



**REPUBLIC OF KENYA**

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

**PETITION NO. 2 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF KENYA AND ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 28, 32, 33, 35, 36,  
39, 40, 41, 45 & 47**

**AND**

**IN THE MATTER OF AN ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOM OF CONSCIENCE  
BELIEF AND OPINION**

**AND**

**IN THE MATTER OF REASONABLENESS AND PROPORTIONALITY**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**REV. DR. SILAS YEGO & 30 OTHERS (*SUING AS MEMBERS OF THE EXECUTIVE***

***COMMITTEE OF THE CENTRAL CHURCH COUNCIL***

***OF THE AFRICA INLAND CHURCH).....1<sup>ST</sup> RESPONDENT***

**VERSUS**

**THE CHIEF MAGISTRATE'S COURT, KISUMU LAW COURTS.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**REGISTRAR OF SOCIETIES.....1<sup>ST</sup> INTERESTED PARTY**

**AMOS NYAGA OGADA.....2<sup>ND</sup> INTERESTED PARTY**

**MARTIN ORWA OBUYA.....3<sup>RD</sup> INTERESTED PARTY**

**JOSHUA DUME AYIECHO.....4<sup>TH</sup> INTERESTED PARTY**

**DAVID OUKO ANYANGO.....5<sup>TH</sup> INTERESTED PARTY**

## JUDGMENT

The Petition before me asks this Court to make a declaration that the Chief Magistrate's Court lacks jurisdiction to hear and determine the dispute through which the Interested Parties herein sought the annulment of the Constitution of the **AFRICA INLAND CHURCH**.

1. The case before the magistrate's court is **AMOS NYAGA OGADA & 4 OTHERS Vs REV. SILAS YEGO & 3 OTHERS, KISUMU CMCC NO. 555 OF 2018**.

2. When the Plaintiffs lodged the Complaint in Court, they simultaneously lodged an application for interlocutory reliefs.

3. The Interested Parties herein sought the stay of the Elections which had been scheduled by the Petitioners herein. The said elections had been scheduled to be conducted between 22<sup>nd</sup> November 2018 and 15<sup>th</sup> January 2019.

4. On 22<sup>nd</sup> November 2018 the learned trial magistrate issued an Order restraining the Petitioners herein from carrying out the elections which had been scheduled.

5. The Petitioners moved to the High Court to seek (in this Petition), the following Orders;

***“1. Declaration that the proceedings before the Chief Magistrate are in violation of the Petitioners freedom of conscience, religion, belief and opinion guaranteed under Article 32 of the Constitution.***

***2. Declaration that the proceedings before the Chief Magistrate are in violation of the Petitioners freedom of Association under Article 36 of the Constitution.***

***3. Declaration that the proceedings before the Chief Magistrate are in violation of the Constitution of African Inland Church.***

***4. An order of Certiorari to quash the proceedings before the Chief Magistrate's Court.***

***5. An order of prohibition do issue against the Respondents from sustaining, hearing, conducting or in any manner entertaining proceedings under the Chief Magistrate's Court.***

***6. A permanent injunction restraining any member, leader, person from referring the matter to the Court until the Church determines.”***

6. It was the Petitioner's submission that the Magistrates Courts lack jurisdiction to annul the Constitution of the Society.

7. In making reference to “*the Society*”, it is important to point out that the **AFRICA INLAND CHURCH** is organized and registered under the **Societies Act**.

8. The Petitioners submitted that if any person had been dissatisfied with the decision made by the Registrar of Societies, recognizing the **Church's Constitution 2018**, such person ought to have challenged that decision by lodging an appeal to the Minister.

9. Thereafter, if the person was dissatisfied with the decision of the Minister, he should have, in the opinion of the Petitioners, lodged an appeal to the High Court.

10. In the circumstances, the Petitioners invited this court to declare that the Magistrate's Court lacked jurisdiction to hear and determine the case which was placed before it.

11. The Registrar of Societies has the authority to accept the amendment of the Constitution of a Society, if he is satisfied that the process leading up to the said amendment was lawful.

12. The Petitioners have not alleged that in the discharge of his statutory obligations, the Registrar of Societies had acted in any irregular manner. Therefore, as no averments of wrongdoing have been made against the Registrar, and because no reliefs are sought against the said Registrar, I find that no orders can be directed against the Registrar of Societies, in these proceedings.

13. In similar vein, no assertions were directed against the Attorney General. Therefore, and because no reliefs have been sought against the Attorney General, this Court cannot grant any orders against the 3<sup>rd</sup> Respondent herein.

14. In my understanding of the Petition, the issue of jurisdiction is premised upon the fact that there are specific forums provided for, by law, for resolution of disputes of the nature that has arisen herein between Elected Officials of a Society and Members of the said Society.

15. The Petitioners asserted that the Constitution of the Church provides a mechanism for dispute resolution.

16. **Chapter XI** of the **Constitution** expressly states that;

*“No member of AIC – K shall take the church officials to court.*

*There shall be a Church Disputes Resolution Tribunal appointed in every ACC and Church Disputes Resolution Appeals Tribunal at CCC level.”*

17. The Constitution provides an appellate structure which is available to any party who was not satisfied with the decisions of the first-instance Tribunals.

18. Pursuant to **Chapter XI** of the **Constitution**;

*“If a party or member is dissatisfied with the decision made by an Area Church Disputes Tribunal (CDRT), they may lodge an appeal to the Church Disputes Resolution Appeals Tribunal (CDRAT) established by the Central Church Council.*

*The decision of the Church Disputes Resolution Appeals Tribunal (CDRAT) shall be final.”*

19. A plain reading of that provision means that the Interested Parties herein ought not to have taken either the Church or the Church Officials to Court.

20. However, I understand the said Interested Parties, who are members of the Church, to be saying that the very people who were supposed to put up the Tribunals are the people with whom they have disputes.

21. Indeed, the said Church members major complaint was that their attempts to follow due process was curtailed by the persons who are Petitioners herein.

22. It therefore begs the question how an aggrieved member of the church would be expected to first go through a process which was supposed to be facilitated by the very people whom they have a dispute with.

23. But it is important to take note of the fact that the By-Laws acknowledge the possibility that disputes could already be before the Court.

24. At **page 84** of the **By-Laws**, under the sub-heading;

*“Commencing of Dispute Resolution Process”,* it is stated as follows;

*“8. If legal action is pending in a court of law at the time a dispute resolution action is commenced with CDRT, the Tribunal may require that the parties take steps to stay, withdraw or postpone the legal proceedings pending the conclusion of CDRT proceedings.”*

25. It is noteworthy that even when the Dispute Resolution action had been commenced, it was not mandatory that legal action pending before a Court of Law had to be terminated.

26. The Tribunal would have the discretion to require the parties to stay, withdraw or postpone the legal proceedings until the Tribunal concluded the proceedings before it.

27. To my mind, the Constitution recognizes that although Tribunals are a preferred mode of dispute resolution, there is no bar to the courts exercising jurisdiction in respect to such disputes.

28. Of course, where a Constitution provides a mechanism for dispute resolution, such as in this case, parties ought to embrace the said mechanism.

29. However, if any party can demonstrate that he has taken steps to pursue the mechanism provided, but that his efforts have been Frustrated, the said party cannot be barred from seeking justice from the Courts of Law.

30. In the case of **EAST AFRICA PENTECOSTAL CHURCHES REGISTERED TRUSTEES & 1754 OTHERS Vs SAMWEL MUGUNA HENRY & 4 OTHERS, CONSTITUTIONAL PETITION NO. 14 OF 2014** (at Meru), the Court held as follows;

*“That although the Court has jurisdiction to deal with the Plaintiffs’ complaints, it is premature as they did not strictly follow the church Constitution providing for dispute resolution mechanism.”*

31. In the circumstances, the Court found that the case was improperly before the court.

32. In this case, it is common ground that the parties who are members of the **AFRICA INLAND CHURCH** have already compromised the case which was before the Magistrate’s Court.

33. On 11<sup>th</sup> April 2019 the parties recorded a Consent Order, lifting the Interim Orders which the learned trial magistrate had issued.

34. The parties agreed that;

*(i) The Central Church Council shall, within 30 days, pass a Resolution creating GREATER CENTRAL LAKE AREA;*

*(ii) Elections shall be conducted in the proposed Greater Central Lake Area, from the Local Church Council (LCC), to Area Church Council (ACC) within 30 days of the date of the decision of the Central Church Council (CCC);*

*(iii) The Election of the Regional Church Council and Area Church Council (ACC) shall be conducted by the Central Church Council.*

*(iv) The Central Church Council shall ensure that there is peaceful transition between the Greater Central Lake Area and other areas.*

*(v) The Plaintiffs' concerns about certain*

*clauses in the Constitution shall be raised and dealt with in a procedural manner, as laid down in the Constitution;*

*(vi) In default of any of the clauses abovementioned, the Plaintiffs will be at liberty to institute Contempt proceedings against the Defendants.*

*(vii) Each party shall bear its own costs.*

*(viii) Mention on 20<sup>th</sup> June 2019 to confirm compliance.*

35. First, it is a Constitutional Imperative, as enshrined in **Article 159(1)** of the **Constitution of Kenya**, that;

*“Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).”*

36. That means that whether or not disputes had been brought before the courts, for determination, the Courts are enjoined to promote Alternative forms of dispute resolution.

37. In this case, the Constitution of the Church provided a mechanism for dispute resolution.

38. I find that, by engaging in reconciliation, the parties made a conscious decision to resolve the dispute through a process that was in line with the **Constitution of Kenya**.

39. Nobody; not even the Court can stop parties from taking steps to find amicable solutions to their disputes, save only to the extent stipulated in **Article 159 (3)** of the **Constitution**; which stipulates as follows;

*“Traditional dispute resolution mechanisms shall not be used in a way that –*

*(a) contravenes the Bill of Rights;*

*(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*

*(c) is inconsistent with this Constitution or any written law.”*

40. I find that the consent order entered into by the parties in the case before the Magistrate's Court was consistent with the constitutional aspirations.

41. I further find that the consent resolved the issues in contention, so that there was nothing that the Magistrate's Court would be required to determine.

42. In effect, this court cannot now pronounce itself on matters which the parties have already resolved.

43. Furthermore, by making the conscious and deliberate decision to compromise the suit, the Petitioners must be deemed to have acknowledged that the court before which the compromise was Recorded, had the requisite authority to give effect to the said compromise.

44. To my mind, the foregoing should suffice to conclude this judgment.

45. Nonetheless, I feel that there is a need to address one other issue, which is in relation to the Petitioners' choice to file this Petition.

46. The Petitioners had already lodged a Preliminary Objection before the trial Court. Through the said Preliminary Objection, the

Petitioners herein challenged the jurisdiction of the trial court.

47. Whilst the Preliminary Objection was still pending, the Petitioners lodged the Petition at the High Court. The Petition raised, inter alia, the issue of the jurisdiction of the Magistrate's Court.

48. Jurisdiction is conferred by law.

49. It is well settled that when a court or tribunal lacks jurisdiction to handle the case placed before it, the said court or tribunal must immediately stop handling the matter.

50. A party who is challenging the jurisdiction of the court ought to canvass the said challenge before that court.

51. Having lodged the Preliminary Objection to challenge the trial court's jurisdiction, the Petitioners ought not to have thereafter lodged the Petition to also challenge the trial court's jurisdiction, when the Preliminary Objection was still pending.

52. In conclusion, I find that in principle, the Magistrate's Court would not have had jurisdiction to handle the dispute, as the Constitution of the Church provided a mechanism for dispute resolution.

53. However, if the members of the Church had taken steps to have the matter dealt with in the manner provided for in the Church's Constitution, but they had been frustrated, it would be wrong to bar them from moving the Court for appropriate relief.

54. In this case, there is a dispute between the Church leaders and the members who filed the case in court, regarding the question as to whether or not the members had first exhausted the mechanism provided for, prior to filing the case in court.

55. That is a matter of fact, which would require evidence before the court can make a pronouncement on whether or not the members had flouted the Constitution of the Church. As the parties have not yet canvassed the said issue, through appropriate evidence, it would be premature for this Court to make a determination on that aspect of the matter.

56. But more fundamentally, I find that the parties have compromised the case which gave rise to this Petition, and therefore this Court declines to make any declaration that could undo the legitimate resolution which the parties have reached.

**DATED, SIGNED and DELIVERED at KISUMU**

This 9<sup>th</sup> day of **December** 2019

**FRED A. OCHIENG**

**JUDGE**