



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 10 OF 2014

(Formerly High Court Civil Case No.147 of 2009 at Embu)

PASTOR PAUL MUTHEE

MUNUHEPLAINTIFF

VERSUS

**THE EXECUTIVE SECRETARY, SEVENTH DAY ADVENTIST CHURCH C.K.C.....1ST
DEFENDANT**

**THE EXECUTIVE DIRECTOR, SEVENTH DAY ADVENTIST CHURCH C.K.C.....2ND
DEFENDANT**

**THE TREASURER, SEVENTH DAY ADVENTIST CHURCH C.K.C.....3RD
DEFENDANT**

**THE MINISTERIAL SECRETARY, SEVENTH DAY ADVENTIST CHURCH C.K.C.....4TH
DEFENDANT**

(Before Hon. Justice Byram Ongaya on Friday 16th December, 2016)

RULING

The court delivered the judgment in the suit on 30.09.2016. The plaintiff's suit was dismissed with no orders on costs.

On 10.10.2016 the plaintiff filed a notice of motion dated 10.10.2016 said to be under section 16 Cap 234 B and Article 35(2) of the Constitution of Kenya 2010. The plaintiff prayed that the judgment of the Honourable Court be reviewed and judgment be entered in favour of the claimant as against the respondents; and costs be provided for.

The application was based on the plaintiff's supporting affidavit filed together with the application and the grounds set out in the application. The grounds are that there is an error or mistake apparent on the face of the record and the application has been filed without unreasonable delay. The applicant's case is that the suit was dismissed in the judgment on the ground that the respondents are non-existent persons incapable of being sued; a point which was determined by Warsame J in the ruling of 30.03.2011. Thus, by the judgment, it was urged that the court in effect overturned the earlier decision by Warsame J who was then a judge of concurrent jurisdiction. Further, it was urged that in the judgment the court relied upon the certificate of incorporation of the Seventh Day Adventist Church (East Africa Limited) which was never produced in evidence. Further, the court failed to consider exhibits 1 to 21 produced for the

applicant which showed that the Central Kenya Conference (CKC) was the claimant's employer. It is the applicant's further case that the court failed to take into account that Article XI of the Constitution of the Seventh – Day Adventist Church Central Kenya Conference provides that to the extent permitted by law, the Conference shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceedings, whether civil, criminal administrative, or investigative, because she or he is a member of the Conference Executive Committee or an officer or employee or agent of the conference.

The grounds of opposition were filed on 01.11.2016 as follows:

- a. There is no certificate of registration adduced in court to spell out what is Central Kenya Conference.
- b. Central Kenya Conference is not a legal body as it is not registered as a society, a limited liability company or unlimited company.
- c. The plaintiff being seized of the facts has for 2 years never or at all applied to court to substitute the parties.
- d. The plaintiff's reading of Warsame J's ruling is wrong as the court did not clearly consider who were the respondents, but was interested in making applications which will hinder parties from moving the case forward.
- e. That the judgment of the court dated 30.09.2016 was factual, up to date and had no error whatsoever.

The grounds of opposition urged that the application be dismissed with costs.

Submissions were filed for the applicant and for the alleged respondents.

The **1st issue** for determination relates to whether there is an error or mistake on record to justify a review of the judgment as applied for. The first inquiry is to find out the scope of the determination by Warsame J on 30.03.2011. The record is clear that on that date before the court was the application dated 21.01.2011 seeking the setting aside of the order dismissing an application dated 26.11.2010 on account of non- attendance. The application of 26.11.2010 which had been dismissed had prayed that the plaint filed on 11.09.2009 to be struck out on the grounds that the plaintiff had no cause of action against the defendants; the defendants were non-suited as they were not legal entities capable of being sued but mere administrative titles within the Seventh Day Adventist Church; and the proper party to be sued and who was vicariously liable was the Seventh Day Adventist Church, East African Union Limited. On 30.03.2011 Warsame J ruled that he had considered the grounds for seeking the striking out of the plaint and it was clear to him that the plaintiff disclosed a reasonable cause of action against the defendants so that the preliminary application would not be relied upon to strike out the plaint as the matter had to be heard on merit. The court then concluded thus, **"....The application dated 26/11/2010 is a classic abuse of the court process and even if I was merited the excuse Mr.Kaumba for the delay, the result and conclusion in the application dated 26/11/2010 would not change. It is worthless to stop or postpone the meritable from taking its cause. Consequently the application has no merit and it is dismissed with no orders as to costs."**

The court has considered the proceedings of 30.03.2011 and the ensuing ruling and orders. The court dismissed the application of 21.01.2011 seeking reinstatement of the application of 26.11.2010 which had been dismissed for non-attendance. The court did not consider and make a ruling on whether the proper party had been sued or whether the defendants were persons in law capable of being sued. Thus the court returns that there is no error or mistake on record by the finding in the judgment that the defendants did not exist as persons in law as there was no previous determination by the court in that regard – the judgment did not, by that finding, overturn a finding on the same issue by a court of concurrent jurisdiction. To that extent, the court considers that the application should fail.

The 2nd issue is whether the court erred in relying upon the certificate of incorporation for the Seventh Day Adventist Church (East Africa Limited) as had been filed in court. The court stated as follows in the judgment and in that regard, thus, **“The 1st issue for determination is whether the defendants have a valid preliminary objection as pleaded in their defence and as amplified in the supporting affidavit of Jones Masimba filed on 26.11.2010. The defendant’s case is that the proper defendant is the Seventh Day Adventist Church (East Africa Limited) as per the certificate of incorporation filed in court. Thus the offices in the church as per named defendants are not suited and in any event holders of those offices act for the church so that the church would be vicariously liable for the actions of the officials. Thus, it was submitted that the named defendants being mere offices in the church are not persons and they are nonexistent persons and the suit must fail because the ensuing orders would not be enforceable. The claimant did not submit on that substantive and crucial issue raised for the defendants.”** The court then proceeded to uphold the preliminary objection.

The court considers that the affidavit was properly on record, the issue had been properly pleaded and brought to the plaintiff’s attention and there is no ground for the court to have disregarded the affidavit evidence and the pleading as had been put forward for the purported defendants.

Concurrent with the filing of the application for review, the plaintiff filed the notice of appeal dated 10.10.2016. The court finds that such concurrent pursuit of review and appeal rendered the application for review an abuse of the process of the court and therefore an impetus to dismissal of the application as the applicant was bound to elect review or appeal process.

Finally, it was submitted that rather than dismissing the suit, the court ought to have struck out the suit to give a chance to the plaintiff to file a fresh suit. Whereas that was not a prayer or a ground stated in urging for the review, the court has considered that the plaintiff’s pleading was that he was dismissed on 29.02.2008 so that the 3 years of limitation for such suits as prescribed in section 90 of the Employment Act, 2007 lapsed on or about 29.02.2011 rendering possibility of a fresh suit extremely remote.

In conclusion the application dated 10.10.2016 and filed for the plaintiff on the same date is hereby dismissed with costs.

Signed, dated and delivered in court Nyeri this Friday, 16th December, 2016.

BYRAM ONGAYA

JUDGE