REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2098 OF 1985

1. ANNE MUMBI HINGA

2. JULIA WAMBUI KIARIE.....PLAINTIFFS

VERSUS

1. P.C.E.A THROUGH TIMOTHY NJOYA

2. MOSES K. WAWERU.....DEFENDANTS

RULING

The 2 plaintiffs, who are also the applicants, namely Mrs Anne Mumbi Hinga, and Mrs Julia Wambui Kiarie, did on July 12, 1985, move the court by summons under Order XXXIX Rule 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, asking for an injunction to restrain the PCEA Church, the 1st defendant from inducting Rev Moses Waweru, the second defendant.

The application was heard *ex-parte* on that date (12/7/85) and a temporary injunction was granted which restrained Rev Waweru from being inducted.

On 30/9/85 the application finally came before me for hearing *inter-partes*, however, before the hearing could start, Mr Muite, for the 2 defendants raised 2 preliminary points of objection.

1) That the issues raised in the plaint itself, which said issues are the basis of the injunction are not in law justiciable. Consequently, the suit is misconceived and the injunction sought cannot be granted.

2) And secondly that the matters in the plaint constitute a cause of action if any against the Church. Consequently, a representative suit, is what should have been filed, and failure to do so is failure to comply with Order 1 Rule 8 of the Civil Procedure Code. This follows that the suit is incompetent and the injunction cannot be granted.

Mr Muite then took me through the plaint pointing out the complaints of the two plaintiffs and the nature of the reliefs sought. He pointed out that the plaint complains of the conduct and suitability of Rev Waweru, as a preacher. That such matters are not within the jurisdiction of the court as these are matters of the administration of the Church, and the court should not get involved with them. Mr Muite posed two questions,

1) Can the court assume jurisdiction over these matters?

2) Are these issues justiciable?

He referred me 1st to the case of

Asa Karanja Solomon

v

Presbeterian Church of EA

This was a judgment of Hancox J, as he then was. Suffice it to point out straight-away that being a High Court decision it is not binding on my court, however, it provides a very useful guide. In that case the plaintiff ,Asa Karanja, sued the Presybeterian Church of East Africa for a declaration that the alleged ex communication of him by the church was null and void, and he was still a member of the church, entitled to participate in its activities. Hancox J, considered several decided cases and other factors, as a result of which he finally said,

"The P.C.E.A is a Church set up and formed by its own Constitution. They make rules for their own governance. To my mind the Church is the appropriate body to determine disputes such as this. I do not think it a matter for the ordinary courts of Law".

Another case discussed by Hancox J, in his judgment of *Asa Karanja's* case, and also relied on by Mr Muite was the case of *Matalinga and others v Attorney-General* [1972] EA page 518. In that case, the plaintiffs sued for declaration that certified and registered medical assistants be treated equally as to salary and other privileges and a consequential order to the Director of Personnel. Simpson J, as he then was held that the plaintiffs were not seeking a declaration with respect to any legal right, that the matter was not a justiciable issue and that the Attorney General's application to strike out the plaint should be granted. The learned Judge considered Order 2 Rule 7, which was in very similar terms to Order 15 Rule 7 of the English Rules of the Supreme Court.

In considering the application before him Simpson J, had resort to decided English authorities, which I find very appropriate here, and I wish to consider them for instance, the case of,

Guarantee Trust Co of New York

v

Hannay and Co [1951] 2QB 536

Where Bankers LJ said,

"That shows that the wide language of RSC, O.15 Rule 17 is not free from all limitations. It is subject to this that the declaration claimed must not be contrary to the accepted principle on which the court exercises jurisdiction and one of those principles is that the court will not make declarations in a dispute which is not a justiciable dispute. For that reason, I propose to order that the endorsement of the writ of summons and statement of claim be struck out".

Again, Plowman J in *Cox v Green* [1966] 1 Ch at page 220 said,

> "But however wide order 15 Rule 17, may be, it does not seem to me that it is so wide as to make justiciable disputes which are not justiciable. For example, what is commonly called a gentleman's agreement cannot be sued upon as a contract, and it does not seem to me to be open to a party to a gentleman's agreement who cannot sue in law for damages for breach of contract to circumvent this rule by claiming some appropriate declaration. R.S.C Order 15 Rule 17, is undoubtedly very wide, but there must at least be a justiciable dispute between the parties to bring it into operation. In my judgment the issues between the plaintiff and defendant here are not justiciable disputes at all.

> The issue between them does not concern any right of property, it does not concern any right of contract, it does not concern any legal right. The question is purely whether the plaintiff as the defendant alleges has been guilty of unethical conduct in a professional way, and that is a matter, in my judgment, for the Central Ethical Committee constituted under the Rules of the British Medical Association."

Another case relied on by Mr Muite, was the case of *Forbes v Eden* (1867) LC 1 Sc and Div Appeal Cases 508. This case is the basis for the passage in the 4th Edition of the *Halsbury's Laws of England* at page 803 para 1418. In that case the plaintiff was ordained in the Scotch Episcopal Church in 1848 and was a conscientious and zealous clergyman of that Church. He had been ordained under the Code of Canons adopted by the Synod in 1838. In 1863 the Church issued a new code of Canons, adopting *inter alia* the Book of Common Prayer of the Church of England and as it then was Ireland. With this the plaintiff disagreed on morally unimpeachable He therefore instituted a suit in the Scottish Court for a declaration, that he was entitled to celebrate Divine worship and administer sacraments and rites in accordance with the Canons of 1838, and furtherfor reimbursement of UK Pounds 120 to the curate and UK Pounds 200 as a solatium for his wounded feelings. He claimed that it was not voluntarily joined to change its fundamental character, as they did by the enactment of the 1863 Canons, in violation of the contract which he had made with that association.

In that case, which went to the House of Lords, Lord Cranworth said,

> "There is no jurisdiction in the Court of Session to reduce the rules of a Voluntary Society, or indeed, to inquire into them at all, except so far as may be necessary for some collateral purpose."

Lord Cranworth went ahead to deal with various grounds of complaint against the individual canons, and eventually held that the plaintiff failed on those grounds also.

Mr Muite argued that in the case of *Forbes v Eden*, the priest was relying on an implied contract, as a cause of action. What about the two plaintiffs? Mr Muite asked? What is their cause of action? They are the members of the Church and their complaints against Rev Waweru range from his hostile manner of preaching, failing to reconcile the groups in Church, accepting members who are morally depraved, bearing false witnesses against the church, spending church funds in an unauthorized manner and treating office of the church as his personal property.

Mr Muite pointed out that these plaintiffs are not even asking for any declaratory orders. But even if they were asking for declaratory orders the court would still have to be satisfied that their prayers were justiciable as was the case in *Matalinga v Attorney General* [1972] EA, before such orders can be granted.

Mr Muite submitted further that the complaint herein by the two plaintiffs was a domestic matter, was it not justiciable by the court. To support this contention, he quoted three English authorities, and one local case, the *University* cases. First was the case of *Thorne v University of London* [1966] 2 WL R 1080 where Diplock LJ shortly disposed of an application for leave to appeal against an order stricking out the claim of a law student that his examination papers had been negligently marked on the ground that it was a domestic dispute between members of the University of London and to be dealt with by the Visitor. The court thus had no jurisdiction to deal with it. This decision was followed in *Republic v Dunsheath ex parte Meredith* [1951] 1 KB 127 in which it was held that the question of a particular lecturer should be retained was a matter within the domestic jurisdiction of the University. Similarly in *Thomson v London University* (1964) 33 LJ (Ch) 625 where the plaintiff sought to restrain the award of a gold medal to another candidate.

The local authority was the case of

Otieno Ambala & Others

v

Where again Hancox J held *inter alia* that matters that touch on a Constitution of a body (as in that case, the KANU) are domestic matters which should be dealth with under that body's constitution.

Mr Mackecha disagreed with the submissions of Mr Muite on the issue of justiciability. He referred the court to the PCEA Constitution and said that a court of law has power to decide any matter affecting membership of the church. He submitted further that if a member of the church was aggrieved in a matter arising out of an ecclesiastical matter he first has to submit himself or herself to the Rules, regulations and procedures of the church, but, he continued, if the redress is not being heard despite protests, then the only remedy is to come to the court of law.

By this submission I understood Mr Mackecha to be saying that his clients came to court because the church turned a "deaf ear" to their complaints, so to speak. To this effect therefore, he submitted that his clients were properly before a court of Law, to seek redress. In this submission, he was relying on a High Court decision, in the case of *Rev Canon Mbugua v The Most Rev. Olang' & Diocese of Nairobi,*

Where the learned Judge said,

> "…….. if the plaintiff cannot get redress within the church organisation, as it were, I do not see what else he can do but to come to court for it".

This submission met with a reply from Mr Muite who drew the court's attention to the affidavits of the Rt Rev Doctor George Wanjau, currently the Moderator of the Presbyterian Church of East Africa, and that of the Rev Moses Kimani Waweru, named as the second defendant.

Rev Wanjau outlined in paras 4-10, what according to him is the procedure which should have been followed by the plaintiffs in case of complaints such as the ones they had. He also disclosed in the affidavit that the two plaintiffs went to see him, and he advised them of what to do. The further averments in the affidavit showed that this advise was not followed.

Again, the lengthy affidavit of Rev Moses Kimani Waweru, paragraph XIX particularly how the plaintiff's complaints were being handled, in accordance with the laid down church regulations. That eventually a Kerh Session was convened to investigate their complaints further but the plaintiffs refused to attend the meeting, and instead came to court.

Mr Muite's answer to the submission was that there is church machinery for dealing with such complaints. That this machinery was put into effect, but that the plaintiff's refusal to attend the meeting made it impossible for the machinery to operate and proceed from that stage to the next.

Having summarized the arguments of the two learned Counsels, and read through the decided cases quoted in respect of the first preliminary objection, I am now in a position to decide on it. In doing so, I find myself guided by the decision in Asa Karanja's case and all the cases discussed in it. All those cases discussed the issue of justiciability, with the result that they found that for an issue to be justiciable, it must constitute a cause of action in law, and it must be an issue concerning a right to property, contract or any other legal right. Also, the issue must not be a domestic matter that can be dealt with by the laws and regulations concerning a particular body or organisation.

I have considered these authorities carefully and I find myself in agreement with them.

I do not find any reasons to make me depart from them.

That being so, and now applying the principles and decisions from the said cases to our case at hand today, a question can be posed as to whether the plaintiffs have shown that they have a cause of action in law, for this court to deliberate on. Are the issues between the plaintiff and the defendant justiciable issues? Are they for example, issues that concern a right of property, or contract or any other legal right

for that matter?

I find that the issues complained of in the plaint, issues from which the chamber summons has now emerged, are issues, which as was rightly submitted, touch on the conduct, and integrity of Rev Waweru as a priest.

Now looking through the constitution of the P.C.E.A Church, I find that it has detailed provisions contained in its 15 Chapters.

I have read through the 15 Chapters. I find Chapter 13, particularly relevant to the case. It is headed,

"Church Discipline".

The Chapter also outlines what is,

"Conduct Open to Church Discipline,"

and also give a list of the "Disciplinary Measures," that can be imposed on the one being disciplined, a member or priest, as the case may be. Such measures include suspension from the church, expulsion, and several others. A glance at the plaint shows that these are the same prayers the plaintiffs are seeking from the court. Chapter 13 of the Constitution goes further to give details of the "different courts" within the church set-up, in which such complaints are to be heard.

My careful study or scrutiny of this constitution reveals that it makes sufficient provisions for dealing with the kind of complaints that the plaintiffs in this case have brought to court.

Infact, these church courts are vested with powers to suspend a Church Minister, investigate him, expel him etc etc. I would say that Mr Machecha appreciated this point during his submissions except he said that his clients were not given a hearing. That the church turned a "deaf-ear" so to speak, to their problem. I have already point out on record, Mr Muite's reply to this submission.

Be that as it may, I find that the P.C.E.A 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 that 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 annextures, thereto, I am satisfied that there was no such violation. I also find that the laid down procedure in the P.C.E.A constitution was not exhausted, <u>with the result that the case came to a court of law prematurely</u>! Perhaps there was a break-down of communication somewhere a long the way!

I now have to consider Mr Muite's second preliminary point of objection, to the effect that the suit is against the church, as such, a representative action should have been brought, as this is a suit against an incorporated body as outlined in page 103 (3) of Gower's book on '*Principles of Modern Company Law*, 4th Edition. In this aspect of the submission, Mr Muite relied on a Uganda High Court case, the case of *Johnson v Moss & others* [1969] EA at page 654, to stress the point that the plaintiffs should have obtained court's leave to bring a representative action against his clients, and that failure to obtain this leave, either *ex-parte* or *inter-partes* is fatal to the suit. When I scrutinized the wording of Order 1 Rule 8 of the Uganda Civil Procedure Rules, as outlined on page 657 of the above quoted judgment, I found that it is worded slightly different from our Order 1 Rule 8, which does not make leave of the court a mandatory requirement for bringing a representative action.

Anyway, be that as it may, it is my considered opinion, that the point about a representative action against a church, was well taken, and I am in agreement with the submission to that effect. I would also like to add that if such a representative action was brought in this case, as should have been, the office bearers of

the P.C.E.A Church, are the ones that should have been named as the defendants, and not Rev Njoya, whom I was told in court is not in the hieracy of the P.C.E.A. Church, but heads a particular Presbytery. Also, Rev Waweru should not have been named the second defendant.

Mr Makecha, in reply to this point submitted that the non-compliance of Order 1 Rule 8 oculd not result in this suit being thrown out, as the court can resort to Order 1 Rule 9. He quoted an authority to this effect.

Having found therefore, that the issues complained of in this case are not justiciable in law, the first preliminary point of objection therefore succeeds. The second point too succeeds, as I have already found that it was well taken.

Finally, is Mr Muite's point that if his two points succeed, then there would be nothing new to decide in the chamber application as well as the suit, which should therefore be dismissed with costs. He relied on a decided case, Civil Case 480/82 (unreported) which was infact argued by Makecha, sometime in 1982. Mr Muite referred particularly to page 2 line 24 which reads,

> "The plaintiff need not wait for a full trial involving unnecessary delay and expense when nothing material is going to turn up."

Mr Makecha however submitted that the two preliminary points were not such as to warrant the court to strike out the whole case, as there were other issues.

I have gone through the chamber application asking for an injunction grounded on the prayers in the plaint. Since I have found that the prayers and or complaints are not justiciable, I do not see any matter that remains to be decided in this case. Mr Muite's first point particularly went to the root of this case. It affected the substancial issues herein. I may say in passing that the second preliminary objection is really a technical or procedural point. It is'"curable". It is not all together "fatal", however since the first preliminary point of objection is so substantive, I find that it affects the injunction application as well as the plaint filed herein. I am therefore left with no alternative but to dismiss the plaint herein with costs.

Dated and Delivered in Nairobi this 10th day of October 1985.

J.A.ALUOCH

JUDGE