



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, VISRAM & GATEMBU, J.J.A)

CIVIL APPEAL NO. 185 OF 2012

BETWEEN

JOSEPHAT KABUTIEL.....APPELLANT

AND

THE TRUSTEE OF THE

INLAND CHURCH OF KENYA.....1<sup>ST</sup> RESPONDENT

JOHN CHIRCHIR.....2<sup>ND</sup> RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nakuru (Emukule, J.) dated 24<sup>th</sup> June, 2011*

*in*

*H. C. C. C. No. 22 of 2007)*

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JUDGMENT OF THE COURT

1. The facts which gave rise to the appeal before us are straight forward. The appellant herein has been a staunch member of the African Inland Church of Kenya (A.I.C) since his childhood. Of relevance is that sometime in the year 1994, a fellow congregant, Mary Kaptuiya Komen, levelled serious accusations against the appellant touching on his spiritual and moral uprightness. In a nutshell, she alleged that the appellant was bent on breaking up her relationship with her then fiancée, who now is her husband, Joseph Cheserek.

2. According to the appellant, the allegations were false and had caused so much havoc resulting in him being shunned and scolded by members as well as the leadership of the Koiserat local church which he attends. It appears this caused the appellant a lot of anguish and he embarked on a mission to clear his name. He approached the leadership of the local church to mediate between him and Mary on the matter in line with the AIC constitution which called for resolution of disputes in the terms of the *Gospel of Mathew 18:15-17*:

***“If your brother or sister sins, go and point out their fault, just between the two of you. If they listen to you, you have won them over. But if they will not listen, take one or two others along, so that ‘every matter may be established by the testimony of two or three witnesses. If they still refuse to listen, tell it to the church; and if they refuse to listen even to the church, treat them as you would a pagan or a tax collector.”***

3. The local church leadership was unwilling to get involved but the appellant remained steadfast and kept raising his concern within the organizational structure of the A.I.C. Finally, on 31<sup>st</sup> March, 1998 a dispute resolution committee sat down with the appellant, Mary and her husband to settle the dispute. It is at that forum that Mary owned up to having made false accusations against the appellant. According to the appellant, she apologized and he accepted the same. Nonetheless, he felt there was a need for his reputation to be vindicated publicly at the regional level and requested for the same.

4. Once again, the leadership of the local church did not wish to be involved. Be that as it may, they appeared to have given in following spirited efforts by the appellant, which at one point led to his arrest for creating disturbance. On 30<sup>th</sup> December, 2002 a committee set up by the local church resolved to forward the issue to the regional office in accordance with the appellant’s wishes. Towards that end, a delegation

of 15 members was selected to convey the appellant's exoneration to the regional office.

5. Apparently, as per the appellant, the delegation refused and/or neglected to carry out the aforementioned recommendation provoking the appellant to file a suit in the High Court against the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were sued in their capacities as the management body of A.I.C and the Chairman of the local church respectively. In his plaint the appellant sought the following orders:

**a) A declaration that the plaintiff is entitled to a fair and speedy hearing and determination of the dispute within the established mechanism of the church and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are obligated to constitute the Committee.**

**b) Mandatory injunction compelling the defendants to constitute a dispute resolution committee to hear and determine the plaintiff's case.**

6. Despite service of the plaint and summons to enter appearance both respondents failed to enter appearance and as a procedural consequence an interlocutory judgment was entered against them. The matter was set down for formal proof wherein the appellant gave evidence in support of his claim.

7. At the close of the trial, the learned Judge (Emukule, J.) in a judgment dated 24<sup>th</sup> June, 2011 dismissed the appellant's suit. It is that decision that has instigated the appeal before us wherein the learned Judge is faulted for failing to basically resolve the dispute before him and for being biased against the appellant.

8. At the hearing of this appeal, the appellant was represented by learned counsel, Mr. Oriri while the 1<sup>st</sup> respondent was represented by learned counsel, Mr. Amalemba. There was no appearance for the 2<sup>nd</sup> respondent. Counsel relied on the written submissions on record and made oral highlights as well.

9. In his opening remarks, Mr. Oriri contended that the false allegations against the appellant had been publicised widely hence they needed to be purged at the regional level. According to him, the appellant's persistence for vindication stems from his belief that unless his name, which was tarnished by the false allegations, is cleared on earth, he could not get absolution from his heavenly father, the Almighty God. He submitted that the appellant had not only gone through all the avenues of dispute resolution within the A.I.C hierarchy but had also put up a gallant fight amidst roadblocks placed by the church leadership. In his view, it was time for the Court to intervene and ensure the appellant received justice.

10. Mr. Oriri went as far as suggesting that the foregoing state of affairs had led the appellant to put his marriage on hold until his exoneration. It is on that basis that he set the stage for taking us through the significance of a good name as he put it. We were referred to an excerpt of William Shakespeare as quoted in the High Court's decision in ***Samuel Ndung'u Mukunya vs Nation Media Group Limited & Another [2015] eKLR*** thus,

***"Lago: Good name in a man or woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing; Twas mine, tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him; And makes me poor indeed."*** (Othello Act 3 Scene 3,155-161)."

In addition, counsel also relied on biblical references namely, ***Ecclesiastes 7:1*** and ***Proverbs 22:1*** to buttress this line of argument.

11. We also understood counsel to argue that the appellant had been denied a fair hearing by the respondents contrary to the 1<sup>st</sup> respondent's dispute resolution mechanism. Finally, we were asked to step in and compel the 1<sup>st</sup> respondent to comply with its regulations in line with the case of ***Tanui & 4 Others vs Birech & 11 Others [1991] KLR*** wherein this Court expressed:

***"... while it is not the business of the High Court or this Court to involve itself in the day to day running of institutions such as the Church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and this Court would not only be entitled to but under a duty to compel it, either, by injunction or otherwise, to obey its constitution."***

12. On his part, Mr. Amalemba made heavy weather of the fact that the 1<sup>st</sup> respondent was not sued in its correct name, that is, '***Africa Inland Church Kenya Trustees Registered***'. Equally, he submitted that the 2<sup>nd</sup> respondent should have been sued in his representative capacity as an official of the A.I.C Koiserat Church, Baringo.

13. Submitting on the merits of the appeal, counsel contended that the learned Judge properly evaluated the evidence before him and arrived at the right conclusion. In his view, there was no reason to warrant the interference with the trial court's decision by this Court. He posited that the claim of bias was not substantiated by any evidence. Last but not least, in distinguishing the authorities relied on by the appellant and more specifically with regard to the appellant's 'good name', counsel claimed that they were in relation to a cause of action founded on defamation.

14. We have considered the record, submissions and the law. To begin with, we find that the trajectory taken by the appellant's counsel to be as different as night and day with the appellant's pleadings in the trial court. Mr. Oriri's submissions leaned more towards a claim for defamation which clearly was not the issue at the trial court. The appellant simply sought a declaration that he was entitled to a fair hearing

from the respondents and the setting up of a dispute resolution committee by the 1<sup>st</sup> respondent in that regard.

15. The law on pleadings is clear as succinctly set out by this Court in **Mareco Limited vs Future Limited & Another [2017] eKLR**:

*“It is trite that issues for determination by a court flow from the pleadings. A court cannot make pronouncement on issues not raised in the pleadings filed by parties and to do so would be tantamount to acting outside its mandate.”*

16. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing which is encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. The spirit behind this right is to ensure that a person is afforded an opportunity to be heard on his/her claim. See **Judicial Service Commission vs Sheikh Abubakar Bwanakai & Another [2019] eKLR**.

17. Applying the rationale behind the right to a fair hearing to the circumstances of this case, we concur with the following sentiments of the learned Judge:-

*“Of course it also goes without saying that not only the plaintiff but every member of his church who has a dispute with his church is entitled to a fair hearing and determination within a reasonable time. The plaintiff’s evidence shows that he was actually heard by his local church, but at his insistence, he wanted his matter determined at a higher level than the local church.*

*With great respect to the Plaintiff, his matter having been heard and a 15 member delegation having been appointed to report to the Regional Church, I am of the considered view that he had been heard, and exonerated and the Report by the 15 elders was merely to confirm that exoneration. Further having heard the apology from his accuser, who was now duly married to the very person he was accused by her of dissuading her not to marry him, there is little else that the Committee would sit to resolve, and in my view the matter ended when the accuser apologized to the plaintiff, in her house, and in the presence of her husband.*

*I think that this is fully in consonance with the admonition of Apostle Matthew - "If your brother sins (against you), go and tell him his fault between you and him alone. If he listens to you, you have won your brother." I do not therefore think that the prayers sought would serve any useful purpose.”*

18. Consequently, we find that the appeal lacks merit and is hereby dismissed. Taking into account the nature of the dispute is between a congregant and his church we make no orders as to costs.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of April, 2019.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**