



REPUBLIC OF KENYA



**Ochieng & 19 others v Owaga & 6 others (Civil Case 13 of 2020)  
[2024] KEHC 9911 (KLR) (7 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9911 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE 13 OF 2020  
RE ABURILI, J  
AUGUST 7, 2024**

**BETWEEN**

**ELD. JOHN JOHNSON OCHIENG ..... 1<sup>ST</sup> PLAINTIFF**  
**ELD. MICHAEL ORUKO ..... 2<sup>ND</sup> PLAINTIFF**  
**ELD. WALTER ODINGO ..... 3<sup>RD</sup> PLAINTIFF**  
**ELD. BENARD ONYANGO ..... 4<sup>TH</sup> PLAINTIFF**  
**ELD. ANNE AKOKO ..... 5<sup>TH</sup> PLAINTIFF**  
**ELD. ABRAHAM GWADA ..... 6<sup>TH</sup> PLAINTIFF**  
**ELD. GEORGE OMBORO OWUOTH ..... 7<sup>TH</sup> PLAINTIFF**  
**CALEB OUMA OWITI ..... 8<sup>TH</sup> PLAINTIFF**  
**JOHN JONYO APEPO ..... 9<sup>TH</sup> PLAINTIFF**  
**MRS. MAREEN OKUMU ..... 10<sup>TH</sup> PLAINTIFF**  
**ELD. CHARLES OCHUKA ..... 11<sup>TH</sup> PLAINTIFF**  
**ELD. CHARLES KADU MOSES ..... 12<sup>TH</sup> PLAINTIFF**  
**ELD. JOEL WALULA ..... 13<sup>TH</sup> PLAINTIFF**  
**ELD. TOM OMUNGO ..... 14<sup>TH</sup> PLAINTIFF**  
**MRS. PENINA OUMA ..... 15<sup>TH</sup> PLAINTIFF**  
**ELD. ELIAKIM ODERA JIMBO ..... 16<sup>TH</sup> PLAINTIFF**  
**MRS. FLORENCE RANDA ..... 17<sup>TH</sup> PLAINTIFF**  
**MR. SETH ALAI ..... 18<sup>TH</sup> PLAINTIFF**  
**MR. DAN ONYANGO ..... 19<sup>TH</sup> PLAINTIFF**



MR. JORIM ODADA ..... 20<sup>TH</sup> PLAINTIFF

AND

REV. WELLINGTON KUTHE OWAGA ..... 1<sup>ST</sup> DEFENDANT

REV. ALEX OWINO ..... 2<sup>ND</sup> DEFENDANT

REV. GABRIEL OCHUKA ..... 3<sup>RD</sup> DEFENDANT

ELD. AMOS NYAIGA OGADA ..... 4<sup>TH</sup> DEFENDANT

ELD. MARTIN ORWA OBUYA ..... 5<sup>TH</sup> DEFENDANT

ELD. JOSEPH DUMA AYIECHO ..... 6<sup>TH</sup> DEFENDANT

ELD. DAVID OUKO ANYANGO ..... 7<sup>TH</sup> DEFENDANT

JUDGMENT

1. The plaintiffs herein filed suit vide a plaint dated 2nd September 2020 in which they sought the following orders;
  - a. A permanent injunction preventing installation of the defendants or any other persons into the position of Bishop, Administrative Secretary and Assistant Bishop of the alleged AIC Greater Lake Area or at all.
  - b. A permanent injunction preventing the operation and/or carrying out of church services and activities under the umbrella of the alleged AIC Greater Lake Area until such a time when the said region would have been formed as per *the constitution* and bylaws of the church.
  - c. An order mandating the Central Church Council to formulate a tribunal as per the bylaws of the church to handle matters relating to creation of Greater Lake Region as well as installation of relevant officials thereto.
  - d. Costs of the suit.
2. The plaintiffs averred that the defendants intended to carry out elections and subsequently swear themselves in into the position of Bishop, Administrative Secretary and Assistant Bishop of the alleged AIC Greater Lake Area, an area that was non-existent and that at the time of the filing of the suit was pending the conclusion in Kisumu CMCC No. 555 of 2018 Eld. Amos Nyaiga & Others v Dr. Rev. Silas Yego & Others.
3. The plaintiffs further averred that if the defendants' actions were allowed they would cause chaos, confusion and disrespect to *the constitution* and bylaws of the AIC hence the need for intervention by the Court.
4. In response, the defendants filed an amended statement of defence and counterclaim dated 12<sup>th</sup> April 2023 in which they denied the allegations made by the plaintiffs and put them to strict proof. The defendants further raised a counterclaim seeking compensation of Kshs. 500,000 that had been deposited in court by the plaintiffs following postponement of the elections that had duly been called vide a court order issued by the court in the Chief Magistrates Court Civil Suit No. 555 of 2018.



5. It was further averred by the defendants that the plaintiffs failed to adhere to the provisions of Article 10 of the AIC bylaws that provides that no member of the church should go to court without the authority of other members.
6. Following the progress of the matter, the parties herein agreed that the only issue pending before the court for determination was that of Kshs 500,000 security for costs deposited in this court by the plaintiff. This is because whereas the defendants claimed that they organized for elections, the plaintiffs, averred that they never organized for any elections.
7. Both parties called witnesses in support of their case.

### **The Plaintiffs' Case**

8. PW1 Elder John Johnson Ochieng adopted his witness statement dated 2<sup>nd</sup> February 2023 as his evidence in chief. He further produced a bundle of documents dated 2<sup>nd</sup> February 2023 as exhibits 1 – 4. It was his testimony that he had authority to act on behalf of the other plaintiffs in this case which authority he produced as P. Exhibit 5.
9. PW1 testified that it was his prayer that the deposit of Kshs. 500,000 deposited in court be returned to them as there was no notice of an election that was ever issued to the local churches alleged to form part of the area, neither was there any documentation demonstrating alleged expenses incurred in the formulation of any elections at all hence it was only proper that the security for costs deposited into court be returned to them.
10. In cross-examination, PW1 admitted that several years had passed since the case was filed and he could thus not tell if the plaintiffs were in the places where they were as they signed the authority when they were in one place. He testified that no letter was written to him concerning elections to be held but admitted that one was written to Bishop Abraham Mulwa and another dated 8<sup>th</sup> September 2020 to Phillip Osenya by Rev. Abraham Mulwa
11. PW1 testified that when they filed the suit, they only had Nyanza area and not the Greater Central Lake Area which had been created in 2019. He further admitted that he was not aware that dates for elections had been set vide the order of 11<sup>th</sup> April 2019 and that he was not aware that CCC had already set the date for the elections when they came to court. PW1 further admitted that the church's Baraza Kuu did not authorize them to file this suit to stop the elections.
12. In re-examination, PW1 testified that the letters dated 10<sup>th</sup> July 2020 and 8<sup>th</sup> September 2020 were not addressed or copied to him but that he was made aware of the letters. He testified that he could not participate in elections of GLCA because he was not a member and that he could only have gone to see what was happening but not participate. He testified that Baraza Kuu of the Church was the body that organized the church's elections.

### **The Defendants' Case**

13. DW1, Alex Otieno Owino, the Administrative Secretary of AIC GCL Area and who was the Administrative Secretary AIC Kisumu Region at the time of filing of the suit adopted his witness statement dated 16<sup>th</sup> March 2023 as his evidence in chief. He also adopted the list and bundle of documents dated 16<sup>th</sup> March 2023 as DW Exhibit 1 – 11 respectively.
14. It was his testimony that this case was filed in 2020 at which time there was a consent order dated 11<sup>th</sup> April 2019 creating GCL Area within 30 days and elections were to be held within 30 days of the creation of GCLA by the CCC. He testified that there was a letter from Baraza Kuu stating the date



- of election and inauguration and further that the Plaintiffs were not entitled to come to court to stop elections because they were members of AIC Nyanza Area which is a different area and thus they could not be allowed to come and participate in elections of a totally different area created by Baraza Kuu as *the Constitution* of AIC could not allow them.
15. DW1 further testified that even after coming to court, the plaintiffs did not attend the elections and further that despite inviting them for inauguration, they never appeared. It was their testimony that when they prepared for elections and inauguration, they incurred expenses and the plaintiffs not being members of GCLA, they had no business coming to stop elections. He testified that in their counterclaim, they had sought for release of the amount deposited in court to cater for their expenses, a fact that the 1st plaintiff at paragraph 6 of his statement sworn on 2<sup>nd</sup> February 2023 had confirmed that the defendants would be entitled to the deposited money. He testified that the deposit was security for costs for organizing elections which had costed them.
  16. In cross-examination, DW1 further testified that Elections were to be held in 2020 pursuant to the consent order. DW1 did not want to answer the questions as to whether any elections had taken place leading to the communication on inauguration. He admitted that he had not produced receipts for the expenses incurred in preparing for elections. In re-examination, DW1 testified that elections were held on 18<sup>th</sup> January 2022 and the inauguration was done on 30<sup>th</sup> January 2022. It was his testimony that in preparation for the same, they hired tents as the church was small, provided transport for CCC members and bought refreshments. He further testified that there were no attempts to set aside the order of the court.
  17. DW1 testified that there was no ground for the Plaintiffs to come to court to stop elections and inauguration in GCL Area as they are members of Nyanza Area. Further, that the defendants never intended to declare any intention to vie for any position.
  18. DW2 Amos Nyaiga Ogada, an elder of AIC corroborated DW1's testimony adopting his witness statement dated 16<sup>th</sup> March 2023 as his evidence in chief which testimony was similar to that of DW1.

### **Submissions**

19. Only the defendants filed written submissions. According to counsel for the defendants, the plaintiff's suit is an abuse of court process for reasons that although the plaintiffs brought a representative suit, the 1<sup>st</sup> plaintiff during the Cross-examination confirmed that he did not even know the people he was representing, and that it even transpired that one of them was dead - ELD.joel Walula and that the witness could not explain his whereabouts and how his signature was obtained hence it was basically fraudulent.
20. It was also submitted that the Plaintiffs were not members of Greater Lake Central Region and therefore had no business interfering with the affairs of another area. Thirdly, that there was already a case number 555 of 2019 which was alive in court and the Court had made orders concerning Greater Lake Central Area status hence they had no business filing another case when there already a case which was self-executing. It was submitted that the plaintiffs did not explain why they did not apply to join that suit.
21. Reliance was placed on the case of Hunter –vs- Chief Constable of West Midlands Police & Others (1981) UKHL 13 (19 November 1981), where Lord Diplock dealt with what constitutes an abuse of process of the Court Abuse of Court process is an intentional tort.
22. Further reliance was placed on Yiannakis t/a GPY Investments v Indebank Limited (Ruling) (Civil Cause No. 57 of 2016) 120161MWHC 596, Muchanga Investments Limited vs Safaris Unlimited



- (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 [2009] e KLR 229 and on Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR on what constitutes abuse of court process.
23. It was submitted that the Plaintiffs frivolous suit was filed to harass, oppress and vex the Defendants and that it was wanting in bona fides, vexatious or oppressive.
  24. It was submitted that there was already a case in the lower Court case dealing with the same matters in 555 of 2018 hence by instituting different actions between the same parties simultaneously in different court even though on different grounds, that was an abuse of court process; that there was no iota of law supporting a court process or where it is premised on recklessness, which abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action. Further, that although the plaintiffs have access to Court under Article 48 but which law backed their Course of action, no injury was going to be suffered as this was not a Constitutional petition.
  25. The defendants' counsel further submitted that the plaintiffs were forum-shopping in the enforcement of a conceived right looking for a different court other than where contempt proceedings had been instituted against them.
  26. Another submission was that the letter written to Mwamu and Company Advocates on behalf of certain persons was not written or copied to them, which is evidence of bias, bad faith and malice on the part of the plaintiffs.
  27. It was further submitted that the Plaintiffs herein lacked locus standi because the issues involved Baraza kuu and that none of them were members of Baraza KUU nor members of Greater Central Lake Area. That the letter they were relying on was not addressed to them. Counsel submitted that that the court has distinguished the Constitutional rights of the Parties to file suit with locus standi in normal suits in the case of John Wekesa Khaoya V Attorney General [2013] eKLR, citing Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others [2021] eKLR. Further reliance was placed on Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR while referring to the matter of Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010.
  28. Additionally, that the plaintiffs had stated that they had absolutely no interest in what happens in Greater Lake Central Area, they were not members, they were not candidates and finally when the elections took place they did not attend hence they did not have locus standi to bring the case hence they were busy bodies that had become guns for hire.
  29. Mr. Mwamu further submitted that these are surrogate proceedings filed on behalf of some leaders who did not want to appear in Court personally and who used these plaintiffs as subterfuge and that the court must therefore go behind the façade to get the real Plaintiffs by piecing behind the veil and discover that the real litigants were persons who authored and recipients of the letter dated 8<sup>th</sup> September 2021.
  30. That therefore, to the extent that that they allowed themselves to be used to bring a suit against the Defendants ,some of them who had nothing to do with the issues at hand ,the Plaintiffs must pay cost and expenses incurred by the Defendants. He relied on the Supreme Court case in the case of Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR) (17 February 2023) (Judgment) which set the criteria for security for costs.
  31. On special damages claimed, it was submitted that the Defendants Pleaded that they used money to organize elections when they stated that the postponement of the elections caused the defendant untold suffering and distress after incurring huge amounts in organizing the said coronation of the new officials after the elections.



32. He however submitted that the defendants conceded that they did not state the amount nor had they produced any receipts but that the court should take judicial notices that elections and ordination in Africa Churches would entail buying of some foodstuffs, hiring of chairs, venues and organization generally hence invoke section 60 of the *Evidence Act* and take Judicial notice of matters of common notoriety
33. Further submission on special damages was that there are exceptions to proof of special damages, given the circumstances and that this is one such matter. Reliance was placed on the case of Omumbo Achola v Peter Ondieki Ganga[1986] eKLR to argue that the Court of Appeal plucked a figure from the air. Further reliance was placed on the cases of Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.
34. Counsel urged the court to award the defendants damages of kshs 500,000 plus costs of the suit.

### **Analysis and Determination**

35. I have considered the pleadings herein, the evidence adduced by both parties and submissions by the defendant's counsel. The plaintiffs sought to permanently stop the defendants from forming the AIC Great Lakes Area and further halting them from holding the resultant leadership positions.
36. To this end, the plaintiffs through their advocate Mr. Ochuka moved the court on the 11.9.2020 to stop the impending elections organised by the defendants and wider AIC and even agreed to deposit a sum of Kshs. 500,000 as security for costs with the court. The exact order granted by this court (F.A.Ochieng J as he then was) and which the plaintiffs complied with was as follows:
  1. "The elections scheduled for 12<sup>th</sup> September 2020 shall be stayed provided that by 10.00am on 12<sup>th</sup> September 2020 the Applicants will have deposited the sum of Kshs. 500,000 as security with the court.
  2. In the event that the said sum is not deposited, as ordered, the elections may proceed.
  3. By allowing elections to proceed, if the Deposit is not put together, this court is not to be taken to have rendered the elections legitimate."
37. The main prayers sought by the plaintiffs in this suit have been spent. The remaining issue is whether the money deposited as security ought to be returned to the plaintiffs as prayed or be surrendered to the defendants to cater for costs they had allegedly incurred prior to the stopping of the elections, as per the counterclaim.
38. The burden of proof lies with he who alleges. Mativo J (as he then was) in Hellen Wangari Wangechi v Carumera Muthini Gathua [2015] eKLR, quoted with approval Lord Brandon in Rheir Shpping Co. SA. v Edmunds [1955] IWLR 948 at 955 as follows:

"No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take."



39. The learned Judge in the above decision, went on to state as follows:

“Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the...test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in *Britestone PTE Ltd v Smith & Associates Far East Ltd* [2007] 4SLR (R) 855 at 59: ‘The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.’”

40. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding, lies on that person, who will fail if no evidence at all were given on either side, See also (Section 107 of the *Evidence Act*).

41. The burden of proof in this suit or proceedings therefore shall shift to either of the parties herein on the issue herein.

42. In this case, the issue for determination as earlier herein stated is whether the plaintiffs ought to receive back the monies deposited as security for costs prior to the halting of the defendants’ elections or the same ought to be given to the defendants as reimbursement for costs expended or incurred prior to the halting of the elections.

43. The plaintiffs averred, as I understand, that the defendants had presented no evidence that they had incurred any costs prior to halting of the elections.

44. On their part, the defendants admitted that they had no receipts but that they had carried out the elections and incurred costs in the elections and subsequent inauguration of elected officials. They urged this court in their submissions, to rely on the cited cases and pluck figures from the air and award them Kshs 500,000.

45. The Supreme Court in the *Wilmington Case* (*supra*) stated as follows on security for costs:

“(45) Security for costs is defined in the *Black’s Law Dictionary Ninth Edition* at page 1478 as money, property, or a bond given to a court by a plaintiff or an appellant to secure the payment of court costs if that party loses. The purpose of security for costs order is to alleviate the concerns of potential difficulties in seeking to recover costs. An applicant of such an order, is required to establish that the respondent, if unsuccessful in the proceedings will be unable to pay costs. The objective is to protect a party from circumstances where one is dragged to court and made to incur costs due to litigation. It is meant to prevent frivolous and Security for costs is defined as money, property, or a bond deposited in court by a suing party to secure the payment of litigation costs (while the case is ongoing) and to protect the sued party if eventually the suing party loses.”

46. In this case, having alleged that the defendants did not incur any expense in organizing the halted elections, the burden shifted to the defendants to prove that indeed an election was halted at the request of the plaintiff and that as a result, they incurred loss.

47. The evidence presented by the defendants in my view was not sufficient in the circumstances as it all pointed to an election being carried out way after the orders for security for costs had been issued. My understanding of security for costs is that it is a relief for the defendant for losses incurred as a result of, in this case, the plaintiffs’ insistence. Security for costs is not in my view compensation/protection for a future expense to be incurred but a past expense that has already been incurred.



48. In addition, evidence of such costs being incurred must be presented. The submission that in some cases a party may be exempted from proving actual expenses does not hold any water as the claim was a special damage of money spent unlike in the cited case of *Omumbo Achola v Peter Ondieki Ganga*[1986] eKLR for loss of a tractor.
49. The defendants in this case were expected to prove that prior to the order of 11.9.2020 for security of costs to be paid by the plaintiffs, they had incurred some expenses which they ought to be compensated for.
50. In the circumstances, I find no merit in the defendants' counterclaim and proceed to dismiss it. The security for costs of Kshs. 500,000 paid into this court following the order of 11.9.2020 shall be refunded to the plaintiffs through their counsel on record to be returned to the plaintiffs.
51. On the submissions that the plaintiff's suit was an abuse of court process, no application was made for striking out of the suit for being an abuse of court process as required under Order 2 Rule 15 of the Civil procedure Rules, which suit, upon which the Judge who first heard the application for conservatory orders issued orders staying elections and he made it clear that even if the elections were to be held on account of the security for costs not being paid, it would not be taken that the court legitimised the said elections.
52. In addition, the submission that the plaintiffs are surrogates and that some plaintiffs like ELD.JOEL WALULA were dead was not proved on balance of probability. The 1<sup>st</sup> plaintiff denied that fact. Further, the 1<sup>st</sup> plaintiff did not bring suit on behalf of Eld Joel Walula or on behalf of any other person other than themselves and therefore his admission that he did not know where the Elder was does not render the suit incompetent as far as the other plaintiffs are concerned. Furthermore, the defendants had a counterclaim and if they knew that some of the plaintiffs had died, which fact was denied by the plaintiffs, and indeed, there was no evidence that the person who was alleged to have died was the same as the person who was named as the plaintiff, nothing prevented the defendants from applying to court to either substitute or strike out of the suit the dead plaintiff.
53. The pleadings are clear that the plaintiffs sued as individuals and as elders in the Church. None of them is described as suing on behalf of the other who was unknown.
54. On the claim that the plaintiffs had no locus standi to sue because they were not members of Baraza Kuu, Article 50(1) of *the Constitution* is clear that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body. *The Constitution* of Kenya, 2010 confers rights to access justice under Article 48 of *the Constitution* and it would be a violation of those rights if persons were to be barred from suing by virtue of any written rule made by the church barring their congregation from suing other church members yet there is no evidence that there was any effective internal dispute resolution mechanism for resolution of those disputes affecting their relations. Not being members of Greater Central Lake Area was in itself not a bar to filing suit against the defendants herein and no evidence has been availed to prove that contention.
55. On the claim for damages for cancellation of the elections, I find no evidence of any damage suffered by the cancellation of elections as the order cancelling the elections was made by the court on application by the plaintiffs and no such damage has been established to the required standard of balance of probabilities.
56. In the end, I find and hold that all the prayers a to c sought by the plaintiffs in this case were spent before the hearing of the suit and therefore they are incapable of being granted. They are dismissed.



57. The Kshs 500,000 security for costs deposited into court by the plaintiffs shall be refunded to the plaintiffs upon production of the original deposit receipt issued by the court.
58. On the counterclaim, I find and hold that none of the prayers sought was proved on the balance of probabilities. The counterclaim is dismissed.
59. Each party shall bear their own costs of the suit and counterclaim
60. This file is now closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF AUGUST, 2024**

**R. EABURILI**

**JUDGE**

