God Bware Pentecostal Assemblies of God v General Supritendant PAG Kenya & 2 others (Judicial Review E017 of 2024) [2025] KEHC 6776 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 6776 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

JUDICIAL REVIEW E017 OF 2024

A. ONG'INJO, J

JANUARY 30, 2025

BETWEEN

GOD BWARE PENTECOSTAL ASSEMBLIES OF GOD ..... APPLICANT

AND

GENERAL SUPRITENDANT PAG KENYA ..... 1ST RESPONDENT

BOUNDARY REVIEW COMMISSION PAG KENYA ..... 2ND RESPONDENT

MIGORI EAST PENTECOSTAL ASSEMBLIES PAG DISTRICT .... 3RD RESPONDENT

RULING

1. The Applicant came to this court, seeking Judicial Review orders of certiorari, prohibition and mandamus. They are seeing to quash the decision of the Respondents for unlawfully and without following the due procedure in creating Migori East PAG district, the 3rd Respondent herein , they also seek to prohibit the Respondents from recognizing the 3rd Respondent and from carrying out the intended election in and for Migori East PAG district.

2. They are praying for an order to compel the Respondent to recognize the Applicant as one of the only two rightfully created PAG Districts within Migori and to conduct the necessary elections for and therein.

3. Coupled with the Statutory Statement, the Applicant, also brought a Notice of Motion Application dated 25th October 2024, seeking for temporary restraining order against the Respondents from carrying out the intended annual elections in and for the third Respondent.

4. That pending the hearing and determination of the Application, a temporary order staying all operations, for the third respondent be issued.

5. The Application is supported by the verifying affidavit of Rev. Jotham Gimisi sworn on 17th October 2024.

6. The Respondents opposed the Statutory Statement. In their grounds of opposition dated 13th of November 2024 and issued a notice of preliminary objection dated 13th of November 2024 to the effect that the matter herein filed in non-suited and orders sought cannot be issued therefrom. They also filed a replying affidavit sworn by Jacob Muhanji Abukuse on 19th of November 2024.

7. Directions were taken for hearing of the preliminary objection by way of written submissions.

8. The Respondents in their submissions dated 19th November 2024 argued that this court lacks jurisdiction to hear the motion herein for reasons that it invites the court to interrogate the merits of the decision and facts and not just the legality of a process and that therefore the court must down its tools forthwith. To support this position they relied on the holding in Republic vs National Transport and Safety Authority and 10 Others Ex parte James Maina Mugo [2015] KEHC 5372 (KLR) where it was held:

> "It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits"

9. They also relied on the holding in Seventh Day Church (East Africa Ltd) Vs Permanent Secretary Ministry of Nairobi Metropolitan Development and Another and Republic Vs Attorney General and 4 Others Ex Parte Diamond Hashim Lalji and Ahmed Hasham Lalji to fortify their position.

10. Further, the Respondents contended that the Applicant had not demonstrated that they attempted to first exhaust the dispute resolution mechanisms provided under Article 28 of the PAG Kenya 1993 Constitution and relied on the Court of Appeal decision in Speaker of National Assembly Vs Karume where it was held as follows:

> "Where there is a clear procedure of redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed, accordingly the special procedure provided by any law must be strictly adhered to because there are good reasons for such special procedures"

11. The Respondents also cited the Court of Appeal Decision in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR where it was stated as follows:

> "We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside

of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

12. They also quoted the matter of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR where it was held:

> " The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases"

13. The Respondents relied on Section 9(2) and Section 9(3) of the Fair Administration Act which provides that The High Court of the subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. That under sub section (3) provides that the High Court or a subordinate court shall if it is not satisfied that the remedies referred to in sub section (2) have been exhausts direct that an Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

14. The Respondents have argued that the Applicant did not demonstrate any exceptional circumstances and did not make an application to be exempted from the internal remedies.

15. The Respondents urged the court to uphold the Preliminary Objection and dismiss the Notice of Motion dated 25th October 2024 and Statutory Statement date 17th October 2024.

16. The Applicants in their submissions dated 19th November 2024 raised the following issues for determination:

    1. Whether the Respondents are Quasi-Judicial bodies

    2. Whether the Application is placed properly before this court-jurisdiction

18. The Applicants have argued that the 2nd Respondent is a quasi-judicial body designed in creation of PAG Districts after following the laid down procedures but the making of the 3rd Respondent was unlawful and bereft of compliance with the laid down procedures and that the High Court has overarching power to look into the lawfulness of a process by which the decision of a quasi- judicial Body was arrived at and set it aside if the process was flawed and/or the decision was unlawfully and illegally arrived at.

19. The Applicants reckoned that where there is an alternative statutory remedy, an Applicant for judicial review must satisfy the Court that alternative remedies were exhausted before judicial review orders were sought for. As per Section 7(1)(b) of the *Fair Administrative Action Act*.

20. It was further submitted that the efficacy of an alternative remedy is a question of fact which is to be determined by the Court and that this Court has the power to exempt a party from complying with the requirements to exhaust the route of alternative remedies. The holding in Kenya Bureau of Standards v Powerex Lubricants Limited [2018] KECA 752 (KLR) was cited where the Court of Appeal held that for the High Court to exempt a party from complying with the requirement as under paragraph

16, the party must first satisfy the court that the available alternative remedies are less effective than the judicial review process.

21. The Applicants justified their approach through judicial review on the basis that the Respondents have failed to resolve the dispute through meetings and resolutions made have never been obeyed.

22. They argued that the alternative internal resolution mechanisms sought by the Applicant have been futile and therefore less effective and the only option that can arrest the apparent illegality by the Respondent is an order of the court through judicial review.

23. On jurisdiction of the Court, it was submitted that judicial review is a constitutional principle for enforcement of Kenya's transformative Bill of Rights and that the traditional Private-Public Dichotomy is no longer primary. It was submitted that the horizontal application of the bill of rights implies that remedies which were initially applicable to public bodies or to private bodies performing public functions is now applicable to all administrators where rights and interests are in issue.

24. The Applicant relied on the holding in Margret Nyaruai Theuri Vs National Police Service Commission 2016 eKLR where it was held under the constitutional provisions and in particular Articles 22 and 23, every person is entitled to seek judicial review orders. Thus, the court returns that applicants or parties seeking judicial review orders need not move the court in the name of the Republic. Needless to state, the current constitutional order does not envisage a crown and the related concept of prerogative orders."

Analysis And Determination

25. Having considered the Preliminary Objection and the rival submissions, the issue for determination is whether the Judicial Review Proceedings and Notice of Motion Application are properly before the Court.

26. The case of Mukisa Biscuits Manufacturing Company Ltd v West End Distributors [1969] EA 696 set out what constitutes a Preliminary Objection in the following words –

> So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

27. Article 47 of *the Constitution* of Kenya provides that:

Fair administrative action.

47.

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration."

28. Under the Fair Administrative Actions Act Section 9 provides as follows –

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

29. The concern raised in the Preliminary Objection is that Article 22 of the PAG Constitution provides for internal dispute resolution machinery for which members, pastors or officials of the church are supposed to exhaust before they go to court. The Applicants have acknowledged the existence of the internal dispute resolution machinery provided by the 1st Respondent's Constitution but argued in their submissions that their efforts have been frustrated by the 1st and 2nd Respondents who failed to show up for meetings or where resolutions were made, they failed to obey the said resolutions.

30. It was claimed that there were many correspondences demonstrating the non-compliance by the Respondents to the internal resolution mechanisms. This Court has perused the Judicial Review proceedings and annexures which comprise of letters dated 11th December 2012, 30th August 2012, 30th September 2016, 6th September 2019, 12th August 2024, 7th August 2019, 20th December 2012 but none of the annexures refer to lodging of a complaint pursuant to Article 28 of the PAG Kenya 1993 Constitution.

31. Although the Applicants have argued that alternative internal resolution mechanisms that they sought have been futile, and less effective, they have failed to show that they lodged a claim or complaint under the said ADR and they have also not sought leave of this court under Section 9(4) of the Fair Administrative Actions Act to be exempted from the obligation to exhaust the internal remedy.

32. In consideration of the mandatory provisions of Section 9 of the *Fair Administrative Action Act*, this Court finds that the proceedings herein are premature and are therefore struck out with no orders as to costs. The Applicants are directed pursuant to Section 9 (3) to first exhaust the internal remedy before instituting proceedings under subsection (1).

DELIVERED, DATED AND SIGNED AT MIGORI THIS 30TH DAY OF JANUARY, 2025.

A. ONGINJO

JUDGE

In presence of; -

Mr. Watama Advocate for Applicant

Mr. Singei for Advocate for Respondent

Victor Court Clerk