



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1220 OF 2016**

**(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 29<sup>TH</sup> JULY 2016)**

**PAUL NDUNGU NDICHU .....CLAIMANT**

**VERSUS**

**AMOS MATHENGE KABUTHU .... 1<sup>ST</sup> RESPONDENT**

**REGISTERED TRUSTEES OF AFRICA INDEPENDENT PENTECOSTAL CHURCH OF  
AFRICA ..... 2<sup>ND</sup> RESPONDENT**

**THE CENTRAL BOARD OF THE AFRICA INDEPENDENT PENTECOSTAL CHURCH OF  
AFRICA .. INTERESTED PARTY**

**(SUING THROUGH THE EXECUTIVE OFFICIALS NAMELY THE ASSISTANT SECRETARY  
GENERAL AND SECRETARY GENERAL)**

**RULING**

1. The first Application before the Court is dated 16.6.2016 filed on 22.6.2016 where the Claimant/Applicant is seeking for orders that:

- 1. The application be certified as urgent and service be dispensed with in the first instance.***
- 2. Pending the hearing and determination of this application inter-partes, there be an order of temporary injunction, restraining the 1<sup>st</sup> Respondent from holding office of the Archbishop of Africa Independent Pentecostal Church Africa (through the 2<sup>nd</sup> Respondent herein) with immediate effect.***
- 3. Pending the hearing and determination of the suit, there be an order of temporary injunction, restraining the 1<sup>st</sup> Respondent from holding office of the Archbishop of the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein) with immediate effect.***
- 4. Pending the hearing and determination of this application inter-partes, there be an Order of mandatory injunction compelling the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein), its servants, agents, officials, trustees, employees and/or representatives or any other person acting on its behalf to retire the 1<sup>st</sup> Respondent from the position of the Archbishop of the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein)with immediate effect.***

**5. Pending the hearing and determination of the suit, there be an order of mandatory injunction compelling the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein), its servants, agents, officials, trustees, employees and/or representatives or any other person acting on its behalf to retire the 1<sup>st</sup> Respondent from the position of the Archbishop of the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein) with immediate effect.**

**6. Costs of this application.**

**7. Any other or further relief that the Honourable Court may deem fit to grant.**

2. Which Application is premised on the grounds that:

**1. The 1<sup>st</sup> Respondent is the Archbishop of the Africa Independent Pentecostal Church of Africa (the Church) appointed and ordained on 23.6.2013. His date of birth as indicated on his National Identity Card is 1946. The National Identification Card is however not particular on his exact date and month of birth.**

**2. The Honorable Court in Abdalla Hadi Rifai vs. International Donkey Protection Trust (K) (2013) eKLR determined that where the National Identification Card does not indicate the exact date of birth of a person, the same is presumed to be in the June of that year.**

**3. Article VIII (8) (ii) of the Church Constitution on appointment of the Archbishop provides:**

**“The Appointment shall automatically terminate upon the holder of the office attaining the age of seventy (70) years or such later age as may from time to time be determined by the Central Board and the Bishop Synod.”**

**4. Order 26(2) (a) of the church’s standing orders on retirement age of bishops and Archbishop provides:**

**“The retirement age of Bishops and Archbishops shall be seventy (70) years.”**

**5. Logically the 1<sup>st</sup> Respondent should have retired in June, 2016, since he has already attained the age of seventy (70) years as required by the Church constitution and standing Orders but the Church has neither issued a retirement notice to the 1<sup>st</sup> Respondent nor the 1<sup>st</sup> Respondent indicated in any way that he would retire this month.**

**6. There is even evidence that the 1<sup>st</sup> Respondent may have lied about his age in National Identification Card. Wherein his younger brother, Samuel Gitonga Kabuthu is said to have been born on 1<sup>st</sup> April, 1944 in his burial program, his brother the 2<sup>nd</sup> Respondent herein is indicated as having been born in 1946.**

**7. The Respondents are therefore in clear violation of the church constitution and standing orders thereon by failing and/or refusing and/or neglecting to retire the 1<sup>st</sup> Respondent at the age of seventy (70) as required.**

3. The Application is supported by the affidavit of Paul Ndungu Ndichu a Member of the Church, sworn on 17<sup>th</sup> June, 2016, wherein he states that the African Independent Pentecostal Church is governed by its constitution which was promulgated on 20<sup>th</sup> December, 2010, which binds all the members, officials, representatives, agents and employees.

4. He further states that as a Member of the Church Article III (D) of the Church Constitution entitles a Member who has paid the subscription fee to participate in the government and organization of the

Church.

5. It is the Applicant's contention that Article VIII (8) (ii) of the Church Constitution is to the effect that an appointment shall automatically terminate when the office holder attains the age of seventy or as may from time to time be determined by the Central Board and the Bishop Synod.

6. He states that the 1<sup>st</sup> Respondent is the Archbishop of the Church appointed and ordained on 23.6.2013 having been born in 1946 but exact date and month are not indicated on the National Identification Card. He also avers that Courts have ruled that where the exact date is not indicated on the National Identification Card, it is presumed to be in June of that year.

7. In light of the above the Applicant contends that the Archbishop automatically retired in June 2016 when it is presumed he attained the age of seventy. However, the 1<sup>st</sup> Respondent has not issued a retirement notice nor has the 1<sup>st</sup> Respondent indicated in any way that he has retired.

8. According to the Applicant it is believed that the 1<sup>st</sup> Respondent may have lied about his age as his younger brother is said to have been born in 1944 according to his burial program whereas he was born in 1946.

9. It is the contention of the Applicant that the Respondents are violating the Church Constitution and standing orders by failing to retire the 1<sup>st</sup> Respondent at 70 as required.

10. The Respondents have also filed an Application dated 24.6.2016, seeking orders that:

- 1. The Application be certified as urgent and the same be heard ex-parte in the first instance.***
- 2. Pending the hearing of this application inter-partes the Honourable Court be pleased to stay vary and/or suspend the Orders issued herein on 23.6.2016.***
- 3. Pending the hearing and determination of this suit inter-partes the Honourable Court be pleased to stay, suspend, set aside, vary and/or discharge the Orders issued herein on 22<sup>nd</sup> June, 2016, absolutely.***
- 4. There be a provision for costs.***
- 5. Any other relief that the Honourable Court may deem fit to grant.***

11. Which Application is based on the grounds that:

- 1. The Court on 22<sup>nd</sup> June, 2016, issued Interim Orders restraining the 1<sup>st</sup> Respondent from holding the office of Archbishop of the African Independent Pentecostal church.***
- 2. The Claimant herein obtained the Orders by failing to disclose material facts which would have led the Court to arrive at a different conclusion.***
- 3. The 1<sup>st</sup> Respondent being the spiritual head and symbol of unity of the African Independent Pentecostal Church of Africa is likely to be prejudiced by the said Orders.***
- 4. The Orders sought are not in line with the African Independent Church Africa Constitution.***
- 5. The Claimant has no capacity to seek for the Orders herein in line with the African Independent Pentecostal Church Constitution.***
- 6. That there is a likelihood of chaos and unrest erupting amongst approximately 3,500,000 followers of the African Independent Pentecostal Church.***

***7. If the Orders sought herein are granted no prejudice will be occasioned upon the Claimant but will ensure the ends of justice are seen as done.***

12. The Application is supported by the Affidavit of Amos Mathenge Kabuthu, the 1<sup>st</sup> Respondent herein wherein he also responds to the Claimant's Application of 16.6.2016.

13. He states that the prayers granted by the Court on 22.6.2016, are incapable of enforcement as according to Article xii (a) and (b) the Registered Trustee's major role is to act as the care taker of all immovable properties acquired by the Church and therefore have no constitutional capacity to effect any changes and that the power to remove the Archbishop vests in the Bishops synod, the Central Board and the National Delegates Congress.

14. He further states that the Claimant has no capacity to bring the suit as he has not satisfied the conditions of membership which is payment of subscription fees and further he seems to have two membership numbers 0133 cited in the instant application and 4571 cited in HCCC 41 of 2014 annexed herein as AMK3.

15. It is contended that the Claimant has not come to Court with clean hands as the issue of Membership was raised in HCCC 41 of 2014 and the Court is yet to pronounce on the same.

16. The Respondents admit that the Constitution sets the retirement age at seventy years but in the same breath gives leeway to the topmost organs of the church to extend the age limit at their discretion. That the Central Board of the African Independent Pentecostal Church of Africa deliberated on the issue of age limit on 27.5.2016, and decided to extend the 1<sup>st</sup> Respondent's retirement for the remainder of the term. They refer to the minutes of the said meeting annexed as AMK5.

17. It is contended by the Respondents that where there is a conflict between the Standing Orders and the Constitutional provisions then the Constitution shall prevail.

18. The Respondent is also of the view that the authority cited by the Applicant in support of the allegation that the Respondent ought to have retired in June has been misconstrued and the time cited in the said authority was peculiar to the circumstances of that case and it was not meant to be the time to be generally adopted in all cases.

19. The 1<sup>st</sup> Respondent states that he was under no obligation to issue a retirement notice as the Central Board had already extended his term.

20. In response to the allegation that the 1<sup>st</sup> Respondent seems to have lied about his age, he states that during the time of issue of his national identity card there was poor record keeping and it was difficult to ascertain one's date of birth. He states that he recalls that his younger brother was born two years after him and a burial program which the Claimant is relying on to prove the Brother's age cannot be the basis of determining one's age.

21. The 1<sup>st</sup> Respondent states that there has not been any violation of the Constitution as the Central Board observed all relevant protocol in extending his age limit to the end of his term. He states that the Claimant's application is brought in bad faith as he sought similar Orders in HCCC 14 of 2014 but the Court refused to grant him the same.

22. The 1<sup>st</sup> Respondent urges the Court to set aside the interlocutory Orders granted pending the hearing and determination of the Application inter partes.

23. The 2<sup>nd</sup> Respondent filed a Replying affidavit in which they state that they are wrongly enjoined in the suit as their work according to the Constitution of the church is to act as custodian of the Church's properties and investments and have no power to cause retirement of the 1<sup>st</sup> Respondent as such the Application must fail as the Orders sought are incapable of enforcement.

24. The Interested Party has also opposed the Claimant's Application of 16.6.2016 and has filed a replying affidavit sworn by one Bernard Maina Mwangi a Member of Africa Independent Pentecostal Church Africa (AIPCA) wherein he states that the Interested Party is the topmost decision making organ of established under AIPCA Constitution.

25. He states that the import of the Orders granted on 22.6.2016 was that the 1<sup>st</sup> Respondent was no longer in office which would lead to a power vacuum.

26. He states that the mandate of the Interested Party is policy formulation, disciplinary action and determining the term of the Archbishop. The Interested Party and the Bishops Synod are empowered by the Church's constitution and standing Orders to extend the retirement age and as such retirement age at 70 is not mandatory. He goes on to state that on 27.5.2016, the Board convened a meeting where it was resolved that the 1<sup>st</sup> Respondent continues to hold office for the remainder of his term.

27. They also claim that the Orders sought have far reaching implications on the church and its operations and no prejudice will be suffered by the Claimant if they are not granted.

28. The third application is dated 6.7.2016 seeking for Orders that:

- 1. The Application be certified as urgent and service be dispensed with in the first instance.***
- 2. This Honourable Court be pleased to set aside the Orders issued by Hon. Justice Nderi Nduma on 1<sup>st</sup> July, 2016, pending the hearing and determination of this application inter partes.***
- 3. Pending the hearing and determination of this application inter partes, there be an order of temporary injunction, restraining the 1<sup>st</sup> Respondent from holding office of the Archbishop of the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein) with immediate effect.***
- 4. Pending the hearing and determination of this application inter partes, there be an order of Mandatory Injunction compelling the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein), its servants, agents, officials, trustees, employees and/or representatives or any other person acting on its behalf to retire the 1<sup>st</sup> Respondent from the position of the Archbishop of the Africa Independent Pentecostal Church of Africa (through the 2<sup>nd</sup> Respondent herein) with effect.***
- 5. Costs of this application.***
- 6. Any other or further relief that this Honourable Court may deem fit to grant.***

29. Which Application is premised on the grounds that:

- 1. The duty judge Hon. Justice Mathews Nderi Nduma, on 1<sup>st</sup> July, 2016, vacated, discharged, and/or set aside the Orders granted by the Honourable Lady Justice Wasilwa on 22.6.2016, pending the hearing of the application inter-partes on 7<sup>th</sup> July, 2016.***
- 2. The Honourable Judge vacated the orders based on a misrepresentation by the 1<sup>st</sup> Respondent that the Claimant was in the process of recruiting an Acting Archbishop of the Africa Independent Pentecostal Church (the church), a position which is allegedly inexistent in the church constitution. The 1<sup>st</sup> respondent however did not adduce any concrete evidence to back his assertions. Furthermore, the issue of whether an acting Archbishop should be appointed or not is extraneous to the matter before hand.***
- 3. Be as it may, the 1<sup>st</sup> Respondent does not deny that he has attained the mandatory retirement***

*age of seventy years, which the same constitution mandates that he should retire automatically.*

**4. Whereas the 1<sup>st</sup> Respondent admits lacking capacity to hold the position of the Archbishop of the Church, setting aside of the Orders granted by the Honourable lady Justice Wasilwa on 22.6.2016 by Hon. Justice Mathews Nderi Nduma on 1.7.2016 in effect allows the 1<sup>st</sup> Respondent to hold office of the Archbishop of the church illegally.**

**5. Further, the Order issued by Hon. Justice Mathews Nderi Nduma on 1.7.2016 in effect allows the 1<sup>st</sup> Respondent to benefit from an illegality.**

**6. The hearing of the Application was set down on 7.7.2016, whereas the said date shall be a public holiday.**

30. The Application is supported by the Affidavit of Paul Ndungu Ndichu sworn on 6.7.2016, wherein he states that the Honourable Judge vacated the Orders based on a misrepresentation by the 1<sup>st</sup> Respondent that he Claimant was in the process of recruiting an Acting Archbishop of the church which position is inexistent in the church constitution.

31. He further contends that the setting aside of the orders of Honourable Judge Wasilwa allows the 1<sup>st</sup> Respondent to be in office illegally as he already admits that he has attained the age of 70. He prays for the Application to be allowed as prayed.

32. It is noted that the Claimant did not reply to any of the Applications by the Respondents.

33. The Applications were disposed of by way of written submissions. The Claimant has set out the following issues for determination:

**1. Whether the 1<sup>st</sup> Respondent herein has indeed attained the retirement age of seventy (70) years.**

**2. Whether the 1<sup>st</sup> Respondent is illegally in office and should be retired compulsorily.**

34. On the first issue he states that the 1<sup>st</sup> Respondent's date of birth according to his National Identification Card reads as 1946 but is not particular to the exact date and month of birth. He states that where the National Identification Card does not indicate the exact date of birth of a person, the same is presumed to be in June of that year. He relies on the case of **Abdalla Hadi Rifai Vs International Donkey Protection Trust (K) (2013) eKLR** where it was held:

***“That the one who alleges when he was born has the onus of proving the date of birth. It is however understandable that many births were not recorded during the colonial era in Kenya when the Claimant was born... The Court is inclined to determine this matter on the basis of equity in the absence of concrete evidence as to the actual date of birth. The Respondent wishes the Claimant to retire with effect from 1<sup>st</sup> January, 2013, whereas the Claimant wishes to retire with effect from 31<sup>st</sup> December, 2013. The Court on the basis of equity and fair play sets the retirement age for the Claimant to be with effect from 31<sup>st</sup> June, 2013 and he should vacate the company house within a month from the date of this judgment.”***

35. The Claimant maintains that the 1<sup>st</sup> Respondent has attained retirement age of seventy years as we are in the month of July and according to the above cited case law the Court should presume that he turned 70 in the month of June. Further that according to the funeral program of his younger brother who was born in 1944 it is to be deduced that the 1<sup>st</sup> Respondent was born earlier than that and as such he is past retirement age.

36. On the 2<sup>nd</sup> issue the Claimant submits that the church should be guided by its own Constitution

which determines the scope of its existence and activities, prescribes the powers of the various officials and demarcates such powers not only those of the individual officials but those of the structural organs of an association. In the Church's Constitution Article VIII (8) (ii) provides that an appointment shall automatically terminate upon the office holder attaining the age of 70 or at such later as may from time to time be determined by the Central Board and the Bishop Synod.

37. The Claimant submits that the Central Board and the Bishop's Synod have not determined a new retirement age and as such the 1<sup>st</sup> Respondent is in office illegally. He states that the 1<sup>st</sup> Respondent should not be allowed to benefit from an illegality and they rely on the case of **Omar Salim Swedi Vs K-Rep Bank Limited & Another (2008)** to support this position.

38. He prays for the prayers sought to be allowed.

39. The Respondents have broken down their issues as:

***1. Whether the 1<sup>st</sup> Respondent is entitled to continue holding the office of the Archbishop of the Africa Independent Pentecostal Church of Africa (AIPCA).***

***2. Whether the 2<sup>nd</sup> Respondent had the capacity to enforce the retirement age of the Archbishop of the Africa Independent Pentecostal Church of Africa (AIPCA).***

***3. Whether the Orders sought are meritorious and/or enforceable.***

***4. Whether the Claimant has the relevant capacity to institute this suit.***

40. On the 1<sup>st</sup> issue the Respondents submit that Article VIII (8) (II) of the Church's Constitution provides:

***“The appointment shall automatically terminate upon the holder of the office attaining the age of seventy (70) years or such later age as may from time to time be determined by the Central Board and the Bishop Synod.”***

41. The Respondent submits that the Claimant has interpreted the above provision to his own convenience. They state that the top administrative organ of the Church held a meeting on 27/5/2016 and it was resolved that the 1<sup>st</sup> Respondent to continue in office upto June 2018. The minutes are annexed to the affidavit of Eliud Njua Juma sworn on 22.6.2016 as Exhibit “ENJ4”. The Respondents submit that they have complied with the provisions of the constitution and as such the 1<sup>st</sup> Respondent is in office legally.

42. On the 2<sup>nd</sup> issue they submit that the Orders sought are not capable of enforcement due to the reason that AIPCA Constitution Chapter IX Article XII(A) thereof sets out the role of trustees as property, investments and securities managers and as such are not in a position to comply with orders of enforcing vacation of the 1<sup>st</sup> Respondent from office.

43. On the third issue they state that the Claimant has not satisfied the criteria set out in the case of **Giella vs. Cassman Brown (1973) EA 358** for the granting of injunctive orders and as such the Application should fail.

44. On their last issue they submit that the Claimant filed this claim on the basis of being a member of AIPCA vide membership no. 4575. The Respondents attached evidence to show that the Claimant has another membership number without any explanation for this peculiarity. The allegation that he has paid his membership fee is unsupported and as such it should be taken that his membership status is doubtful and he therefore lacks capacity to bring this suit. The Respondents submit that the application should be dismissed with costs.

45. The Interested Party in their submissions have raised four issues for determination:

- 1. Who is responsible for appointment and/or retirement of the holder of the office of the Archbishop.**
- 2. Whether the 1<sup>st</sup> Respondent should retire or vacate the office of the Archbishop.**
- 3. What age should the 1<sup>st</sup> Respondent vacate or retire from the office of the Archbishop.**
- 4. What reliefs should issue.**

46. On the first issue they submit that the 1<sup>st</sup> Respondent was elected by the National Delegates Committee and Central Board Executive officials. The Constitution provides that appointment lapses upon attainment of the age of 70 years or such later age as may from time to time be determined by the Central Board and the Bishop Synod. The Constitution also does not set out the procedure for retirement and the calendar for retirement is determined by the Central Board and Bishops Synod.

47. On the second issue they submit that the 1<sup>st</sup> Respondent has indeed attained the age of seventy but the Constitutional provision on retirement from office is clear and qualifies the retirement age of seventy by allowing the topmost organs of the church to extend the retirement age.

48. They therefore submit that the allegation that the 1<sup>st</sup> Respondent ought to retire is premised on bad faith and bent on causing the 1<sup>st</sup> Respondent to vacate office whereas the constitution is clear on retirement age.

49. On the third issue they submit that the Claimant is misinterpreting Article VIII (8) (D) (I) of AIPCA Constitution and giving it a restrictive meaning which is contrary to the spirit of the said constitution. The Central Board and the Bishops Synod sat on 27.5.2016 and extended the 1<sup>st</sup> Respondent's retirement age for the remainder of his term which is allowed under the said constitution.

50. They therefore submit that the application is meant to vacate the 1<sup>st</sup> Respondent from office without lawful cause and should therefore be dismissed.

51. On the fourth issue the Interested Party submits that the Claimant has not demonstrated a prima facie case that would necessitate the granting of the Orders sought in the application dated 16.6.2016 and urge the Court not to grant the orders sought.

52. The Claimant seeks a mandatory injunction and the Courts have held that the effect of such an Order would be to issue a remedy that would ordinarily be available at trial at an interlocutory stage. It has been held that the Court should exercise caution and restraint prior to issuance of such an Order.

53. It is also requisite for the Court to observe high degree of assurance since it could occasion greater injustice. They cite the case of **Kenya Breweries Ltd vs. Washington Okeyo (2003) EA 209** where it was held that the test of granting a mandatory injunction is higher than of granting a temporary injunction.

54. They submit that the 1<sup>st</sup> Respondent has raised pertinent issues and questions that would require protection. The office the 1<sup>st</sup> Respondent holds is key in the church and if the orders sought by the Claimant are granted it will affect the church's operations locally and internationally. They pray that the Claimant's application be disallowed.

55. Having considered submissions of all parties, I will determine the 3 applications jointly as they arise and relate to the issue of the 2<sup>nd</sup> Respondent being in office as Arch Bishop of the AIPCA.

56. I will determine the following issues:

- ***Whether the Applicants in all the applications have established a prima facie case with a probability of success.***

57. In determining the above issue, I will consider *Locus Standi* of the Claimant Applicant, the Constitution of the AIPCA, the role of the Interested Party and 2<sup>nd</sup> Respondent in retirement of 1<sup>st</sup> Respondent.

58. In relation to the Claimants, he filed this Claim/Application indicating that he is a member of the AIPCA by virtue of Article III of the Church Constitution and holds a Membership Card No. 4511. He attached his Membership Card as Appendix PNN 2. He avers that being a registered member of the Church he is entitled to participate in the Church's governance issues.

59. Article III of the AIPCA Constitution provides as follows:

***A. Membership shall be open to everyone over 18 years with payment of the prescribed entrance and membership fees subject to application form being approved by the Local Church Committee /Pastor/Chairman or somebody of high rank, provided they believe and accept the teaching of African Independent Pentecostal Church of Africa as laid down in the Holy Scriptures and the African Independent Pentecostal Church of Africa Liturgy.***

***B. Anybody who attains the age of Eighteen (18) years and has paid his/her entrance and membership fee shall be regarded as a Member of the Church.***

***C. ....***

***D. Every Member shall pay the prescribed fee to the Church that he/she is associated with. A Member who has not paid his subscription fees as aforesaid shall not be entitled to participate in the government and organization of the church although he/she may attend the church services but not take part in other ceremonies of worship.***

***E. ....***

***F. ....***

***G. A register of all Members shall be kept by the Local Church.....”.***

60. In case of the Claimant he avers he has fulfilled the above provisions.

61. The Respondents on their part denied that he had paid his subscriptions and so is not entitled to participate in the church's governance issues.

62. The Respondents also stated that the Claimant holds 2 membership cards No. 4575 and 4571 and so this makes his membership suspect. The No. 4571 is said to have been cited in High Court Civil Suit No. **41/2014 (Paul Ndungu Ndichu vs. Amos Mathenge Kabuthu and Another** at paragraph 7 of the supporting affidavit. It is their contention that no explanation has been tendered to explain why he has 2 membership numbers.

63. That position notwithstanding from the Constitution of the AIPCA, what proves membership is a register of members which is in the custody of the AIPCA as per Clause (G) above.

64. The Respondents didn't exhibit any register to show that the Claimant is not a member of their Church nor not a paid up member. I therefore find that his submission that he is a member of the church by whichever number is established and so he has locus to participate in church governance issues.

65. On the 2<sup>nd</sup> issue, the constitution of the Interested Party is clear on retirement age of the Archbishop. Under Article VIII(8) (II) of the Church's Constitution:

***“The appointment shall automatically terminate upon the holder of the office attaining the age of 70 years or such later age as may from time to time be determined by the Central Board and the Bishop Synod”.***

66. My reading of this provision is that one can only serve up to the age of 70 unless the Central Board and the Bishop Synod determine otherwise. This age shall however be predetermined in advance and is not subject to change to fit a particular sitting Archbishop.

67. This also means that once determined that age remains unless changed in general terms to for instance state that the retirement age will henceforth be 72 years.

68. In the case of the 1<sup>st</sup> Respondent, it is not in doubt that he has attained the age of 70 years as per his Identify Card and should therefore retire. There is also no indication that the Church Central Board or Bishop Synod has hence renewed the retirement age of the Archbishop.

69. Lastly the Respondents have argued that the order of the Court is unenforceable as it is directed at the 2<sup>nd</sup> Respondent to perform an act that they are incapable of doing.

70. The Respondents have argued that the appointment of the Archbishop is governed by provisions of Clause 11 and that the 2<sup>nd</sup> Respondent is not responsible for this appointment.

71. Clause 8 of Interested Party's Constitution provide as follows:

***A. There shall be only one Archbishop the Spiritual Head of AIPCA Church who shall also be the Bishop of the Archdiocese of Nairobi.***

***B. The Archbishop shall be elected by a national delegate congress consisting a Bishop, a Layman and a Laywoman from every Diocese and the Central Board Executive Officials. No member shall have two roles.***

***C. The Archbishop shall be elected out of the number of those who are at the time of election Diocesan Bishops of AIPCA Church. Vacant positions of Diocesan Bishop shall not hold election of the Archbishop position since there will be 2 delegates from those Dioceses.***

***D. Subject as is hereinafter provided, the Appointment of the Archbishop shall be for a maximum of two (2) terms of five (5) years .....***

72. The orders of this Court made on 22.6.2016 directed that 2<sup>nd</sup> Respondent should ensure that 1<sup>st</sup> Respondent does not hold office of Archbishop of AIPCA. 2<sup>nd</sup> Respondent are registered Trustees of the AIPCA who however from the Constitution do not have any mandate to elect the Archbishop of this church. That order cannot therefore continue to exist.

73. Given the analysis of the submissions, I do find that the Claimant has a prima facie case with a probability of success. This is because he has locus and the retirement age of the 1<sup>st</sup> Respondent is already a foregone issue. The modality of choosing another Archbishop should however be handled carefully given the nature of the entity the Court is dealing with being a Church.

74. I will therefore vacate my interim orders of 22.6.2016 and also the orders given by Hon. J. Nderi on 1.7.2016. I make an order that the Central Board of the AIPCA do put in place mechanism to elect a new Archbishop of the AIPCA within 60 days.

75. In the meantime, the 1<sup>st</sup> Respondent will be allowed to hold fort pending the appointment of the new

Archbishop which appointment should be in place within 60 days from today.

76. This is premised on the fact that society abhors a vacuum and this Church can only have one Archbishop. There is also no position for acting Bishop. These are the orders of this Court.

**Read in open Court this 29<sup>th</sup> day of July, 2016.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Makokha for Claimant Applicant – Present

Kuria for 2<sup>nd</sup> Respondents – Present

Kuria for Respondents and holding brief for Mathenge for interested Party – Present