



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 1 OF 2016

REV. GEOFFREY MUTHINJA.....1ST PLAINTIFF

REV. ROBERT BANDA NGOMBE.....2ND PLAINTIFF

REV. DOUGLAS MURIUNGI.....3RD PLAINTIFF

REV. JACOB KITHINJI.....4TH PLAINTIFF

REV. DANIEL KIRUGI.....5TH PLAINTIFF

VERSUS

REV. SAMUEL MUGUNA HENRY.....1ST DEFENDANT

REV. JOHN JEMBE MUMBA.....2ND DEFENDANT

REV. JOHN MAROO.....3RD DEFENDANT

RULING

1. The plaintiff filed application dated 25th September 2018 seeking this court to review/set aside the Ruling issued on 18th July 2018 and proceed to hear and determine both applications of 23rd January 2018 and that of 4th April 2018 contemporaneously.

2. **Rev. Geoffrey Muthinja** in support of the application averred that this court had on 5th April 2018 issued orders to the effect that the application dated 4th April 2018 be heard through written submissions. That on 31st May 2018 the court confirmed filing of submissions on both applications and a Ruling was scheduled for 18th July 2018. That from the directions both Rulings ought to have been delivered together. However, the Ruling dated 18th July 2018 left out the application dated 4th April 2018 hence there being an error apparent on the face of the record.

3. **Rev Samuel Muguna Henry** opposed the application vide Replying affidavit dated 3rd December 2018. He averred that, if the applicant desires the court to deliver a separate Ruling on the application dated 4/4/2018, he should move the court for that purpose rather than apply to review the Ruling of the Court which relate on a different application altogether. That the applicant has already filed notice of appeal dated 2/8/2018 against the said court's Ruling and should not be allowed to engage in two processes at the same as that would be tantamount to abuse of the court process.

Submissions

4. Parties canvassed the application through written submissions. However, only the Respondents filed their submissions. The Respondents cited the provisions **of Order 45 of the Civil Procedure Rules** and reiterated that the applicant should not be allowed to engage in two processes at the same time as that would be tantamount to abuse of the court process.

ANALYSIS AND DETERMINATION

5. This Application is anchored on **Section 63 and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80** is on **Review** and provides as follows: -

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Section 63 (e) provides: -

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

Order 45, rule 1. Provides: -

Application for review of decree or order.

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

6. It was expressed in **Serephen Nyasani Menge v Rispah Onsase**; In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited**^[1] the Court of Appeal, of similar circumstances to the present application held as follows;

“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: **Kamalakshi Amma v A. Karthayani** [2001] AIHC 2264). The respondent’s application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose of the appeal.....”

7. By parity of reasoning, the fact that the applicant filed a notice of appeal against the decision of this court, is sufficient to dispose of the application before me. But as I do not wish to administer a sudden shock, let me consider the merits of the application.

8. The applicant has alleged an error on the face of the record. I was his view that the Court ought to have determined both applications contemporaneously. I will dig the record to test this hypothesis.

9. On 5/4/2018 this court gave the following directions on each of the applications as follows: -

I have heard Counsels. Delay is loathed by law. Dulu has not advanced good reason for not complying with my earlier Orders. I now reluctantly allow him 7 days to file and serve submissions on the application dated 23/1/2018. Upon Service, the Respondents have seven (7) days thereof to file and serve submissions thereto.

With regard to the application dated 4/4/2018, the Respondents have 7 days to file and serve their respective replying affidavits. On service the applicant shall file and serve submissions thereto in 14 days. And on latter service, the Respondents have 14 days to file their respective submissions thereto.

10. On 31/5/2018 parties confirmed that they had filed their respective submissions. The submissions were filed separately and on each application. The Court reserved the matter for Ruling. The ruling on one of the application was read in open court on 18/7/2018.

11. The major argument was that, from the above directions, both applications were to be heard and determined contemporaneously. The directions issued by the court did not provide that the two applications will be heard together or contemporaneously as suggested by the applicant. In fact, directions were issued on each application with different obligations and timelines. Perhaps, the applicant thought - albeit wrongly and without proper foundation- that, since the directions were given on the same day, the two applications shall be heard together or contemporaneously. These are legal terms. They carry specific legal meaning and connotation. And, they serve a specific purpose, say, to enable the court to determine similar issues effectively or at the same time. They should not be used just loosely or be expected to apply

without proper foundation. Such order ought to be specifically applied for and granted especially where the issues seem to be disparate as in this case. No such order was sought or granted in the specific directions the court gave.

12. Looking at the applications; (1) the 1st application sought to set aside the elections held by the National Elections Committee of East Africa Pentecostal Churches dated 8/2/2017 and/or in the alternative to prohibit the elected officials from assuming office; and (2) the application dated 4/4/2018 sought discovery of documents relating to East Africa Pentecostal Churches. To say the least, both applications were set on different reliefs; were not consolidated; or ordered to be heard together or contemporaneously.

13. Doubtless, by rendering the ruling in issue, the court did not commit any error apparent on the face of the record on which review may be anchored. Accordingly, the application before me is bound to fail in so far as it is founded on this ground. I therefore dismiss it.

14. Nonetheless, the application dated 4th April 2018 is still pending. And, parties have filed their respective submissions thereto. The applicant is at liberty to insist on the determination of the said application on its merit if he considers the reliefs to be feasible. I only wish he listened to counsel by the respondent; perhaps the time wasted on this application would have been profitably spent on determining the pending application.

15. Be that as it may, and as this matter involves matters of the church, I will make no orders as to costs.

Dated, signed and delivered at Meru this 13th day of October 2020

F. GIKONYO

JUDGE

Representation

Muriuki for 2nd and 3rd defendant

Murango for 1st defendant – Muriuki holding brief

M/s Kiome for plaintiff/applicant – absent

F. GIKONYO

JUDGE
