



**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 27<sup>th</sup> October 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 Notice of Motion Application before Court is dated 11.10.2016 brought under Orders 40, and Order 51 Rules 1 and 4 of the Civil Procedure Rules 2010, Section 12 (3) (ii) and (viii) of the Industrial Court Act, Rule 27 (1) (c) (a,b & g) of the Industrial Court Procedure Rules, 2010, Articles 2 and 23(3)(b) of the Constitution of Kenya 2010, sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, and all enabling provisions of the law where the Claimant/Applicant seeks the following orders:

***1. This Honourable Court be pleased and order that the retired Archbishop of the Africa Independent Pentecostal Church of Africa (AIPCA), the 1 Respondent herein, vacates office with immediate effect and the Bishop Synod Chairman, Bishop Phillip Kubai, take over the functions of the Archbishop and spiritual head immediately for a period of one hundred and thirty five (135) days after which the National delegates shall elect the spiritual leader pursuant to the mandatory requirement of Chapter IV Article VI (H) (i) of the AIPCA constitution pending the hearing and determination of this application interpartes.***

***2. This Honourable Court be pleased and order that the elections of the Archbishop of the AIPCA be conducted within fourteen (14) days upon expiry of the one hundred and thirty five (135) days.***

**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 and the interested party, their employees, servants, cronies and/or agents or anybody working under or for them from interfering with the management and/or leadership of the church and subsequent election process of the new Archbishop and spiritual head by intimidating, bribing, threatening, misleading, blocking the entrance of the church headquarters or in any other way harassing voters or potential voters and/or aspirants or candidates or in any way frustrating the conduct of elections for the new archbishop of the AIPCA.**

**4. In the Alternative, this Honourable Court be pleased and order that the elections of the Archbishop of the AIPCA be conducted on 28.10.2016 or any other date that the court deems fit under the supervision of the Registrar of Societies or his/her representative and in the presence and protection of the police.**

**5. Costs of this application.**

**6. Any other or further relief that this Honourable Court may deem fit to grant.**

2. The Application is premised on the grounds that:

**1. In a Ruling delivered in open Court by Hon. Lady Justice Hellen Wasilwa on 29.7.2016, the Honourable Court made a finding that the 1<sup>st</sup> Respondent had attained the mandatory retirement age for a holder of the office of the Archbishop.**

**2. The Court further allowed the 1<sup>st</sup> Respondent to hold office of the archbishop for not more than 60 days pending the election and appointment of the new archbishop.**

**3. The 1<sup>st</sup> Respondent and interested party, their employees, servants, cronies and/or agents or anybody working under or for them have deliberately frustrated the conduct of the said election of the new archbishop blocking the eligible voters and/or delegates/officials and the candidates/aspirants from accessing the church headquarters where the elections were to be conducted as particularized in the Further Affidavit sworn by Simon Peter Mwangi on 3<sup>rd</sup> October, 2016.**

**4. The 1<sup>st</sup> Respondent and the interested party, their employees, servants, cronies and/or agents or anybody working under or for them in a total and fundamental abuse of the Court process have also filed JR Misc. Appl No. 408 of 2016 and JR Misc App. No. 451 of 2016 with the sole purpose to frustrate the said elections.**

**5. In JR Misc App No 408 of 2016 for instance, the Applicants who this Court pronounced as non-delegates and therefore ineligible to vote in its ruling delivered on 1<sup>st</sup> September, 2016, have moved the Court seeking to compel the registrar of societies to register them as officials of the church and eligible to vote. This is a gross abuse of the Court process since the High Court has an equal status with this Court; the applicants have moved the High Court to appeal the decision and finding of this Court through the back door.**

**6. In JR Misc App No 451 of 2016 the applicants misled the Court that there had been issued a short notice for the election slated for 27.9.2016, to the General Secretary whereas the General Secretary is a party to these proceedings and was well aware of the elections since the same was ordered by this Honourable Court.**

**7. Chapter IV Article VI (H) (i) of the Africa Independent Pentecostal Church of Africa Constitution provides:**

**“in case of death/retirement/resignation of the head of the church, the Bishop Synod Chairman**

***shall take over his functions immediately for a period of one hundred and thirty five (135) days after which the National Delegates elect the spiritual leader.”***

***8. Bishop Phillip Kubai was elected as the chairman of the Bishop Synod by the bishops in terms of the provisions of Chapter V Article VII (3) (b) of the AIPCA Constitution.***

***9. As mandatorily required under the provisions of Chapter IV of Article VI (H) (I) of the AIPCA constitution therefore, Mr. Kubai Phillip should be allowed to hold office of the archbishop of the church for a period of one hundred and thirty five (135) days and the elections for the new archbishop be held thereafter.***

***10. In the Alternative, the Honourable Court be pleased and order that the elections of the Archbishop of the AIPCA be conducted on 28.10.2016 or any other date that the Court deems fit under the supervision of the Registrar of Societies or his/her representative and in presence and protection of the police.***

3. The Application is supported by the affidavit of Paul Ndungu Ndichu the Claimant herein wherein he restates the grounds on the face of the application and prays for the prayers sought to be granted in the interest of justice.

4. The Application is opposed by both Respondents and the interested party. The 1<sup>st</sup> Respondent in his Replying Affidavit states that the Applicant is misleading the Court and wants to portray him as a person bent on disobeying Court Orders.

5. The 1<sup>st</sup> Respondent denies frustrating the process of recruiting a new archbishop and states that the process is managed by the Central Board who are party to the suit and it is imperative that a progress report is obtained for consideration.

6. He states that the Applicant intends to fuel speculation that there is interference with the process of discussing his successor as no evidence in support of those aspersions has been produced. He denies having any knowledge of the messages alleged to have been crafted by him.

7. The 1<sup>st</sup> Respondent states that he is not a party to the proceedings the Applicant refers to in his application namely JR No. 408 of 2016 and in JR 451 of 2016 where the Court gave orders staying the Registrar of Societies from registering the successor to his seat.

8. It is the 1<sup>st</sup> Respondent's contention that the Claimants allegation that the chairman of the Bishop Synod is one Bishop Phillip Kubai while in the records of the AIPCA the chairman of the Bishop Synod is one Bishop Suleiman Kimani. Any allegations of interference have not been substantiated by evidence and are mere propaganda.

9. He further contends that the Central board has to deliberate on the provisions of Chapter VI (Article 23) on the establishment of retirement package for the retiring officer which process he believes is ongoing. He prays for the Court to disregard the information fronted by the applicant as it may lead to collapse of the church.

10. The 2<sup>nd</sup> Respondent has also filed a Replying Affidavit through their assistant General Secretary one Bernard Maina Mwangi, wherein they deny the *locus standi* of the interested party and his authority to make statements on behalf of the board.

11. The 2<sup>nd</sup> Respondent further denies denying access to members to vote for their desired leader and state that such averments have been made by a disgruntled person in his personal capacity and not on behalf of others. They also deny the short messages published in paragraph 4 of the Applicant's affidavit as the recipient if any is undisclosed.

12. They further state that there is a constitutional procedure for filling the office of the Archbishop which must be followed. That they issued a notice of a national delegates' congress which was held on 5.8.16 the Church's headquarters and 37 members attended.

13. They further contend that another meeting on 9.8.2016 another meeting was held where it was resolved that since there was an application in Court opposing the composition of the Board, they should await the outcome of the said Application.

14. In addition to the above noted meetings they allege that on 5.9.2016, another meeting was called but there was no quorum and the meeting was rescheduled to another date with ample notice being given.

15. The Board allegedly met on 12.9.2016 to discuss succession of the 1<sup>st</sup> Respondent. That at the said meeting it was noted that some members had filed a fresh suit JR 408 of 2016 where they had obtained orders against the Board and granted leave to commence proceedings as such it was agreed that they needed to await the outcome of the case to avoid being in contempt of Court.

16. On 28.9.2016, the Board met again wherein the members were informed that there was another Order of the Court in JR 451 of 2016 which injuncted the filling up of the position of Archbishop.

17. That in addition to all of the above setbacks the 2<sup>nd</sup> Respondent has faced in succession of the 1<sup>st</sup> Respondent they are of the view that the sitting archbishop cannot vacate office and leave a vacuum in the leadership.

18. The interested party filed grounds of opposition opposing the Claimant's application wherein they state that the applicant does not have *locus standi* to speak on behalf of the Board or any of the Church's organs as he holds no position whatsoever. They pray for the application to be dismissed with costs.

19. Having considered the submissions of all the parties herein, there are 2 issues for determination:

***1. What is the Constitutional provision in regard to the filing up of the AIPCA Church Archbishop?***

***2. What is the remedy in view of the seeming wrangles and misunderstandings in the AIPCA Church?***

20. The 1<sup>st</sup> issue was discussed at length in my Ruling dated 29<sup>th</sup> July 2016. I gave directions that in order to avoid a vacuum in the church leadership, the 1<sup>st</sup> Respondent who has reached retirement age should hold fort for 60 days in the period during which elections for a new Archbishop was to be held.

21. I restated Article VIII (8)(1) of the AIPCA's Constitution which states that:

***"The appointment shall automatically terminate after the holder of the office (Archbishop) 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".***

22. This position is couched in mandatory terms and it is apparent that the Archbishop cannot be in office after attaining the age of 70 years. The elections were to be held and a report on the status made to Court on 29.9.2016. This report has not been presented to Court since and the information presented to Court is that no elections have since been conducted.

23. Instead application after application seems to be filed in different Courts culminating in a process which is an abuse of the Court process and which is bent to frustrating the implementation of the Court's orders in the Ruling of July 2016.

24. In the current application, the Applicants are imploring this Court to enforce Chapter 4 Article 6(h)

(1) of the AIPCA's Constitution which provide in mandatory terms that in case of death, retirement or resignation of the head of the church, the Chairman of the Bishop Synod shall take over the functions immediately for 135 days after which the national delegates appoint the Spiritual Leader.

25. They aver that one Bishop Philip Kubai is the Chairman of Bishop's Synod and should henceforth take over the leadership of the church pending the elections. They annexed Appendix PNN-6 – a resolution of all Bishops who declared Philip Kubai as their Chairman. The resolution is signed by 17 Bishops but the date of the signing is not clear but it is line 20/7/2016.

26. The Respondents and Interested Party on their part had indicated that Philip Kubai was removed and they annexed minutes of a meeting chaired by Samuel Mburu Kimani.

27. The Applicants aver that in the Court's Ruling of 1.9.2016 the Court made a finding that Samuel Mburu Kimani was not a proper official of the Church, and so any meeting chaired by Samuel Mburu Kimani was annuity and not conducted properly.

28. The Respondents on their part aver that the Chairman of the Bishops Synod is one Bishop Suleiman Kimani as per Annex AMK 3- Paragraph 10 Minute 5. These minutes are however suspect as they have not been confirmed in any sitting and are only signed by one person the Secretary General.

29. The other endorsement however is signed by 17 Bishops who seem to now have disowned the minutes of November 2015 confirming the Bishops Synod. Infact the list is signed by the same Bishops including Suleiman Kimani who also signed the later list ordaining Philip Kubai as the Chairman of the Bishops Synod.

30. It is however apparent that the wrangles in this church can only be resolved if proper free and fair election are held to elect a new Archbishop. I had ordered that election be conducted and that is still this Court's position.

31. Since however the current Archbishop has attained retirement age, I will now order that he vacates office and Chairman of Bishop Synod Philip Kubai takes over as Spiritual Head for at Most 135 days.

32. In the next 2 months however the parties must conduct election to elect a new Archbishop under the supervision of Registrar of Societies and report back to Court at the expiry of that period.

33. Costs in the cause.

### **Further Order**

The Police (OCS Jogoo Road Police Station) to provide security.

Mention on **16.1.2017**.

Read in open Court this 27<sup>th</sup> day of October, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Makokha for Claimant and holding brief Kirimi for 2<sup>nd</sup> Respondent – Present

No appearance for other Parties