



**Oluhano & 5 others v Pentecostal Assemblies of God-Kenya Church & 3 others;  
Orera & 8 others (Interested Parties) (Constitutional Petition 1 & 1 of 2023  
(Consolidated)) [2024] KEHC 8289 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8289 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CONSTITUTIONAL PETITION 1 & 1 OF 2023 (CONSOLIDATED)**

**JN KAMAU, J**

**JULY 11, 2024**

**IN THE MATTER OF THE ENFORCEMENT OF  
FUNDAMENTAL RIGHTS AND FREEDOMS**

**IN THE MATTER OF ARTICLES 1,2,33, 23, 27, 32, 36, 38 AND  
81 OF THE CONSTITUTION OF KENYA AMONG OTHERS**

**AND**

**IN THE MATTER OF THE SOCIETIES ACT**

**AND**

**IN THE MATTER OF PENTECOSTAL ASSEMBLIES OF COD- KENYA CONSTITUTION**

**BETWEEN**

**ELIJAH KATHIARI MIKWA ..... 1<sup>ST</sup> PETITIONER**

**DANIEL NYAKUNDI OYARO ..... 2<sup>ND</sup> PETITIONER**

**MARK KAKAI NANGALAMA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**PENTECOSTAL ASSEMBLIES OF GOD-KENYA CHURCH ... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF SOCIETIES ..... 3<sup>RD</sup> RESPONDENT**

**REV PATRICK MUSUNGU LIHANDA ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. This matter was previously handled by Njagi and Musyoka JJ. There were innumerable cases pertaining to the Pentecostal Assemblies of God Church Kenya (hereinafter referred to as the “PAG-K Church”) that were filed by different parties. When Rev Dr Zedekiah Matata (hereinafter referred to as “PW 3”) was being cross-examined, he mentioned having seen seventeen (17) cases. Be that as it may, from the summaries that the parties gave and a perusal of the documentation that was filed by different parties, this court found the cases to have included:-
  - a. Kisumu CMCC No 421 of 2018 Antony Kenyakis v Patrick Musungu Lihanda & 3 Others
  - b. Kakamega Arbitration Award (sic) No 129 of 2018 Rev Humphrey Goren & 3 Others v Rev John Juma & Others. This was challenging the Ruling of the Award of the Pentecostal Assemblies of God and Arbitration Tribunal Case No 2 of 2018.
  - c. Kakamega HC Misc Application No 132 of 2018 Zedekiah Mutata Odera & Another vs Patrick Musundu Lihanda. This was withdrawn vide a Notice of Withdrawal dated and filed on 3<sup>rd</sup> September 2018
  - d. Amended Petition No 6 of 2018 Rev Stephen Malande & 2 others vs Rev Patrick Lihanda & Others. The same was dated 28<sup>th</sup> January 2022 and filed on 31<sup>st</sup> January 2022.
  - e. Amended Petition No 8 of 2018 dated 10<sup>th</sup> January 2022 and filed on 17<sup>th</sup> January 2022.
  - f. Kakamega CMCC No 99 of 2019 formerly Kisumu CMCC No 543 of 2018.
  - g. Kisumu ELRCC No 180 of 2018 Dr Enos Lwamba vs Rev Patrick Lihanda & 10<sup>th</sup> Others
2. Kakamega Constitutional Petition No 6 of 2018 and Kakamega Constitutional Petition No 8 of 2018 were consolidated. Pursuant to the court order of 8<sup>th</sup> November 2018, the following matters were also consolidated for determination alongside the said matters:-
  - a. Kakamega Miscellaneous Application No 129 of 2018
  - b. Kakamega Miscellaneous Application No 131 of 2018
  - c. Kakamega CMCC No 421 of 2018
  - d. Kakamega Miscellaneous Application (JR) No 145 of 2018
3. When the consolidated matters were transferred to High Court Vihiga under whose territorial jurisdiction PAG- K Church fell, they were registered as Vihiga Constitutional Petition No 1 of 2023.
4. When this court became seized of the matter on 15<sup>th</sup> March 2023, it was evident that the parties were not able to agree on who was a petitioner and who was a respondent. The representation of the parties was also very contested as there was a dispute as to which law firm was representing PAG- K Church. This court therefore opted to address them by name where necessary.
5. Even so, M/S H.M. Wasilwa & Co Advocates and Erig Garo were representing the Petitioners in Kakamega Constitutional Petition No 6 of 2018 while M/S Ochieng Oginga & Co Advocates was representing the Petitioners in Constitutional Petition No 8 of 2018.



6. PAG- K Church was represented by M/S Zablon Mokua & Co Advocates. M/S Oloo & Oloo Advocates LLP also indicated that they were also representing PAG- K Church. They were also on record for Rev Patrick Musungu Lihanda, Rev Zedekiah Odera, Carol Andisi, Freeson Ondego, Samuel Juma, James Makokha, John Kebongo, Dina Mukala, Jusa Ambani and 454 PAG- Kenya members (hereinafter referred to as Interested Parties). They were acting alongside Jusa Ambani Advocate, Mwangi Wahome & Co Advocates and Karani Grey & Co Advocates. As the said firm of M/S Oloo & Oloo Advocates LLP was the one that filed the Written Submissions, this court referred to it in the decision herein for ease of reference.
7. This court referred to the parties that were represented by M/S Oloo & Oloo Advocates LLP to as Respondents and Interested Parties. This court did not differentiate the party known as PAG – K Church that M/S Zablon Mokua & Co Advocates was representing as it was the same party M/S Oloo & Oloo Advocates LLP, Jusa Ambani Advocate, Mwangi Wahome & Co Advocates and Karani Grey & Co Advocates were also representing.
8. It did appear to this court that the said law firms have been representing different factions of the same client, namely PAG K- Church as the response to the Petitions herein by M/S Oloo & Oloo Advocates LLP, Jusa Ambani Advocate, Mwangi Wahome & Co Advocates and Karani Grey & Co Advocates to the Petitions herein was different from that of M/S Zablon Mokua & Co Advocates. This could also have been the reason why the Mediation Settlement Agreement that had been arrived at some point in the proceedings did not meet the approval of all the parties.
9. In the Petition dated 10<sup>th</sup> January 2023, the Petitioners therein sought the following orders:-
  1. A declaration do issue to the effect that the following Articles of the Pentecostal Assemblies of God (PAG)-Kenya Church Constitution 1998 were unconstitutional, namely:
    - a. Articles 6, 9.2 and 12 were in contravention of Article 27 of *the Constitution* of Kenya 2010.
    - b. Articles 6, 7 and 23.2 (b) were in contravention of Articles 24, 25, 47, 48 and 50 of *the Constitution* of Kenya, 2010
    - c. Articles 25 was in contravention of Articles 22,23,27(1), 48, 50, 159 and 165 of *the Constitution*
    - d. Article 7.6 was in contravention of Article 36 of *the Constitution* of Kenya, 2010 and
    - e. Article 8.7 (e), 12.4 and By Law 2.8 (c) for being in contravention of Article 38 of *the Constitution*.
  2. That an order of Mandamus does issue pursuant to Article 23(3)(f) of *the Constitution* compelling the Registrar of Societies to invoke Section 12 of the *Societies Act* until the above provisions of the Pentecostal Assemblies of God Church Constitution are amended accordingly.
  3. That the Notice issued by the PAG Church Superintendent dated 11<sup>th</sup> July 2018 for the elections to be held between 5<sup>th</sup> and 6<sup>th</sup> December, 2018 be and is hereby declared illegal and contrary to the PAG Church Constitution.
  4. The cost of this suit be borne by the Respondents.
  5. Any other remedy that the court deems fit and just.



10. In their Amended Petition dated 28<sup>th</sup> January 2022 that was filed on 31<sup>st</sup> January 2022, the Petitioners therein prayed that:-
  - a. A declaration to issue that the conduct, omission and other acts of Patrick Lihanda in the Office of General Superintendent of PAG-K was in gross violation of *the Constitution* of Kenya, the *Societies Act*, the *Retirement Benefits Act*; and the PAG Church Constitution.
  - b. A declaration do issue barring Patrick Lihanda from contesting as a candidate for or holding any office or role in the PAG Kenya Church.
  - c. The Respondent do pay the costs of these proceedings.
11. In the Amended Complaint dated 12<sup>th</sup> February 2019 in Kakamega CMCC No 99 of 2019, which was indicated to have been consolidated herein, the Plaintiffs therein sought the following orders:-
  - a. ....
  - b. A declaration that the Account No 1260277681614 opened at Equity Bank Kisumu Branch and Account No 0111370000002 held at Rafiki Microfinance Bank in Mbale were commenced unlawfully and that the same be declared illegal.
  - c. A permanent injunction do issue barring the Respondents and the Executive Committee of PAG Kenya Church acting either by themselves or their agents, servants, employees and/or in any manner whatsoever be restrained from carrying out administration of the PAG Church and/or calling or attending any meeting convened by them or by anyone else and further that they be restrained from accessing and/or using or utilising the PAG Church funds and/or monies and/or running and operating any PAG Church Bank Accounts including but not limited to the ones mentioned in paragraph 5(b).
  - d. A permanent injunction do issue barring and the Respondents, their agents, employees and/or anyone acting on their behalf from carrying out any duties in and/or pertaining to the PAG Kenya Church and that the Trustees of the Church in exclusion of the 1<sup>st</sup> Respondent, the Church Council Chairman and a former General Superintendent who shall have retired or attained the age of retirement do take over the administration and the finance of the PAG Kenya Church and they make any decision in furtherance of the sound administration of PAG Kenya Church.
  - e. An order do issue compelling the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants (sic) to reimburse and pay back all the monies belonging to the PAG Church illegally received and banked in the Accounts numbers mention in paragraph 5(b).
  - f. An order do issue compelling the aforesaid Defendants to account for all the monies belonging to the PAG Church, that had been illegally received, banked and spent in the above mentioned impugned Bank Account numbers.
  - g. Costs be provided for.
12. While M/S Ochieng Oginga & Co Advocates filed their Written Submissions dated 25<sup>th</sup> December 2023 on 26<sup>th</sup> December 2023, M/S Zablon Mokuia & Co Advocates filed Written Submissions dated 28<sup>th</sup> December 2023 on 22<sup>nd</sup> January 2024. On their part, M/S H.M. Wasilwa & Co Advocates filed Written Submissions dated 12<sup>th</sup> January 2024 on 22<sup>nd</sup> January 2024 while M/S Oloo & Oloo Advocates LLP filed Written Submissions dated 27<sup>th</sup> February 2024 on 28<sup>th</sup> February 2024. CPA Rev Patrick



Oyondi's undated Written Submissions were filed on 14<sup>th</sup> March 2024. The Judgment herein was based on the said Written Submissions which parties relied upon in their entirety.

### Legal Analysis

13. The matter herein was very convoluted. Parties had raised several issues in the different matters that they had filed. However, having considered the Petition herein, the various affidavit evidence, the oral evidence and Parties' Written Submissions, it appeared to this court that the Petitions and the consolidated suits herein revolved around three (3) key issues namely:-
  - a. Constitutionality or otherwise of various provisions in the PAG-K Church Constitution; and
  - b. The process of amendment of the PAG-K Church Constitution; and
  - c. The administration of the said Church by one Rev Patrick Lihanda and his eligibility to continue holding office in the PAG-K Church.
14. The issues that this court was therefore called upon to determine were:-
  - a. Whether or not the certain Articles of *the Constitution* of the PAG Church-Kenya were in contravention with *the Constitution* of Kenya, 2010;
  - b. Whether or not Rev Patrick Lihanda was fit to hold office in the management and administration of the PAG Church- Kenya;
  - c. How was the amendment of *the Constitution* of the PAG Church-Kenya, if at all, to be done;
  - d. Who was to bear the costs of this Petition?
15. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

### I. Constitutionality or Otherwise of The Pag K- Church Constitution

16. The Petitioners who were represented by M/S H.M. Wasilwa & Co Advocates submitted that the PAG-K Church Constitution that was enacted in 1998 was outdated. It was their contention that since the same had never been reviewed or amended, it was therefore not aligned to the various statutes that had been enacted thereafter together with *the Constitution* of Kenya, 2010. As a result, the PAG- K Church had unlawfully infringed various fundamental rights and freedoms as enshrined in the Bill of Rights providing for inclusion, enfranchisement and non-discrimination among various other guiding principles for all persons, bodies and entities such as societies and churches.
17. They argued that certain provisions of the PAG- K Church Constitution were repugnant to the rules of natural justice and contrary to the principles of governance, discriminatory and arbitrarily, unjustifiably and unreasonably curtailed the fundamental rights and freedoms of their members contrary to *the Constitution* of Kenya.
18. They were apprehensive that in the event elections were held under the current PAG- K Church Constitution, persons under the age of eighteen (18) years and women would be disenfranchised as they were not allowed to contest in elections which was contrary to the provisions of Article 27 of *the Constitution* of Kenya.
19. They placed reliance on the case of *Rose Wangui Mambo & 2 Others v Limuru County Club & 17 Others* Petition 160 of 2013 (eKLR citation not given) where in striking out certain provisions which barred female golfers from participating in the affairs of the Respondent Club, for being



unconstitutional, the court held that the Bill of Rights was an integral part of Kenya's democratic state and was the framework for social, economic and cultural policies and had to be protected and promoted for the purpose enunciated under Article 19(2) of *the Constitution* of Kenya which was to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

20. They further relied on the case of *Prisca Kemboi & 2 Others vs Kenya Post Office Savings Bank* [2014] eKLR where the court therein cited the case of *Kituo Cha Sheria & 8 Others v Attorney General* [2013] eKLR where it was held that a policy that did not make provision for examination of individual circumstances and anticipated exceptions was unreasonable.
21. They invited the court to apply the proportionality test in determining whether the various limitations of fundamental rights and freedoms under the impugned Constitution were reasonable and justifiable in a democratic society and in line with Articles 10 and 24 of *the Constitution* of Kenya 2010.
22. In this regard, they cited the case of *R v Jakes* [1986] 26 DLR 4<sup>th</sup> Edition at 227 where the court set out the three (3) components of the proportionality test, the first being that the measures that were adopted had to be carefully designed to achieve the objectives in question, the second being that the impact was to be as little as possible to the right or freedom in question and the third being that there had to be a proportionality between the effects of the measures which were responsible for limiting the Charter, right or freedom and the objective which had been identified as of sufficient importance.
23. They submitted that no such rationality had been demonstrated for the limitation of the fundamental rights and freedoms of the members of the PAG-K Church. They pointed out that the said Church and its various organs as sued in these proceedings had conceded and indicated that it was not their intention to limit any rights or freedoms but that it was the societal changes and the enactment of the new laws and *the Constitution* of Kenya that had rendered their Constitution obsolete, hence the need for urgent need for amendment.
24. They also asserted that the PAG- K Church Constitution also offended Article 47 of *the Constitution* of Kenya which guaranteed the right to a fair hearing and trial, Article 36 of *the Constitution* of Kenya which guaranteed the freedom of association and that several of its By- Laws were obsolete and resulted in an overlap of roles and duties. They also called for the removal of Rev Patrick Musungu Lihanda from holding the position of General Superintendent of the PAG-K Church as he was in blatant violation of Chapter Six of *the Constitution* of Kenya.
25. The Petitioners who were represented by M/S Ochieng Oginga & Co Advocates also submitted that Articles 6, 9, 12, 12.4 of the PAG-K Constitution were in contravention of Section 7 of the *National Cohesion and Integration Act* which recognised diversity and Article 27 of *the Constitution* of Kenya as they were discriminatory on the basis of age, marital status, gender, ethnic and social origin.
26. In that regard, they placed reliance on the case of *Peter K. Waweru vs Republic* [2006] eKLR where it was held that discrimination was the failure to treat all persons equally where no reasonable distinction could be found between those favoured and those not favoured.
27. They also cited the case of *Rose Wangui Mambo & 2 Others vs Limuru County Club & 17 Others* (Supra) and the case of *Mohamed Fugicha vs Methodist Church in Kenya (Suing through its Registered Trustees) & 3 Others Civil Appeal No 22 of 2015* (eKLR citation not given) where it was held that the claim to equality before the law was in a substantial sense, the most fundamental of the rights of man.
28. They further stated that Article 12.4 of the PAG-K Constitution on nominations and elections of General Officers disenfranchised the Church members by locking them out of the elections and denying them the chance to participate and elect persons of their choices to lead them in the position



- of the Church because it was only pastors who were allowed to vote contrary to Article 27(1) and 38 of *the Constitution* of Kenya.
29. In that regard, they relied on the South African Constitutional Court case, *Richter v Minister for Home Affairs & 2 Others* [2009] ZACC3 where it was held that the vote of each and every citizen was a badge of dignity and personhood, thus, everybody counted.
  30. They further pointed out that some of the Articles such as 12.2(h), 9,14.3, 8.8(a) and 10.5 of the PAG-K Constitution provided for an overlap of roles and duties.
  31. It was their contention that *the Constitution* of Kenya had set out values and norms to be adhered to by all persons whether in the public or private sphere as was held in the case of *Centre for Rights Education and Awareness & 2 Others v Speaker, National Assembly & 6 Others* Petition No 371 of 2016 (eKLR citation not given). They pointed out that this court ought to promote the spirit, purport and objects of the Bill of Rights and ought to prefer a generous construction over a merely textual or legalistic one in order to afford the Petitioners herein the protection of the constitutional guarantees.
  32. To buttress the above point, they placed reliance on the case of Gabriel *Nyabola vs Attorney General & 2 Others* Petition No 72 of 2012 (eKLR citation not given) where it was held that the principle of equality and non-discrimination did not mean that all distinctions between people were illegal but that distinctions were legitimate if they pursued a legitimate aim such as affirmative action to deal with factual inequalities and were reasonable in the light of their legitimate aim. In the same context, they also relied on the case of *Richard Nduati Kariuki v Leonald Nduati Kariuki & Another* (Supra).
  33. They urged the court to strike out the impugned archaic, discriminatory and unreasonable laws that unjustifiably limited fundamental rights and freedoms of members of the PAG-K Church.
  34. The parties who were represented by M/S Zablon Mokuia & Co Advocates supported the Petitioners' case and urged this court to allow the said Petition. They cited the case of *Richard Nduati Kariuki v Leonald Nduati Kariuki & Another* Misc Civil Appl No 7 of 2006 (eKLR citation not given) where it was held that courts had a duty to invoke the common law to enforce the private rights of individuals in such a way that the private causes of action were expanded to incorporate appropriate remedy against the private individual or agency violating such rights.
  35. They also relied on the case of *CKC & Another* (Suing through their mother and next friend JWN) vs ANC [2019] eKLR where it was held that *the Constitution* of Kenya had laid great emphasis on respect, enjoyment and protection of rights and fundamental freedoms of all persons, unlike the previous Constitution and did not derogate from those rights and freedoms, except in clear, exceptional and tightly controlled circumstances.
  36. They reiterated that under Articles 23 and 165 of *the Constitution* of Kenya, this court had the powers to strike out any act that violated *the Constitution* of Kenya and grant any such appropriate remedies. In this regard, they relied on the case of *Law Society of Kenya & 7 Others vs Cabinet Secretary for the Health & 8 Others; China Southern Co. Airline Ltd (Interested Party)* [2020]eKLR where it was held that an appropriate relief as per Article 23(3) of *the Constitution* of Kenya was a relief that was required to protect and enforce *the Constitution*, a declaration of rights, an interdict, mandamus, or such other relief as may be required to ensure that the right as enshrined in *the Constitution* was protected.
  37. On their part, the Respondents and Interested Parties argued that although the Petitioners had asked the court to declare several Articles of the PAG-K Constitution unconstitutional, the Petitioners had not demonstrated that there had been attempts to amend the impugned Constitution and that Rev Patrick Lihanda had frustrated the process.



38. They referred this court to Article 12.2(c) of the impugned PAG-K Constitution and pointed out that the said Article placed the duty to introduce the proposals for amendments upon the General Secretary of the Church and that the said Rev Patrick Lihanda was the General Superintendent and not the said General Secretary. They contended that the Petitioners had deliberately ignored to cast their blame on the responsible office.
39. While they conceded that time was ripe to amend the PAG- K Church Constitution with a view to aligning it to *the Constitution* of Kenya and to address issues that had led to the current leadership and governance impasse, they were emphatic that the same ought to be done within the structures that were provided in *the Constitution*.
40. They added that the Church members were against piecemeal amendments and that they advocated for a holistic member- led process that should reflect the spirit of revival and renewal of the Church.
41. This court was constitutionally mandated under Article 23(1) of *the Constitution* of Kenya to hear and determine applications for redress of a denial, violation or threat to a right or fundamental freedom in accordance with Article 165 of *the Constitution* of Kenya. When the violation or threat stemmed from an Article contained in a constitution of a Church for instance, it behoved the court to lay side by side the impugned provision and the Articles of *the Constitution* it is alleged to have offended and see whether the former squared with the latter.
42. The guiding principles of constitutional interpretation are as follows:-
- a. Article 2 of *the Constitution* of Kenya states that *the Constitution* is the supreme law of the land and further stipulates that any law that fails to resonate with *the Constitution* is invalid to the extent of its inconsistency.
  - b. Article 10 of *the Constitution* of Kenya is premised on the basis that the national values and principles are binding to all and ought to be considered when enacting, applying and interpreting any law. These principles include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
  - c. Article 258 of *the Constitution* of Kenya further gives every person the right to institute court proceedings claiming that *the Constitution* has been contravened, or is threatened with contravention.
43. Article 259 of *the Constitution* is the cornerstone of the interpretation of *the Constitution*. It lays down the guidelines as follows:
1. This Constitution shall be interpreted in a manner that:-
    - a. Promotes its purposes, values and principles;
    - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
    - c. Permits the development of the law; and
    - d. Contributes to good governance."
44. In interpreting the Bill of Rights, Article 20 of *the Constitution* of Kenya requires the courts to promote:-
- a. the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and



- b. the spirit, purport and objects of the Bill of Rights.
45. The spirit of *the Constitution* of Kenya ought to reverberate throughout the court's approach towards the interpretation of *the Constitution* in relation to the question at hand. In construing the impugned provisions of the impugned PAG-K Constitution, this court was enjoined to avoid an interpretation that clashed with the Constitutional values, purposes and principles but instead adopt an interpretation that most favoured the enforcement of a right or fundamental freedom.
46. It had also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, development of the law, good governance, human rights and fundamental freedoms in the Bill of Rights.
47. This court therefore considered the alleged infringement and /or violations of the constitutional rights under different and distinct headings for ease of following its reasoning on the different issues that had been raised.

#### **A. Discrimination on Membership on The Basis of Age**

48. PAG- K Church was registered under the *Societies Act* Cap 108 (Laws of Kenya). Section 2(1) of the *Societies Act* defines a "society" as one that "includes any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society." Companies, trade unions, co-operative societies, a school, a building society, a licensed bank or any international organisation were not considered to be societies within the meaning of the *Societies Act*.
49. The Society Act envisaged that a group of ten (10) or more people would come together for a common purpose and objective. Those people decided what constituted the membership of the society. No person could therefore be compelled to be a member of a society. It was therefore expected that every member had to adhere to the rules and regulations of the society.
50. An association was free to decide the category of people it wished to be its members. It was for that reason that there existed exclusive men and women associations in Kenya. However, this did not make them unconstitutional.
51. Indeed, an association was not deemed to be discriminatory merely because it did not consist people of all ages, of different sex, of different gender, of different marital status, of different health status, of different race, of different colour, of different physical and mental abilities, of different religions, of different beliefs, of different cultures, of different conscience, of different languages or of different ethnic or social origin at any given time.
52. It was also not mandatory that an association of people must have members who are pregnant, members who speak different languages or members who dress differently so that the association could be said to have complied with the provisions of Article 27(4) of *the Constitution* of Kenya.
53. PAG- K Church formulated rules and regulations relating to its membership. It had a right to decide what would constitute its membership and in particular the age at which the formal membership would commence.
54. Article 6 of the impugned Articles of the PAG-K Constitution provides as follows:-

“The Church consists of the following:



- 6.1. Adherents-Adherents include all who wish to fellowship and receive spiritual nourishment through the local Assembly.
- 6.2. Junior Membership- Persons between the ages of 12 and 16 who fulfil the requirements for full membership shall be eligible for junior membership. Such members do not qualify for voting privileges at Assembly meeting.
- 6.3. Associate members – Associate membership is open to persons:
  - a. Over 16 years of age who are born again
  - b. Who are members of other churches but wish to fellowship with the local Assembly.
  - c. Whose admission into full membership is under process of consideration.
- 6.4. Full members -Full membership is open to persons who are over 16 years of age, providing the following qualifications are met:
  - a. The persons have given a credible confession and profession of faith in the Lord Jesus Christ as Saviour.
  - b. Has been baptized in water by immersion.
  - c. Lives a life that portrays holy living as evidenced by refraining from acts of sinful nature such as sexual immorality, impurity, debauchery, idolatry, witchcraft, hatred, discord, fits or rage.....
  - d. Subscribes to the PAG-Kenya Constitution and Standard of Faith and Practices
  - e. If married, the marriage must be recognized as a valid monogamous one.
  - f. Strives to live in harmony with the believers in the Assembly
  - g. Be willing to be a regular financial supporter of the Assembly in tithes, offerings and gifts.

55. Notably, Article 32(1) of *the Constitution* of Kenya stipulates that:-

- “1. Every person has the right to freedom of conscience, religion, thought, belief and opinion.
2. Every person has the right, either individually or in community with others, in public or private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of day of worship...”

56. This court noted the Petitioners’ assertions that children below the age of twelve (12) years had been denied the opportunity to exercise their right to worship as guaranteed under Article 32 of *the Constitution* of Kenya. As was held in the case of Gabriel Nyabola vs Attorney General & 2 Others (Supra), there had to be factual inequalities that were reasonable in light of their legitimate expectation.



57. Against that backdrop, it was evident that Article 6.2 of the PAG- K Church Constitution did not expressly bar children below twelve (12) years from worshipping in the PAG K- Church. They could easily have fallen under adherents who included all who wished to fellowship and receive special nourishment through the local Assembly.
58. Be that as it may, this court took the view that a child of tender years had no legitimate expectation regarding his religion when he or she accompanied his parent and/or guardian to the PAG K- Church. Indeed, a person who had no capacity to exercise his or her right to freedom of conscience, religion, thought, belief and opinion due to disability of age could not have those rights infringed and/or contravened and/or violated as he or she had no legitimate expectation of how that right was to be enjoyed and/or to be aggrieved when the same was limited and/or curtailed.
59. Indeed, it was debatable whether a child of tender years could express his or her own free will to profess a particular religious persuasion or belief or whether that persuasion or belief was instead imposed on that child by parents and guardians.
60. This court surmised that PAG- K Church may have adopted a rationality test that put a cut off age of twelve (12) years because it determined that at that age, a child had some sort of understanding and could think critically and make rational decisions relating to his or her conscience and/or belief. Indeed, a child from the age of twelve (12) years was expected to easily understand the qualifications of joining the PAG- K Church as set out in Article 6.4 (c) to (g) of the PAG- K Church Constitution.
61. The Petitioners were obligated to demonstrated how children below twelve (12) years had been discriminated against by PAG K- Church. They did not do so. For that reason, this court was not persuaded that children below twelve (12) years had been discriminated against by PAG K- Church and/or that Article 6.2 of the PAG- Church Constitution had infringed, contravened and/or violated the provisions of Article 27(4) of *the Constitution* of Kenya.

## **B. Discrimination on The Right To Vote**

62. Turning to the voting rights of children between twelve (12) and sixteen (16) years, this court had due regard to the provisions of Section 2 of the *Age of Majority Act* Cap 33 (Laws of Kenya). The same provides that:-
 

“A person shall be of full age and cease to be under any disability by reason of age on attaining the age of eighteen years.”
63. Further, Article 38(3) of *the Constitution* of Kenya provides as follows:-
 

“Every adult citizen (emphasis court) has the right, without unreasonable restrictions

  - a. to vote by secret ballot in any election or referendum; and
  - b. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”
64. The junior members complained of in Article 6 of the PAG- K Church Constitution were aged between twelve (12) and sixteen (16) years. Being persons under disability and not adults as envisaged in Article 38(a) of *the Constitution*, their rights to vote could not have been said to have been infringed and/or contravened.
65. After a careful perusal of Article 6 of the PAG- K Church this court did not see any unconstitutionality regarding what constituted junior members, associate members, full members,



- transfer of membership, resignation of members, suspension and/or termination of membership. If there was infringement and/or contravention of *the Constitution* of Kenya, the Petitioners did not demonstrate the same.
66. This court noted that Article 12.6 of the PAG- K Church Constitution states that:-
- a. At the pastors’ Conference, nominations shall be made from the floor by secret ballot for each of the offices of General Superintendent, General Secretary and General Treasurer which shall be submitted to the Electoral Committee.
  - b. The Electoral Committee will submit not less than three names to the council for verification of qualifications and return them to the Electoral Committee who presents them to the Business Conference for election by secret ballot.
67. A perusal of Article 8.12 of the PAG- K Constitution provided for a voting system by delegates. It states as follows:-
- a. The District Conference voting delegates shall consist of the following:-
    - i. All pastors
    - ii. Assembly Committee Members
68. According to Article 7.1 of the PAG-K Church Constitution:-
- “An Assembly is a group of members who have agreed to come together in a local church which means in a building either owned, leased or rented in the name of PAG- Kenya to worship God, fellowship, observe church ordinances, and to be instructed in the Bible and church Doctrine.”
69. Voting for elective offices could either be direct or indirect. It was direct where the voters voted for the candidates. It was indirect where the voters voted for the candidates through delegates they had themselves chosen. It was evident that PAG- K Church had adopted a delegate voting system. This was an indirect voting system where all the voter’s voices were heard through the delegates they had chosen. There were several reasons for the adoption of this mode of voting one of which being due to logistics of convening all voters in one (1) venue or the process of each of them voting.
70. In Article 123(4)(a) of *the Constitution* of Kenya, the Kenya people exercise indirect voting through their representatives in Senate. The said provisions stipulates that:-
- “Except as provided otherwise in this Constitution, in any matter in the Senate affecting counties, each county delegation shall have one vote to be cast on behalf of the county by the head of the county delegation or, in the absence of the head of the delegation, by another member of the delegation designated by the head of the delegation.”
71. The voting through delegates could not therefore be said to have disenfranchised the members of the PAG-K Church. If this was not a system that they wished to adopt, the same could be amended in their Constitution.
72. Notably, the PAG-K Church Constitution did not exclude women from being voters during elections. Women were included in the Assembly Committee that could exercise voting by delegates in the District Conference as was stated in Article 8.12 of the PAG-K Church Constitution.



73. The Assembly Committee was established under Article 7.9 of the PAG- K Church Constitution. The same provided as follows:-

“ An Assembly shall have the following officers who shall form the Assembly Committee:-

- a. A credentialed pastor
- b. A secretary
- c. A treasurer
- d. A deacon and deaconesses (emphasis court)
- e. And such other officers as may be determined by the assembly from time to time.”

74. This court was not persuaded to find that women were excluded from voting or that the method of voting that was adopted by the PAG- K Church did not contravene the provisions of Article 27(4), Article 27 (5) and Article 38 of *the Constitution* of Kenya.

### **C. Discrimination on Right To vie for Elective Position**

75. The Petitioners argued that the PAG-K Constitution did not treat everyone equally as women and youth were not allowed to contest executive positions and that it imposed age limits for certain positions.

76. Article 12.4 of the PAG- K Constitution provided as follows:-

“ General Officers shall be members of the PAG-Kenya and shall be men of mature experience and ability, who shall not be younger than 40 years of age at the time of first nomination and not older than 60 years of age at the time of nomination (emphasis court), ordained for period of not less than ten (10) years, whose life ministry are above question, holding a Diploma in Bible or above.

77. Notably, Article 27 of *the Constitution* of Kenya provides that:-

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin (emphasis court), colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Article.

78. This court had due regard to the case of Peter Waweru vs Republic (Supra) where the court defined discrimination as follows:-

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions...Discrimination also means unfair treatment or



denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

79. There was no logical explanation why women were excluded from holding offices in the Church. The qualification of men as the only persons who could be general officers of the PAG- K Church therefore fell afoul the provisions of Article 27(5) of *the Constitution* of Kenya that provides that no person shall discriminate another on the basis of sex or gender. Women were part of the Church and had to be treated equally and fairly if they met the criteria and/or qualification of the elective position that was being contested for. Any law that prohibited women from vying for any elective position in Kenya was clearly ultra vires *the Constitution* of Kenya and in particular Article 27 of *the Constitution* of Kenya and could be allowed to stand.
80. Regarding the qualification of pastors being between forty (40) and sixty (60) years at the time of nomination, this court took the view that an association was free to come up with its criteria of qualification to a particular office. A prospective employer and/or hirer of a particular position had the right to call for specific qualities to a particular position. Such prospective employer and/or hirer had the mandate to determine the age which an employee could retire.
81. According to Article 137 of *the Constitution* of Kenya:-
1. A person qualifies for nomination as a presidential candidate if the person:-
    - a. is a citizen by birth;
    - b. is qualified to stand for election as a member of Parliament;....
82. Under Article 99(1)(a) of *the Constitution*, it is provided as follows:-
- “Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person is registered as a voter.”
83. It was evident from Article 99(1)(a) and Article 137(1) (a) and (b) of *the Constitution* of Kenya that there was a minimum age for which one had to run for the Office of President in Kenya. This was eighteen (18) years which was the age that any person could be registered as a voter as contemplated in Article 38(1) of *the Constitution* of Kenya.
84. In Article 167(1) of *the Constitution* of Kenya, it was provided as follows:-
- “A judge shall retire from office on attaining the age of seventy years (emphasis court), but may elect to retire at any time after attaining the age of sixty-five years.”
85. It could not therefore be said that *the Constitution* of Kenya had discriminated against persons who were younger than eighteen (18) years and those who were older than seventy (70) years as the terms of employment were determinable. *The Constitution* of Kenya envisaged that the productivity of a judge would go declining due to old age and that a person who was less than eighteen (18) years was still under the disability of age. It also appreciated that a person who contested the position of the Office of the President of Kenya had to be capable to handle an office of that magnitude.
86. This court noted that the position of the general officer was a senior position in the PAG K- Church. This is because the General Superintendent, General Secretary and General Treasurer constituted the Executive Committee that executed the duties of spokesperson of the PAG K- Church, signatory to the accounts, preparing budgets amongst other duties.



87. This court took the firm view that Article 12.4 of the PAG- K Constitution revolved around qualification of the persons to hold the office of general officers. The qualification entailed experience and competences to carry out the duties of the said offices.
88. According to the members who passed the PAG – K Church Constitution, an age between forty (40) to sixty (60) years at the age of nomination was determined to have been the most suitable for the aforesaid offices. Article 12.4 of the PAG- K Church Constitution may have become outdated as there were both younger and older pastors in today’s world but it could not be said to have contravened, violated and/or infringed on Article 27(4) and Article 27(5) of *the Constitution* of Kenya. This was a provision that the members of PAG- K Church themselves could tinker around with for it to work for their purposes.

#### **D. Right To Assemble**

89. Article 7 of the PAG- K Church Constitution provided that:-

“ An Assembly must have not less than fifty (50) adult’s attenders on a regular basis.”

90. It was evident from Article 7 of the PAG- K Church Constitution that the minimum number of regular attendees that an Assembly could have was not less than fifty (50) adults people and that when the Assembly reached a level of five hundred (500) and above of adult regular attendees, Assembly would be eligible for full autonomy status which could be granted upon a petition to the Boundaries Review Commission as was provided in Article 7.8 of the PAG- K Church Constitution.
91. Indeed, any association was free to decide on what constituted an adequate structure for governance. In this regard, the Petitioners had failed to demonstrate how Article 7.6 of the PAG- K Church Constitution contravened Article 36 of *the Constitution* of Kenya.
92. The assertions by the Petitioners in Petition No 8 of 2018 that the imposition of a limit in terms of the number of persons who could be in the Assembly at any given time as set out in Article 7 of the impugned Constitution was a curtailment of the freedom of association as guaranteed under Article 36 of *the Constitution* of Kenya did not find favour with this court.

#### **E. Discrimination On Inclusivity**

93. As regards the composition of the Boundaries Review Commission, Article 9.2 of the PAG-K Church Constitution stipulated that the representatives would be from:-

- a. Kisii
- b. Coast/Nairobi
- c. Central
- d. Western (two Representatives)
- e. Rift Valley
- f. Lake/Siaya

94. Notably, Article 36(1) of *the Constitution* of Kenya provides that:-

“ Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”



95. As this court observed hereinabove, an association could not be discriminatory merely because it did not consist of categories of people who had been described in Article 27(4) of *the Constitution* of Kenya.
96. It did not come out clearly from the evidence that was adduced during trial where the membership of PAG K- Church extended to in Kenya. Representatives to the Boundaries Review Commission could come from areas when the membership of PAG- K Church was localised.
97. While giving evidence, Rev James Ondieki Ogendi (hereinafter referred to as “PW 2”) alluded to having signed a document for a Nyeri property. It was not clear whether it was a property belonging to a branch and/or Assembly of PAG- K Church so as to make the representation from a member from Nyeri necessary.
98. It was also not clear from PW 3’s evidence if there was another branch and/or Assembly in Turkana. His evidence was that he did not attend the meeting at Turkana as PAG-K Church Secretary General. He also made reference of Rev Adito being an overseer of Turkana Central. He asserted that he was not aware of a case at Kitale over PAG- K Church. Rev Elisha Kimangetich Kimaiyo (hereinafter referred to as “PW 5”) made reference to a District Overseer of Nyamira.
99. On his part, Tom Olendo Ogangá (hereinafter referred to as “DW 1”) referred to cases in Kericho, Busia and Narok. In his evidence, Rev Patrick Lihanda mentioned one John Juma and Simon Alovi being in Nairobi while DW 1 was ministering in Givogi.
100. Whereas this court could not authoritatively state how many branches and/or Assemblies constituted the PAG K- Church was, it was apparent from oral and documentary evidence that was presented before this court that PAG- K Church had several branches and/or Assemblies spread across Kenya.
101. Even so, this court was not certain if the said branches and/or assemblies that were mentioned by the witnesses were outside Kisii, Coast, Nairobi, Central, Western, Rift Valley and Siaya which already had representatives sitting in the Boundaries Review Commission.
102. Suffice it to state that if the PAG- K Church had members outside the Boundaries that were indicated in Article 9.2 of the PAG- K Church Constitution, then they ought to have been and/or be included as representatives. Indeed, women, the youth and all persons from all ethnic or social origins were entitled to participate in the running of the affairs of the said PAG- K Church as all people were equal before the law and ought not to be discriminated against either on the ground of gender, sex, ethnic origin as was provided in Article 27 (4) and (5) of *the Constitution* of Kenya.
103. Having said so, it was difficult to envision representatives from the various branches and/or Assemblies of PAG- K Church being members of the Boundaries Review Commission. A selection of the members had to be made and it was obvious that not all areas in Kenya would sit in the said Boundaries Review Commission.
104. It was for that reason that this court found and held that Article 9.2 of the PAG- K Church Constitution did not violate, infringe and/or contravene the provisions of Article 27 of *the Constitution* of Kenya. However, if the members of PAG K- Church found it necessary to include members from all areas where it was situated in the Boundaries Review Commission, that would still be perfectly in order as its members had the right to choose how they wished to be governed.

## **F. Right to Fair Administrative Action and to Fair Trial**

105. The Petitioners in Petition No 8 of 2018 asserted that Article 6.7 of the PAG- K Church Constitution was in contravention of Article 27(1), 47, 48 and 50 of *the Constitution* of Kenya as it curtailed the right to fair trial and hearing for failing to give individuals an opportunity to challenge any suspension



- or termination of their membership to the Church. They submitted that the grounds for suspension or termination as provided in the said Article were ambiguous.
106. They also pointed out that Articles 23.2 (b) and 23.3 were also in contravention of Article 25, 47, 48 and 50 of *the Constitution* of Kenya as they denied a person facing allegations the opportunity to give any written response to allegations of complaint made against them.
107. They also referred to Article 25 of the impugned PAG-K Constitution and argued that it was in contravention of Articles 22, 23, 27(1), 48, 50, 159 and 165 of *the Constitution* of Kenya as it purported to limit the right to fair trial and by ousting the jurisdiction of the courts.
108. They further submitted that the PAG-K Church Constitution By-Laws 1 and 2 had no procedures regarding nominations and/or appointments and/or removal of persons to and from the various departments and committees and hence, Rev Patrick Lihanda had been appointing and dismissing from office such persons without the involvement or following any procedures. They pointed out that that was in contravention to Article 47 of *the Constitution* of Kenya as the provisions were in contrary to the provisions of *Fair Administrative Action Act*.
109. They were categorical that Article 8.7(e) and By-Law 2.8 had since become obsolete and therefore there was need to have them annulled. In this respect, they relied on the case of Godfrey Ngotho Mutiso vs Republic Criminal Appeal No 17 of 2008 (eKLR citation not given) where it was held that human society was constantly evolving and therefore the law, which all civilised societies must live under, must evolve in tandem and that a law that was caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history.
110. Article 23.2 of the PAG- K Church Constitution provides that:-
- a. No complaint of misconduct or improper act shall be considered by the DARC unless made in writing and duly signed by the complainant, save for the provision made in Article 22.
  - b. The member complained against shall be advised in writing and invited to appear before the committee at which times 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 one more of the following:
    - i. Order restitution
    - ii. Order reimbursement of the complainant's costs
    - iii. Demand an apology
    - iv. Order removal of privileges
    - v. Order compensation
    - vi. Issue reprimand
    - vii. Other action of the committee
111. Article 47 of *the Constitution* of Kenya deals with fair administration. The same stipulates that:-
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 Article (1) and that legislation shall-
  4. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  5. Promote efficient administration.
112. Article 25 of *the Constitution* of Kenya provided that the right to fair trial is one of the rights that could not be limited. The test in administrative actions was that of the legality and lawfulness of such administrative actions. It was for that reason that Article 47(1) of *the Constitution* of Kenya emphasised the right to administrative actions that were expeditious, efficient, lawful, reasonable and procedurally fair. The above attributes demanded that administrative actions be not only legal but also constitutional.
113. This court had due regard to the case of Dry Associates Ltd v Capital Markets Authority and Another [2012] eKLR where it was held that Article 47 was intended to subject administrative processes to constitutional discipline so that relief for administrative grievances would no longer be left to the realm of common law or judicial review under the *Law Reform Act* (Cap 26 of the Laws of Kenya) but be measured against the standards established by *the Constitution*.
114. A reading of Article 23. 3 of the PAG- K Church denied a person facing allegations the opportunity to give any written response to allegations of complaint made against them. However, the pertinent question was whether the right to respond had to be in writing so as not to offend the Article 47 of *the Constitution* of Kenya.
115. Obviously, there was need to document proceedings to avoid accusations and counter-accusations. It could not be said that capturing of video proceedings which was electronic, for example, contravened the provisions of Article 47 of *the Constitution* of Kenya. In the mind of this court therefore, fair administrative action entailed being notified of a complaint and being given an opportunity to respond to the same and it did not matter the form the response took. In other words, it was not mandatory that the response to the complaint be in writing.
116. This court was not therefore persuaded to find that Article 23.2 of the PAG-K Church Constitution contravened Articles 24, 24, 47, 48 and 50 of *the Constitution* of Kenya.

### **G. Ouster of The Jurisdiction of The Court**

117. The Petitioners further contended that Article 25 of the impugned Constitution was an ouster Article and was therefore unconstitutional.
118. This court had due regard to the case of Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others [2014] eKLR, where it was held that ouster articles were provisions in *the Constitution* or a statute that took away, or purported to take away the jurisdiction of a competent court of law. They denied the litigant any judicial assistance in the relevant matter, denying a person who suffers damage in a given matter no legal remedy. They also denied the court jurisdiction to contribute to the merits or otherwise a decision that has been made by a tribunal that it supervises contrary to Article 165(6) of *the Constitution* of Kenya.
119. Article 25 of the PAG-K Church Constitution provides that:-  
The District DARC Committee shall-
- a. deal with disputes and differences arising between and among



- i. Pastors in the District
  - ii. Assemblies within the District
  - iii. Pastors and their Assemblies
- b. hear appeals arising from Assembly DARC Committees within its jurisdiction and no further appeals shall lie from its decisions while sitting on appeal.
  - c. receive for onward transmission to the Executive Restoration Committee all Excommunication cases originating from Assembly DARC Committee. (Emphasis court)
120. It was this court understanding that anyone who was aggrieved from the decision of the Assembly DARC Committee could not appeal to it as its decision was final and binding. However, such aggrieved party could seek redress from the court.
121. Indeed, Article 22.1 of the PAG- K Church Constitution stipulated as follows:-
- “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.”
122. The dispute resolution mechanisms were actually in compliance with Article 50 of *the Constitution* of Kenya which provided everyone an opportunity to seek redress from the court. The same states that:-
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
123. This court therefore found and held that appeals from the District DARC Committee were not curtailed and hence, Article 25 of the PAG –K Church Constitution did not oust the court’s jurisdiction and/or contravene the provisions of Articles 159 of Article 165 of *the Constitution* of Kenya.

## **II. Process of Amending The Impugned Constitution**

124. The Petitioners submitted that if the intended forthcoming PAG- K Church Elections were conducted in accordance with the PAG Church Constitution, 1998 as it was currently, it would be prejudicial to the members of the PAG-K Church owing to its discriminatory provisions and the disenfranchisement as it would lock out a number of church members from contesting for various positions on the basis of their age, geographical location, gender and further lock out members from directly exercising their right to vote under Article 38 of *the Constitution* of Kenya.
125. They placed reliance on the case of *Njoya v Attorney General* case where it was held that if the process of constitutional review was to be truly people driven, Wanjiku (the mythical common person) must give her seal of approval, her very imprimatur to the proposed Constitution.
126. They further contended that the members of the church (including some of the Petitioners), the PAG-K Church and the current General Superintendent called for a constitutional review structure that would start and end with the input of its members in the exercise of their sovereign and constituent power through an agreed framework.



127. In response thereto, the Respondents relied on authority by B.O Nwabueze in *Presidentialism in Commonwealth Africa* in which it was written that the constituent power was a primordial power and the ultimate power to constitute a frame of government. They also cited a Paper by Yash Pal Ghai, titled *The Role of Constituent Assemblies in Constitution Making*, where it read, "...constitution making was no longer accepted as imposition by a victor or dominant group over others (or a grant by Monarch, Pastors or Presidents on their subjects).
128. They were categorical that Article 10 and 12 of the PAG-K Church Constitution had two (2) organs being the Executive Committee and the Executive Officers, that should take decisions and make proposals on how *the constitution* should be reviewed. They asserted that the Executive Committee among others had the duty to supervise and provide guidance to all departments until elections were held and temporarily filled vacancies due to death, resignation and disciplinary action.
129. They further added that the General Superintendent was the official spokesperson of the church and chaired the Executive Committee and the General Secretary was the secretary to the Executive Committee who issued notices of all meetings and had the responsibility for presenting all proposals to amend the impugned Constitution or by laws to the business conference.
130. It was their case that the impugned Constitution be reviewed through existing church structures and the process should be consultative, member driven and the eventual product be member ratified. To buttress their point, they cited the case of *IEBC & 4 Others vs Ndi & 312 Others* (eKLR citation not given) where it was held that good prudence demands that there be constitutional changes which would in turn inform changes in the law to meet societal need as and when such need arose.
131. Anthony Etindi Kenyakisa (hereinafter referred to as "PW 6"), the 2<sup>nd</sup> Petitioner herein, testified that he was the National Education Secretary for PAG-K Church's sponsored institutions and a member of the Church's Council. He stated that the impugned Constitution of 1998 had never been revised. He stated that it was the desire of the Church's Council that the said Constitution be revised in line with *the Constitution* of Kenya 2010 and the *Societies Act* of 2002 and that the Council approved a special general conference to deal with the draft constitution but Rev Patrick Lihanda failed to convene the said conference.
132. Fred Osayi Oluhano (hereinafter referred to as "PW 7") and the 1<sup>st</sup> Petitioner herein, testified that the Council had recommended a draft constitution but which had never been adopted. His evidence corroborated that of PW 6. He was categorical that the PAG-K Constitution was ripe for amendment.
133. Patrick Musungu Lihanda (hereinafter referred to as "DW 3") stated that he was Reverend and the Bishop of PAG-K Church. He agreed that the PAG-K Constitution had served the church well but that time had come for it to be amended.
134. Evidence was adduced during trial to suggest that there were some offices and institutions that were no longer in existence for instance, the PAG-Kenya Medical Clinic, Regional Bible College and Nyang'ori Industrial Training Centre. This was evident from the testimony that the 4<sup>th</sup> Respondent adduced during trial.
135. This court took judicial notice that there had been multiplicity of suits in respect of PAG- K Church between the members since 2018. This had caused a lot of acrimony within the PAG-K Church congregation and for that reason elections had after the elections that were to be held between 5<sup>th</sup> and 6<sup>th</sup> December 2018 were stopped. The process of how PAG- K Constitution would be amended and how elections would be held were therefore pertinent questions.



136. This court grappled with the question of whether the PAG K- Church Constitution ought to be amended first before the elections were held or whether the elections should be conducted first before the PAG K- Church Constitution was amended. As the current governance structures and operations of PAG- K Church were strained, it was therefore necessary for this court to give directions on the way forward.
137. In view of the discord and hostilities that were experienced in the PAG- K Church over the last six (6) years, it was clear that the members could not be left on their own to hold elections and/or amend *the Constitution*.
138. Notably, there was nothing in the *Societies Act* under which the PAG-K Church was registered that empowered this court to do what was in the interests of justice. However, all was not lost as under Section 3A of the Civil Procedure Rules, 2010, the court had inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
139. To this end, this court found that it would be in the interests of justice that the Registrar of Companies conducts the elections of PAG- K Church to move the process of amending its Constitution. Once the elections were conducted, the existing structures within the PAG-K Church would initiate the process of amending the PAG K- Church Constitution under the supervision of the Registrar of Companies.
140. Notably, Article 15.3 (a) of the PAG- K Church Constitution provides as follows:-
- “The Special Conference shall be convened for the purposes of approving all amendments to *the Constitution* and By- laws.”
141. Whatever the members deemed to be archaic and out-dated in the PAG- K Church Constitution could be addressed through a complete overhaul of *the Constitution*. As they were all agreed that the same was outdated since it was enacted in 1998, they were at liberty and right to decide how they wished to be governed. However, in view of the impasse, this court deemed it fit to guide the process by putting in place self-executing mechanisms in the event they did not do what they had all agreed was necessary to be done.
142. Notably, this court opted to have the elections conducted first because there was already a structure within which amendments to the PAG-K Church Constitution could be made. It found that there would be acrimony in deciding agreeing on the mode of approving amendments to the PAG- K Church Constitution and By Laws without a structure yet this court wished that this matter be resolved as quickly as possible to reduce the hostilities.
143. The members were at liberty to hold fresh elections under any new structure that they would put in place after amendment of *the Constitution*. Notably, whenever laws are enacted, transitional clauses are included detailing what would happen to officials holding office immediately before the commencement of such law or if they would be deemed to have been appointed in accordance with the provisions of this Act.
144. An example of this is the Transitional Clause in Section 112 of *Elections Act* Cap 7 (Laws of Kenya). The said Section 112(1)(a) of the Election Act stipulates that:-
- “Notwithstanding the provisions of this Act, an election official holding office immediately before the commencement of this Act shall be deemed to have been appointed in accordance with the provisions of this Act.”



145. Going further, *the Constitution* of Kenya contains the Sixth Schedule on Transitional and Consequential Provisions.
146. Transitional Clause 10 in Part 3 of *the Constitution* of Kenya states as follows:-
- “The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its unexpired term.”
147. *The Constitution* of Kenya and statutes were replete with such transitional clauses. As transitional clauses ensure a smooth avenue for transition, this court was persuaded that it would be best for PAG –K Church to hold its elections for its members to elect those people it could trust to drive the process for amendment of the PAG- K Church Constitution. Indeed, Constitution making was all about creativity of a people to craft rules and regulations that would govern them

### III. Suitability of Rev Patrick Lihanda To Hold Office

148. The Petitioners averred that the said Rev Patrick Lihanda was not fit to hold office due to allegations of mismanagement of funds and other church functions and administration.
149. They pointed out that Rev Patrick Lihanda had arbitrarily and to the exclusion of other church officials continued to mismanage and embezzle PAG Church funds and monies including preparing for the PAG Church elections by issuing illegal notices and opening bank accounts not sanctioned by the Church Constitution. They asserted that he was acting outside the provisions of the Church’s Constitution and usurped the roles and mandate of the Church officials.
150. They contended that he had failed to plan for the development of the core mandate of the Church in violation of Article 259(1) of *the Constitution*. They asserted that his acts of omission had resulted in his failure to promote social justice and the realization of the full potential of the community of faithful and members of the church in violation of Article 19(2) of *the Constitution*.
151. They further submitted that he opened the two (2) bank accounts, purporting to be the Church’s Bank Account, singly and in exclusion of the Committee members and contrary to Article 12.2(e) of the PAG Church Constitution. They asserted that he proceeded to issue memo and/or notice directing and compelling church District overseers to make deposits in the said bank account on or before 15<sup>th</sup> October 2018 contrary to the Church’s Constitution.
152. They blamed him for having not involved the General Secretary of the Church to be a signatory to the said Bank Accounts but included unauthorised persons such as one Abdi Choge who was a member of the executive but not a signatory and Dorothy Agufana. They asserted that as per the Church’s Constitution, the General Superintendent, the General Secretary and the Treasurer were to be the only signatories to any church’s bank account but the said Rev Patrick Lihanda acted to the contrary.
153. They further contended that the said Rev Patrick Lihanda had purported and/or secretly and arbitrarily appointed one Mr Patrick Oyondi as the Church’s Administrator without following the required procedures and despite the fact that the said Mr. Oyondi’s term as a Church’s Administrator had expired. They added that he had also issued various notices in regard to meetings which role was the preserve of the General Secretary.
154. It was their case that the said Rev Patrick Lihanda had abused his office and exercised his powers arbitrarily and as a result the leadership of the Church is greatly compromised and the Petitioners and their fellow Church members are greatly prejudiced. They asserted that the position he held was one of



- trust and was akin to a public office and therefore his conduct was in blatant disregard of the provisions of Chapter Six of *the Constitution* as read with the provisions of the *Leadership and Integrity Act*.
155. They contended that the integrity issues they had raised against him were sufficient to warrant the granting of an order barring him from holding any office in the PAG Church Kenya. In this regard, they placed reliance on the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR where it was held that the determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence.
  156. They further relied on the case of Trusted Society of Human Rights Alliance v The Attorney General & 5 Others, Nairobi Petition No 229 of 2012 (eKLR citation not given) where it was held that a person was said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in *the Constitution*.
  157. They were emphatic that they had proven their case on a balance of probabilities and demonstrated that he had indeed misappropriated over Kshs 3,000,000/= belonging to the PAG Church Kenya and had failed to account for the same. To buttress their point, they asserted that Article 23 and 165 of *the Constitution* of Kenya 2010 grants this court the powers to strike out any act that violates *the Constitution* of Kenya and grant appropriate remedies. They prayed that the management of the Church be bestowed to the Church Trustees as prayed in CMCC No 99 of 2019.
  158. However, the said Rev Patrick Lihanda denied the allegations facing him in respect to his eligibility to hold the impugned office. He was categorical that he had neither violated the PAG-K Church Constitution nor *the Constitution* of Kenya because his position was an elective post and he was duly elected to the same.
  159. The Respondents and Interested Parties submitted that PAG K- Church and Rev Patrick Lihanda had given evidence to show that a meeting was held to approve the opening of account into which special collections for purposes of holding the Business Conference and that the money was withdrawn and spent on the Business Conference which was a subject of this Petition.
  160. They asserted that when the Petitioners were required to amend the Petition herein, they were required to consolidate all the prayers into the Petition and that to suggest that the prayers are contained in a matter before a lower court was to oust the jurisdiction of this court. They were categorical that the question of the opening of the bank account and the issue of Kshs 3,000,000/= and Kshs 800,000/= was a subject of an active criminal case, Republic v Patrick Lihanda & 2 Others E723 of 2021 thus should be left at the hands of the criminal court until its determination.
  161. They pointed out that Rev Anthony Kenyakisa admitted that he took the amount of Kshs 800,000/= as an imprest which he surrendered back and banked in the Cooperative Bank Account held by the PAG-K Staff Provident Fund and that to allege that the same was stolen was hot air. They were emphatic that it was premature to allege that such an offence occurred when such matter was subject to proof beyond reasonable doubt in a criminal process in the lower court.
  162. It was their case that though the Petitioners raised serious allegations against the said Rev Patrick Lihanda ranging from dictatorship, corruption, embezzlement of church funds, soliciting for bribes and all sorts of evil deeds, they failed to substantiate their allegations. They pointed out that the accusations were mere propaganda intended at attacking discrediting and maligning him.



163. They asserted that it was not in dispute that there existed some differences within the PAG – K Church given it was a society comprising of many persons as the church as its inception contemplated this occurrence and that is why its Constitution had a provision for such eventualities.
164. They invoked Article 22 of the impugned PAG-K Church’s Constitution and argued that the Petitioners ought to have engaged and arrived at an amicable solution which they did not. It was their contention that the instant Petition was grossly offensive of the said Article and therefore should be dismissed with costs.
165. They were emphatic that the two(2) issues that required redress were the need for amendments to the PAG-K Constitution 1998 and the need for reconciliation, restoration and renewed leadership through established mechanisms and further added that the solution to the said issues lay in a team spirit filled with wise women and men being selected to work together with experts to either craft a new Constitution or Propose comprehensive amendments and that upon a new or amended Constitution being ratified, leadership be renewed through agreed PAG an election be conducted. They were hopeful that in the premises foregoing, the church would heal and flourish.
166. On his part, CPA Rev Patrick Oyondi submitted that the Petition herein and all other suits consolidated herein had no claim against him. He pointed out that he was an employee of the church and that naming him as a Respondent offended the *Societies Act* as held in the case of *Islamia Madrassa Society v Zafar Niaz & Others Civil Case No E034 of 2021* while citing *African Orthodox Church of Kenya vs Rev Charles Omukora & Another [2014] eKLR*.
167. He submitted that if the Petitioners were aggrieved by his status as an employee, there existed a competent court other than this court which could handle employment disputes. He asserted that there was no order sought against him and that he was not liable for any mismanagement of the church. He urged the court to exonerate him as the suit herein did not disclose any cause of action against him. He further urged the court to fast-track its decision, direct minimum changes to the impugned Constitution and allow the church proceed to an election within the shortest time possible based on the fact that there existed acrimony within the congregation.
168. Having analysed the parties’ submissions, it was clear that the Petitioners questioned the suitability of Rev Patrick Lihanda in holding the office of the General Superintendent citing credibility issues and instances of mal-administration and financial impropriety. The allegations went into the merit or otherwise of the same and could only be resolved by way of oral evidence.
169. The applicable law regarding the burden of proof was Section 107 (1) of the *Evidence Act* Cap 80 (laws of Kenya) which states that:-
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
170. Section 108 of the *Evidence Act* further provides that:-
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”



171. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. In this regard, the Court of Appeal rendered itself in the case of Karugi & Another v Kabiya & 3 Others [1987] KLR 347 as follows:-

“The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

172. This court considered the oral evidence herein against the backdrop of the aforesaid provisions of the law. Rev Stephen Kekenah Matende (hereinafter referred to as “PW 1”) testified that he had been a pastor at PAG-K Church since 1987. He told the court that Rev Patrick Lihanda was not fit to lead the PAG-K Church as he was the former General Superintendent and his term expired in the year 2018 December.

173. He said that no elections had been carried out since the said year although Rev Patrick Lihanda had purported to carry out elections in the year 2019. He was categorical that they had tried to settle this matter through mediation but with no success. He stated that they had tried to access the 4<sup>th</sup> Respondent’s offices at Nyang’ori but were beaten up and hurt. He pointed out that after the court stopped the elections in the year 2018 the church had been full of chaos.

174. PW 2 testified that he was a member of the caretaker committee and that together with Rev Kango, Rev Khayanga and Rev Elikana Salamba, they were asked to take up the governance of the church. He stated that they came together and appointed people in place to run the day to day activities of the church in administration, finance and other departments but that on 21<sup>st</sup> March 2020, there was an order from Nairobi High Court which pushed them out and Rev Patrick Lihanda and his team occupied the office.

175. PW 3 testified that one of his ten (10) duties under Article 10 of the PAG-K Constitution was to be a signatory of official accounts. He pointed out that the church had only two (2) bank accounts namely, Barclays Bank and Eco Bank in which he was a signatory of both. He stated that in 2018, a business conference was supposed to be held but it was not held as it was barred by a court order, however, Pastors were to pay Kshs 1000/= for the elections in 2018 and it was said that the same money was banked at Equity Bank which was not one of the Church’s Banks. He pointed out that a committee allowed that in his absence and contrary to Article 12(2) of the PAG-K Constitution. He added that they protested and wrote letters to EACC and Equity Bank and later found that the signatories were Dorothy Agufana, Rev Patrick Lihanda, Choge, Dr Arero Elisha Kimaiyo.

176. Isaiah Kipsang Rotich (hereinafter referred to as “PW 4”) testified that he was a Chief Accountant of the PAG-K Church since the year 1992. He stated that his duty was to receive funds from District churches, make payments and ensure that money is banked. He pointed out that however, he was ejected from the office on 26<sup>th</sup> March 2020 but were not given any letter of suspension or termination. He said that since then he had not discharged his duties nor been paid. He further stated that he had been going back to retrieve his belongings but was denied entry. He said that the opening of the Equity Bank account in 2018 was in order for the purposes of the elections.

177. PW 5 stated that he was elected as the General Treasurer to oversee the finances of the Church. He pointed out that the same underwent annual audit. His evidence corroborated that of PW 3. He stated that though his name was among the signatories for the impugned bank account at Equity Bank, he was not aware of it and had not been included. He pointed out that his specimen signature was not sought for by Rev Patrick Lihanda for the opening of the impugned account. It was his evidence that there was no need for a secret bank account since the money belonged to the church. He told the court that



- Kshs 2,500,000/= was withdrawn on 8<sup>th</sup> November 2018 but he did not know where it was directed. He stated that one Dorothy withdrew Kshs 500,000,000 (sic) from Equity Bank on 15<sup>th</sup> November 2018 and that the alleged Kshs 800,000/= was not stolen by Rev Patrick Lihanda but that the same was given to Rev Anthony Kenyakisa. It was his evidence that the withdrawal of monies by Rev Patrick Lihanda was mandatory as it was to be used for elections.
178. In his cross-examination, PW 6 agreed having received the alleged Kshs 800,000/= as imprest and that he repaid it back to the bank.
179. PW 7 blamed Rev Patrick Lihanda for disobeying court orders, threatening, disciplining and illegally transferring pastors and overseers and cutting trees at the mission station.
180. On the part of the defence case, Tom Olendo (hereinafter referred to as “DW 1”) testified that he was a Pastor ordained as Reverend of the PAG-K Church. He stated that he was used by Rev Ondego and Counsel Wasilwa to fight Rev Patrick Lihanda as they filed cases in his name. He pointed out that he had previously tried to reconcile Rev Ondego and Rev Patrick Lihanda but Rev Ondego was problematic. He agreed that there was need to amend the Church’s constitution
181. Rev Patrick Oyondi Kirungu (hereinafter referred to as “DW 2”) testified that he was the General Administrator of the PAG-K Church and employed under Article 13 of PAG-K Constitution. He stated that his duties were technical advisor of the Church Council, official custodian of the seal of the church and all documents of title and was responsible with the finances of the church hence worked together with the treasurer.
182. He pointed out that he was aware of the issues relating to the monies Kshs 3,000,000/= and Kshs 800,000/= disbursed to Rev Anthony Kenyakisa as imprest. He confirmed that the Kshs 800,000/= was repaid on 27<sup>th</sup> January 2016. He asserted that whenever they had elections, they would open special accounts to hold monies for elections as per Article 12.3 (a) and (b) of the Church’s Constitution. It was his evidence that the church passed a resolution to allow the opening of the special account being the impugned Equity Bank account.
183. Rev Patrick Lihanda testified that he was elected as a General Superintendent on 6<sup>th</sup> December 2013, together with Rev Dr Orera as General Secretary and Rev E. Kimaiyo as National Treasurer and that they worked well for the first term but from 2014 things changed as his said two (2) partners stopped working leaving him alone. He told the court that elections were due in 2018 but the same were suspended by the court. He denied violating *the Constitution* of Kenya and/or the PAG-K Constitution. He denied the allegations that he was unfit to hold office.
184. He stated that his leadership did not endanger the spiritual reaping of the church and that if that were true the church would not be where it was today. He further informed the court that the impugned Bank accounts were opened by the approval of the Church Council.
185. He denied having stolen Kshs 3,800,000/=. He said that the Kshs 800,000/= was given to Rev Anthony Kenyakisa. He denied having engaged in any business with Madison Insurance. He pointed out that the allegations on his conduct were not true but that he was being targeted by one Nathan Ondego.
186. Having said so, his evidence in rebuttal, showed that a meeting was held to approve the opening of the impugned accounts into which special collections were made for purposes of holding the Business Conference and that the money was withdrawn and spent on the said conference. The Petitioners did not rebut this evidence.



187. The said Rev Anthony Kenyakisa actually conceded that he took the amount of Kshs 800,000/= as an imprest which he surrendered back and banked in the Cooperative Bank Account held by the PAG-K Staff Provident Fund thus that allegation fell on the wayside.
188. This court agreed with the Respondents that the question of the opening of the bank account and the issue of Kshs 3,800,000/= were subject of an active criminal case, Cr Case No E723 of 2021 Republic v Patrick Lihanda & 2 Others which was still pending determination and it was only prudent that the said criminal court be given time to make its determination on the matter.
189. After considering the entire evidence that was adduced before the Trial Court, this court was convinced that although the Petitioners raised serious allegations against the said Rev Patrick Lihanda ranging from dictatorship, corruption, embezzlement of church funds, soliciting for bribes and all sorts of evil deeds, they failed to substantiate the said allegations with evidence. He was innocent until proven guilty in a court of law.
190. The burden of proof lay with the Petitioners to prove their assertions. They ought to have discharged their legal and evidentiary burden as per the provisions of Sections 107, 108 and 109 of the Evidence Act to persuade this court to find that Rev Patrick Lihanda was not suitable to contest any office in the PAG K- Church. They failed to discharge this duty which weakened their case and consequently, this court could not make a declaration that he was not fit to hold office in the PAG K- Church. His position was an elective post and members of PAG- K Church could decide to vote him in or not. The provisions of Chapter Six could not be invoked herein as it was premature.

#### **IV. Cancellation and/or De-registration of The Church**

191. The Petitioners submitted that the Registrar of Societies had not exercised his powers pursuant to Section 12 of the Societies Act by suspending and/or cancelling the registration of the PAG-K Church as a result of its Constitution being inconsistent with the Constitution of Kenya 2010 and that he had not made any efforts to sanction the PAG-K Church for failure to amend and/or rectify its constitution so as to have it comply with the Constitution of Kenya 2010 and other provisions of the law.
192. It was their contention that the failure to act by the Registrar of Societies was an illegality and amounted to wrongful exercise of powers, administrative duties and was in contravention of Article 47 of the Constitution of Kenya 2010 as read with Fair Administrative Action Act.
193. On their part, the Respondents and Interested Parties submitted that the PAG-K Church was registered under the Societies Act and its therefore bound by the provisions of the said Act. They pointed out that Section 12 of the Act laid out the grounds upon which PAG –K Church could be deregistered or its registration cancelled.
194. They contended that Petitioners had laid no basis before the court to warrant the deregistration of PAG –K as they were to demonstrate failure on the part of the Registrar of Societies to comply with the provisions of the law and not the Respondents.
195. Section 12 (1) (b) of the Societies Act provides that:-  

Where, in respect of any registered society, the Registrar where he has reasonable cause to believe that the registration of a society should be cancelled or suspended on the ground that the interests of peace, welfare, or good order in Kenya would, where he has reasonable cause to believe, be likely to be prejudiced by the continued registration of the society ...

the Registrar shall, give written notice in the prescribed form to the society calling upon the society to show cause, within such period as is specified in the notice, why its registration should not be



cancelled or, as the case may be, suspended; and, if the society fails to show cause to the satisfaction of the Registrar within the time specified, the Registrar may cancel or suspend the registration of the society.” (emphasis court).

196. The law was clear that where the registration of a society had been suspended, the society could not take any action, nor permit any action to be taken, in furtherance of its objects except collection of subscriptions; payment of its debts; and such action as the Registrar may from time to time authorise. Any society that contravened the above provisions would be guilty of an offence. A suspension put a society in a non- functional mode until it was lifted or the society’s registration is cancelled.
197. According to the said Section 12 of the Societies Act, the Registrar was required to give notice in the prescribed form to the society concerned calling upon such a society to show cause within a given time why its registration may not be cancelled or suspended.
198. It was only after failing to show cause to the satisfaction of the Registrar that the Registrar could action either to cancel or suspend the society’s registration as the case may be. The law left no doubt that the Registrar could take steps to cancel or suspend registration of a registered society without giving it a hearing. Where notice was given, until the society fails to show cause to the satisfaction of the Registrar, no lawful action could be taken against it.
199. In the circumstances of this case, no such notice had been issued by the Registrar of Societies requiring the PAG-K Church to show cause why it should not be suspended. The statute clearly placed that mandate on the Registrar of Societies and it was not upon this court to determine whether or not the PAG- K Church had infringed the interests of peace, welfare, or good order in Kenya and/or to believe that the church would likely be prejudiced by the continued registration of the society; but that the same was solely the mandate of the Registrar of Societies.
200. In the premises foregoing, the Petitioners’ claim that the Registrar act of omission was in contravention of Article 47 of the Constitution of Kenya, thus, fell on the wayside.

## V. Reliefs

201. Article 23 (3) provides as follows:-

In any proceedings brought under Article 22, a court may grant appropriate relief, including-

  - a. a declaration of rights;
  - b. an injunction;
  - c. a conservatory order;
  - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - e. an order for compensation; and
  - f. an order of judicial review.
202. Depending on the circumstances of each particular case, an appropriate relief would be that which protects and enforces the Constitution. From the premises, this court would proceed to deal accordingly.

## VI. Costs

203. The question of costs in constitutional petitions is well settled. The court has discretion in awarding costs, which discretion must be exercised judiciously, noting that an order for costs may bar citizens



who would wish to litigate constitutional matters that concern fundamental rights or the public interest.

204. This court had due regard to the case of John Harun Mwau & 3 Others v Attorney General & 2 others [2012] eKLR where it was held that the intent of articles 22 and 23 of *the Constitution* is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.
205. It was the considered view of this court that this matter was brought to court in good faith and in the interest of the public. It was litigated in similar fashion. It therefore made no order as to costs.

### **Disposition**

206. For the foregoing reasons, the upshot of this court's decision was that the Petition herein was partly merited and directed as follows:-
1. A declaration be and is hereby made that Article 12.4 of the PAG- K Church Constitution was a contravention of *the Constitution* of Kenya in so far as it discriminated against women from vying for the position of general officers
  2. An order be and is hereby issued directing that the elections of PAG- K Church Constitution be held within the next sixty (60) days from the date of this decision under the supervision of the Registrar of Societies.
  3. An order be and is hereby issued to the effect that the Pentecostal Assemblies of God (PAG)- Kenya Church Constitution 1998 be amended within the limits determined by members of PAG K Church within one hundred and twenty (120) days from the date of this decision under the supervision of the Registrar of Societies.
  4. For the avoidance of doubt, in the event that the PAG K- Church shall not hold elections and amend the PAG K- Church Constitution within the specified periods for whatever reason, the Registrar of Societies will only be at liberty to extend the said periods for a further thirty (30) days for each respective action. If the parties herein will not comply with the directions of this court to hold the elections and amend the PAG K- Constitution during the extended period as foresaid, the Registrar of Societies will be at liberty to exercise powers under the relevant provisions of Section 12 of the *Societies Act* Cap 108 (Laws of Kenya) without further reference to this court.
207. All the issues that were consolidated in different matters on the questions raised herein be are hereby deemed to have been determined herein.
208. In view of the nature of the matter herein, each party will bear its own costs of the Petition herein.
209. The interim orders that had been issued herein be and are hereby set aside and/or vacated and/ or discharged to facilitate action by the Registrar of Societies.
210. Orders accordingly.

**DATED and DELIVERED at VIHIGA this 11th day of July 2024**

**J. KAMAU**



**JUDGE**

