



Njera & another (Suing as the Archbishop and Trustees of St Meshack’s Fellowship Church (HERA)) v Ochola & another (Cause 4 of 2023) [2024] KEELRC 474 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 474 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 4 OF 2023
S RADIDO, J
FEBRUARY 22, 2024

BETWEEN

ARCHBISHOP DR HESBORN NJERA 1ST CLAIMANT
JONATHAN ONYANGO OCHARE 2ND CLAIMANT
SUING AS THE ARCHBISHOP AND TRUSTEES OF ST MESHACK’S
FELLOWSHIP CHURCH (HERA)

AND

TOBIAS OCHOLA 1ST RESPONDENT
JULIUS ODUNDO 2ND RESPONDENT

RULING

1. The Claimants (trustees of St Meshack’s Fellowship Church (Hera)) sued the Respondents before the High Court on 30 May 2019, alleging that the Respondents, pastors with the Church, had acted contrary to the Constitution and Canon law of the Church.
2. The Claimants sought reliefs:
 - i. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants whether by themselves, their agent, representative, servant and/or employee from interfering with the operations of St. Meshack’s Fellowship Church (HERA) by collecting offerings, tithes or in any manner handling church funds and property, carrying out any church duties contrary to the Church Constitution or without the authority of the Church.
 - ii. That this Honourable Court be pleased to issue an order of permanent injunction restraining the Defendants whether by themselves, their agent, representative, servant and/or employee



from interfering with the operations of St. Meshack's Fellowship Church (HERA) by collecting offerings, tithes or in any manner handling church funds and property, carrying out any church duties contrary to the Church Constitution or without the authority of the Church.

- iii. That an order do issue to the Defendants jointly to return all church items, regalia, property that is in their custody that belongs to St. Meshack's Fellowship Church (HERA).
 - iv. Costs of the suit.
 - v. Interest on (iv) above at court rates.
 - vi. Any other relief and/or further relief this Honourable Court may deem fit to award.
3. When served, the Respondents filed a Notice of Preliminary Objection date 13 August 2019 questioning the jurisdiction of the High Court, and the failure of the Claimants to exhaust the church's internal alternative dispute resolution mechanisms.
 4. The High Court heard the parties on the Preliminary Objection and in a Ruling delivered on 29 April 2020 rendered itself:

In the final analysis, and bearing in mind the fact that pursuant to Article 165(a) of the Constitution of the Republic of Kenya, which vests the High Court with unlimited original jurisdiction to adjudicate in any criminal and civil matters, I find no merit in the Preliminary Objection. The same is thus overruled, and I order the Defendants to pay to the Plaintiffs, the costs of the Preliminary Objection.

5. With the dismissal of the Preliminary Objection, the High Court set the suit for hearing and witnesses testified on 5 October 2021 after which the dispute was referred to mediation. An agreement was not reached.
6. On 24 May 2023, the High Court directed the parties to file and exchange submissions ahead of judgment on 3 October 2023.
7. In the judgment, the High Court held:

Having set out the parties respective positions above, it is clear to me that in determining the merits of this case, the Court will have to determine not only the issue of return of church regalia and or injunction to restrain the Defendants from conducting or interfering with the operations of the church by collecting tithes and offerings but also to determine whether the suspension of the Defendants clergy from conducting the church business since the plaintiffs claim that the Defendants were suspended on account of transgressions was procedurally fair. In addition, and in respect of the 2nd Defendant, this Court will give (sic) to determine whether the demand for the 2nd Respondent to retire at 65 years instead of 70 years was in accordance with the church constitution and terms and conditions of service of the 2nd Defendant as clergy for the church clergy. (sic).

In my view, the determination of the above questions requires the Court to investigate into the lawfulness of the Plaintiff's decision to suspend the 1st Defendant who was on study leave, the justification for the transfer as well as the lawfulness or otherwise of the suspension of the 1st Defendant from exercising the functions and duties as an ordained clergy as well as the lawfulness of the demand that the 2nd Defendant retires at 65 years old and not 70 years.

In my humble view, these questions and issues are not matters which are in the province of this Court as they relate to Employment and Labour Relations as contemplated in section 12(1) and (7) of the Employment and Labour Relations Court Act and Article 162(2)(a) of the Constitution.



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I hereby direct that this file is hereby transferred and placed before the Employment and Labour Relations Court, Kisumu for disposal.

8. When the file was placed before this Court on 7 December 2023, it expressed doubt as to whether it had jurisdiction and the parties were directed to file and exchange submissions on the jurisdiction question.
9. The Claimants filed their submissions on 20 December 2023 while the Respondents had filed their submissions on 19 December 2023.
10. The Claimants submitted that in line with section 12(2) of the *Employment and Labour Relations Court Act*, as read with Article 162(2) of the *Constitution*, this Court had the requisite jurisdiction as the parties had an employer/employee relationship.
11. The Respondents, however, contended that the Court did not have jurisdiction because the relationship between the parties was not one of employer and employee and that the relationship was one of a civil nature (members of a church).
12. The Court has considered the pleadings, records and submissions and makes the following determinations.
13. One, the High Court having rendered a judgment and not a Ruling, this Court would not have the jurisdiction to proceed to hear the parties and deliver a second judgment.
14. Two, the cause of action as pleaded did not advert to an employer and employee relationship, and indeed none of the parties raised that issue in the course of the proceedings before the High Court.
15. Three, the reliefs sought by the Claimants did not suggest or infer an employer/employee relationship between the parties.
16. Of course, this Court is alert to the fact that some relationships between pastors and their respective churches may come under the umbrella of an employer/employee relationship deserving the protections assured employees by the *Employment Act*, 2007.
17. Four, despite declining jurisdiction suo moto, the High Court did not give the parties a chance to submit on the question.
18. Last, one of the essentialia of an employment relationship is the payment of a salary or wages. The payment of a salary or wage forms the cornerstone of an employment relationship whether the control test, integration/organisation test, the fourfold test or the multiple test is used.
19. The only iota of evidence on record is that the Respondents were earning some honoraria.
20. Without further evidence, the Court is of the view that the payment of an honorarium alone cannot establish an employer/employee relationship.
21. For the above reasons, the Court regrettably declines to assume jurisdiction over this dispute where a judgment had already been delivered by the High Court.
22. Before concluding, the Court must observe that it has agonised over the final orders it should grant considering that the High Court had already delivered a judgment and it is not open to it to deliver a second judgment. Should it strike out or dismiss the Cause?



Orders

23. Flowing from the above, the Court declines jurisdiction, and terminates these proceedings with no order on costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF FEBRUARY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

For Claimants Otieno, Yogo, Ojuro & Co. Advocates

For Respondents Wasuna & Co. Advocates

Court Assistant Chrispo/ Chemwolo

