**Mtai & 9 others v Anglican Church of Kenya & 2 others (Appeal E008 of 2024) [2025] KEELRC 1988 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1988 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE**

**APPEAL E008 OF 2024**

**MA ONYANGO, J**

**JULY 3, 2025**

**BETWEEN**

**REV. ELIJAH MTAI ..... 1ST APPELLANT**

**REV. JOSEPH PEYWO ..... 2ND APPELLANT**

**REV. PETER NARIU ..... 3RD APPELLANT**

**REV. JOSHUA RECHAH KORINYANG TULWO ..... 4TH APPELLANT**

**REV. PAUL LONGIRO ..... 5TH APPELLANT**

**REV. DANIEL KATOME AREMAN ..... 6TH APPELLANT**

**REV. STEPHEN AREPEL ..... 7TH APPELLANT**

**REV. GEORGE WANGILA WANYONYI ..... 8TH APPELLANT**

**VEN. JACKSON NGARITAI ..... 9TH APPELLANT**

**VEN. FRANCIS R. NALELIO ..... 10TH APPELLANT**

**AND**

**THE ANGLICAN CHURCH OF KENYA ..... 1ST RESPONDENT**

**THE MOST REV. JACKSON OLE SAPIT ..... 2ND RESPONDENT**

**REV. DR. SIMON E. ONYANGO ..... 3RD RESPONDENT**

***(Being an Appeal from the ruling of Hon S.K Mutai (SPM) in Kitale CMELRC No. E009 of 2024 delivered on 14th October 2024)***

## JUDGMENT

1. The 3rd Respondent filed a Preliminary Objection dated 26th June 2024 at the trial court on grounds that: -

    i. The Claimants in the suit have wrongfully enjoined the 3rd Respondent as a party to the suit. The 3rd Respondent is an employee of the Anglican Church of Kenya and is not eligible to be sued in their individual capacity. The claim is misdirected and out to be presented as against the Registered Trustees of the Anglican Church of Kenya, which is a registered society under the *Societies Act*, Cap 108 Laws of Kenya.

    ii. The Claimants are yet to exhaust all available local remedies thus the suit is premature, wrongfully instituted and fatally defective.

2. The Preliminary Objection was disposed of by way of written submissions. The trial court after considering the submissions of the parties, delivered its ruling on 14th October 2024 finding the preliminary objection merited.

### The Appeal

3. The Appellants being aggrieved by the said ruling, moved this court on appeal vide the Memorandum of Appeal dated 28th October 2024 on the following grounds:-

    a. That the learned trial Magistrate, failed to appreciate that the two preliminary objections were not pure points of law.

    b. That the learned trial magistrate failed to appreciate that the two preliminary objections were blurred with factual details, and which needed proof by evidence.

    c. That the learned trial magistrate failed to appreciate that the two (2) issues raised as preliminary objections should have been raised through a notice of motions so that evidence could be adduced in support of the said issues.

    d. That the learned trial Magistrate failed to appreciate that misjoinder of parties (and which wasn't even the case) cannot defeat a suit.

    e. That the learned trial magistrate in holding that the suit should have been filed against the trustees of the Anglican Church of Kenya failed to appreciate that the suit was on the Employment of the claimants as opposed to a property dispute.

    f. That the learned trial Magistrate failed to consider and appreciate the claimants/appellants submissions over the preliminary objection.

4. The Appellants prayed that the appeal be allowed and the decision of the trial court be quashed and set aside with costs. The Appellants also prayed for an order that the suit at the trial court be heard by another magistrate other than S.K. Mutai.

5. Pursuant to the directions of this court, the appeal was disposed of by way of written submissions.

### The Appellants' submissions

6. While submitting on grounds a, b and c, the Appellants contended that no bishop has ever been elected, that there has never been a synod put in place and that no other administrative offices have been

established for the Kapenguria diocese. According to the Appellants, the claim that had been brought before the trial court was sui generis as Kapenguria Diocese is a new diocese, which has never had a bishop elect, and had not had the opportunity to put in place the various organs as envisaged in the Anglican Church of Kenya Constitution. In this regard, the Appellants submitted that this is a matter that needed evidence, to hear and determine whether the available remedies even existed.

7. It is the Appellants' submission that the trial court erred in law and fact in holding that he had relied on evidence, and which was not admitted, rather than relying on a pure point of law as is required in a preliminary objection.

8. On ground d in the Memorandum of Appeal, the Appellants submitted that there was no law presented, recited or otherwise demonstrating to the trial court that the 3rd Respondent, who dratted and presented interdiction letters to the Claimants was immune and beyond the reach of the court. The Appellants contended that from the list of documents at page 24-26 of the record, the 3rd Respondent is the one who personally signed the impugned letters on behalf of the 1st Respondent.

9. While placing reliance on the case of Boniface Omondi v Mathare Youth Sports Association & Another (2021) KEELRC 671(KLR), the Appellants submitted that 3rd Respondent meets the threshold under Order 1 rule 3 of the Civil Procedure Rules to be joined as a Respondent in the claim as he is the person who signed the impugned letters and therefore his presence is necessary and relevant for the effectual and complete determination of all questions in the suit.

10. With regard to ground e, the Appellants submitted that the dispute before the court is an employment dispute and not one on property and that even if the trial court was to find that the 1st Respondent was to be sued through its registered trustees, and which no evidence was presented, the court ought to have only struck out the suit against the 1st Respondent, allowing the Appellants to enjoin the trusted trustees if they so wished.

11. The Appellants maintained that joinder or non-joinder of a party to a suit can never be the basis for striking out a suit. In support of this position, the Appellants cited the case of Moses Nyambega Ondieki v Vice Chancellor, Maasai Mara University & 3 0thers (2018) KEBLRC 877 (KLR).

12. In the end, the Appellants contended that the learned trial magistrate misapplied the law in allowing the preliminary objection and dismissing the suit as the issues raised were not pure points of law, but rather, evidentiary issues. The Appellants further averred that even if the Respondents were not properly enjoined, an amendment ought to have been ordered, and not striking out the suit in its entirety.

13. The Appellants urged the court to allow the appeal, quash and set aside the orders of the trial court made on 14th October 2024 with costs.

**The Respondents' submissions**

14. In their submissions, the Respondents identified the issues for determination to be:-

    i. Whether the trial magistrate correctly applied the law on Preliminary Objections?

    ii. Whether the trial Court correctly found the suit fatally defective for misjoinder?

    iii. Whether the trial Court correctly found the suit premature for non-exhaustion of internal remedies?

    iv. Whether the appellants' submissions cured the fatal defects?

15. On the first issue, the Respondents submitted that the trial court properly relied on the principles established in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd| 1969) EA 696 as the issues raised in the preliminary objection to wit: the jurisdiction of the Court in determining the matter in light of their being established local remedies and misjoinder of the Respondents in the suit resulting from an interpretation on the legal capacity of individuals in a case against a registered society were objections which were purely legal issues requiring no factual inquiry capable of being determined without recourse to evidence.

16. It is the Respondents' submissions that the objections raised by the 3rd Respondent fell squarely within the Mukisa Biscuit principles and that the trial court correctly found that suing individual office holders instead of the registered trustees of the Anglican Church of Kenya was a fatal misjoinder and further, that the Appellants had not exhausted internal dispute resolution mechanisms under the Anglican Church of Kenya Constitution (2002). On this basis, the Respondents submitted that the objections were not a matter of fact but of law thus was properly addressed by the trial court by way of the preliminary objection.

17. On the issue whether the trial court correctly found the suit fatally defective for misjoinder, the Respondents submitted that the trial Court rightly cited the case of Trustees of Kenya Redeemed Church & Others Samuel M'obuya Morara & 5 Others |2011| eKLR where it was held that it is trite in law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued and that a society can only sue or be sued through its due officials. The Respondents thus submitted that the trial Court aptly held that the 3rd Respondent was improperly sued as an individual, yet he was an employee of the Anglican Church of Kenya and that the registered trustees were the proper legal persons to be sued.

18. According to the Respondents, the suit, as rightly held, was filed against individual clergy rather than the Registered Trustees of the Anglican Church of Kenya, who are the proper legal persons under the *Societies Act* and that the defect was not a mere technicality, but one that went to the root of the claim and warranted dismissal.

19. On the third issue on whether the trial court correctly found the suit premature for non-exhaustion of internal remedies, the Respondents submitted that the trial Court in arriving in its decision relied on Article 159(c) of *the Constitution* of Kenya, 2010 that implored it in the exercise of its judicial authority to be guided and promote the use of alternative forms of dispute resolution. The Respondents averred that the Anglican Church of Kenya Constitution provides internal dispute settlement mechanisms including regulations, different Committees and bodies such as the body responsible for receiving, investigating and addressing disputes within the church.

20. The Respondents therefore maintained that the Appellants failed to demonstrate that they referred the dispute to the established dispute resolution mechanisms or in the alternative, offer cogent reasons as to why they failed to explore such mechanisms, rendering the suit premature and that as such, the trial court correctly applied the law with regard to the doctrine of exhaustion. To buttress this argument, the Respondents cited the case of Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others (2015) eKLR and also the cases of Tom Odago and Meshack Onyango and 12 Others v The Rev. Zephaniah Okello and The Ven v Nicholas Otieno Oyare And 7 Others [2024] eKLR

21. On the fourth issue, the Respondents submitted that the Appellants' arguments at the trial stage and in this instant appeal cannot override the clear legal defects in their case as they had sued the wrong parties also, that they failed to adduce evidence of exhausting the established internal remedies under the Anglican Church of Kenya Constitution or in the alternative, offered cogent reasons as to why they failed to explore such mechanisms, rendering the suit premature.

22. The Respondents thus submitted that the Preliminary Objection was properly raised, based purely on law, and the trial court correctly dismissed the suit for being fatally defective.

**Analysis and determination**

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions.

24. From the Memorandum of Appeal and the submissions of the parties on appeal, the only for determination on appeal is whether the trial correctly appreciated the Preliminary objection as raising pure points of law.

25. As mentioned earlier in this judgment, the ruling of the trial court, which is now the subject of this appeal upheld the preliminary objection raised by the Respondents. The grounds on which the notice of preliminary objection dated 27th June 2024 was premised on were that:-

    a. The Claimants in this suit have wrongfully enjoined the 3rd Respondent as a party to the suit as the 3rd Respondent is an employee of the Anglican Church of Kenya and is not eligible to be sued in their individual capacity. The claim is misdirected and ought to be presented as against the Registered Trustees of the Anglican Church of Kenya which is a registered society under the *Societies Act*, Cap 108, Laws of Kenya.

    b. The Claimants are yet to exhaust all available local remedies thus the suit is premature wrongfully instituted and fatally defective.

26. The import of a preliminary objection was stated in Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 where the court observed:-

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

27. On the first ground as raised in the Preliminary objection, courts have held that the issue of misjoinder or non-joinder, is one that cannot be raised in a preliminary objection as such failure can be cured by an amendment to the pleadings.

28. In William Kiprono Towett & 1597 Others v Farmland Aviation Ltd, Marco Dunn & Toby Dunn (Civil Appeal 247 of 2011) [2016] KECA 301 (KLR) (2 August 2016) (Judgment), the Court of Appeal observed :-

> " Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit."

29. Order 1 Rules 9 and 10 of the Civil Procedure Rules, 2010 provides:-

> " Misjoinder and non-joinder [Order 1, rule 9.] No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
>
> 10. Substitution and addition of parties [Order 1, rule 10.]

1. Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

2. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

3. No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto

4. Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants."

30. Further, in the case of Consolata Kihara & 241 Others v Director Kenya, Trypanosomiasis Research Institute [2003] KEHC 940 (KLR), the court held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation.

31. Applying the principles above to the instant appeal, it follows that a suit would not fail for mere reason of misjoinder. This ground of appeal as raised before the trial court in the preliminary objection dated 27th June 2024 was not merited.

32. It is further worth mentioning that in both the *Employment Act* and in the *Employment and Labour Relations Court Act* the definition of employer includes an agent of the employer and the person who issues the letter of appointment. Employer is defined to mean "any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company."

33. The foregoing should however not be read to mean that the employee should not sue the correct legal entity. It only means that a suit should not be dismissed on grounds that the name of the person sued in not the legal entity behind the employer if that person is the one who issued the letter of appointment. An employee may not know that there is another person behind the employer named in the contract of employment. He is allowed to sue the person who on the face of the contract is the "employer" as defined in the relevant legislation.

34. Going by this definition, the Respondents are properly sued in this case.

35. On the second ground of the preliminary objection, the trial court in the impugned ruling held: -

> " From the material placed before me, I find that claim is premature and wrongfully instituted since the Claimants have not exhausted internal dispute resolution mechanisms as provided for in the Anglican Church of Kenya Constitution Adopted on 14th February 2002 and became effective on 16th March 2002 before escalating the matter to this court. The Claimants herein have not shown that they exhausted all the available internal dispute resolution mechanisms within the said church before instituting this claim."

36. In Kenya Revenue Authority & 2 others v Darasa Investment Limited (2018) KECA 358(KLR), the Court of Appeal stated as follows concerning exhaustion of remedies:

> " (34) It is trite that where *the Constitution* or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with *the Constitution* or statute. In Secretary, County Public Service Board & another vs. Hulbhai Gedi Abdille [2017] eKLR this Court expressed itself as follows:-
>
> > "Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."
>
> What then is the consequence, if any, of the respondent's failure to invoke the alternative remedies?
>
> (35) As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this Court in Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR and Kenya Revenue Authority & 5 others vs. Keroche Industries Limited -Civil Appeal No. 2 of2008. Perhaps, that is the reason why the legislator under Section 9(4) of the *Fair Administrative Action Act* stipulated that:-
>
> > "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."[Emphasis added}
>
> Our reading of the above provision reveals that contrary to the appellants contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.

36] Did the respondent 's case fall within the exception? The principles which a court should consider in determining whether a case falls within the exception are settled. This Court in Republic vs National Environmental Management Authority-Civil Appeal No. 84 of 2010, set out the said principles as follows:

> "...in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."

37. The Appellants in their submissions both at trial and on appeal, submitted that there are no structures in place to channel their grievances, or even to hear them as there is no synod in place wherein they can appeal the decision of the 3rd Respondent.

38. The Respondents did not rebut the allegation made by the Appellants that no bishop has ever been elected and that there has never been a synod put in place.

39. I have looked at the 1st Respondent's constitution at page 11 of the Record of Appeal. Canon XXI is on Appeals and it provides:-

> " 1. There shall , subject as is hereinafter otherwise provided, be a right of appeal to the Provincial Tribunal from any judgment or sentence of the Diocesan Tribunal or (as the case may be) the judgment or sentence of the Bishop....."

40. My reading of the above shows that appeals are to be tendered before a Provincial Tribunal and from my analysis of the Record of Appeal and even the submissions on appeal, the Respondents have not identified which available internal dispute resolution mechanisms the Appellants failed to resort to within the church constitution before instituting their claim at the trial court. Further, the Respondents did not rebut the allegation made by the Appellants that no bishop has ever been elected, that there has never been a synod put in place and further, that no other administrative offices have been established for the Kapenguria diocese.

41. It is therefore my finding that in the absence of evidence showing that the Appellants have violated the doctrine of exhaustion of remedies, the second ground as raised in the Preliminary objection by the Respondents did not meet the threshold of a preliminary objection and I find that the trial court fell into error by upholding the Respondents' preliminary objection.

42. Further, the doctrine of exhaustion, as raised herein, required to be proved by evidence as it is not a matter raised in a statute and therefore a matter that the court should take judicial notice of. These are matters that should have been pleaded and proved.

43. Consequently, I allow the appeal, set aside the trial court's decision dismissing the Appellants' suit and substitute it with an order dismissing the Preliminary objection dated 27th June 2024. The case is thus remitted back to the trial court for hearing and determination before any court other than Hon. S.K Mutai.

44. The Respondents shall bear the Appellants costs of this appeal.

45. Orders accordingly.

**DATED, DELIVERED AND SIGNED ON THIS 3RD DAY OF JULY, 2025.**

**M. ONYANGO**

**JUDGE**