



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2054 OF 2013**

**BISHOP BAKARI KEA.....CLAIMANT**

**VERSUS**

**THE EVANGELICAL LUTHERAN CHURCH IN KENYA (ELCK) Through**  
**ARCH-BISHOP RT. REV. DR WALTER OBARE OMWANZA.....1<sup>ST</sup> DEFENDANT**

**REV. BENJAMIN LEMOSI.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MUCHIRI.....3<sup>RD</sup> DEFENDANT**

**RULING**

This matter was initially filed in the High court as Nairobi HCCC no. 526 of 2013 and was handled by Justice Onyancha in chambers. After perusing the file he determined that it is an employment matter and referred the case to this court for hearing and determination.

The Respondents have now filed a Preliminary Objection challenging this court's jurisdiction to hear this case. The Respondents further raise an objection to the effect that the applicant has not exhausted the internal church dispute resolution mechanisms.

On the issue of jurisdiction the Respondents submit that Article 162(2) of the constitution of Kenya 2010 and Section 12 of the Industrial Court Act 2011 prescribe the jurisdiction of the Industrial Court to hear disputes relating to employment and labour relation only. The Respondents submit that they are neither a Labour Union or an employer of the claimant. They submit that the claimant is an elected official and so are the Respondents named in the suit. The Respondents refer to Article X(19) and XXVIII(c) of the Constitution of Evangelical Lutheran Church in Kenya which provides for election of bishops and submit that such election does not constitute the bishop as an employee. The Respondents further submit that there is no employment relationship between the Claimant and the Executive Committee, that the Executive Committee has not been named as a party to the proceedings and that the Claimant has not stated that he was an employee of the Executive Committee.

The Respondents compare the position of the Claimant to that of an elected member of Parliament who does not become an employee of the electorate within the contemplation of the Industrial Court Act by virtue of his election. That it is the constitutional right of the members of the Central Diocese of the Evangelical Lutheran Church in Kenya to discipline or recall or remove their bishop and this right should not be curtailed by the court, and that this is provided for in Article X(23)(1) of the Respondents'

constitution.

The Respondents urge the court not to exercise the jurisdiction that it does not have. They referred the court to the case of **Owners of the Motor Vessel "Lillian" V Caltex Oil (Kenya) (1989) KLR1** which deals with the issue of jurisdiction.

On the second ground of objection the Respondents submitted that the Claimant rushed this matter to court prematurely before exhausting the internal mechanisms of resolving disputes. The Respondents referred to Article XXIII and XXII(16) of the Respondent's Constitution which provide that no person shall refer to a court of law any dispute unless the mechanisms in the constitution are exhausted. The Respondents submit that the Claimant ignored all the internal provisions in the church constitution.

The Respondent have referred the court to the following authorities;

**1. HINGA & ANOTHER V PCEA THROUGH REV. DR. NJOYA & ANOTHER (1986) KLR316** in which Aluoch J (as she then was) dismissed the suit for being brought to court prematurely before exhausting the church's internal machinery.

**2. KIMANI NGUNJIRI V DAVID MANYARA EKLR** where Musinga J. struck out the suit on the grounds that the Plaintiff had ignored the internal dispute resolution machinery.

The Respondents urged the court to uphold the Preliminary Objection and strike out the case with costs to the Respondents.

In its response to the Preliminary Objection through written submissions, the Claimant submits that this case was filed under certificate of urgency in the High Court as HCCC No. 526 of 2013 and was considered by Justice Onyancha who referred it to the Industrial Court. That Justice Rika of the Industrial Court considered the application and granted the interim orders currently subsisting. He urges that should this court rule that it has no jurisdiction the best action would be to refer the matter back to the High Court and not to dismiss the suit, that it would be unfair and unjust to dismiss the case as the Claimant would be driven from the seat of justice from an action performed *suo moto* by an officer of the court.

On the second ground of objection the Claimant submitted that it is not a matter suitable for hearing at preliminary stage as it requires that the court considers evidence. That the Respondent has invited the court to scrutinize evidence to ascertain the facts being the church's constitution filed as claimants annexure BBKII and annexure BBKIII(B) which is a demand for a meeting by members of the diocese headed by the Claimant. The claimant has referred the court to **HCCC NO. 427 OF 2004 MAYFAIR SERVICES & INVESTMENTS LTD V HOTEL SIRIKWA LTD MILIMANI HCC NO. 427 FO 2004** and the landmark case of **MUKISA BISCUIT CO V WESTEND DISTRIBUTORS LTD (1969)** to the effect that a preliminary objection consists of a pure point of law and cannot be raised if any fact has to be ascertained.

On the authorities referred to by the Respondent the claimant submitted that they are not relevant to this case as in the **HINGA** case the issues for determination were that the plaint was not justiciable in law with the second limb being the failure to comply with Order 1 Rule 8 of the Civil Procedure Rules.

On the **KIMANI NGUNJIRI** case the Claimant submits that the court scrutinized the KANU constitution and that this court ought to be cautious when applying the case and bear in mind the decision on **MUKISA BISCUIT** on what constitutes a preliminary objection.

I have considered the written submissions of the Respondent and the claimant and perused the authorities relied upon by both parties.

On the issue of Jurisdiction, I have to consider whether the Claimant is an employee within the meaning of the Industrial Court Act and whether his relationship with the Respondents is an employment relationship.

The Employment Act defines an employee as a person employed for wages or a salary and includes an apprentice and indented learner.

According to the Respondents, the Claimant is not an employee because **“the defendants are neither a Labour Union nor are they the employers of the Plaintiff,”** further that **“That is not a position of employment but rather a position which the plaintiff occupies by reasons of an election”**.

I do not agree with the argument of the Respondent. The Employment Act is not concerned with the manner in which the employment relationship was created. What defines an employment relationship according to the Act is that there is work done by the employee for which he receives payment in the form of “wages” or “salary” from the employer. I have read the Constitution of the Church and note that it provides for payment of salaries for pastors from the funds of the church. None of the parties addressed the court on the issue as to whether or not the Claimant as Bishop was paid a salary by the church. I however presume that since he works with pastors who are paid and since he is elected from among the pastors he must be earning a salary from the church for the work defined in the constitution as the duties and responsibilities of a Diocesan Bishop. The Respondent informed the court that if the claimant was removed from the position of bishop he would revert to the position of pastor.

For these reasons I find that the Claimant is an employee of the church within the meaning of the Employment Act and the Industrial Court Act and that the Industrial Court therefore has jurisdiction to hear his case.

On the second ground of objection, it is true that the church constitution provides that the internal dispute resolution machinery should be exhausted before a party files a claim in court.

The Respondent has in its submissions stated that the constitution of the church at article IX (6) provides for the General Assembly to be the final appellate body in respect of disputes. I have read the same and noted that it provides that the General Assembly has power to receive, hear and determine appeals arising out of the decisions of the Diocesan Councils or other bodies. According to the claimant’s application no decision had been communicated to him that was capable of being appealed against. He alleges the decision to replace him were arrived at unconstitutionally. If this is true then the Respondent having failed to comply with the same constitution cannot blame the Claimant for coming to this court instead of appealing to the General Assembly to which the Respondents are members. This however is a matter that can only be determined after hearing evidence from the parties.

The Respondent has referred this court to 2 cases in support of its submissions on this ground. In the **Hinga case** the prayers sought was the discipline of a fellow member of the church by other members of the church which in my opinion would not be a matter for the court while in the present case the Claimant himself is the one who has come to court alleging breach of the constitution. It is therefore in my opinion not relevant to this case.

The **Kimani Ngunjiri** case was similar to the **HINGA CASE**. It did not relate to the contravention of the constitution by the people who were sued but rather on issues of property owned by the political party.

I have also taken note of the Claimant’s submissions that this is not an issue for preliminary objection as it relates to facts which can only be proved by considering evidence.

I agree that the parties would have to be heard before determining this issue.

For the foregoing reasons I find no merit in the preliminary objection and dismiss the same with costs.

Delivered and signed in open court on 12<sup>th</sup> day of February 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Mrs. Kimotho**..... Claimant

**Ochichi**.....for Respondent