REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E252 OF 2021

BETWEEN

WILSON BURSEN MOKUA.....PETITIONER

VERSUS

1. CENTRAL KENYA CONFERENCE OF THE SEVENTH DAY ADVENTIST

2. EAST KENYA UNION CONFERENCE OF

THE SEVENTH DAY ADVENTIST..... RESPONDENTS

AND

NAIROBI COSMOPOLITAN CONFERENCE LIMITED....INTERESTED PARTY

RULING NO. 1

Introduction:

1. Mountain View SDA Church is one of the Churches in the Seventh Day Adventist Church East Africa Union in Kenya. It is situated in Nairobi County off Waiyaki Way. In these proceedings, the said church is embroiled in internal leadership wrangles.

2. The disharmony has resulted to the filing of several Court cases. In this Petition, the leadership of the Mountain View SDA Church is contested by the Respondents herein, *Central Kenya Conference of the Seventh Day Adventist* and *East Kenya Union Conference of the Seventh Day Adventist* as against the Interested Party herein, *Nairobi Cosmopolitan Conference Limited.*

3. Pending the determination of the Petition, the Petitioner herein, *Wilson Bursen Mokua*, has *vide* an application by way of a Notice of Motion dated 2nd July, 2021 sought some interim conservatory orders. The Respondents, in turn, filed a Notice of Preliminary Objection dated 12th July, 2021 seeking to terminate the entire proceedings.

4. This ruling is, hence, on the Notice of Motion dated 2nd July, 2021 and the Notice of Preliminary Objection dated 12th July, 2021.

The Application and the Objection:

5. The Notice of Motion seeks the following orders: -

> *1. THAT the matter be certified urgent and be heard ex parte in the first instance;*
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> *2. THAT pending the hearing of the application inter partes, there be a conservatory order in the interim maintaining the administration of Mountain View SDA under the Interested Party;*
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> *3. THAT pending the hearing and determination of this application and Petition, there be a conservatory order maintaining the administration of Mountain View SDA under the Interested Party.*

6. The application is supported by three Affidavits sworn by the Petitioner. They are a Supporting Affidavit sworn on 2nd July, 2021, a Further Affidavit sworn on 6th July, 2021 and a Supplementary Affidavit sworn on 13th July, 2021. In further support of the application, the Petitioner filed written submissions dated 14th July, 2021 and a Case Digest dated 15th July, 2021.

7. The Interested Party supported the application. It filed an affidavit sworn by one *George Simi* on 11th July, 2021 and written submissions dated 17th July, 2021.

8. The Respondents opposed the application. They filed two Affidavits sworn by one *Robert Ng'wono Obonyo* on 9th July, 2021 and 12th July, 2021 respectively. They also filed written submissions dated 16th July, 2021.

9. The objection is tailored as follows: -

> *THAT the 1st and 2nd Respondents herein namely CENTRAL KENYA CONFERENCE OF THE SEVENTH DAY ADVENTIST CHURCH and EAST KENYA UNION CONFERENCE OF THE SEVENTH ADVENTIST CHURCH are internal administrative entities of the Seventh Day Adventist Church East Africa Union, with no capacity whatsoever to sue or be sued, the Petitioner's Petition is therefore incurably defective and bad in law.*
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> *REASONS WHEREFORE the Respondents pray for the striking out of the Petitioners Petition and application with costs.*

10. The written submissions filed by the parties included the parties' positions on the objection as well.

Issues for determination and analysis:

11. I have carefully considered the application, the responses thereto, the objection, the parties' submissions and the decisions referred to. I, hereby, discern the following areas of discussions: -

(i) *Whether the Preliminary Objection is sustainable in law;*

(ii) *Whether the Petition and the application are barred by the doctrines of sub-judice and res judicata;*

(iii) *If the Petition and the application are sustainable, the nature of conservatory orders;*

(iv) *The guiding principles in conservatory applications;*

(v) *The applicability of the principles to the application; and*

(vi) *Disposition.*

12. I will deal with the above sequentially.

(a) Whether the Preliminary Objection is sustainable in law:

13. The Respondents contend that, on the basis of Articles 22(1) and 260 of the Constitution, the word *"Person"* is restricted to the one vested with the right to *"institute Court proceedings"*. The word "Person" is limited and/or restricted for use when referring to a Petitioner or the one moving the Court through a Petition. The word "person" cannot apply to a Respondent in a Petition, otherwise the Constitution of Kenya would have expanded Article 22(1) to include the words "*to institute or to defend"*.

14. The Respondents counter the submission by the Petitioner that "there is no law that bars the institution of a Petition against unincorporated entities" as misplaced and misleading. According to the Respondents, the correct interpretation of the position under Article 22(1) read together with Article 260 of the Constitution is that the people of Kenya intended that the *locus standi* to file judicial proceedings and constitutional Petitions seeking the redress of a denial, violation or the infringement of a right or fundamental freedom was to be enlarged by the Constitution to ensure that there is unhindered access to justice. The provision does not apply to the Respondents in Constitutional Petitions who are joined by the Petitioner, but to only an aggrieved party whose interests have been directly affected can institute proceedings.

15. In buttressing the argument, the Respondents referred to the Supreme Court Civil Application No. 29 of 2014 ***Mumo Matemu Vs Trusted Society of Human Rights Alliance and Others***, where the Court stated thus: -

> *It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya v. Attorney General, Petition No. 60 of 2012; [2013] eKLR the High Court thus expressed the principle.*
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> *...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice...*

16. Referring to Nairobi HCCC NO. 5116 of 1992(OS) *Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank* the Respondents affirmed the Court's holding that "*The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit must be instituted by or against one or more such persons in the representative capacity*".

17. It is the Respondents' argument that in the Further Affidavit sworn by Pastor Samuel Makori, the President of the 2nd Respondent, the deponent stated that the Seventh Day Adventist Church in Kenya is registered as Seventh Day Adventist Church East Africa Union under the provisions of the Societies Act. The Petitioner has not disputed the fact that the 1st and 2nd Respondents are internal administrative entities of the Seventh Day Adventist Church. Instead, the Petitioner is making a belated attempt to interpret the Constitution in a manner that is inconsistent with the Constitution and common law.

18. While making reference to Articles 23(1) and 165(1)(b) of the Constitution and Section 25 of The High Court (Organisation and Administration) Act No. 27 of 2015, the Respondents further argue that the Court in determining the Respondents' Preliminary Objection ought to exercise its judicial authority in a manner that will uphold the Constitution and the law. The Respondents aver that it is not in dispute that the Respondents are simply administrative entities with no capacity to sue or be sued and that there is no relief or order that can be issued by this Honourable Court that is capable of binding the Respondents as they do not exist in law.

19. According to the Respondents, the Petition ought to have been instituted against the recognized agents or registered name which is the Seventh Day Adventist Church East Africa Union, or in the names of, or against all the members of the Association as required under Order 1 Rule 8 of the Civil Procedure Rules.

20. Countering the Petitioner's interpretation of the finding in the *Mumo Matemu* Case (supra), the Respondents submitted that the Petitioner got it all wrong as the issue that was in contention at the Supreme Court was whether a deregistered (unincorporated) Non-Governmental Organisation could file and prosecute a Petition in public interest. The Supreme Court made a finding that *"The facts in that case, and in the instant one, are different. The respondent herein was a plaintiff in the earlier matter; it was duly registered at the time of filing the cause but was deregistered during the pendency of the suit. The learned Judge relied on the NGO Act which, as he found, vested in the 1 respondent the power to sue and be sued; and he held that the cancellation of the registration certificate had rendered the 1 respondent non-existent in law, so that its appearance amounted to an abuse of the Court process. This reasoning was adopted in other pre-2010 Constitution cases, which the applicant herein seeks to rely on, such as: Fort Hall Bakery; Dennis Ololoigero and Two Others; and Housing Finance of Kenya Limited. These cases can be distinguished from the instant one, as they were decided before the promulgation of the Constitution. Even if the 1st respondent was deregistered prior to filing a cause in this Court, the new Constitution directs that every person, including an association whether incorporated or not, can institute proceedings before a Court challenging the contravention of the Constitution"*.

21. It was further submitted that the letters of authority filed by the 1st and 2nd Respondents herein have not been issued by non-existing entities. The said documents are self-explanatory and it is expressly stated on the face of the letters that they have been issued and signed by one *Pastor Jeremy Mwenda Marambi* in his capacity as the Executive Secretary of the 1st Respondent and *Pastor Samuel Makori* in his capacity as the President of the 2nd Respondent respectively.

22. The Respondents further argue that there is nowhere in the letters where it is indicated that it is the 1st and 2nd Respondents giving the authority to swear affidavits. The 1st and 2nd Respondents do exist as internal administrative entities of the Seventh Day Adventist Church, but they lack the legal capacity to sue or be sued as they are not registered entities or organizations under any legal regime.

23. The Petitioner opposed the objection. He raised two grounds in opposition. The first ground was that there is no law that bars the institution of a Petition against unincorporated entities in the manner alleged by the Respondents. He argued that under Article 260 of the Constitution, a person is defined to include *"a company, association or other body of persons whether incorporated or unincorporated."* In *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [20141 eKLR*, the Supreme Court dismissed the argument that a Petition could not be sustained in view of the alleged legal status of the 1st Respondent, stating that *'... we think that the fact that it is unincorporated does not necessarily deny it capacity to litigate claims of this nature under the Constitution. Under Article 260 of the Constitution, a person includes a company, association, or other body of persons whether incorporated or unincorporated...'*

24. The second ground is that the Respondents have acknowledged that they are existing organs notwithstanding their alleged "non-registration." The Petitioner referred to paragraph 3 (b) - (d) of the Respondents' Further Affidavit where Samuel Makori stated that *'the 1st and 2nd Respondents herein…. are part of the [conferences] and "internal administrative entities of the Seventh Day Adventist Church East Africa Union…'*

25. The Petitioner further makes reference to the letter of authority dated 9th July, 2021 filed with the Respondents' Affidavit which states that *"the 1st Respondent has authorized Robert Obonyo to swear the Affidavit on behalf of the 1st Respondent. A similar authority has been filed in respect to the 2nd Respondent….'*.

26. The Petitioner argued that the letters of authority cannot be issued by a non-existing entities in the manner alleged by the Respondents. Further that any violations of the Petitioner's rights perpetrated by the Respondents can only be answered by the Respondents whether registered or not.

27. The Interested Party also opposed the objection. It raised four main grounds in opposition. They are, first, that the definition of a person under Article 260 of the Constitution is very broad and it includes entities whether incorporated or unincorporated. The Petitioner has identified the Respondents as entities 'local conferences' who through their actions threaten and/or continue to violate his rights to worship, assemble and to a fair administrative action. Second, the Respondents have previously been sued in their respective capacities and they have defended the said suits upto judgment. These suits are reported on Kenya Law, one of the suits being *Nairobi ELRC Cause 716 of 2012: Emily Migwa vs. Seventh Adventist Church Central Kenya Conference (CKC) & Seventh Day Adventist Church East Kenya Union*

28. The third ground is that the objection does not meet the test in *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696*, for the reason that while the Respondents contend to be 'administrative units' without capacity to be sued, the Interested Party contends that both Respondents and the Interested Party are entities in the nature of local conferences of the Seventh Day Adventist Church in Kenya with capacity to sue and be sued. It would certainly require an interrogation of facts for the Court to arrive at a decision whether the Respondents are proper entities to be sued or not. Lastly, on a without prejudice basis to the first ground, the Interested Party submits that a Petition would not be defeated for reasons of mis-joinder or non-joinder of parties. In the unlikely event the Court finds that the proper party has not been sued the Court on its own motion has the power to substitute and have the 'correct' party included in line with Rule 5 of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.

29. The Interested Party made further submissions in expounding the above grounds. It argued that it is not disputed by all the parties that the Seventh Day Adventist Church in Kenya is organized into local conferences who would by implication carry out administrative duties. These local conferences are organized as independent entities and in the case of the Interested Party is registered as a Limited Company by Guarantee. The Respondents are organized as entities and have complete systems/personnel and addresses. In the letters of authority signed by the Respondents and filed herein, the 1st Respondent's authority is given by its Executive Secretary while the 2nd Respondent's authority is given by its President. The Respondents conduct their business as complete entities and its puzzling that for the first time they claim to lack capacity to be sued.

30. Be that as it may, the Interested Party further argued, that the Petitioner has identified the Respondents as entities whether incorporated or unincorporated that violate/threaten his rights. It would be for the Court while considering the Petition to determine whether the Respondents are liable or not. The capacity and/or authority to sue or be sued has been addressed comprehensively by the Petitioner in his submissions on Article 260 of the Constitution. Further, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 define a person to '*include an individual, organisation, company, association or any other body of persons whether incorporated or unincorporated'*. For purposes of the Constitution and so as to deal with the technicality on *locus* (similar to the one presented by the Respondents) the Constitution for very good reasons gave a very broad definition on who could sue or be sued for purposes of its enforcement.

31. Refining the argument that the objection does not meet the test in the *locus classicus* case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696*, the Interested Party quoted the Court as saying thus:

> ***….*** *a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration… a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion…...*

32. The Interested Party went on to submit that a Preliminary Objection cannot be sustained where there is a contested fact or a fact to be ascertained. While the Respondents contend to be administrative units without capacity to be sued, the Petitioner contends that the Respondents and the Interested Party are local conferences carrying out administrative duties 'independently' and can sue or be sued. Evidently, the Seventh Day Adventist Church in Kenya carries out its functions *vide* various unions and conferences. One can only arrive at a conclusion on this issue after interrogating the facts and the evidence.

33. It was again submitted that the Respondents have previously been sued in their respective capacities and this is the first time they have raised an objection with regard to their capacity to be sued and/or to sue. Such cases are reported and include; *Emily Migwa v Seventh Day Adventist Church Central Kenya Conference (CKC) & another [2020] eKLR* and *James Maina Gachie & another v Seventh Day Adventist Church (E.A) & another [2020] eKLR.*

34. On the basis of the argument that a Petition cannot be defeated for reason of non-joinder or misjoinder of parties, the Interested Party submitted that in instances where a different party is rightly or mistakenly sued, such can simply be substituted with the correct party since the business of the Court is to ensure that justice is served, a provision similar to Article 48 of the Constitution.

35. The above comprises of the parties' arguments and counter-arguments on the objection.

36. As the objection is raised by way of a preliminary objection, I will briefly look at the law guiding such objections. Recently, in Nairobi High Court Constitutional Petition No. E260 of 2021 ***Borniface Akusala & Another v. The Law Society of Kenya & 12 Others*** (unreported) I dealt with this aspect as follows: -

> *13. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.*
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> *14. The foregoing nature of preliminary objections was discussed in* ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors*** *Ltd, (1969) E.A. 696 page 700 when the Court observed as follows: -*
>
> *...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.*

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

15. In Civil Suit No. 85 of 1992, ***Oraro vs. Mbaja*** *[2005] 1 KLR 141****, Ojwang J****, as he then was, cited with approval the position in Mukisa Biscuit -vs- West End Distributors (supra) and stated as follows on the operation of preliminary objection: -*

…. *I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.*

16. In ***Omondi -vs- National Bank of Kenya Ltd & Others*** *{2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -*

…*In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.*

17. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in Petition No. 7 of 2013 ***Mary Wambui Munene v. Peter Gichuki Kingara and Six Others,*** *[2014] eKLR****,*** *when the Learned Judges stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.*

18. The Apex Court had earlier on in Constitutional Application No. 2 of 2011, ***In the Matter of Interim Independent Electoral Commission*** *(2011) eKLR observed as follows in regard to jurisdiction and its source: -*

… *Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent.*

37. I have reproduced the objection above. The main thrust of the objection is that the Respondents are unincorporated entities and as such lack the capacity to be sued.

38. There is no dispute that the Respondents and the Interested Party are all local conferences variously charged with the administration of the Seventh Day Adventist Church in Kenya. With such a state of affairs, what comes to the fore is the contention relating to which one of them is the right one to administer the affairs of the Mountain View SDA Church.

39. Having carefully considered the arguments and the law, I find that the capacity of the Respondents is highly contested. There are assertions that the Respondents are well-defined entities having been previously sued and that the objection is an afterthought aimed at forestalling the Petition. The Respondents, however, did not respond to the submission that they were previously sued and they defended those suits without raising the now objection.

40. Be that as it may, the objection, as raised, falls short of the requirement that it ought to have been raised on the platform of agreed facts and pure points of law. I say so because the facts are not agreed and that calls for proof or adduction of evidence. As a matter of legal principle, the objection is, therefore, not a true preliminary objection in law which the Court should allow to proceed.

41. Having said so, and without prejudice thereto, I must state that even if the objection had passed the proprietary test, still I do not think I would have upheld it. Article 260 of the Constitution as read with Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as '*the Mutunga Rules*') defines a '***person***' to '*include an individual, organisation, company, association or any other body of persons whether incorporated or unincorporated*'. Further a '***Respondent***' is described in Rule 2 of the Mutunga Rules ***'as a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental right'.***

42. In this case, the Petitioner contends that the Respondents have, and continue to, variously infringe his rights and fundamental freedoms. The Respondents have appeared in the matter. They did not file any protest thereto or at all. They filed letters of authority on the Counsel and their members who would represent them in these proceedings. They are, as well, mute on the position that they have been previously sued and that they defended those proceedings without raising the issue of their *locus standi*.

43. Regardless of their legal nature, it is a fact that the Respondents are existing entities whether incorporated or otherwise. If need be, the matter may be interrogated at the hearing. But, at the moment, as long as the Respondents have appeared in these proceedings and even filed letters of authority and responses, and the Petitioner hold them as the perpetrators of the alleged infringement of rights and fundamental freedoms, the Respondents can only rise to answer the allegations against them.

44. In sum, I find the objection to be without merit and is for rejection.

(b) Whether the Petition and the application are barred by the doctrines of *sub-judice* and *res judicata*:

45. *Sub-judice* and *res judicata* are legal doctrines which apply to constitutional petitions. When properly raised and sustained, they are capable of wholly disposing of a matter. The doctrines, therefore, ought to be raised at the earliest possible opportunity as they have a nexus on the jurisdiction of a Court.

46. The Respondents, once again, contend that the Petition and the application are non-starters. They argue that pursuant to Sections 6 and 7 of the Civil Procedure Act, this Honourable Court lacks the jurisdiction to grant the reliefs sought by the Petitioner until the other suit in HC. COMM/E294/2019 has been heard and final determination given that the matter in issue is not only pending in two Courts, but it has also been pleaded by the Respondents and it has not been disputed by the Petitioner or the Interested Party that there is a third suit being Milimani CMCC Case No. E8753 of 2021 pending at the Subordinate Court, instituted by the Interested Party herein against the 1st and 2nd Respondents herein.

47. It is argued that given the provisions of Sections 6 and 7 of the Civil Procedure Act and the fact that the Respondents have brought to the attention of the Court the existence of a suit filed at the Commercial and Tax Division of the High Court in Nairobi, then the current proceedings are either sub-judice or res-judicata, in that: -

a) That the matter in issue is also directly and substantially in issue in a previously instituted suit.

b) That the proceedings are between the same parties, or between parties under whom they or any of them claim, litigating under the same title.

c) Where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

d) And that the suit in which such issue has been subsequently raised has been heard and finally decided by such Court.

48. The Respondents took the Court through the contents of the matter pending before the Commercial and Tax Division of the High Court in great length. In the end, the Court is urged to terminate these proceedings in favour of the previously filed matters.

49. Opposing the contention that the doctrines of sub-judice and res judicata apply in these proceedings, the Petitioner through his supplementary affidavit attempted to distinguish this matter and the two other matters. To the Petitioner, the doctrines do not have any room in these proceedings.

50. The Interested Party joins the Petitioner, through its Affidavit, in contending that the doctrines of sub-judice and res-judicata are inapplicable.

51. I will begin this discussion with a look at the doctrine of *sub-judice*. In Nairobi High Court Constitutional Petition No. E406 of 2020 ***Renita Choda versus Kirit Kapur Rajput*** (2021) eKLR this Court discussed the said doctrine at length and as follows: -

> *48. The second limb of the issue is on whether the jurisdiction of this Court is ousted by the sub-judice rule. The Respondent contends that the pendency of the Divorce Cause and the Custody case ousts the jurisdiction of this Court as all issues on the cases ought to be addressed before the trial courts.*
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> *49. In answer to this limb, I will run through how the Supreme Court in **Advisory Opinion Reference No. 1 of 2017, Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** handled the issue of sub-judice.*
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> *50. The Supreme Court was approached by the Applicant, Kenya National Commission of Human Rights. It sought the Court's Advisory Opinion on the purposive interpretation of Chapter 6 of the Constitution of Kenya specifically in the context of the affairs of political parties.*
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> *51. The Applicant contended that there was lack of clarity and/or guidance in High Court and the Court of Appeal decisions on the place of chapter 6 of the Constitution, especially in respect of leadership and integrity qualifications of persons offering themselves to be elected or appointed to public service.*

52. Before the matter could proceed, one of the Interested Parties filed a Preliminary Objection claiming that the application before the Court was sub-judice two other cases before the High Court namely; Constitutional Petition No. 142 of 2017 and Constitutional Petition No. 68 of 2017. It asserted that the application was an abuse of the Supreme Court's advisory opinion jurisdiction.

53. Upon considering the parties' arguments and counterarguments, the Apex Court comprehensively addressed the often raised jurisdictional challenge of sub-judice. It first defined the term, outlined its purpose and then set the threshold for its operation. The Court observed as follows: -

> *[67] The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order*

to await the determination to be made in the earlier suit. ***A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.***

54. Upon setting the above foundation for the operation of the doctrine, the Learned Judges then pitched the issues emanating from the two High Court cases against the ones raised by application before them. They went ahead and observed as follows: -

> [68] In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of the Constitution. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of the Constitution. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.
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> [71] In so doing, **(determining the two Constitutional Petitions)** the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.

55. From the foregone, the Court was of the finding that the application before it was caught up by sub-judice doctrine. It refused to usurp the jurisdiction of the High Court in the following terms: -

> [72] We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of the Constitution, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that Court has already been moved.
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> ***[73] Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of the Constitution. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).***

56. The Supreme Court, hence, declined jurisdiction because it was demonstrated that the issues before the Court were the same as those before the High Court.

57. In this case, whereas the parties in the Divorce Cause and the Custody case are the same as those in the Petition before this Court, the issues raised in the Petition before this Court are different from the issues before the other Courts. The Petitioner, in essence, seeks the pronouncement of this Court on whether some evidence which the Respondent intends to use in the other cases was illegally obtained and if so, whether such evidence offends Article 50(4) of the Constitution.

58. I have carefully perused the pleadings in the Divorce Cause and the Custody case. I have found that the issue of the constitutionality of the evidence is not contained in any of the pending suits. In any event, the issue raised in the Petition before this Court can only be determined by the High Court courtesy of Article 165(3) of the Constitution.

59. I, hence, find that the objection based on sub-judice doctrine fails.

60. I have also considered the two other matters. As disclosed, they are the ***Nairobi High Court Commercial Case No. E294 of 2019 between General Conference Corporation of the Seventh Day Adventist versus Nairobi Cosmopolitan Conference Limited & Another*** and ***Milimani Chief Magistrates Court Commercial Suit No. E8753 of 2021*** between ***Nairobi Cosmopolitan Conference Ltd vs. Central Kenya Conference of the Seventh Day Adventist Church & Another.***

61. Both cases are pending.

62. The cause of action in the High Court case is primarily on the use of the Church logo which is registered as a trade mark. The prayers sought therein as the following: -

> *1. A permanent injunction restraining the Defendant, whether by itself, servants, agents, employees and/or assigns from trading, advertising, marketing passing off and/or in any manner or other way from using or dealing with the trademark "SEVENTH-DAY ADVENTISTS" which is duly registered as Trade Mark No. 61294 and "CHURCH LOGO" registered as Trade Mark No. 61295 respectively registered at the Kenya Industrial Properties Institute (KIPI), or bearing the name "SEVENTHDAY ADVENTISTS" or its assimilation production, counterfeit, copy, colourable, without limitation the abbreviation, including without limitation the abbreviation "SDA" and colourable "SDA" or other designations thereof or any other name closely resembling or incorporating the Plaintiff's well-known trademarks however arising.*
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> *2. A declaration that the Plaintiff is the rightful proprietor of the well-known trademarks "SEVENTH-DAY ADVENTISTS" which is duly registered as Trademark No. 61294 and "CHURCH LOGO" registered as Trademark No. 61295 respectively registered at the Kenya Industrial Properties Institute (KIPI).*
>
> *3. A declaration that the registration of the Defendant Company by the Interested party was in violation of the provisions of Sections 49 (1) (c) of the Companies Act, No. 17 of 2015 Laws of Kenya as the Defendant's name was offensive and undesirable and*

the Defendant has from the date of its registration deliberately and consistently conducted itself in a manner that was intended to mislead the public and to cause confusion and is against public policy.

4. An Order issued pursuant to the inherent jurisdiction of the Honourable Court under Article 159(2) of the Constitution of Kenya directing the Interested Party to deregister the Defendant within the provisions of Sections 49 (1) (c) of the Companies Act, No. 17 of 2015 Laws of Kenya from the register of companies for being offensive and undesirable, as its incorporation and/or is against public interest . as the Defendant has from the time of its registration acted Ultra Vires its objectives and was deliberately intended and designed to mislead the public by undertaking religious activities contrary to its known objectives, and its continued existence, operations and the nature of its activities is so misleading and likely to cause harm •to the public, and/ or;

5. In the alternative, a declaration that the use of the word "Conference" as part of the names of the Defendants corporate name is offensive, undesirable and incompatible with public interest and gives a misleading indication of the Defendant's activities as it has been used illegally and/ or unlawfully by the Defendant to pass off as an unit of the Plaintiff thereby allowing it to infringe on the Plaintiff's trademarks and that the Defendant be ordered to change its name forthwith and in any event not later than fourteen (14) days from the date of Judgement pursuant to the provisions of Section 60 (1) (a) and (b) of the Companies Act, No. 17 of 2015 Laws of Kenya, failure to which the Defendant be deregistered as a Company by the Interested Party without further application upon the expiry of the fourteen (14) days and the deregistration be published by the Interested Party in the Kenya Gazette within thirty (30) days of the date of the judgement.

6. A permanent injunction restraining the intended Defendant whether by itself, servants, agents, employees and/or assigns from trading, advertising, marketing and/or in any manner whatsoever from trespassing, storming into any Adventist local congregation, taking over and/ or attempting to take over the religious and humanitarian activities that are run by the congregations, and or entering upon any and/or all premises owned and managed by the Plaintiff.

7. General and aggravated damages.

8. Costs of the suit and interests at Court rates.

63. The parties before the High Court are the *General Conference Corporation of the Seventh-Day Adventists* versus *Nairobi Cosmopolitan Conference Limited* and the *Registrar of Companies* and five others as interested parties. The Mountain View SDA Church is one of the interested parties.

64. The Respondent before the High Court filed a Counter-claim. It sought the following prayers: -

1. A declaration that Mountain View SDA Church is entitled to use the phrases and/or words word "Seventh-day Adventist", or SDA and the 'church logo" whether trademarked or not.

2. A declaration that Nairobi Cosmopolitan Conference Limited is a legitimate church organ of the Seventh Day Adventist Church.

3. Mountain View SDA Church has a right to be affiliated to Nairobi Cosmopolitan Conference Limited.

4. Any other relief this Honourable Court may deem fit to grant

65. The parties before the Magistracy are the Interested Party herein, Nairobi Cosmopolitan Conference Limited, as the Plaintiff and the Respondents herein, Central Kenya Conference of the Seventh Day Adventist and East Kenya Union Conference of the Seventh Day Adventist as the Defendants.

66. From the depositions of the Respondents and the Interested Party, it seems that the cause of action before the Magistracy relates to the administration of the Mountain View SDA Church. The parties therein are the current Respondents and the Interested Party. The record currently has copies of the application filed and the orders made in the Magistrates Court. However, the parties did not avail a copy of the Plaint.

67. A look at the Plaint before the magistrates Court would have greatly aided this Court in determining whether the issues raised therein are either wholly, partly or not sub-judice the current proceedings. As said, the prevailing state of the record denies this Court that opportunity.

68. I will, nevertheless, consider the matter further. From the guidance laid by the Supreme Court in *Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* case (supra) and the nature of the cause of action before the *Nairobi High Court Commercial Case No. E294 of 2019 between General Conference Corporation of the Seventh Day Adventist versus Nairobi Cosmopolitan Conference Limited & Another* viewed against the current proceedings, there is no difficulty in finding that the sub-judice rule does not apply.

69. The reason is simple. The parties as well as the causes of action and the remedies sought are different from the ones before this Court. The prayers in the Plaint and the Counter-claim do not in any way challenge the alleged take-over of the administration of the Milimani SDA Church by the Respondents herein. Prayer 3 of the Counter-claim, which comes closer to the issues raised in the Petition, seeks an order that the Mountain View SDA Church has a right to be affiliated to Nairobi Cosmopolitan Conference Limited. Even if it is assumed that the right to affiliation is eventually affirmed, still the existence of that right *per se* will not settle the disputed take-over.

70. On the proceedings pending before the magistracy, I note that the remedies sought in this Petition may have some commonality with the prayers sought before the magistracy. The remedies sought in the Petition before this Court are as follows:

a) A declaration that the purported take-over of the administration of Mountain View Seventh My Adventist Church by the Respondents in the place of the Interested Party absent following the church's rules and regulations is unconstitutional, illegal, irregular, unlawful and consequently null and void,

b) An order of prohibition directed to the 1st and 2nd Respondents restraining them from interfering with the affairs of Mountain View Seventh Day Adventist Church unless in strict adherence to and;

c) Any other relief that the Court may deem fit and necessary in upholding the Constitution and the rule of law.

71. The difficulty this Court finds itself in is the inability to ascertain whether these proceedings are sub-judice those before the magistracy for lack of the Plaint filed in the magistracy. In that case, this Court finds that there is no sufficient evidence for holding that the current proceedings are sub-judice those before the magistracy.

72. On the issue of whether the current proceedings herein are *res judicata*, one needs not to belabor the issue in view of the clear provision of **Section 7** of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The provision states as follows: -

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and ***has been heard and finally decided by such court****.* (emphasis added).

73. The proceedings before the High Court and the magistracy are pending. As such, there is no way one can attempt to introduce the applicability of the res judicata doctrine. In keeping up with the law and the decisions by the Supreme Court in ***Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR*** and the Court of Appeal in ***Suleiman Said Shahbal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR,*** the contention must and hereby fails.

74. In the end, on the basis of the prevailing record, this Court finds that the Petition and the application are not barred by the doctrines of sub-judice and res judicata.

(c) <u>The nature of conservatory orders</u>:

75. In ***Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR,*** *the Supreme Court* discussed, at paragraph 86, the nature of conservatory orders as follows: -

[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.

76. The Court in ***Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR*** defined a conservatory order as follows: -

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.

77. In ***Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR*** the Court had the following to say about the nature of conservatory orders: -

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

78. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.

79. Given the interlocutory nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

80. The foregoing was fittingly captured by **Ibrahim, J** (as he then was) in ***Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR***. The Learned Judge, correctly so, stated as follows: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

81. The decisions in ***Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR, Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR*** and ***Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR*** also variously vouch for the cautionary approach.

82. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

(d) <u>The guiding principles in conservatory applications:</u>

83. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled.

84. The *locus classicus* is the Supreme Court in ***Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others*** case (supra) where at paragraph 86 stated the Court stated as follows: -

> *[86] …… Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.*

85. In ***Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others*** **[2015] eKLR,** the Court summarized the principles for grant of conservatory orders as: -

> *(i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.*
>
> *(ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.*
>
> *(iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.*
>
> (vii) *Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.*

86. In ***Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR*** the Court summarized three main principles for consideration on whether to grant conservatory orders as follows: -

> *(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.*
>
> *(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and*
>
> *(c) The public interest must be considered before grant of a conservatory order.*

87. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, among many others.

(e) <u>The applicability of the principles to the application:</u>

(i) **<u>A *prima-facie* case:</u>**

88. A *prima facie* case was defined in ***Mrao vs. First American Bank of Kenya Limited & 2 Others*** (2003) KLR 125 to mean: -

> ***….*** *In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.*

89. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 ***Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another*** (2015) eKLR while dealing with what a *prima facie* case is, made reference to Lord Diplock in *American Cyanamid vs. Ethicon Limited (1975) AC 396,* when the Judge stated thus: -

> *If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.*

90. What constitutes a *prima-facie* case was further dealt with by the Court of Appeal in ***Mirugi Kariuki -vs- Attorney General*** Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> *It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show…… that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question.* ***Without a rebuttal to these allegations****, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.* (emphasis added).

91. In ***Re Bivac International SA (Bureau Veritas)*** (2005) 2 EA 43, the Court while expounding on what a *prima-facie* case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

92. In sum, therefore, in determining whether a matter discloses a *prima-facie* case, a Court must look at the case as a whole. It must weigh, *albeit* preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the Constitution which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the Constitution has been contravened, or is threatened with contravention.

93. The record has it that the Interested Party has been running the affairs of the Mountain View SDA Church since 25th August, 2019. The Petitioner now decries the manner in which the Respondents allegedly *'took over'* the administration of the Church from the interested party. The Petitioner cites breach of the Articles 36 and 37 of the Constitution.

94. The Petitioner has proved, on a *prima-facie* basis, that he is a member of the Mountain View SDA Church and that he regularly attends worship services at the said Church.

95. Having raised allegations of continued infringement of his rights and fundamental freedoms, and in view of the position taken by the Respondents, I find that the Petitioner has established a *prima-facie* case which ought to be interrogated further by this Court.

(ii) Whether the Petitioner will suffer prejudice and the case rendered nugatory unless the conservatory <u>orders are granted:</u>

96. The *Black's Law Dictionary 10th Edition Thomson Reuters* at page 1370 defines '***prejudice'*** as follows: -

> *Damage or detriment to one's legal rights or claims.*

97. Will the Petitioner, therefore, suffer any damage or detriment if the conservatory orders are not granted? Generally, any contravention or threat to contravention of the Constitution or any infringement or threatened infringement of human rights and fundamental freedoms in the Bill of Rights is an affront to the people of Kenya. That is the clear purport of the Preamble and Chapter 1 of the Constitution.

98. Courts must, in dealing with Petitions brought under the various provisions of the Constitution, be careful in determining the prejudice at least at the preliminary stages. I say so because, at such stages of the proceedings, the provisions of the Constitution alleged to have been infringed or threatened with infringement are yet to be subjected to legal scrutiny.

99. Therefore, the damage or threat thereof to the rights and fundamental freedoms or to the Constitution must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent.

100. In this case, the Petitioner who is a member of the Mountain View SDA Church religiously attends church services and has a legitimate expectation that such services shall be conducted orderly. The record, however, reveals otherwise. It is not disputed that the Respondents conduct a parallel service on every Saturday with loudspeakers mounted less than 40 metres from where the Petitioner attends his service. Such state of affairs breeds confusion and is a recipe for chaos.

101. This Court is persuaded that the Petitioner continues to be prejudiced by the conduct of the parallel services.

(iii) <u>Public interest:</u>

102. '***Public interest'*** is defined by the *Black's Law Dictionary 10th Edition* at page 1425 as: -

> *The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.*

103. The Church in general has, from time immemorial, been a perceived as a beacon of hope and decorum. The Church plays a critical role in commanding social order and more often than not it is described as '*the cornerstone in life'*.

104. The society expects the Church to show leadership and faithfulness to the laws of the land. The society is usually taken aback when the Church falls short of such expectation. In other words, it is in public interest that the affairs of the Church are conducted with honour, decorum, faithfulness and above all in obedience to the laws of the land.

105. When the affairs of any Church degenerate to the level of factions holding parallel services within the vicinity of each other, the respective members of such groups ought to self-introspect and candidly ask themselves whether such actions are pleasing not only to their maker, but also to the other members of the society whom they look forward to bring them aboard at some point.

106. What I am simply saying is that whereas it is normal for members of a Church to differ, the manner in which the members of that Church deal with the disputes is more important to the society at large than the disputes themselves. The Church is expected not to exhibit any signs of acrimony among its members and, if such happens, then the Church is looked upon to take steps to, without delay, settle the matters.

107. As stated above, it remains uncontroverted that the administration of the Mountain View SDA Church has been undertaken by the Interested Party herein since 25th August, 2019. That is a period of around 2 years. The Respondents were, surprisingly, quiet 'so to say' during that period. The Respondents, however, seem to have 'woken up from their slumber' sometimes in June 2021 and, by use of unorthodox means, claim the administration of the Mountain View SDA Church.

108. The Court of Appeal in Civil Appeal No. 51 of 2015, ***Willy Kimutai Kitilit v Michael Kibet*** [2018] eKLR urged Courts to uphold the position that the principles of equity are now elevated to constitutional principles. One of the equitable principles is that equity aids the vigilant and not the indolent or differently put, delay defeats equity.

109. Whereas I am not purporting to settle the dispute subject of the Petition herein at this point in time, it is important to note that if the *status quo* for the last 2 years has been that the Interested Party has been administering the affairs of the Mountain View SDA Church, then it is only fair and in the interest of harmony and decorum that the Respondents hold their horses for such period as the Court endeavors to determine the matter. In any event, having dealt with the interlocutory matters, it is unlikely that the determination of the Petition will take more than 6 months from now. To me, the interests of the public will be secured and order will reign at the Mountain View SDA Church, at least in the meantime.

110. This Court now finds that it is in public interest that some interim relief be considered.

(f) Disposition:

111. Having considered the relevant legal principles, and the exceptional circumstances in this matter, this Court finds that the above analysis yields that the Petitioner has established the principles for consideration in granting conservatory orders.

112. That being the case, the following orders do hereby issue: -

(a) The Respondents' Notice of Preliminary Objection dated 12th July, 2021 is hereby dismissed.

(b) Pending the hearing and determination of the Petition herein, there be a conservatory order maintaining the administration of Mountain View SDA Church under the Nairobi Cosmopolitan Conference Limited, the Interested Party herein.

(c) The Petition shall be heard by way of reliance on the Affidavit evidence and written submissions.

(d) In view of (c) above, the Respondents and the Interested Party shall file and serve their respective responses to the Petition, if not yet, within 14 days.

(e) The Petitioner shall, upon receipt of the responses in compliance with (d) above, file and serve any supplementary responses, if need be, together with written submissions within 14 days.

(f) The Respondents and the Interested Party shall file and serve their respective written submissions within 14 days of service.

(g) Highlighting of submissions on a date suitable to the Court and the parties.

(h) Costs shall abide the outcome of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Kubai, Counsel for the Petitioner.

Mr. Onyango, Counsel for the Respondents.

Mr. Malenya, Counsel the Interested Party.

Elizabeth Wanjohi – Court Assistant.