



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CONSTITUTIONAL PETITION NO.7 OF 2017

IN THE MATTER OF: ARTICLES 1, 2, 3, 19, 20, 21, 22, 28, 32, 36, 40, 47, 48, 159, 165, 258 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 32, 36, 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE INTERFERENCE OF WORSHIP AT A.I.C MATILIKU

BETWEEN

SUSAN KALONDU ONDUMWANZUI.....PETITIONER

-VERSUS-

PASTOR JOHN NGUMI & 23 OTHERS.....RESPONDENTS

RULING

INTRODUCTION

1. There are two preliminary objections (P.O) before the Court. The one by the 1st - 21st respondents is dated 27/09/2017 and is grounded as follows;

a) That the suit offends both the Constitution of AIC Kenya (2008) and by-laws (2015).

b) That this Court lacks jurisdiction to hear this matter in view of provisions of the Constitution of AIC Kenya (2008) and by-laws (2015) as well as the Constitution of Kenya 2010.

2. The other one by the 22nd, 23rd and 24th respondents is dated 10/10/2017 and is grounded as follows;

a) The petitioner has not exhausted the Dispute Resolution Process as provided under the Constitution and by-laws of the Africa Inland Church –Kenya.

b) The petitioner has no legal capacity to commence these proceedings.

c) Being bound by the Constitution, the petitioner has failed to disclose to this Honourable Court that there exists definite dispute resolution mechanisms provided under the 2015 by–laws that were adopted by the church’s highest decision making organ, the CCC.

d) The petitioner had an alternative forum provided under the Constitution and by-laws of the African Inland Church-Kenya for the resolution of the matters in issue and she has not demonstrated that they used that process before approaching the Court.

3. Both P.Os were canvassed by way of written submissions. I will deal with them together because the issues raised therein are similar. The bone of contention is whether this Court should entertain the suit in light of the fact that the petitioner has not utilized the dispute resolution mechanism provided under the Constitution and By-Laws of AIC-Kenya.

4. The 1st -21 respondents submit that it is not in dispute that the petitioner and the 1st - 23rd respondents are members of AIC-Kenya and subscribe to its faith. Further, they submit that it is also not in dispute that there exists a dispute resolution mechanism in the AIC-Kenya By-Laws, 2015.

5. They have reproduced the By-Laws on dispute resolution to wit; Chapter XII (*Church Dispute Resolution Tribunals*) and Chapter XIII (*Church Disputes Resolution Appeals Tribunal*). They contend that this mechanism exists to guide members of AIC-Kenya on the modalities to be followed where a dispute arises between members, institutions or officials.

6. It is also their submission that the petitioner decided to ignore the mechanism yet she has not alleged that it is inadequate or unconstitutional or that the officials refused to hear any dispute or that there was a violation of procedure.

7. They contend that before a party goes to Court, he/she must first exhaust the laid down procedures.

8. They rely on the case of Bernard Murage –vs- Fineserve Africa Ltd and 3 others (2015)eKLR where the Court stated as follows;

“There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organ to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly –vs- Njenga Karume (2008)1KLR 425 where it held that;

“In our view, there is considerable merit...that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”.

9. They urge the Court to uphold the PO and strike out the petition with Costs.

10. The 22nd, 23rd and 24th respondents submit that the petitioner has not exhausted or even attempted to resolve the matter through the AIC-Kenya dispute resolution mechanism and as such, the petition is pre-mature, unconstitutional and an abuse of the Court Process.

11. On the issue of *locus standi*, they have invited the Court to take judicial notice that churches in Kenya are not legal entities capable of suing and being sued.

12. It is their contention that they are established under AIC-Kenya which is in turn registered under the Societies Act and as such, they are not incorporated associations which have capacity to sue or be sued.

13. They rely on *inter alia* the case of Hinga & anor –vs- PCEA (1986) KLR 317 where the Court held as follows;

“be that as it may, I find that the PCEA church Constitution having invested such wide and extensive powers on the church as to the manner of dealing with complaints such as the ones before my Court today, it is the provisions of the Constitution which should have been invoked and utilized fully because the issues before Court, I find, are not justiciable in law but fall under the provisions set out in the church Constitution. A Court of law such as mine should therefore be slow in interfering with church matters, unless of course the rules of natural justice were being violated. In this case, after listening to the arguments from the learned Counsel and also reading through the annexed affidavits and annexures thereto, I am satisfied that there was no such violation. I also find that the laid down procedure in the PCEA Constitution was not exhausted with the result that the case came to a Court of law prematurely! Perhaps there was a breakdown of communication somewhere along the way.

14. They also rely on the case of Andrew Inyolo Abwanza-vs- Board of Trustees of Pentecostal Assemblies of God-Kenya & 3 others, HCCC No. 69 of 2009 where the Court held that;

“The conclusion and finding I come to is that the plaintiff had failed to exhaust the dispute resolution machinery of the 1st defendant church. He accordingly has no cause of action in this Court which has no jurisdiction to hear him in matters he has complained about herein which are in the domain of the church’s dispute resolution machinery. Put differently, the plaintiff’s complaints as pleaded in his plaint are not justifiable. His coming to this Court with this case in general is premature and outside of his church’s Constitution”.

15. They urge the Court to uphold the PO’s and strike out the petition in its entirety.

16. On her part, the petitioner submits that the suit is properly before Court. She contends that the dispute resolution mechanism in the AIC-Kenya Constitution does not have mechanisms for disputes relating to the violation, infringement or denial of any fundamental freedom contained in the bill of rights.

17. She also submits that according to the AIC Constitution, members of the disputes tribunal should be appointed by the area bishop i.e. the chairman to the 23rd respondent hence there is a likelihood of impartiality. She further submits that the by-laws do not have an ouster clause that prevents someone from petitioning the Court when their rights have been violated.

18. They submit that the rationale and justification for the principle of non-justifiability in religious disputes was set out in Gathima –vs- Afrivan Orthodox Church of Kenya (1982) KLR, 358 where it was held that in a case with mixed spiritual and temporal characters where matters affecting legal rights are in issue, the Court can properly determine those issues.

19. She relies on *inter alia* the case of Arthur Gatungu Gathuma–vs- Africa Orthodox Church of Kenya, CA 4/1982. When confronted with the question of whether matters of ecclesiastical law could be determined by Courts, the Court of Appeal held that the High Court had jurisdiction to determine such matters depending on each case, pleadings and facts especially in matters of mixed spiritual and temporal character, with temporal consequences affecting the rights. The Court of Appeal further stated that in such matters, the High Court may, in exercise of its discretion, decline to entertain the action for relief or strike them out.

20. She has also relied on the case of Alfred Obuya Obengo & Anor –vs- Chairman National Nurses Association of Kenya & Anor (2014) eKLR where Kasango J held that;

“In my view, members of the NNAK are bound by the provisions of the society’s Constitution. Rules and by-laws are not in themselves Acts of Parliament. They are not even subsidiary legislation promulgated under the provisions of the Societies Act or any other statute. In my view, they are only made to govern the affairs of the society and to regulate dealings between members. Although binding on members, they do not have statutory force and cannot bind persons or institutions outside the society. Can the hands of this Court therefore be tied by NNAK’s Constitution, rules and by-laws which are not Acts of Parliament or even subsidiary legislation? To put it differently, can the jurisdiction of this Court be ousted by the Society’s Constitution, rules and by-laws?”

21. The learned Judge in answering the above questions cited the Court of Appeal decision in Peter Gichuki King’ara –vs- IEBC & others (2013) eKLR where the superior Court held;

“the election petition Rules and procedures and the question whether rules of procedure can confer jurisdiction must be answered. The issue for determination is whether the jurisdiction of the Court of Appeal or any other court of law for that matter can be created, established, limited or governed by a subsidiary legislation more particularly a regulation and rules of procedure made by the Rules Committee.

Jurisdiction is specified either by the constitution or statute. In Samuel Kamau Macharia & another v KCB Ltd & 2 others- Supreme Court Civil Application No. 2of 2011, the Supreme Court delivered itself as follows on the issue of jurisdiction:

“a courts’ jurisdiction flows from either the Constitution or legislation or both.”

It is our considered view that a subsidiary legislation or rules of procedure or a rule made by a Rules Committee cannot confer, create, establish, limit or subtract the jurisdiction of any court of law, or tribunal as established by the Constitution or statute....we hold that Rule 35 of the Election Petition Rules being a subsidiary legislation is not a jurisdictional Rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We also hold that the Election Petition Rules cannot limit the jurisdiction of the court as granted under Article 164(3)of the Constitution and as operationalized by section 85 A of the Elections Act. A subsidiary legislation cannot add, expand, add or reduce the jurisdiction of any court as spelt out in the Constitution or by statute. Jurisdiction is neither derived nor does it emanate from regulations or rules. Jurisdiction is either from the Constitution or a statute. A rule cannot limit the jurisdiction of a court of law.”

22. The Petitioner further submits that the cases cited by the respondents are distinguishable in that the issues raised therein are not about contravention of the Constitution of Kenya. She has referred the Court to the case of East Africa Pentecostal Churches Registered Trustees & 1754 others –vs-Samuel Muguna Henry & 4 others, Constitutional Petition No. 14 of 2014 (Meru) which was appealed vide Civil Appeal No. 10 of 2015: Geoffrey Muthinja & Anor –vs- Samuel Muguna & 1756 others (2015) eKLR where the Court of Appeal sitting in Nyeri held that;

“...this is so because it really has never been the law in this Country that Courts cannot touch disputes involving churches. Churches are not some enclaves where illegalities and violations of rights can be allowed to thrive in the name of God. They are not beyond the Constitution and the search lights of the Courts. The Court may be slow to intrude, for good policy reasons, but in appropriate cases and at appropriate moments they will.”

23. She urged the Court to dismiss the PO’s with costs.

24. I have considered the rival submissions and the authorities cited by the parties. To help determine the issue at hand, I have looked at the pleadings and scrutinized every single annexure. I have also looked at the prayers being sought in the petition.

25. Evidently, there are leadership wrangles within the African Inland Church-Kenya. As can be discerned from the pleadings, AIC-Kenya is organized into internal administrative councils *to wit* Local Church Council (LCC), District Church Council (DCC), Area Church Council (ACC) and the Central Church Council (CCC).

26. In her affidavit in support of the petition, the petitioner associates herself with the Matiliku DCC which she claims to be under the Nzaui Regional Church Council of Makueni Area Church Council.

27. The materials before Court lead to the irresistible conclusion that Matiliku DCC is the antagonist. It is my considered view that the petitioner has been economical with the truth and has not approached this Court with clean hands. I will illustrate briefly.

28. The 1st - 2nd Respondents associate themselves with AIC Matiliku Central DCC which in my view is a splinter outfit of Matiliku DCC. The petitioner says that AIC Matiliku Central DCC was illegally created and is basing her averments on a letter dated 4th August 2015 which was written by the presiding Bishop, Rev. Dr. Silas Yego.

29. This letter has however been countered by the resolutions of the meeting which was held on 28th January 2016 at AIC Emali in which the presiding Bishop was in attendance. I am not convinced that the petitioner was unaware of the said resolutions prior to the filing of the petition.

30. In a nutshell, it is my considered view that the petition does not disclose any infringement of fundamental rights to warrant the attention of this Court. In fact, if the correspondences in the parties' pleadings are anything to go by, the people who should be complaining about interference with the right to worship are the 1st to 21st respondents.

31. I am alive to the various decisions of the High Court and more so the ones from the Court of Appeal stating that rules cannot limit the jurisdiction of a Court of law. However just as the learned judges of Appeal stated in the case of Geoffrey Muthinja & Anor –vs- Samuel Muguna & 1756 others (*supra*), there are instances where the Courts, for good reasons, will be slow to touch disputes involving churches.

32. In my view, this is one such instance. The dispute between the parties herein started in the year 2015. I note that there have been attempts by some of the church councils to resolve it contrary to the petitioner's allegations that they having been sitting on the fence watching as things deteriorate from bad to worse.

33. I have looked at the dispute resolution mechanism set out in the AIC-Kenya By-Laws (2015). In my view, it is comprehensive and adequate and should be given a chance. This is in line with the spirit and letter of the Constitution of Kenya 2010 that alternative dispute resolution mechanisms should be embraced. Further, I am of the view that if the Court entertains this dispute, the evident acrimony between the parties will only be made worse. Our Court system is adversarial and often times, the end result is a situation where the winner takes it all.

34. As for the issue of impartiality raised by the petitioner, again I have looked at the by-laws and it is true that the area bishop is supposed to appoint 5 members to sit in the Church Disputes Resolution Tribunal (CDRT). However, as I was scrutinizing the correspondences I came across the letter dated 01/09/2017 which is favorable to the petitioner's DCC. It was written by Rev. Daniel Ngui the Bishop of AIC-Makueni Area Church Council. The 1st-21st respondents depone that Bishop Ngui was working in cahoots with the petitioner.

35. If my interpretation is right, this is the same bishop who is supposed to appoint the CDRT members. In my view, complaints about impartiality should come from the 1st-21st respondents and not the petitioner.

36. Be that as it may, I have already opined that the AIC-Kenya dispute resolution mechanism is sufficient and can handle the dispute between the parties.

CONCLUSION

37. The court finds that the preliminary objections have merit and thus makes the following orders;

- i. The petition herein is struck out.
- ii. No orders as to costs.

SIGNED, DATED AND DELIVERED THIS 2ND DAY OF MAY 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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