



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 6 OF 2018**

**REVEREND JOHN JUMA.....1<sup>ST</sup> PETITIONER**

**REVEREND SIMON ALOVI.....2<sup>ND</sup> PETITIONER**

**REVEREND TOM OLENDO.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**REVEREND PATRICK LIHANDA.....1<sup>ST</sup> RESPONDENT**

**REVEREND PATRICK OYONDI.....2<sup>ND</sup> RESPONDENT**

**AND**

**REVEREND ZEDEKIAH ORERA.....1<sup>ST</sup> INTERESTED PARTY**

**REVEREND ELISHA KIMAIYO.....2<sup>ND</sup> INTERESTED PARTY**

**THE REGISTERD TRUSTEES,**

**PENTECOSTAL ASSEMBLIES OF GOD.....3<sup>RD</sup> INTERESTED PARTY**

**MEMBERS OF THE PENETECOSTAL ASSEMBLIES OF GOD**

**CHURCH KENYA (PAG) APPEALS.....4<sup>TH</sup> INTERESTED PARTY**

**THE CHURCH COUNCIL.....5<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The Motions for determination are dated 14<sup>th</sup> March 2019 and 16<sup>th</sup> August 2020, and are brought at the instance of Rev. Tom Olendo and Elijah Kathiari Mikwa, who I shall refer hereinafter as the applicants.

2. The application dated 14<sup>th</sup> March 2019 seeks orders against Mr. Aggrey Musiega, Rev. Patrick Lihanda and Rev. Patrick Oyondi, who I shall refer hereto as the respondents, to the effect that they show cause why contempt proceedings ought not be instituted against them; interim conservatory orders to issue to the effect that the returns and/or any such declarations made pursuant to the purported elections held in the night of 3<sup>rd</sup>/4<sup>th</sup> March, 2019 be suspended and the respondents be restrained from submitting any such names to the Registrar of Societies and they be further restrained from holding themselves out as *bona fide* officials of the PAG Church Kenya they be committed to civil jail for six months for being in contempt of orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018; and costs be borne by the respondents. The grounds upon which the application is founded are that the court had made orders on 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018, suspending elections for leadership of the PAG Kenya church to be referred thereafter as the church that were scheduled for 5<sup>th</sup> and 6<sup>th</sup> December 2018. It is argued that the said orders were disregarded by the respondents, as they went ahead and conducted elections on 3<sup>rd</sup> and 4<sup>th</sup> March 2019. It is submitted that that conduct diminished the power of the court to naught, and the dignity of the court has been belittled.

3. The application dated 26<sup>th</sup> August 2020, seeks a variety of orders, but the critical order for the purpose of these proceedings is prayer 2, which is directed at the 1<sup>st</sup> respondent, and which seeks that a summons do issue directing him to appear in court to show cause why he has

disobeyed the orders made herein on 8<sup>th</sup> November 2018, 5<sup>th</sup> December 2018 and 18<sup>th</sup> March 2019, and in Hamisi SRMCCC No. of 15 of 2019 and Kisumu CMCCC No. 543 of 2018. Prayer 5 seeks his committal to civil jail for 6 months for being in contempt of the said orders. The background, as set out in the grounds and the affidavit in support, is that the term of the 1<sup>st</sup> respondent as General Superintendent of the Church lapsed on 5<sup>th</sup> December 2018. In 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018, the court herein made orders to suspend the holding of elections to pick church officials, and made an order for installation of a caretaker committee to oversee the overall management and running of the affairs and operations of the Church. The courts made several rulings thereafter, whose effect was to bar and restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents from holding themselves out as or representing themselves and their agents as officials of the Church. There was even an order for them to leave or vacate the Church headquarters at Nyang'ori. They then got orders from Nairobi, in HC Petition No. 116 of 2020, allowing them to access the Church premises, without disclosing to the court the expediency of the instant suit, which had barred them from holding the offices that the court was returning them to. Those orders were subsequently rescinded by the court, after it came to its attention that there existed contrary orders.

4. In his response, the 1<sup>st</sup> respondent has averred that he was aware of an order made in Kisumu CMCCC No. 543 of 2018, which barred him from performing the duties of the executive committee of the Church, and that the management was placed under the charge of a caretaker committee for a period not exceeding 6 months. He also avers that the court in this matter referred all the consolidated matters to mediation. Mediation was done under the auspices of the Court Annexed Mediation, a settlement was reached, which was filed in court. According to him the mediation settlement agreement reflected the commitment of the parties to go for elections, and withdrawal of all the pending cases. He avers that despite the settlement, members of the church proceeded to file several cases in court, which he has enumerated. He further avers that some of the members appointed to the caretaker committee resigned. He avers that he vacated office after orders were made, in Kisumu CMCCC No. 543 of 2018 and Hamisi SRMCCC No. 15 of 2019, requiring him to do so, and members of the caretaker committee took over. He asserts that he resumed office after he was reinstated in orders that were made in Vihiga PMCCC No. 246 of 2019 and Nairobi HC Petition No. 116 of 2020. He avers that he and the 2<sup>nd</sup> respondent obeyed court orders, even though they took issue with how they were obtained.

5. The only issue for determination is whether the respondents should be held to be in contempt of court. That was the only issue that was argued before me on 18<sup>th</sup> December 2020, when the matter came up for hearing.

6. Mr. Oginga for the applicants, in both applications, submitted that this court had, on 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018, after hearing the parties, suspended the elections scheduled to be held for the Church. Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> respondents conducted elections on the night of 3<sup>rd</sup> and 4<sup>th</sup> March 2019, and declared themselves, and other individuals, as Church officials. The said elections were conducted while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were aware that the term of office of the Church executive had already lapsed, and while aware of the court orders that had suspended the elections. To buttress his point, that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had knowledge of the court order suspending elections, Mr. Oginga referred to a deposition made by 1<sup>st</sup> respondent, in his affidavit sworn on 8<sup>th</sup> December 2018, where he said that he knew, and it was in the public domain, that the elections for the general officers of the Church, scheduled for 5<sup>th</sup> and 6<sup>th</sup> December 2018, had been suspended by a court order, made or issued on 5<sup>th</sup> December 2018, in this matter. He made a similar deposition in his affidavit of 17<sup>th</sup> January 2019, at paragraph 3, and at paragraph 11 of his affidavit sworn on 18<sup>th</sup> December 2018.

7. He submitted that the actions of the two respondents, prompted the filing of the application dated 14<sup>th</sup> March 2019, subsequent to which orders were made on 18<sup>th</sup> March 2019, to the effect that an interim conservatory order issued injunctioning the two respondents from certain acts, as per that order. The two respondents attempted to have the orders vacated or varied, through a preliminary objection, dated 2<sup>nd</sup> April 2019, and an application, dated 3<sup>rd</sup> April 2019, but the said efforts were dismissed, in a ruling that this court delivered on 24<sup>th</sup> July 2019. It was submitted that orders similar to those made on 18<sup>th</sup> March 2018 were made in other related suits, including Kisumu CMCCC No. 543 of 2019 and Kakamega CMCCC No. 99 of 2020.

8. Mr. Oginga submitted that despite the said orders, the two respondents went ahead to put together a caretaker committee of the Church in office, which meant that they continued to hold themselves out as being in office. It was further submitted that they continued to utilize the funds of the Church to their own benefit. He pointed at an affidavit on record, sworn by an employee of the Church, Isaiah Kipsang, who was allegedly removed from office by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent was also said to be purporting to be transferring pastors and district overseers, and to have placed his agents at the Church headquarters, who look out for any individuals who do not support their cause.

9. On what constitutes contempt of court, he submitted that the test is whether the breach complained of was committed deliberately or intentionally. He submitted that the court needed to be satisfied as to the terms of the order breached, knowledge by the contemnor of the terms of the order, and the failure to comply with the order. He submitted that a court without contempt powers was not an effective court, and that the court had an obligation to secure compliance with its orders. He stated that when a court cites a person for contempt of court, it does so to enforce rule of law and uphold justice.

10. He cited the decision in *Judicial Service Commission vs. Speaker of the National Assembly and 8 other s* [2014] eKLR (Mwongo PJ, Meoli, Chemitei, Omondi and Ngugi JJ). He argued that a party dissatisfied with a court order should move the court for appropriate orders, and, at the same time, comply with the order that they complain of. He further submitted that even where a party is unaware of a court, any action taken which is contrary to that order would still be null and void, asserting that lack of knowledge did not sanitise the illegality. He stated that all actions taken in contravention of a court order are null, void and of no effect. An illegality was an illegality, he submitted, which could not be sanitised by consent of the parties.

11. Finally, he submitted, with regard, to Nairobi Petition No. 116 of 2020, which had been transferred to Kakamega, and become Kakamega HC Petition No. 7 of 2020. He stated that Makau J, in that matter, had discharged the interim orders that the court had made in that case, after it was established that the said orders were contrary to the orders issued by this court in this cause. He submitted that the orders made in the Nairobi matter had not granted the respondents access to or control over the Church. He submitted that the disobedience of the court orders by the respondents was intentional and continuous.

12. Mr. Wasilwa supported the two applications. He started by pointing out that the Contempt of Court Act, 2015, had been repealed, and that meant that the applicable law remained section 5 of the Judicature Act. He submitted that the applicable law on contempt remained the English law, so far as procedure is concerned. He cited decisions made in *Samuel MN Mweru & Others vs. National Land Commission & 2 others* [2020] eKLR (Mativo J), *Clerk of Nairobi City Council and ODM & Jubilee Party and Abdi Guyo* (Makau J). He submitted that the affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not proper affidavits, when looked from the perspective of sections 62 and 63 of the Evidence Act, Cap 80 Laws of Kenya, and Order 19 Rule 3 of the Civil Procedure Rules, arguing that they were not admissible and ought to be struck out. On the withdrawal of some parties from the matter, he submitted that the same did not diminish or relieve the contemnors of their culpability for disobedience. He submitted that the actions of the contemnors were not justified by the mediation settlement, as the court had pronounced itself on 24<sup>th</sup> July 2019, when the mediation process and its outcome were impugned and nullified. He asserted that the purpose of contempt proceedings is to punish not vindicate, and that it was an instrument in the hands of the court to promote order and avert anarchy.

13. Mr. Ondego, on his part, submitted that Mr. Musiega had been included in the contempt proceedings because of the SMS that he sent.

14. Mr. Mokuia supported the application. He submitted that the order of 8<sup>th</sup> November 2018 prevented the 1<sup>st</sup> respondent from preparing the elections of December 2018, but he just went ahead and made preparations. That conduct was condemned by the court in *Patrick Lihanda & 4 others vs. Gedeon Kivisi & 3 others* [2020] eKLR (Musyoka J) as being in disobedience of a court order. With regard to the orders of 18<sup>th</sup> March 2019, the 1<sup>st</sup> respondent wrote letters authorizing countywide elections of district overseers, in blatant violation of the orders of the court. He further submitted that the 1<sup>st</sup> respondent had sworn and filed an affidavit in a Kitale matter, Kitale ELC No. 61 of 2020, where he described himself as the General Superintendent of the Church.

15. The response to the applications was led by Mr. Oloo. He submitted that the petition ought to be canvassed first, before the court takes any steps. He was reacting to the submissions on the Kitale matter, which he said was being imported into this dispute. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not disobey court orders since the trustees or members of the caretaker committee did not take office. He submitted that it was not the respondents who frustrated the court orders of 18<sup>th</sup> March 2019, instead it was the caretaker committee members who refused to come on board. He submitted further that contempt proceedings were civil in nature, but invoked a criminal sanction. He argued that the application dated 14<sup>th</sup> March 2019, did not meet the standards, by way of raising issues that warrant a contempt orders. He submitted that after the elections were suspended by the orders of 5<sup>th</sup> December 2018, none were held on that day. He argued that the respondents were lawful citizens who unsuccessfully sought to have the orders set aside. He submitted that the order of 5<sup>th</sup> December 2018 gave the parties time to conduct mediation, and then report back to court. They submitted themselves to mediation, culminating in a settlement, signed by all the parties who were subject to it, on 16<sup>th</sup> January 2019. He asserted that the settlement reflected the spirit of what the parties wanted, and the court could take judicial notice of it. He argued that the mediation was court directed, and there was nothing that stopped elections in March 2019, as the court that stopped the elections had mandated the mediation. He submitted that there was no evidence of *mala fides*, for the elections were not held after the order stopping them, but rather after the mediation. He submitted that court recognized, in its orders of 18<sup>th</sup> March 2019, that elections had been conducted, hence the order to stop filing of returns, and that there was no evidence that the respondents had made an effort to file returns.

16. Ms. Sijenje submitted that the SMS message relied on to cite Mr. Musiega for contempt of court was privileged communication between an advocate and his client. It made reference to a document, which was not identified in the SMS.

17. Mr. Athung'a opposed the application. He submitted that the orders of 18<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018 had stopped the elections scheduled for 5<sup>th</sup> December 2018, and no elections were held on that date. The matter was referred to mediation, and after the mediation elections were conducted. He submitted that for one to be in contempt of court there must be a willful refusal to obey the order. He submitted that it would not be contempt of court where the conduct of the offending party is in good faith. He argued that after the matter was referred to mediation, the settlement was that elections be conducted within one month, and the elections in March 2019 were conducted on the basis of the mediation settlement, which settlement has not been challenged by anyone. On the application dated, 14<sup>th</sup> March 2019, he submitted that the 2<sup>nd</sup> respondent was not party to the application dated 26<sup>th</sup> August 2018, and he had not been cited in that application. He submitted that the 1<sup>st</sup> respondent had not asked the Registrar of Societies to deregister him as a church official. He asserted that the 1<sup>st</sup> respondent was still a church official according to those records, as there had been no change of officials. He was not representing himself to be a general superintendent, he was in fact one, and he was using the title because he believed that he owned it. He submitted that the orders of 8<sup>th</sup> November 2018 were substituted by the order of 5<sup>th</sup> December 2018, and lapsed after the order of 5<sup>th</sup> December 2018 was made. He submitted that punishing the respondents would not offer a solution to the dispute that was in the Church, and the court should instead encourage the parties to reach settlement. On Mr. Musiega, he submitted that he was the advocate for the parties, and that there was nothing that he did that could be termed contemptuous. He did not organize the elections, and the communication between him and the respondents was protected by the advocate-client privilege.

18. In rejoinder, Mr. Oginga argued that the orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018 both subsisted; adding that the order of 5<sup>th</sup> December 2018 was specific and supplemented that of 8<sup>th</sup> November 2018.

19. I have perused the record before me to map out the orders that are said to have been disobeyed by the respondents.

20. The pages of the handwritten record of the proceedings of 8<sup>th</sup> November 2018 are missing. I have, however, seen a copy of the order extracted from the said ruling. The court made four orders. One, an order of injunction to restrain the 1<sup>st</sup> respondent and other officials of the Church from receiving names of pastors from district overseers registering pastors, compiling and or constituting the names into a register or list of voters in connection with elections of Church officials. Two, an order of injunction to restrain the 1<sup>st</sup> respondent and other Church officials from convening or holding meetings of management or committees of organs of the Church in connection with preparation of the PAG-Kenya Business Conference, until further orders of the court. Three, an injunction to stay and suspend a notice dated 11<sup>th</sup> July 2018 or issued thereafter by the 1<sup>st</sup> respondent purporting to convene the Pastors Conference, General Conference, the Business Conference or nay

other national conference. Four, consolidation of several cases listed in the application.

21. The order of 5<sup>th</sup> December 2018 had four components. One, it declared that the elections scheduled for 5<sup>th</sup> and 6<sup>th</sup> December 2018 stood suspended until further orders of the court. Two, parties were given one month to conduct mediation and to report to the Judge on 7<sup>th</sup> January 2019 or on any other earlier date as they might agree. Three, the Deputy Registrar was directed to open a mediation file. Four, the mediation filed opened at the High Court at Kisumu was ordered closed.

22. The order of 18<sup>th</sup> March 2019, granted leave for contempt proceedings to be brought against the respondents, a notice to show cause why contempt proceedings could not be instituted against them, a conservatory order to bar the respondents from submitting the names of the individuals purportedly elected on 3<sup>rd</sup> and 4<sup>th</sup> March 2019 and restraining them from holding themselves out as the *bona fide* officials of the Church.

23. The orders of 8<sup>th</sup> March 2019, made in Kisumu CMCCC No. 543 of 2018, barred the 1<sup>st</sup> respondent and other officers from acting as agents or servants or employees or other capacity from carrying out the executive administration duties at the Church headquarters at Nyang'ori, or calling or attending meeting there or elsewhere, and accessing or using or utilizing funds from stated bank accounts operated in the name of the Church. There are other orders injuncting them from discharging any duties relating to the management and administration of the Church.

24. The final orders were made on 26<sup>th</sup> August 2019, in Hamisi SRMCCC No. 15 of 2019, to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and others from accessing or entering into the Church mission station, pending transfer of the suit from the Hamisi court to the High Court.

25. Civil contempt is the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court. The first element, in an action for contempt of court, is willful disobedience of the order in question. The Court of Appeal, in *Michael Sistu Mwaura Kamau vs Director of Public Prosecutions & 4 others* [2018] eKLR (Ouko, Warsame and M'noti JJA) said as follows, with respect to it:

*“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of.”*

26. What a court seized of an application to cite a party for contempt of court should look out for was summarized, in *Johari School Limited vs. Rosemary Wambugu t/s Johari School* [2021] eKLR (Mabeya J), *Katsuri Limited vs. Kapurchand Depar Shah* [2016] eKLR (Mativo J) and *Cecil Miller vs. Jackson Njeru & Another* [2017] eKLR (Njuguna J), into four elements. One, that the terms of the order were clear, unambiguous, and binding on the defendants. Two, the defendant had knowledge of or proper notice of the terms of the order. Three, the defendant acted in breach of the terms of the order. Four, the conduct of the defendant was deliberate. I will consider the conduct of the respondents as against the four elements enumerated above.

27. It is not in contention that the parties were aware of the court orders dated 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018, which suspended the elections of the Church. The parties were aware that the orders were valid, and were available to be complied with unless and until they were varied, set aside, discharged or otherwise directed. The respondents argue that the mediation agreement between the parties set aside the said orders. However, the settlement agreement in question was never adopted as an order of court in line with Clause 1.7 (j) of the Judiciary Mediation Manual which makes it mandatory for a mediation agreement to be placed before the Judge for adoption so as to acquire the force of law. Njagi J. had addressed the matter of that settlement in the ruling delivered on 24<sup>th</sup> July 2019, where it was said:

*“In the foregoing, there is no substance in the argument that the courts orders on 5<sup>th</sup> December 2018 came to an end on the filing of the settlement agreement. There is no substance in the argument that the pending cases stood withdrawn on the filing of the settlement agreement. There is no substance in the argument that the orders of the court made on 18<sup>th</sup> March, 2019 were irregularly issued. The said orders remain in force until when the settlement is adopted by the court as the judgment of the court.”*

28. Until an order of the court is discharged, varied or set aside, it is the obligation of each party to obey the order. The court, in *Hadkinson vs. Hadkinson* (1952) 2 ALL ER 562 (Denning, Somervell and Romer LJ), said, with regard to the same:

*“...it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged...”*

29. Orders of the court ought to be obeyed, otherwise the standing of the court would be demeaned and the rule of law compromised. The court does not and should not be seen to act in vain otherwise its respect will be lost. In *B vs. Attorney General* [2004] 1 KLR 431 (Ojwang Ag J), the court stated:

*“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”*

30. For the rule of law to be safeguarded, persons who flout court orders ought to be held accountable, as was stated in *Teachers Service Commission vs. Kenya National Union of Teachers & 2 Others* [2013] eKLR (Ndolo J), in the following words:

*“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving*

*and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”*

31. The need to safeguard the rule of law was further echoed by the Supreme Court, in *Republic vs. Ahmad Abolfathi Mohammed & another* [2019] eKLR (Maraga CJ, Ibrahim, Ojwang, Wanjala, N Ndungú and Lenaola JJSC), where it was said:

*“It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen.”*

32. So, has a case been made out herein for contempt of court? The standard of proof required in contempt proceedings was addressed by the Court of Appeal, in *Mutitika vs. Baharini Farm Limited* [1985] KLR 227 (Hancox, Nyarangi JJA and Gachuhi Ag JA), where it was said:

*“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt...it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”*

33. The respondents have argued that they believed the mediation settlement gave them a go-ahead to carry out the elections. The record reflects that a clarification of the effect a settlement agreement was given by the court on 24<sup>th</sup> July 2019. The elections were carried out on 3<sup>rd</sup> and 4<sup>th</sup> March, 2019. The effect of a party being held in contempt is that their freedom of movement is curtailed. It is important that before this court can hold the respondents to be in contempt, it is satisfied that their actions were a blatant disrespect of the court orders, and were devoid of any action that would have made them think otherwise or interpret the orders differently. The respondents claim that they believed that the order of 8<sup>th</sup> November 2018, was overtaken by the order of 5<sup>th</sup> December 2018, which referred the matter to mediation, and that the mediation settlement agreement that they arrived at, although not yet made an order of the court, gave them leeway to conduct elections.

34. I am not persuaded that the orders made on 5<sup>th</sup> December 2018 had the effect of vacating or superseding those made on 8<sup>th</sup> November 2018. The orders of 8<sup>th</sup> November 2018, were specific to arrangements or preparation for the elections scheduled for 5<sup>th</sup> December 2018, in terms of pastors receiving returns from overseers, preparation of election registers and lists, and convening of meetings for the purpose of conduct of the elections. The order of 5<sup>th</sup> December 2018 declared the elections scheduled for 5<sup>th</sup> and 6<sup>th</sup> December 2018 suspended until further order of the court. That order did not override or supersede the earlier order. It merely reinforced it. The earlier order targeted preparation for elections, and barred those preparations, it did not suspend the elections. The latter order specifically suspended the elections. It added to the order of 8<sup>th</sup> November 2018 rather than subtracting from it. The two orders must necessarily be read together. I reiterate that the order of 8<sup>th</sup> November 2018 barred the respondents from making preparations to conduct elections, while the order of 5<sup>th</sup> December 2018 suspended the elections altogether until further orders of the court.

35. The respondents argue that they believed that the mediation agreement allowed them to carry out elections. The mediation process was undertaken following the order of 5<sup>th</sup> December 2018. That order was specific that the elections had been suspended until further orders of the court. Secondly, the court directed the parties to undertake mediation for one month and thereafter report to the Judge. The order was not that a mediation settlement agreement would be filed, and thereafter the parties could act as per the settlement. The order was specific; the elections could not be conducted without a further order of the court allowing the elections. Secondly, the mediation settlement agreement could not be acted upon by the parties before the parties reported back to the Judge, no doubt for directions with respect to whether or not they could conduct elections. Thirdly, when read together with the orders of 8<sup>th</sup> November 2018, the respondents were still barred from making any preparations to conduct elections, by doing any of the acts specified in the order of 8<sup>th</sup> November 2018.

36. This is what the court said in the final paragraph of its ruling of 5<sup>th</sup> December 2018:

*“19. On the 30<sup>th</sup> November, 2018, the court by the consent of the parties referred this matter to mediation, this is in recognition of the fact that there are many cases filed by various parties and it was impossible for all the cases to be heard and determined before the election date. The parties do not seem to have embarked on serious negotiations for mediation. Since the parties agreed to proceed with the matter by way of mediation, I will grant them more time to conduct mediation. In the meantime, the elections scheduled for 5<sup>th</sup> and 6<sup>th</sup> December, 2018 stand suspended until further orders of this court. Parties are given one month to conduct mediation and to report to the vacation duty Judge on the 7<sup>th</sup> January, 2019 or on any other earlier date as parties may agree.*

*The Deputy Registrar at Kakamega High Court is hereby directed to open a mediation file. The mediation file opened at Kisumu High Court is ordered to be closed.*

37. The said order was extracted, on 6<sup>th</sup> December 2020, as follows:

*“1. THAT the elections scheduled for 5<sup>th</sup> and 6<sup>th</sup> December stand suspended until further orders of the court.*

*2. THAT the parties are given one month to conduct mediation and to report to the vacation duty Judge on the 7<sup>th</sup> January, 2019 or any other earlier date as the parties may agree.*

*3. THAT the Deputy Registrar at Kakamega High Court to open a mediation file.*

*4. THAT the mediation file opened at Kisumu High Court to be closed.”*

38. The order that referred the parties to mediation tied conduct of future elections to further orders of the court, and required the parties to report back to the Judge for further directions on the way forward. Did the respondents adhere to the programme given to them by the court, in the order of 5<sup>th</sup> December 2018, with regard to elections and mediation? No. Although the order of 5<sup>th</sup> December 2018 suspended the elections until further orders of the court, the respondents conducted the elections on 3<sup>rd</sup> and 4<sup>th</sup> March 2019, without the benefit of a court order. Secondly, although the order required that once a mediation settlement was reached, the parties report back to the Judge on the mediation, ostensibly so that further directions could be given by the court, possibly relating to conduct of elections. It would appear from the record that a mediation settlement agreement was placed on record, through an application by the respondents, for it to be adopted as an order of the court, however the other side was unhappy with the alleged settlement, and they brought judicial review proceedings against it, with a view to have it quashed. The application for adoption of the mediation settlement was allegedly dated 7<sup>th</sup> January 2019. The record is clear that that mediation settlement agreement was never adopted as an order of the court since it was challenged by the other side, and, therefore, it never became effective, and it could not, without being made an order of the court, form a basis for conduct of the elections, for it could not, without adoption, override the court order of 5<sup>th</sup> December 2018, which required that elections be conducted only with further orders of the court.

39. It is common knowledge that the respondents were well aware of the orders made on 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018. It was on the basis of the two orders that the elections scheduled for 5<sup>th</sup> December 2018 were not conducted. It was also on the basis of the same that they submitted to mediation. Their defence is that they did not have knowledge or awareness that the mediation settlement agreement could not be executed without being adopted by the court as an order of the court. Is that a plausible explanation or excuse? I do not think so. The record reflects that the respondents filed an application, sometime in January 2019, seeking adoption of that settlement as an order of the court, at the time when the other side was seeking a judicial review order against the same mediation settlement. They must have known that it was a requirement of the law that the settlement would be of no binding effect unless it was made an order of the court. When they took the decision to conduct the elections founded on the mediation settlement agreement, they knew that they had been restrained by the order of 8<sup>th</sup> November 2018 from doing certain acts in preparation for the elections, and for the purpose of conducting the elections of 3<sup>rd</sup> and 4<sup>th</sup> March 2019, they must have done those things that the order and barred them from doing. I take judicial notice of the fact that the respondents were national officials of the Church, who were well schooled, educated and worldly, in terms of having general understanding of their wider environment, quite apart from theology and church matters. They were represented those proceedings by an advocate of many years standing, and must have fully known the effect of the orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018. Indeed, it would appear that when they could not get adoption of the mediation settlement, because of the pending judicial review application, they decided to hold elections based on that settlement on the pretext that it was a binding *inter se*. It is my finding, therefore, that the orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018 were unambiguous, the 1<sup>st</sup> respondent had knowledge of the same, and he deliberately acted in in contempt of the said orders by conducting the said elections.

40. For avoidance of doubt, the application seeking adoption of the consent order was dated 17<sup>th</sup> December 2019. The 1<sup>st</sup> respondent swore the affidavit in support of it. The application sought adoption as its judgement the award of the mediator arising from the court annexed mediation that the court had ordered on 5<sup>th</sup> December 2018, and which had been filed in compliance with that order. The terms of the mediation were also set out. It was proposed that minimum amendments be made to the PAG-Kenya Church Constitution of 1998, at a conference to be held on 30<sup>th</sup> January 2019, for approval and thereafter elections to be conducted. The application also sought that the orders made by the court suspending the elections and suspending the notice by the 1<sup>st</sup> respondent convening the business conference for 5<sup>th</sup> and 6<sup>th</sup> December 2018 be lifted. The effect of that application is that the 1<sup>st</sup> respondent was very clear on the effect of the orders of 8<sup>th</sup> December 2018 and 5<sup>th</sup> December 2018. He was very clear that he had been barred from convening a business conference to prepare and hold elections. He was also clear that an election could only be held, based on the orders of 5<sup>th</sup> December 2018, after the court had given a go-ahead. He was also very clear that the terms of the mediation settlement agreement could not be executed or carried out without first having the settlement adopted as an order of the court. He wanted the court to lift the orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018 to pave way for elections. He had knowledge of the orders and their effect. The very filing of that application, seeking the orders set out in it, is clear testimony of that knowledge. He cannot now be heard to say that he did not understand the effect of the order of 5<sup>th</sup> December 2018, or that he did not know that he should not have executed the mediation settlement agreement before the same had been adopted by the court. The fact that he went ahead to conduct elections on 3<sup>rd</sup> and 4<sup>th</sup> March 2019, despite the purport and pendency of his application dated 17<sup>th</sup> January 2019, is testimony to the fact that the breach of the said orders was willful and deliberate.

41. The material placed on record points largely to conduct by the 1<sup>st</sup> respondent. The role that the 2<sup>nd</sup> respondent might have played in all this has not been brought out. It has not been demonstrated that he had a hand in the conduct of the elections of 3<sup>rd</sup> and 4<sup>th</sup> March 2018, in violation of the orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018. Consequently, I find that no case has been made out against him.

42. With regard to Mr. Musiega, the application targets him because of a mobile phone text message that he is alleged to have sent out to persons, who are not clear from the face of it. It reads as follows:

“Ignore that document. That is not an order. I am away in Busia but would have joined you. The document is an empty desperate attempt to scare you. Just check there is nowhere it’s indicated orders had been extended. Proceed with your meeting without any fear. Read this SMS loudly to those present. I will defend every one.”

43. It is not clear who was being addressed, and in respect of what. It is not clear which document and meeting were being referred to. It also not clear which orders were being referred to. It cannot be said, with certainty, whether the communication was to the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, and whether it was in connection with this matter. It was argued that this was a privileged advocate-client communication. I do not see any basis for that submission, given that it is not clear to whom it was addressed. It is not even clear from whom the message was retrieved. The mobile phone number and the set from which the message was sent, and where it was directed are not discernible. I am not persuaded that a case has been made out against Mr. Musiega.

44. There is a very high likelihood that that text message had everything to do with Mr. Musiega encouraging his clients to disobey court orders, but that remains just that, speculation. Anyhow, if he did engage in such skullduggery, it may be worth the while to quote, for his benefit, the words of the court, with respect to the duty of an advocate, in *Francis Mugo & 22 Others vs. James Bress Muthee & 3 Others* [2005] eKLR (Musinga J), where the court said:

“While I agree that the choice of [counsel] is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an Advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to himself, and a duty to the State, as well [expressed] by Richard Du Cann in *The Art of the Advocate*. As an Officer of the Court, he owes allegiance to a cause that is higher than serving the interests of his client, and that is to the cause of justice and truth.”

45. The order of 18<sup>th</sup> March 2019 barred the 1<sup>st</sup> and 2<sup>nd</sup> respondents from holding themselves out as *bona fide* officials of the Church, pending the *inter partes* hearing and determination of the application dated 14<sup>th</sup> March 2019. Is their proof that they have done so? The applicants have attached several documents to their affidavit, which demonstrate that the 1<sup>st</sup> respondent held himself out as General Superintendent of the Church, on several occasions after 18<sup>th</sup> March 2018. The 1<sup>st</sup> respondent did not renounce these documents in his affidavit in reply to the application dated 14<sup>th</sup> March 2018. Indeed, he has made no averments, whatsoever, on the said orders. One such letter is from Khaminwa & Khaminwa, Advocates, dated 29<sup>th</sup> March 2020, addressed to Nathan Ondego, copied to the 1<sup>st</sup> respondent, where he is described as the General Superintendent, which urges that the church leadership, as currently constituted, be respected. There is another letter from the same law firm, Messrs. Khaminwa & Khaminwa, Advocates, dated 28<sup>th</sup> May 2020, addressed to the 1<sup>st</sup> respondent, again in his purported capacity as General Superintendent. The said law firm acted for the 1<sup>st</sup> respondent in Nairobi HC Petition No. 116 of 2020, which later became Kakamega HC Petition No. 7 of 2020. He must have represented himself as such to his advocate. There is a letter dated 25<sup>th</sup> April 2019, from the 1<sup>st</sup> respondent, in his purported capacity as General Superintendent, addressed to Rev. Samuel Ouma, informing him that he had ceased to be a pastor in the Church. There are letters dated 31<sup>st</sup> May 2019, addressed to Rev. John Kaila Mpurkoi, Rev Stephen Kilusu, among others, by the 1<sup>st</sup> respondent, in his purported capacity as General Superintendent, where he is transferring the addresses from one church station to another. There is a huge bundle of letters addressed to various individuals, on divers dates in May, June and July 2019, and some on divers dates in 2020, either transferring them from one station to another, or calling for records, or relating to discipline, or in expression of appreciation, all in the hand of the 1<sup>st</sup> respondent, in his purported capacity as General Superintendent.

46. From the material set out above, it is patently clear that the 1<sup>st</sup> respondent, despite the order of 18<sup>th</sup> March 2019 barring him from projecting himself as an official of the Church, after the impugned elections of 3<sup>rd</sup> and 4<sup>th</sup> March 2019, continued to hold himself out as such, and to conduct Church business as if that order did not exist. He continued to transfer pastors, to sack some and discipline others, among other things. I am satisfied that there is sufficient material upon which, to conclude that there was conduct that was inconsistent with the order of 18<sup>th</sup> March 2018. Was the conduct willful or deliberate, with respect to that order? Whether conduct is willful or deliberate depends on knowledge of its existence. The order was made *ex parte*. The applicants have not demonstrated whether the order was brought to the notice of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, through its service. It cannot, therefore, be ascertained whether the conduct of the 1<sup>st</sup> respondent, with respect to this particular order, was willful or not.

47. The other order was that made in Kisumu in Kisumu CMCCC No. 543 of 2018 on 8<sup>th</sup> March 2019. It restrained the 1<sup>st</sup> respondent and others from carrying out managerial and administrative duties in relation to the affairs of the Church. The 1<sup>st</sup> respondent challenged that order in the High Court at Kisumu in HCCA No. 28 of 2019. He asserted, in his supporting affidavit, that he was the General Superintendent of the Church, and articulated his arguments against the said order. It is not clear whether a stay of execution order was made by the High Court, but what is clear is that, in Kisumu CMCCC No. 543 of 2018, the court made an order for maintenance of *status quo*. It is not clear who the *status quo* order favoured, because it is not clear as who was in control of the Church as at 24<sup>th</sup> October 2019, when that order was made. In his affidavit in response to the application herein, the 1<sup>st</sup> respondent concedes that he was aware of the order of 8<sup>th</sup> March 2019, and appears to say that the persons who were to take over from him did not take up office. Overall, I am not persuaded that the applicants have demonstrated that the 1<sup>st</sup> respondent breached the said order. It is not clearly articulated how and when the order was violated. nothing points at all at the 2<sup>nd</sup> respondent with respect to breach of the order of 8<sup>th</sup> March 2018.

48. The final order alleged to have been breached is that made in Hamisi SRMCCC No. 15 of 2019, which barred the 1<sup>st</sup> respondent and others from accessing the headquarters of the Church at Nyang’ori. It is not clearly articulated when and how the respondents violated this order. It has not been demonstrated when they became aware of the order, so that there is clarity as to when they were expected to comply with it. There is no proof of service. A number of copies of applications that were filed with respect to meeting that were held or scheduled to be held, seeking to have the respondents restrained from holding the meetings are attached. The outcomes of those applications have not been disclosed. I cannot tell whether the applicants succeeded in what they set out to do, and without that I have no basis upon which to find, without more, that the respondents violated those orders.

49. As expressed here above, I find that, with regard to the orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018, the 1<sup>st</sup> respondent had knowledge of the said orders, he acted in breach of the terms of the orders and his conduct was deliberate. The same does not apply with respect to the other respondents and the other orders. It is my finding that the 1<sup>st</sup> respondent, Rev. Patrick Lihanda, is guilty of contempt of the court orders of 8<sup>th</sup> November 2018 and 5<sup>th</sup> December 2018, and I do hereby convict him accordingly. The matter shall be mentioned, on a date, to be given at the delivery of this ruling, for mitigation and sentencing.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE , 2021**

**W MUSYOKA**

**JUDGE**