REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO 6 OF 2018

REV. JOHN JUMA AND 3 OTHERS .....PETITIONERS

VERSUS

REV. PATRICK LIHANDA AND ANOTHER.....RESPONDENTS

AND

REV. ZEDEKIA ORERA AND 4 OTHERS.....INTERESTED PARTIES

AND

PENTECOASTAL ASSEMBLIES OF GOD (PAG-K) THROUGH

REV. JOSEPH OTONDO.....APPLICANT

AND

REV. REUBEN SABATIA ASAMBU

& 453 OTHERS .....INTERESTED PARTIES

RULING

1. The application, dated 2nd June 2020, seeks principally, that the proceedings herein, and the orders made herein so far, be stayed pending hearing and determination of the application, and that the dispute involving the applicant the Pentecostal Assemblies of God PAG-Kenya, which is the subject of the petition, and all other proceedings directed to be consolidated with this cause, by this court or other courts, be recalled and referred to the applicant, for the resolution in accordance with the dispute resolution mechanism provided for in the applicant's Constitution, and more specifically Article 22 of the said Constitution, to be handled by the entity established for that purpose.

2. Rev. Joseph Otondo, who claims to bring the application on behalf of the applicant, claims to be among 454 members of the PAG Church who are allegedly restless and disturbed by the current litigation, and would prefer that the disputes be settled by way of arbitration through the applicant's established arbitration mechanisms. The applicant contends that all the cases filed in court are in total disregard to the constitution of the applicant.

3. The application is opposed by the respondents, being the petitioners herein. It is their position that the matters herein are not appropriate for any kind of alternative dispute resolution, owing to the fact that the matters raise a myriad of issues that can only be resolved by court. They challenge the applicants' locus in filing the application, and state that they are strangers in the application, and that the application is *res judicata* as the orders sought were made by the court in different applications filed by Rev. Patrick Lihanda. They further submit that the case herein emanated from the tribunal, and, therefore, the same cannot be referred back to the same tribunal, which they deem non-existent. They also argue that the applicants have not demonstrated good faith and conduct to warrant the orders prayed for being granted.

4. The two sets of interested parties did not oppose the application.

5. The cause was initiated through a petition that was filed herein on the 26th September 2018, seeking for various declarations against Rev. Lihanda, who was the General-Superintendent of the applicant and who was accused of violating the Constitution of Kenya, the Societies Act, Cap 108 Laws of Kenya and the Retirement Benefits Act, No. 3 of 1997and the applicant's Constitution. An order was sought to have the said Rev. Lihanda barred from presenting himself as a candidate for or holding any office or playing a role in the applicant.

6. The petition was filed together with an application which sought orders for injunction against the respondents. The application was responded to by way of preliminary objection, in which the respondents contended that the court had no jurisdiction to entertain the petition, as the issues in dispute, as raised in the petition and the application, fell within the internal dispute resolution mechanisms provided for under Articles 22 to 28 of the PAG Church. After hearing both sides on the said application, the court held in a ruling delivered on 8th November 2018, that it had jurisdiction over the matter, for the petition raised constitutional questions around violation of fundamental rights and freedoms, a subject-matter that is the preserve of the High Court, according to the Constitution, 2010.

7. The ruling of 8th November, 2018 was then followed by an application, dated 13th November 2018, seeking stay of the injunctive orders given in the matter. The said application was dismissed, and the court, by consent of the parties, on 30th November 2018, referred the matter to mediation. The matter then proceeded to mediation, however, the mediation settlement is yet to be adopted by the court as an order of court. Thereafter, an application was filed, seeking to withdraw the cause herein, and the court, on the 29th November 2019, declined to allow the withdrawal, on the basis that the matter was of public interest. the petitioners were, instead, granted liberty to withdraw from the proceedings, to pave way for other parties to prosecute the petition.

8. The main issue for me to determine with respect to the application, dated 2nd June 2020, is as whether the matter herein should be referred to arbitration under the auspices of the PAG Church Appeals and Arbitration Tribunal.

9. The application is premised on Articles 50 (1) and 159 (2) of the Constitution, the Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, section 1A, 1B, 3, 3A, 59C and 63(c)(e) of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 1 Rule 8 of the Civil Procedure Rules 2010, section 3 (1)(a) of the Judicature Act, Cap 8 Laws of Kenya, section 4(c) of the Judicial Service Act No. 1 of 2011, and section 26 of the High Court (Organization and Administration Act, No. 27 of 2015.

10. Article 159 of the Constitution provides that:

> *"(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*
>
> *(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
>
> *(a) justice shall be done to all, irrespective of status;*
>
> *(b) justice shall not be delayed;*
>
> *(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
>
> *(d) justice shall be administered without undue regard to procedural technicalities; and*
>
> *(e) the purpose and principles of this Constitution shall be protected and promoted."*

11. Section 59 C of the Civil Procedure Act provides as follows: -

> *"(1) A suit may be referred to any other method of alternative dispute resolution where the parties agree or the court considers the case suitable for such referral*
>
> *(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion order."*

12. In addition to the provisions of Article 159(2)(c) of the Constitution of Kenya, 2010 and the provisions of section 59C of the Civil Procedure Act, there is also section 3A of the Civil Procedure Act, which saves the inherent power of court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court. Section 1A of the said Act also mandates the court, while exercising power, to bear in mind the overriding objective, which is, to facilitate the just, expeditious and affordable resolution of disputes. This is aimed at attaining the efficient disposal of the business of the court.

13. These statutory provisions are supported by Order 46 of the Rules. In particular, Order 46 Rule 20 stipulates as follows:

> *"1) Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.*
>
> *2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution."*

14. In *Patcab Tours & Another vs. Family Bank Tours & Another* [2019] eKLR, the court observed that:

> *"In deciding whether or not to refer a matter to mediation the court must weigh on the one hand its constitutional mandate to*

promote ADR as against, the duty of the court to ensure expeditious, fair and affordable disposal of suits as provided by Section 1A, 1B and 3A of the Civil Procedure Code."

15. In *Muriuki Samson Murithi vs. Kirinyaga Dairy Farmers Co-op Society Ltd & Another* [2017] eKLR**,** it was observed that:

> *"The relevant provisions governing the application of ADR other than Article 159 of the Constitution of Kenya are section 59C of the Civil Procedure Act (Cap 21) and Order 46 of the Civil Procedure Rules. Section 59 provides, inter alia, that:*
>
> *1) A suit may be referred to any other method of alternative dispute resolution where the parties agree or where the court considers the case suitable for such referral.*
>
> *2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves may agree to or as the court may, in its discretion order.*
>
> *24. On the other hand, the material provisions of Order 46 rule 20 Rules provide, inter alia, that:*
>
> *1) "Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.*
>
> *2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution."*
>
> *25. It is clear from the above cited provisions of the law that ADR may be undertaken either by consent of the parties concerned or upon the court's own initiative where the court is satisfied that a referral would be suitable. The first alternative is obviously not available here because all the concerned parties are not agreed on referral of this matter to ADR, or at least to the said disputes resolution committee of the County Government of Kirinyaga. In my view, an ADR process should not be imposed upon an unwilling party unless there are compelling reasons for doing so. One of the important principles of a credible ADR process is that it should be voluntary. Parties cannot meaningfully engage in an ADR process under compulsion."*

16. In this cause, the interested parties all agree to have the matter referred to the PAG Arbitration Tribunal. The petitioners, however, oppose the application stating that the same will not be viable courtesy of the conduct of the respondents. From the above, it is clear that not all parties herein support the proposed referral. It should also be noted that this court, by consent of parties herein, referred the matter to court annexed mediation, an alternative dispute resolution. The mediation sessions were conducted, and a settlement was reached, but that settlement is yet to be adopted as an order of the court. Further it must be noted that this court has, earlier on in the matter, made pronouncements over the issue of whether the petition herein can be determined by the PAG Arbitration tribunal.

17. This court, in its ruling of 8th November 2018, said as follows:

> *"19. The issues raised and submitted by the Respondents bring to the fore the doctrine of exhaustion of remedies and the need to exhibit judicial deference to quasi-judicial organs and internal dispute resolution mechanisms, the question to be asked before the jurisdiction of this court is diverted is whether all internal dispute resolution mechanisms have been exhausted and that the available administrative proceedings fall to produce a satisfactory resolution.*
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> *20 …*
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> *21 …*
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> *22 …*
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> *23 …*
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> *24 …*
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> *25. The petitioners herein are contending that the 1st respondent has failed the integrity test and that he has violated the constitution of Kenya 2010. Only the High Court has the jurisdiction to determine issues in respect to violation of fundamental rights. There is no other recourse subordinate to this court available to aggrieved parties who plead a denial, infringement of or threat to that right or fundamental freedom. The mandate of this court to hear such matters cannot thereby be limited by the constitution of an institution such as that of the church in this case.*
>
> *26 …*
>
> *27. I therefore hold that this Court has Jurisdiction to entertain the petition. The petitioners could not get the remedies that they are seeking under the dispute resolution mechanism provided in the church constitution as such bodies do not have mandate to determine on issues of infringement of fundamental rights."*

18. From the above ruling, it is clear that the court holds the view that the issues raised herein touch on infringement of fundamental rights,

and, therefore, the same are way out of the church's tribunal's mandate. In that ruling, the court held that the matter was suited for determination by the courts, sentiments which I wish to adopt herein. Nothing has changed since to warrant departure from the holding by the court of 8th November 2018. In short, the matters raised in the application dated 2nd June 2020 are *res Judicata*

19. In the upshot, the application has no merit, and the same ought to be dismissed, and I hereby dismiss, with no costs.

20. As directed earlier by this court, this matter is hereby consolidated with Kakamega Petition No. 7 Of 2020, and parties are hereby directed to set the matter for mention for directions, on case conferencing, within 2 weeks from the date of delivery of this ruling.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS …17th …DAY OF …July…….2020

W MUSYOKA

JUDGE