



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NUMBER 6 OF 2018

REVEREND JOHN JUMA.....1ST PETITIONER

REVEREND SIMON ALOVI.....2ND PETITIONER

REVEREND TOM OLENDI.....3RD PETITIONER

VERSUS

REVEREND PATRICK LIHANDA.....1ST RESPONDENT

REVEREND PATRICK OYONDI.....2ND RESPONDENT

AND

REVEREND ZEDEKIAH ORERA.....1ST INTERESTED PARTY

REVEREND ELISHA KIMAIYO.....2ND INTERESTED PARTY

THE REGISTERED TRUSTEES PENTECOSTAL

ASSEMBLIES OF GOD.....3RD INETRESTED PARTY

THE MEMBERS OF THE PENTECOSTAL ASSEMBLIES

OF GOD CHURCH KENYA (P.A.G) APPEALS

& ARBITRATION TRIBUNAL.....4TH INTERESTED PARTY

THE CHURCH COUNCIL.....5TH INTERESTED PARTY

RULING

1. The petitioners have filed a petition dated 26th September 2018 seeking for:

a. a declaration to issue that the conduct, omissions and other acts of Patrick Lihanda in the office of General Superintendent of the Pentecostal Assemblies of God Church –Kenya was gross violation of the Constitution of Kenya, the Societies Act, the Retirement Benefits Act and the PAG church Constitution.

b. a declaration do issue barring Patrick Lihanda from contesting as a candidate for or holding any office or role in the P.A.G Kenya church.

2. In the time being, the petitioners have filed a notice of motion dated 26th September, 2018 seeking for orders that:

(a) spent

(b) pending the hearing and determination of this petition a temporary injunction do issue, restraining the General Superintendent of

the P.A. G Kenya Revered Patrick Lihanda, officers , servants ,agents , or any other person acting under him, or on his behalf howsoever, inhibiting them or any of them from receiving names of pastors from District Overseers, or any other person, registering pastors , compiling and or constituting the names into a register or list of voters in connection with or relating to the election of the officers of the society known as Pentecostal Assemblies of God Kenya.

(c) pending the hearing and determination of the petition, an injunction do issue against the General Superintendent restraining and inhibiting the General Superintendent, the General Secretary, the General Treasurer, the Church Administrator or any member howsoever acting, from convening or holding any meeting, of management or committees or organs of the church in connection with, or in relations with or in preparation of the P.A.G Kenya Business Conference.

(d) pending the hearing and determination of the petition, an injunction do issue staying and suspending a notice dated 11th July,2018 , or any notice issued thereafter by the General Superintendent purporting to convene the Pastors Conference , General Conference and the Business Conference or any other national conference.

(e) Pending the hearing and determination of this petition, an order do issue forthwith that the Pentecostal Bible College at Nyong'o'ri be forthwith and unconditionally re opened under the unimpeded stewardship, management and control of Dr. Reverend Enos Lwamba with power to hire qualified lecturers to the exclusion of Reverend Dr. Patrick Lihanda.

3. The petitioners were represented by the firm of **H.M. Wasilwa, Advocate** while the respondents were represented by the firm of **A.B. L. Musiega & Company Advocate**. The firm of Zablon **Mokua & Company Advocates** represented the 1st and 2nd interested parties.

4. In response to the petition , the respondents have filed a notice of preliminary objection dated 8th October , 2018 based on the grounds that:

1. The issues in dispute raised in the petition and the notice of motion falls within the dispute resolution mechanisms provided under Articles 22 to 28 of the Pentecostal Assemblies of God – Kenya Constitution(1998) a copy already filed by the petitioner in which case the jurisdiction of this court at this juncture is ousted.
2. The issues raised in the petition reveals just ordinary disputes between members of a society and do not disclose violation of the national constitution in order to invite the constitutional interpretation jurisdiction of this Honorable Court in the matter sought.
3. The jurisdiction of the honorable court is further ousted by reason of other numerous cases concerning the parties as pleaded by the petitioners which provide sufficient forum to address the petitioners' grievances thereby rendering this petition incompetent.
4. The Retirement Benefits Act and the Societies Act establishes tribunals vested with the mandate to resolve the issues under those laws alleged in the instant petition thereby denying the court the requisite jurisdiction.
5. The petition amounts to gross abuse of the court's process.

5. The notice of motion dated 26/9/18 was supported by the affidavit of the 1st petitioner, **Rev, John Juma** who currently serves as a pastor at Umoja P.AG Assembly in Nairobi and has previously served as PAG Church General Secretary and principal of the Pentecostal Bible College. It was also supported by the affidavit of the 3rd petitioner, Rev. Tom Olendo, who is a pastor with the said church.

There were further supporting affidavits of Rev. Dr. Zedekiah Orera, the 1st interested party who currently is the General Secretary of the church and that of Rev. Elisha Kimaiyo, the 2nd interested party who is the General Treasurer of the church.

6. Among the sins of commission and omission that the 1st respondent is being accused of is failing the integrity test by -

- Receiving a bribe from Madison insurance company in violation of Article 73(2) of the constitution of Kenya 2010 .
- diverting to his personal use the sum of Kshs. 800,000/= meant for the pastors' Retirement Scheme .
- Obstructing a lawful court order by preventing an execution duly authorized by court and the order for his arrest and prosecution.
- Arbitrarily and without just cause, creating and establishing church Assemblies that do not meet the threshold of membership and sustainability envisaged in Article 7.2 of the PAG Constitution.
- Defying the recommendation by the church council to effect the amendment of the church constitution by deliberately refusing to convene a special pastors conference for the said purpose.
- arbitrarily terminating the services of the principal of the church Bible college for refusing to issue certificates to undeserving persons .
- Issuing certificates and diplomas to over 600 persons who had not taken classes.

7. The petitioners contend that in view of the above and other grounds stated in the petition the 1st respondent has failed the integrity test as

established by the constitution of Kenya 2010 and therefore that he should be barred from holding office with the P.A.G Church Kenya.

8. The 1st respondent has in his answer to the petition denied all and the above said allegations. He depones in his affidavit in answer to the petition that the petitioners have not established any grounds to warrant the constitutional jurisdiction of this court. That there is pending before court Judicial Review cause No. 6 of 2018 and Tribunal cause No. 3 of 2018 wherein the disputes are over elections , the church constitution and the Pentecostal Bible College and therefore there is no basis for the present petition.

9. It is admitted that there are other cases pending before courts filed by other parties against the 1st respondent. These are-

Kakamega miscellaneous Application No. 129 of 2018

Kakamega Miscellaneous Application No. 131 of 2018 (Not clear whether it was withdrawn)

Kisumu Chief Magistrates Civil cases No. 421 of 2018

Kakamega High Court Miscellaneous Application (JR) No. 145 of 2018.

10. The matter for determination is the Preliminary application dated 8th October, 2018. A preliminary Objection was held in the case of **Mukisa Biscuits Co v West End Distributors Ltd 1969 (EA) 696, 701** to be that one that is confined to purely points of law. Said the court:-

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is urged 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.

11. The questions for determination that are raised in the preliminary objection are:

- a. Whether the court has jurisdiction to hear the petition
- b. Whether the petition raises constitutional issues
- c. Whether the proceedings are sub judice
- d. Whether the petition is an abuse of the process of the court.

12. Jurisdiction goes into the heart and soul of any judicial proceeding and a court of law should not handle a matter where it has no jurisdiction. In the case of **Samuel Macharia & Another Vs Kenya Commercial Bank Ltd & others () eKLR**, it was held that:-

a court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is confirmed upon it by law. Where the constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon parliament to set the jurisdiction of the court of law or tribunal, the legislature will be within its authority to prescribe the jurisdiction of such court.....

13. The High Court imports its jurisdiction from Article 165 of the constitution of Kenya which provides that:-

(3) subject to clause (b) , the High Court shall have-

- (a) unlimited original jurisdiction in Criminal and Civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated , infringed or threatened
- (c)
- (d) jurisdiction to hear any question respecting the interpretation of this constitution including the determination of
- (i)The question whether any law is inconsistent with or in contravention of this constitution.

14. Article 22.1 of the P.A.G Church constitution provides that :-

“ No member, pastor, official of the church shall take any dispute involving a member, pastor, official organ of the church to a court of law or any tribunal without first exhausting the dispute resolution machinery provided herein after”.

15. Article 28 of the P.A.G church constitution sets up an Appeals and Arbitration tribunal whose functions are to hear disputes and appeals between church members and church bodies.

16. The church is a registered society under the Societies Act. Section 18 of the Societies Act encourages parties to resolve their issues internally and report to the Registrar once the same has been settled.

17. The petitioners have raised issues to do with a dispute with Retirement Benefits Authority. The Retirement and Benefits Act provides for a mechanism of settling disputes with the Retirement Benefits Authority and further appeals to the Appeals Tribunal.

18. The advocates for the respondents thus submitted that the issues raised in the petition and the notice of motion fall within the dispute resolution mechanism provided under articles 22-28 of the church constitution and therefore that this court has no jurisdiction to hear the matter. The advocates for the petitioner on the other hand submitted that the jurisdiction of the High Court cannot be ousted by internal instruments of a society such as Article 22.1 of the P.A.G Church constitution.

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 divested is whether all internal dispute resolution mechanisms have been exhausted and that the available administrative proceedings fail to produce a satisfactory resolution.

20. The doctrine of exhaustion of remedies has been considered in Kenyan courts and found to be a sound procedure. In **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** it was held that:

*This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** in the following oft-repeated words:*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

21. The Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR**, stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with Article 159 of the constitution which commands courts to encourage alternative means of dispute resolution.

It is therefore imperative for parties in a dispute to exhaust the dispute resolution mechanism provided by their institution before resorting to court. The question is whether the doctrine is applicable in matters involving denial, violation and infringement of fundamental rights.

22. The Bill of Rights as provided for by Chapter Four of the Constitution and as stated in Article 19(1) of the said Constitution is an ‘..... integral part of Kenya’s democratic state and is the framework for social, economic and cultural practices’

23. Article 20(3) (a) of the said Constitution of Kenya goes to state that ‘in applying a provision of the Bill of Rights, a court shalladopt an interpretation that most favours the enforcement of a right or fundamental freedom’ (emphasis added)

24. Article 23(1) of the constitution grants jurisdiction to the High Court to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom.

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. The right to access to justice is a cardinal principle of our justice system. In **Leonard Otieno V Airtel Kenya Limited (2018) eKLR** it was held that:-

“..... the right of access to court is entrenched in our Constitution [17] and it is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes. Construed in this context of the rule of law, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.”

27. I therefore hold that this court has jurisdiction to entertain the petition herein. 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.

28. The next question is whether the petition raises constitutional issues. A constitutional question is an issue whose resolution requires the interpretation of the constitution rather than statute -see **CNM V MG (2018) eKLR**. The petitioners herein are principally contending that the 1st respondent has failed the integrity test of good governance. Instances of this failure are particularized in the petition. The tenets of good governance as enshrined in Article 10 of the constitution of Kenya 2010 is a constitutional issue. If it is shown and proved that the 1st respondent has failed this integrity test, the prayers sought can be granted. I therefore hold that the petition raises constitutional issues.

29. The *Sub Judice rule* requires the court not to proceed with a matter where a similar matter is pending before another court. This is captured by section 6 of the Civil Procedure Act that provides that :-

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

In this case it is some other parties and not the petitioners who have filed the suits that are pending before other courts. The prayers that petitioners are seeking herein are in respect to interpretation of the constitution. Such prayers are not being sought in the other suits pending before other courts. The petition is therefore not sub judice. There is no abuse of the process of the court in filing of the petition.

30. Where the court is satisfied that the petition meets the threshold of a constitutional petition, the court will proceed to hear and determine it under powers donated by Article 23 and 165 of the Constitution of Kenya. The High Court in **James Kugocha v Chief County Officer Department of Infrastructure [2018] eKLR** considered the competencies of a petition and stated that:

24. *As to whether the petition is competent, the law was settled in the Court of Appeal case of **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** and that of **ANARITA KARIMI NJERU VS ATTORNEY GENERAL Petition No. 1 of 1979 1 KLR 154**.*

A petitioner must be specific as to the rights violated and give particulars of it. This serves the purpose of generating the issues for determination before the court and assists the opposite party to prepare a comprehensive response. The Constitution of Kenya (Protection of Rights and Procedure Rules, 2013) require in Rule 10(2) that a constitutional petition shall contain the facts relied upon; the constitution provision violated; the nature of injury caused and the relief sought.

These grounds are cited in the petition herein.

31. The constitution bestows upon this court inherent Jurisdiction to determine any matter involving an alleged violation, denial or infringement of any right or fundamental freedom as long as a competent petition is before it, having satisfied all the ingredients and attained the threshold of a petition. The petition before this court states the various constitutional violations and provides the particulars. It must be remembered that the constitution actually sets a very low standard in the protection and enforcement of rights and fundamental freedoms by this court as one can move this court even on the perception of a mere threat of a right or fundamental freedom.

32. This court is bound by Articles 1(3) (c), 10, 23, 159(1) and 259 (1) to ensure that rights and freedoms of every person are protected and enjoyed to the full extent. No Court or quasi-judicial authority subordinate to the High Court can hear and determine a matter that involves the protection and enforcement of fundamental rights and freedoms. It is thus my considered view that this court has jurisdiction to hear the petition in so far as determining whether the rights and freedoms of the petitioners have been denied, violated or threatened in any way. The preliminary objection dated 8th October, 2018 is therefore dismissed.

33. The principles guiding the grant of interlocutory injunction are well settled. A party needs to show that they have a prima facie case with a probability of success, that they stand to suffer irreparable damage that cannot be compensated by an award of damages and that the balance of convenience having regard to the circumstances of the matter tilts in favour of the applicant – **Giella V Casman Brown & Co. Ltd 1973 EA 358**.

34. The 1st respondent is organizing for elections due to take place in December, 2018. The petitioners are stakeholders in the said elections. If the elections are conducted before this petition is heard the petitioners will suffer irreparable loss that cannot be compensated by way of general damages. The petitioners have proved that they have a prima facie case with a probability of success. The grounds for issuing an injunction have been established.

35. In the foregoing the prayers for injunction and inhibition as sought in prayers (b), (c) and (d) of the petition are granted as prayed pending the hearing of this petition.

36. As for prayer (e) where the parties are seeking for re-opening of the Pentecostal Bible College under the stewardship, management and control of Dr. Reverend Enos Lwamba with power to hire qualified lectures to the exclusion of Reverend Dr. Patrick Lihanda, that issue touches on matters relating to employment that fall under the jurisdiction of Employment and Labour Relations Court. Prayer (e) is therefore declined.

37. The issues raised in this petition and other suits filed by other parties raises fundamentally similar issues. The multiplicity of suits filed by different parties have the potential to embarrass the judicial process if handled by different courts as the courts might issue conflicting orders.

38. Rule 3(8) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules** grants the court powers to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court . The multiplicity of suits against the 1st respondents as filed may lead to abuse of the process of the court. The court in such circumstances is called upon to invoke its inherent jurisdiction to prevent such abuse. It is prudent that the various suits filed by different parties that fall under the jurisdiction of this court are consolidated for them to be heard together with this petition. I therefore order the following cases to be consolidated to be heard together with this petition -

Kakamega Miscellaneous Application Number 129 of 2018

Kakamega Miscellaneous Application Number 131 of 2018 (not clear whether it was withdrawn).

Kisumu Chief Magistrates Civil Case Number 421 of 2018

Kakamega High Court Miscellaneous Application (JR) No. 145 of 2018.

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 8th day of November, 2018.

J.NJAGI

JUDGE

In the presence of:

Mr. Wasilwafor petitioners

Mr. Museigafor respondents

Wasilwa holding brief Mokie.....for 1st & 2nd interested parties

Georgecourt assistant

Parties: absent.