



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. E051 OF 2021

KENNETH OKECH MAENA.....CLAIMANT

VERSUS

TRUSTEES/EXECUTIVE COMMITTEE S.D.A CHURCH

KENYA LAKE CONFERENCE.....1ST RESPONDENT

TRUSTEES/EXECUTIVE COMMITTEE S.D.A CHURCH

KENYA WEST UNION CONFERENCE.....2ND RESPONDENT

SEVENTH DAY ADVENTIST CHURCH E.A

UNION LTD.....3RD RESPONDENT

RULING

1. This ruling relates to a Notice of Preliminary Objection dated 10th August, 2021. The notice of Preliminary Objection is premised on the following grounds:

- i. That the Seventh Day Adventist Church, has clear and established structures, running up to the General Conference in Sessions, articulating the rights of appeal and/ or review. Consequently, the instant suit is pre-mature and violates the Doctrine of Exhaustion.
- ii. The impugned decision upon which the subject proceedings are premised and/or otherwise grounded, was/is an administrative decision which is subject to the provisions of Section 9(2) of the Fair Administrative Actions Act, 2015.
- iii. The subject suit was filed and/or commenced on the basis of existing suit and/or proceedings namely **KISUMU PETITION ELRC NO. E17 OF 2021**. Consequently, the subject suit is barred and/or prohibited by the Doctrine of *Sub-Judice*. In the premises, the suit herein offends the provisions of *Section 6 of the Civil Procedure Act, Cap. 21 Laws of Kenya*.
- iv. The Notice of Motion Application and the suit herein are misconceived, frivolous and/or otherwise an abuse of the due process of the court as the same seeks orders that can only be granted in a substantive suit
- v. The application and suit is clothed with massive concealment of material facts in regard to the pending court cases between the parties herein over the same subject matter.

2. Parties canvassed the preliminary objection through written submissions.

The Respondent's Submissions

3. The Respondent submitted that the preliminary objection raises pure questions of law on the question of jurisdiction of the court. They sought to rely on the case of *Aviation and Allied Workers Union Kenya V Kenya Airways Limited & 3 Others*, where the court held that a preliminary objection (PO) may only be raised on "pure questions of law".

4. It is submitted for the Respondent that the Seventh Day Adventist Church (SDA) has administrative and dispute resolution structures which include the 1st and 2nd Respondents. It is further submitted that the highest dispute resolution unit of the Respondent is the General Conference in Sessions, with it headquarters at Washington in the United States of America.

5. It is submitted that the Claimant is aware of the existing church structures and should have preferred an appeal to either the East and Central Division or the General Conference in Session, if aggrieved by the decision of the 1st and 2nd Respondents instead of the court. This requirement for appeal, it is submitted, is contained in the employee's handbook which states as follows in relation to such appeals:

“ .. in case the employee is not satisfied with the decision of the executive committee or the governing board of his/her employing organization/institution, she/he may appeal his/her case in writing to the offices of the next higher organization.”

6. It is submitted that to the extent that the Claimant did not submit himself to the internal dispute resolution mechanism provided under the church's constitution, the suit herein is premature. They sought to rely on the case of **Geoffrey Muthinji & Another V Samuel Henry & 7 Others (2015) eKLR**

7. The Respondent submitted that the Claimant filed case **No. E44 of 2020** at the Chief Magistrates Court at Kisumu seeking near similar orders. It is submitted that before this suit was determined, the Claimant filed yet another case being **KISUMU ELRC PETITION NO. E17 OF 2021**, seeking conservatory orders restraining the Respondents from implementing recommendations which it had not ratified/adopted. It is submitted that the Claimant did not disclose to the court the existence of other proceedings on the same issue some of which he had received favourable orders.

8. The Respondent submitted that the Claimant failed to disclose to the court that the Respondent had raised a preliminary objection in Petition **No. E17 of 2020** on the jurisdiction of the court, and which preliminary objection is slated for a determination on 1st December, 2021.

9. The Respondent submits that on 15th July, 2021, when the instant claim was filed, the dispute which is directly or substantially in issue herein were pending determination in **KISUMU ELRC PETITION NO. E17 OF 2021** and for this reason the subject dispute is *Sub judice*.

10. The Respondents submits that filing of this suit during the pendency of proceedings before the Employment and Labour Court (**KISUMU ELRC PETITION NO. E17 OF 2021**) the Claimant was engaging in forum shopping, with a view to discerning which forum would grant favourable orders. It is submitted that the Claimant's conduct is an abuse of due process of the court. The Respondents sought to rely on the cases of **Muchanga Investments Limited V Safaris Unlimited (Africa) Limited & 2 Others (2009) eKLR** as well as **Madara Evan Okanga Dongo V Housing Finance Company of Kenya (2005) eKLR**.

The Claimant's Submissions

11. It is submitted for the Claimant that the preliminary objection is an abuse of the court process as the Claimant's suit is not premature and does not violate the Doctrine of exhaustion.

12. The Claimant submits that the issues raised by the Respondents are issues of facts which can only be determined upon a hearing and not points of law as alleged. He submits that the second disciplinary process was arbitrary and did not accord the Claimant a right to be heard.

13. The Claimant submits that this court has original and appellate jurisdiction in all matters on employment and labour and this suit herein is not prohibited by Section 9(2) of the Fair Administrative Actions Act, 2015.

14. It is submitted that **KISUMU ELRC PETITION NO. E17 OF 2021** is different from the current suit hence suit is not barred or prohibited by the *Sub judice* doctrine. The Claimant's assertion is that his claim is not an abuse of process, is merited and legal.

Determination

15. The Court has considered the Notice of Preliminary Objection and the parties' submissions. The issues for determination are:

- i. Whether the claim violates the Doctrine of Exhaustion
- ii. Whether this suit offends the question of *sub judice*

Whether the claim violates the Doctrine of Exhaustion

16. The Respondents' case is that the Claimant did not exhaust the internal dispute resolution mechanisms of the Seventh Day Adventist Church and for this reason, the suit herein violates the doctrine of exhaustion. The Respondents cited section 9(2)(3) of the Fair Administrative Action Act and the case of **Geoffrey Muthinji & Another V Samuel Henry & 7 Others (2015) eKLR**, where the court held that it is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked, and, that, courts ought to be a fora of last resort and not the first port of call the moment a storm brews.

17. The Claimant herein had before the institution of this suit undergone two levels of the Respondents' disciplinary process. The evidence before this court is that the matter was placed before an organ of the Seventh Day Adventist Church know as the East and Central Division, which organ is superior to both the 1st and the 2nd Respondents. The East and Central Division recommended that the 2nd Respondent herein proceeds to dispose off the dispute, resulting in the recommendation of 17th December, 2020, which recommendation is the subject of this suit. The highest dispute resolution organ of the Respondents/SDA church, has its head quarters in the United States of America.

18. In the opinion of this court, the Claimant has exhausted the Respondents' internal dispute resolution mechanisms, as the General

Conference in Sessions, which the court was told is the highest dispute resolution mechanism of the Respondents is situated outside the country, and as such, there are no remaining sufficient safeguards in place for a valid determination of the dispute between the parties herein, other than the courts. To use the exhaustion doctrine as a basis to dismiss this suit, is to deny the Claimant his right of access to justice. Moreover, the Claimant has already lost trust in the Respondents' dispute resolution mechanism and to force him to go through the different levels of the discipline processes is an exercise in futility and which will not aid the ends of justice.

19. The court finds and holds that the exhaustion requirement would not serve the values enshrined in the Constitution and the law in the circumstances of this matter and this ground of the Preliminary Objection fails.

Whether this suit offends the question of sub judice

20. The sub judice rule is captured in section 6 of the Civil Procedure Act thus:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

21. According to this section, for a suit (s) to be said to be *sub judice*, the following salient features must be found to exist:

I. There must exist two or more suits filed consecutively

II. The matter in issue in the suits or proceedings must be directly and substantially the same

III. the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title

IV. the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

22. The Respondents' position is that this suit and **KISUMU ELRC PETITION NO. E17 OF 2021** as well as **No. E44 of 2020**, arise from the same set of facts and circumstances and challenge the same decision being the Respondents' decision of 17th December, 2020. This is evident from the pleadings filed in the three suits.

23. The Supreme Court of Kenya in ***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others*** pronounced itself on the subject of *sub judice* as follows:

“.....the purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

24. It is not disputed that there is more than one suit on similar issues. The parties herein are the same as those in the other two suits, and the suits cite similar issues, which are that the Respondents' recommendation of 17th December, 2020, should not be implemented (**KISUMU ELRC PETITION NO. E17 OF 2021** and **Cause No. E44 of 2020**) while the current suit arises from the implementation of the impugned recommendations. Although **KISUMU ELRC PETITION NO. E17 OF 2021** is a petition and the current suit is filed through a Memorandum of Claim, the substance of the suits is the same and substance is what matters in establishing *sub judice*. This was the holding of the court in the case of ***Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga***, where it held that it is not the form in which the suit is framed that determines whether it is *sub judice*; rather it is the substance of the suit and there can be no justification in having the three cases being heard parallel to each other.

25. The Respondent has submitted that a similar preliminary objection was raised in **KISUMU ELRC PETITION NO. E17 OF 2021**, and that a ruling on the same is set to be delivered on the 1st of December, 2021. There cannot be a better indication of a frivolous litigation and abuse of court process than this.

26. The Court finds and holds that this suit offends the doctrine of *sub judice*, is frivolous and an abuse of the court process. The court finds no justification and lacks jurisdiction to sustain the instant suit and is hereby dismissed with costs to the Respondents.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Otieno Ayayo present for the Claimant

Mr. Ochwal Present for the Respondent

Christine Omollo – C/A