



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 408 & 451 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

**FREEDOMS UNDER ARTICLES 27, 32,36,47,48 & 50 OF THE CONSTITUTION OF KENYA
2010**

AND

IN THE MATTER OF SOCIETIES ACT, CAP 108, LAWS OF KENYA

IN THE MATTER OF SECTION 8 AND 9 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES UNDER THE CIVIL
PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA.**

AND

**IN THE MATTER OF THE AFRICA INDEPENDENT PENTECOSTAL CHURCH OF AFRICA
& NAIROBI BRANCH**

**IN THE MATTER OF THE IMPEDING ILLEGAL AND UNWARRANTED ELECTION OF
THE PERSONS TO THE OFFICE OF THE ARCHBISHOP**

AMOS MATHENGE KABUTHU.....APPLICANT

VERSUS

REGISTRAR OF SOCIETIES.....RESPONDENT

PAUL NDUNGU NDICHU.....1ST INTERESTED PARTY

PHILIP KUBAI.....2ND INTERESTED PARTY

PAUL WATORO GICHU.....3RD INTERESTED PARTY

RULING

1. Before this court for determination under certificate of urgency is a Notice of Motion dated 4th January 2017 brought under the provisions of Section (5) (1) of the Judicature Act, Articles 159, 160 of the Constitution and other enabling provisions of the law. The application seeks for orders:

1. Spent

2. Spent

3. Spent

4. That pending interpartes hearing of his application on the 18th January 2017, status quo in favour of the applicant to be maintained, in the alternative an order directing that the respondents their servants, agents, interested parties not to interfere more so access or ingress the AIPCA Bahati Headquarters for the purpose of carrying out the intended elections to be held on 9th January 2017.

5. That this Honourable Court be pleased to find that the interested parties herein who are claiming through or under the 1st respondent (Registrar of Societies) are in contempt of court for the disobedience of the orders issued by this court on the 27th September 2016.

6. That upon granting of prayers No. 1,2,3 above the court be pleased to impose a fine of kshs of 1,000,000 (one million) against Paul Ndungu Ndichu, Phillip Kubai & Paul Watoro Gichu.

7. That upon granting prayers 1,2,3 above, the court be pleased to order that the interested parties herein Paul Ndungu Ndichu, Phillip Kubai & Paul watoro Gichu(purporting to be elected, current acting Archbishop be committed to civil jail for a period of six months.

8. That pending interpartes hearing of this application OCPD Buruburu Police Station, OCS Jogoo Road Police station or the Makadara AP Commandant or any other Kenya Police Administration ensure compliance of orders issued on 28th September 2016 by this court and in the alternative order 4 above.

9. That costs of the application be provided for.

2. The application is supported by the supporting affidavit sworn by Amos Kabuthu Mathenge on 4th January 2017 and annexures thereto.

3. According to the applicant's depositions this court on 27th September 2016 ordered for stay of registration of elected officials vide elections slated for 27th September 2016 and that the stay affected the office of Archbishop; That the 1st respondent is aware of that order of stay but has proceeded to issue letter slating elections for 9th January 2017 vide her letter dated 3rd January 2017; That the 3rd interested party has assumed office of Secretary General of the AIPCA Church without any candor nor colour of law performing functions that are illegal, prejudicial so as to defeat justice; That the intended authorized elections by the 1st respondent is colluding or being partisan hence malicious and prejudicial and in contempt of court orders of this court issued on 28th September 2016 and that the intended elections venue will inhibit, interfere with the AIPCA school academic programme, since the said school is situate at Bahati Headquarters; That the applicant is apprehensive that OCS Jogoo Road will provide security to the respondents and interested parties to forcefully eject him out of the AIPCA Bahati Headquarters at Nairobi; That the main motion in this matter is slated for hearing on 18th January 2017, this court should safeguard the status quo; That contempt proceedings have been commenced vide application filed on 19th December

2016; That actions and inactions of the interested parties have affected the running of the church and that the 2nd interested party claims to be or has bestowed himself as the current acting Archbishop of AIPCA; That an illegality shall be committed if the orders sought are not granted; and that it is *subjudice* for the actions or inactions of the interested parties and the 1st respondent if they proceed to elections thereby interfering with the office of Archbishop of AIPCA church.

4. The application was opposed by the 2nd, 3rd respondents and the interested parties, through the grounds of opposition filed on 6th January 2017 this morning wherein they contend that the application is incurably defective in law, the intended elections were sanctioned by court of equal status in a ruling delivered on 27th October 2016; question of eligibility to vote were determined by the court of equal status on 1st September 2016 ruling; this court never stopped any elections; there is no order that has been disobeyed by this court; and that the application dated 4th January 2017 is an abuse of the court process and should be dismissed with costs.

5. Parties advocates appeared and urged the application orally before me this morning with Mr Odhiambo arguing on behalf of Mr Musyoka for the applicant and Mr Makokha counsel for the 2nd, 3rd respondents and interested parties in the consolidated matters.

6. Mr Odhiambo reiterated the grounds as deposed in the affidavit of his client, the applicant Amos Kabuthu Mathenge sworn on 4th January 2017 adding that this court had allowed the proceedings herein to continue and that there is pending the issue of membership hence there should be stay until the matter is heard and determined *inter partes* on 18th January.

7. In response, Mr Makokha reiterated the grounds of opposition as filed on behalf of his clients and maintained that no orders stopped any impending elections and that the orders of this court of 27th September 2016 have been spent since there was no registration of elections officials.

8. Further, it was submitted that the applicant was misleading this court that orders of stay exist. Counsel maintained that ELRC 1220/2016 has settled the issue of membership and vide a ruling of 27th October 2016 Honourable Wasilwa J sanctioned the scheduled elections of Archbishop, not other officials, while declaring that the applicant herein Amos Kabuthu Mathenge has retired.

9. That the applicant has challenged the orders of Wasilwa J made in ELRC 1220/2016 before the Court of Appeal but that there is no stay issued hence a retired Archbishop cannot stop elections from going on.

10. In addition, that orders of 27th October 2016 sanctioning elections also ordered that the 1st respondent supervise the elections and the OCS Jogoo Road do facilitate security during elections hence the letter of the Registrar was issued pursuant to the court order of 27th October 2016 not in disobedience of this court's orders.

11. Further, that the orders of 1st September 2016 by Wasilwa J were specific that Paul Watoro Gichu remains Chairman of the Central Board of AIPCA which ruling was also appealed against and no stay is in force hence the application herein should be dismissed with costs.

12. In a rejoinder Mr Odhiambo reiterated his earlier submissions and added that his client is preventing a multiplicity of suits and that he acknowledges the orders of 27th October 2016 from ELRC 1220/2016 as being issued by a court of competent jurisdiction but that if elections are not stopped, then the directions of this court on 18th January 2017 will be overtaken by events.

Determination

13. I have carefully and anxiously considered the applicant's application dated 4th January 2017

which seeks principally two main orders: committal for contempt and stay of the impending elections of Archbishop of AIPCA slated for 9th January 2017 to be supervised by the 1st respondent Registrar of Societies as per her letter of 3rd January 2017 rescheduling the same from 6th January 2017 to Monday 9th January 2017.

14. The issue for determination is whether the prayers sought are merited.

15. Commencing with the prayer for committal for contempt, first for contempt of court to be so declared by any court of law, there must be proof of the existence of a specific court order and the proof of specific breaches of that order.

16. Examining the order of this court made on 27th September 2016, albeit the applicant alleges that it stayed elections and any other actions, I do not agree. The order granted leave to apply for Judicial Review order of prohibition to prohibit the respondents, their agents or servants from gazetting any other person to the office of the Archbishop as the impending election slated on 27th September 2016 is in flagrant disregard of the law. The court in granting that prayer *exparte* noted that the notice for elections was too short – 2 days to the date of elections.

17. In granting stay, the court stated that the leave granted do operate as stay of registration of any persons elected into office of Archbishop of AIPCA Nairobi Branch vide elections of 27th September 2016 until the substantive motion is heard and determined.

18. The proceedings in this case are predicated on the elections which were scheduled for 27th September 2016. If those elections did not take place, then it was incumbent upon the applicant to amend his chamber summons to include the prayer prohibiting any other action related to the election of the Archbishop. There was no prayer for prohibition of elections of Archbishop but registration or gazetting of the elected person into office of the Archbishop and the order was specific to the “election” of 27th September 2016 and no other.

19. That being the case, in my humble view, there is no order of this court staying election of the Archbishop and hence, no such order is capable of being breached thereby inviting penal sanctions.

20. On the second main prayer seeking for stay of elections scheduled for 9th January 2017 that prayer must be well grounded. When leave to apply was granted on 27th September 2016, the applicant never sought leave to prohibit conducting of any elections of Archbishop.

21. Accordingly, he cannot come to court through an interlocutory application to seek stay orders yet there is no substantive motion upon which such order can issue.

22. In addition, the applicant withheld from this court very serious material facts, that there was an order of 27th October 2016 issued in ELRC 1220/2016 by Honourable Wasilwa J sanctioning the holding of elections for the AIPCA Archbishop and that the elections be held within 2 months and be supervised by the Registrar of Societies and security be provided by the OCS Jogoo Road Police Station. The judge also declared the Archbishop Amos Mathenge as retired. There is no denial that those orders exist and that the applicant participated in those proceedings and even filed an appeal challenging those orders but there is no stay of enforcement of those orders.

23. Albeit 9th January 2017 will be outside the 2 months period ordered by the ELRC court, this court has no jurisdiction to overturn or to superintend or supervise the ELRC court as the ELRC court is a court of equal status with the High Court and is a superior court as contemplated in Articles 162(2) (a) and 165(6) of the Constitution.

24. It follows that the applicant has been abusing court process by filing a multiplicity of cases before different courts with the aim of achieving the same results and whenever he loses in one

court, he jumps into another court hoping that he would get a favourable outcome.

25. Therefore, albeit the pending proceedings would be rendered nugatory if stay is not issued and elections proceed, this court finds that the applicant has not come to court with clean hands. His hands are soiled with pure lies and moreso, from a man of cloth (collar).

26. This court Enjoys inherent jurisdiction which is not donated by any statute to make any order that is meant to prevent abuse of its process where it is convicted that it has been deceived, in order to preserve its dignity and the integrity of judicial process.

27. In this case, I find that the applicant is using the court process for an improper purpose and with ulterior motive for some collateral purpose other than the desire to access justice. The law does not recognize illegitimate use of its process. (see **Stephen Somek Takwenyi & Another Vs David Mbuthia Githare & 2 Others HCC 363/2009**).

28. The orders which are being sought in these proceedings are equitable and it is an affront to the rule of law for the applicant to subject this court to embarrassment of sorts.

29. The orders of 27th October 2016 having been made by a court of competent jurisdiction and equal status as this court and as this court has no jurisdiction to overturn, review, set aside or hear an appeal from ELRC court which is a superior court, I can do no more than down my tools by finding that the application before me, besides being an abuse of court process, excessively is fatally incompetent and it must fail on all its fours.

30. Accordingly, the applicant's application dated 4th January 2017 is hereby struck out and dismissed with costs to the 2nd, 3rd respondents and interested parties.

Dated, signed and delivered at Nairobi in open court this 6th day of January 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Odhiambo for the exparte applicant

Mr Makokha for the 2nd, 3rd respondents and interested parties

CA: Lorna