It provides as follows;

“7. Interim measures by court

- (1) 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.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

43. In *Safaricom Limited v. Ocean View Beach Hotel Limited & 2 others* [2010] eKLR and *Seven Twenty Investments Ltd v. Sandhole Investments Kenya Limited* [2013] eKLR the courts held the position that if the subject matter of arbitration proceedings is in danger of being wasted an order of status quo should be granted to preserve it pending the arbitration proceedings including termination of contracts. These interim orders are intended to operate as holding orders pending the outcome of the arbitral proceedings.
44. In view of the above, it is my opinion that in as much as the plaintiffs were allowed to approach the High Court for the interim intervention, the substance of the dispute the parties ought to be determined as provided by the Constitution.



45. Having considered the matter, I find that is that the defendants' application dated 10th February, 2024 is meritorious and the same is granted in the following terms: -
- a. An order be and is hereby issued that there be stay of all proceedings herein.
 - b. That the dispute between the parties herein be and is hereby referred to the Internal Dispute Resolution Mechanisms provided by the Constitution of the Pentecostal Assemblies of God Church.
 - c. For maintenance of order, the status quo in place shall remain in force until the process under (b) above is completed.
 - d. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU 19TH DAY OF JULY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Ombachi for Plaintiffs

Mr. Ratemo for Defendants

