



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2054 OF 2013

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 26TH SEPTEMBER 2016)

BISHOP BAKARI KEA.....CLAIMANT

VERSUS

THE EVANGELICAL LUTHERAN CHURCH IN KENYA (ELCK) THROUGH ARCH-BISHOP

RT. REV. DR WALTER OBARE OMWANZA.....1ST DEFENDANT

REV. BENJAMIN LEMOSI2ND DEFENDANT

JOSEPH MUCHIRI3RD DEFENDANT

RULING

[1] Before the Court is the Respondent's Application dated 28.7.2014 brought under Section 3, 12 and 13 of the Industrial Court Act, 2011, Rules 2, 5(2), 10(5), 14(3), 14(4), 14(5) and 16(5) of the Industrial Court (Procedure) Rules, 2007, Sections 1A, 1B and 3A of the Civil Procedure Act, CAP 21 of the Laws of Kenya and Order 1 Rule 10(2), Order 2 Rule 15(1) paragraphs (b), (c) and (d), Order 4 Rule 1 sub-rule (1) (f), Order 4 Rules 5 of the Civil Procedure Rules, 2010.

[2] The Respondents seek for Orders that:

(1) The plaint and subsequent pleadings herein be struck out.

(2) The entire proceedings herein be terminated forthwith.

(3) In the alternative and without prejudice to the foregoing, the names of Arch-Bishop Rt. Rev. Dr. Walter Obare Omwanza, Rev. Benjamin Lemosi and Joseph Muchiri be struck out of and/or removed from this case forthwith.

(4) The Claimant do pay the Respondent's costs of this application and costs of the entire suit herein.

[3] The Application is premised on the grounds that:

(a) This Honourable Court has the power to strike out pleadings and/or terminate proceedings at any stage of the proceedings.

(b) There are no proper proceedings before this Honourable Court for the following reasons:

(i) There is no proper Claimant/Plaintiff to these proceedings as the plaintiff does not disclose a party capable of instituting and/or maintaining these proceedings.

(ii) The Claimant has no locus standi to maintain the proceedings herein.

(iii) There is no proper Defendant/Respondent to these proceedings as the plaintiff does not disclose a party or parties capable of being sued in these proceedings.

(iv) The Defendants/Respondents have no capacity to be sued in the capacity in which they have been named as Defendants/Respondents.

(c) The Notice of Motion dated 10th June 2014 is bad in law, null and void and is an abuse of Court process.

(d) This Honourable Court, being the Industrial Court of Kenya, does not have the jurisdiction to entertain, preside over, hear and/or determine contempt of Court proceedings and/or punish for contempt of Court other than contempt on the face of the Court.

(e) The Notice of Motion dated 10th June 2014 contains a serious misjoinder of prayers that renders it incurably defective and it may prejudice, embarrass or delay the fair trial of the action.

(f) The filing of a multiplicity of causes and the opening of a multiplicity of files leading to a multiplicity of court orders have occasioned massive irregularities and confusion in these entire proceedings.

(g) The multiplicity of causes and/or files are Misc. Cause No. 47 of 2014 and Misc. Cause No. 52 of 2014 in addition to the original cause herein being Cause No. 2054 of 2013. All the three causes have been filed in this Honourable Court and they involve the same parties.

(h) The multiplicity of causes files and court orders aforesaid have embarrassed and prejudiced the Respondents in their defence and is likely to continue to prejudice, embarrass or delay the fair trial of the action.

(i) The entire processes, proceedings and/or orders in the Industrial Court of Kenya at Nairobi Miscellaneous Application No. 47 of 2014 between Bishop Bakari Kea and Rt. Rev. Walter Obare Omwanza and 2 others are unlawful, illegal, irregular, incurably defective, null and void.

(j) The entire processes, proceedings and/or orders in the Industrial Court of Kenya at Nairobi Miscellaneous Application No. 52 of 2014 between Bishop Bakari Kea and Rt. Rev. Walter Obare Omwanza and 2 others are unlawful, illegal, irregular, incurably defective, null and void.

(k) The entire processes, proceedings and/or orders in the Industrial Court of Kenya at Nairobi Cause No. 2054 of 2013 between Bishop Bakari Kea and Rt. Rev. Walter Obare Omwanza and 2 others are unlawful, illegal, irregular, incurably defective, null and void.

(l) The substratum of the suit/claim herein is already lost and/or overtaken by events as the Claimant has already been removed from the office of Bishop of Central Diocese and a new Bishop has already assumed office.

(m) It is not within the powers of the three named church officials being Rt. Rev. Walter Obare

Omwanza, Rev. Benjamin Lemosi and Joseph Muchiri to reinstate the Claimant to the Claimant's former position of Bishop for the following reasons:

- (i) The decision to defrock the Claimant was made by an official organ of the Evangelical Lutheran Church in Kenya, namely, the Executive Committee which is not a party to these proceedings and will not be bound by the orders issued herein.**
- (ii) Subsequently, the ultimate decision to remove the Claimant from the office of Bishop was made by the General Meeting of the Central Diocese of the Evangelical Lutheran Church in Kenya.**
- (iii) The said General Meeting is also not a party to these proceedings and will not be bound by the orders issued herein.**
- (iv) The 1st and 3rd Respondents are not even members of the General Meeting of the Central Diocese of the ELCK and they did not even attend that meeting.**
- (v) It would be unlawful and irregular to nullify the outcome of the meeting at which the Claimant was removed from the office of Bishop of Central Diocese when the General Meeting of the Central Diocese of the Evangelical Lutheran Church in Kenya that made that decision is not even a party to these proceedings.**
- (vi) Having been defrocked as a Pastor of the ELCK, the Claimant is no longer a Pastor of the ELCK and his defrockment is final and theologically irreversible. In the circumstances, the Claimant cannot theologically be readmitted as a pastor of the ELCK and it is impossible for him to regain his former position of Bishop as the Constitution of the ELCK requires that one can only be a Bishop if he is also a Pastor.**
- (vii) The Claimant has not demonstrated that it is within the powers of the aforesaid three named church officials to reinstate him to the position of the Bishop of Central Diocese.**
- (n) The proceedings herein and/or the enforcement of certain orders that may flow from these proceedings may occasion unjustifiable hardships, disorder and absurdities in the operations of the Central Diocese of the ELCK and the entire Evangelical Lutheran Church of Kenya Countrywide and may be impossible to implement/enforce.**
- (o) This Honourable Court must avoid issuing orders in vain or orders that are impossible to implement or whose implementation may occasion unjustifiable hardships and absurdities.**
- (p) Courts of law avoid close interference in the domestic matters of self-governing societies and often leave such societies to self-govern in accordance with their domestic constitutions.**
- (q) This Honourable Court should avoid imposing the Claimant as the Bishop upon the members of the Central Diocese of the Evangelical Lutheran Church in Kenya.**
- (r) The orders sought by the application have the potential of frustrating and denying the members of the Central Diocese their constitutional right and freedom to remove from office a Bishop who has breached the calling of his office and have in office a Bishop of their choice.**
- (s) The plaint herein has offended the rules of pleadings.**
- (t) The proceedings herein are incompetent, bad in law and without merit.**
- (u) The proceedings herein are a total abuse of the Court process.**
- (v) The suit and subsequent proceedings herein are mischievous, scandalous, frivolous and**

vexations.

(w) It is in the interest of justice that the entire proceedings herein should be terminated

(x) Any other grounds to be advanced at the hearing of the application.

[4] The Application is supported by the Affidavit of Rev. Benjamin Lemosi, wherein he states, that, the Claimant has filed up to three causes in this Court involving the same parties, namely Misc. Cause No. 47 of 2014 and Misc. Cause No. 52 of 2014 and the instant Cause No. 2054 of 2013.

[5] That out of the said Causes a multiplicity of Court Orders have flowed causing massive irregularities and confusion in these entire proceedings which have allegedly prejudiced the Respondents in their defence and is likely to continue to prejudice, embarrass or delay the fair trial of the action.

[6] They further state that the substratum of the Claimant's suit is overtaken by events as the Claimant has already been removed from office of Bishop of Central Diocese and a new Bishop has already assumed office.

[7] The 1st to 3rd Respondents state that they do not have the power individually or collectively to reinstate the Claimant for reasons that he was defrocked by an organ of the Evangelical Lutheran Church known as the Executive Committee and the decision to remove him from office was made by the General meeting of the Central Diocese neither of whom is a party to these proceedings.

[8] The Respondents further state that defrocking of a Pastor is final and irreversible and one cannot be admitted as a Pastor within the Evangelical Lutheran Church of Kenya (ELCK).

[9] The Respondents state that if the Orders sought by the Claimant are granted they may occasion disorder and absurdities in the operations of the Central Diocese of the Evangelical Lutheran Church of Kenyans (ELCK) and doing so will deny members of the Central Diocese their constitutional right to remove from office a Bishop who has breached his calling and put in place a Bishop of their choice.

[10] On the issue of contempt of Court raised by the Claimants, the Respondents state that this Court lacks jurisdiction to preside over contempt of Court proceedings other than for contempt on the face of the Court.

[11] The Respondents pray that the Application be allowed as drawn as the proceedings herein are mischievous, scandalous, frivolous, vexations, incompetent, incurably defective, bad in law, without merit and an abuse of Court process.

[12] The Claimant has opposed the application by a Replying Affidavit filed on 12th April, 2016, and states that the suit is brought against the ELCK through its officials as is the legal requirement because the Executive Committee and the General Meeting of the ELCK are not juristic persons capable of suing and/or being sued. He states that the entire church and its Organs are bound by the Orders of this Court.

[13] He contends that Miscellaneous Application No. 47 and 52 of 2014 were necessitated by the circumstances of this case. He alleges that the instant file disappeared forcing him through his advocates to make an application to Court for reconstruction of the Court file owing to the fact that the ELCK was organizing elections for the Central Diocese. His advocates obtained Orders stopping the elections which were served on the Respondents. He states that the Respondents proceeded with elections despite having knowledge of existence of the Orders.

[14] The Claimant states that he commenced contempt of Court proceedings on 10.6.2014 which he withdrew on 16.5.2014 as the judge handling the matter went on transfer and it became necessary to withdraw the suit in order to save time. He seeks directions of the Court to stay all applications in the matter in favour of hearing of the main suit.

[15] The Claimant draws the attention of the Court to Orders of 20.12.2013, staying implementation of all resolutions of the meeting of 16.12.2013 but the Respondent still went ahead to defrock him irrespective of the said orders.

[16] It is the Claimant's contention that the Respondent acted in contravention of its own disciplinary procedures set out in their constitution. Further he contends that he is not imposing himself on the ELCK Central Diocese members but it is the Respondent trying to deny the members the Bishop of their choice. He prays for the Application to be dismissed and the matter to proceed for hearing wherein all issues can be ventilated.

[17] The matter was dispensed with by way of written submissions.

[18] The Respondents state that the Claimant is seeking declaratory orders and orders of prohibitory injunction to preserve his position as the Bishop of ELCK's Central Diocese as detailed in the plaint filed on 19.12.2013.

[19] They contend that since the filing of the suit a lot has happened including removal of the Claimant from office and installation of a new one. The suit was filed to stop some things from taking place which things have already taken place and as such the subject matter of the suit has been overtaken by events.

[20] It is the Respondent's submission that the existence of the suit offends Sections 3(1) and (2) of the Labour Relations Act, 2011, as it is a waste of judicial time. They cite the case of **Muchunga Investments Ltd vs. Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR** where the Court of Appeal stated:

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open Court. Unless a trial is on discernible issues it would be farcical to waste judicial time on it.”

[21] It is also the Respondent's submission that the suit does not have proper parties. They state that there is no proper Plaintiff and no proper Defendant which renders the suit incurably incompetent. The suit has been filed in the name of Evangelical Lutheran Church in Kenya through Archbishop Rt. Rev. Dr. Walter Obare Omwanza, Rev. Benjamin Lemosi and Joseph Muchiri as the 1st, 2nd and 3rd Defendants respectively.

[22] It is stated in the submissions that according to the Claimant the three have been joined in the suit in their capacities as officials through which the society has been sued.

[23] They contend that the law does not recognize that officials of a society can be sued in a representative capacity in a suit targeting the society and as such the suit does not disclose a party or parties capable of being sued.

[24] They rely on the case of **Kenya Audio Visual Works Dealers Association vs. Fox Theatre Ltd & 4 Others HCCC No. 291 of 2003**; where Nyamu J as he then was quoted with approval the position of the law relating to unincorporated associations expressed in **Artistic vs. Art Forma (199)4 All ER 277** thus:

“...the law does not recognize that those bodies have any corporate or separate legal existence. They cannot be sued or sue in their own names. You cannot make a contract with the body because in law it does not exist. It consists of all its members.”

[25] The Respondents further submit that the plaint does not disclose a cause of action against the 1st, 2nd and 3rd Defendants. They state that the suit was triggered by a letter written by the member of ELCK's Central Diocese demanding for a special general meeting. The names of the authors of the letter which was sent by the Claimant and the 2nd Respondent in his capacity as he substantive secretary of ELCK

Central Diocese were detailed in an annexed list. The names of the 1st and 3rd Respondent did not feature anywhere.

[26] The subsequent decision to remove the Claimant from the office of Bishop was made by the relevant organs of the Church which are the Executive Committee and the General Meeting of the church's Central Diocese.

[27] They state that the suit as drawn does not disclose a cause of action against the Respondent's as they have just been named in the heading of the Plaint but the Pleadings do not disclose the fault attributable to each.

[28] That the Claimant's grievance is against what he has described in the Plaint as parishioners. They rely on the case of **Sathi Vijay Kumar vs. Tota Singh & Others**, a Supreme Court of India Decision, to buttress this decision.

[29] Further they state that the Plaintiff has not demonstrated that the Respondents are officials of the Church. They submit that the Claimant ought to have attached a search from the Registrar of Societies to authenticate who the officials of the Church are. They cite the case of **Francis Karani Elijah & 2 Others vs. Chairman of KANU & 2 Others Miscellaneous 238 of 2002**, cited in **Jane Nyambura Joshua vs. Apostolic Faith Church**; where it was stated that where a suit is instituted against the officials of an organization those officials must be authenticated by an official search.

[30] It is the Respondents' contention that the 1st to 3rd Respondents are not registered trustees and have no contract with the Claimant nor do they have the capacity to be sued on behalf of the church. They state that it is therefore improper for the suit to continue hanging over the heads of the three named individuals.

[31] The Respondents submit that the Plaintiff does not have *locus standi* to file the suit for the reason that he has simply stated his name in the Plaint and at paragraph 1 of the plaint he describes himself as the Bishop of ELCK Central Diocese. This in their view goes to show that the Plaintiff filed the suit in his own personal capacity and in the capacity of Bishop (as he then was) which they submit is irregular and unlawful.

[32] They cite the case of **Kimani Ngunjiri vs. David Manyara (2015)eKLR** where Musinga J held:

“an individual member of a party (society) cannot just wake up and purport to file suit in Court without appropriate legal authority to do so.”

[33] The Respondents submit that the suit as framed may lead to absurd results if it were to proceed to full trial for the reason that an improper plaintiff has filed suit against the wrong parties and any Orders flowing herein may be unenforceable.

[34] They further contend that the Courts should not interfere in the domestic matters of churches. They rely on the case of **Hinga & Another vs. P.C.E.A. through Rev. Dr Njoya & Another (1986)KLR 317** where the Court refused to interfere with the matters of P.C.E.A church as those matters had been dealt with by the complaints procedure set out in the church constitution.

[35] The Respondents submit that the Court has jurisdiction to strike out these proceedings and pray that their Application be allowed as prayed.

[36] The Claimant in his submissions states that the law on striking out of pleadings was settled by the late Madan JA (as he then was) in the case of **DT Dobie & Company Ltd vs Muchina (1982)KLR** stating”

“The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of

action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

[37] On the issue of the substratum of the case being overtaken by events he submits that the installation of a new Bishop was done in blatant disregard of Court orders of 19th December, 2013, and 16th May, 2016. This being the case, he states that the matter ought to proceed to trial for the Court to determine the issue after taking evidence.

[38] The Claimant submits that the ELCK has not been sued in its own name but has been sued through its officials, the 1st to 3rd Respondents which is legally recognized. They distinguish the case of **Kenya Audio Visual Works Dealers Association vs. Fox Theatre Ltd & 4 Others HCCC No. 291 of 2003** cited by the Respondents from the instant case stating that the Plaintiff in that suit was registered under the Societies Act but sued in its own name thus leading the Court to hold it could not do so as it did not have a separate legal existence. The instant suit ELCK has been sued through its officials.

[39] On the submission by the Respondent that the suit does not disclose a cause of action against the 1st to 3rd Respondents and that they cannot be made to bear responsibility for the Claimant’s labour claims, the Claimant states that this is an issue which can only be determined through a trial of the issues herein.

[40] They also state that the Respondents have admitted in their pleadings that they are officials of the ELCK and as such it is not an issue in contention that an official search need be availed to establish their capacities.

[41] On whether the claimant has *locus standi*, it is submitted on his behalf that he has not purported to file suit on behalf of the society or the branch and therefore no authority is required to file suit as alleged by the Respondent.

[42] The Claimant submits that there are justiciable issues and as such he cannot be driven away from the seat of justice. The allegations that any Orders issued will lead to an absurdity, the Courts should not interfere in the internal governance of the church, can only be dealt with at a trial and not at a preliminary stage.

[43] Furthermore, the Allegation that the Orders of 16th May, 2016, are irregular and as such could not be obeyed is not an excuse for noncompliance; they did not appeal against the said decisions and are thus bound to comply as ordered.

[44] They pray for the application to be dismissed with costs. They rely on the case of **Kellaway vs. Bury (1892||) 66 LT 599** at page 600 and 601 per Denman J where he stated:

“That this is a very strong power and should only be exercised in cases which are clear beyond doubt... the Court must see that the Plaintiff has got no case at all, either disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments.”

[45] Having considered the submissions filed before me, the issues for determination are as follows:

(1) Whether this Court has jurisdiction to punish for contempt of Court.

(2) Whether the Plaintiff herein has locus to bring this suit.

(3) Whether the Respondents have capacity to be sued as in the suit.

[46] On 1st issue, I take note that the Employment & Labour Relations Court (ELRC) is established under Article 162(2) of the Constitution as a Court with the same status as the High Court. The High Court has power under Section 5 of the Judicature Act to punish for contempt of Court which states as follows:

“5 (1) ...the High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the same being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.

[47] The Employment & Labour Relations Court (ELRC) being a Court of the same status as the High Court is equally clothed with the jurisdiction to punish for contempt of Court. The argument that this Court has no jurisdiction is therefore invalid and I dismiss it.

[48] The next issue is on *Locus* of the Plaintiff to bring this suit before this Court on 19.12.2013. The Plaintiff describes himself as a male adult of sound mind and resident in Nairobi within the Republic of Kenya. He has averred that he was the Bishop of Evangelical Lutheran Church of Kenya (ELCK) – Central Diocese. His complaint concerns the way he was treated by the Respondents and others.

[49] Under our Constitution, every Kenyan has a right to file suit when he/she considers that his/her rights under the law are being flouted. Article 50(1) of the Constitution provides as follows:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

[50] The Plaintiff herein is complaining that he has issues that this Court needs to resolve. The issues of him not having locus does not arise and I find he does have a right to file the suit and be heard by this Court.

[51] On the last issue, the Applicants aver that the Respondents do not have capacity to be sued as such.

[52] In the plaint again, the Claimant has described the Respondents herein as Archbishop, Ag. Secretary and Ag. Treasurer respectively of the Evangelical Lutheran Churchy in Kenya, the Evangelical Lutheran Churchy in Kenya which is a Registered under the Societies Act.

[53] A society like the Evangelical Lutheran Church in Kenya runs its affairs through its offices. It is only the Constitution of the said church which can spell out any other issues concerning the way the said Society wishes to be run. Since the Respondents are said to be officials of the church, their being so or not cannot be demonstrated until the hearing of this case.

[54] I therefore find that the issues being raised will be dealt with fully in the hearing. J. Onyango had already ordered parties to abandon all applications and proceed with main hearing. That is still this Court’s position. The Court will not entertain any more applications and I direct that a hearing date of the main suit be set on priority basis.

Read in open Court this 4th day of October, 2016.

Further Order

Mention on 18/10/2016 for directions on the hearing.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Kimotho for Claimant – Present

No appearance for Respondent