



REPUBLIC OF KENYA



Orthodox Diocese of Kisumu and All & Western Kenya v Amadiva & 25 others (Constitutional Petition E007 of 2022) [2024] KEHC 1904 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E007 OF 2022
PJO OTIENO, J
FEBRUARY 29, 2024**

BETWEEN

**ORTHODOX DIOCESE OF KISUMU AND ALL & WESTERN
KENYA PETITIONER**

AND

**ATHANASIOS OMARE AMADIVA 1ST RESPONDENT
NICODEMUS COLLINS MANGUARI 2ND RESPONDENT
INNOCENT AGREY L. MUCHESI 3RD RESPONDENT
JOHANNES MUTSOTSO 4TH RESPONDENT
CHRISTOS RICHARD AMUYUNZU 5TH RESPONDENT
POLYCAPOS OMINDE 6TH RESPONDENT
HERMOGENIS HEZEKIA OTARA 7TH RESPONDENT
THEODOROS JOSEPHAT OURA 8TH RESPONDENT
CONSTANTINE RODGERS GAO 9TH RESPONDENT
MAXIMOS ALFRED MWEREMI 10TH RESPONDENT
STEPHANOS TOM MAGOMERE 11TH RESPONDENT
BATHLEMEW MUHANDO JOSHUA 12TH RESPONDENT
PATAPIOS PHILIP CHASIA 13TH RESPONDENT
ROMANOS JUMBA MAHAYA 14TH RESPONDENT
THEODOROS OMBISA 15TH RESPONDENT
ANGELOS OMBISA 16TH RESPONDENT**



MENAS BENSON ORONI	17TH RESPONDENT
EVLOGOS OYAYA	18TH RESPONDENT
ARSENIOS RONALD CHITWA	19TH RESPONDENT
PRODHROMOS KABALA	20TH RESPONDENT
EPIPHANIOS ERNEST OMUSUNDI	21ST RESPONDENT
NEKTARIOS PROTAS ISANYA	22ND RESPONDENT
ALEXANDA OTOLI	23RD RESPONDENT
JOHN KARAKACHA	24TH RESPONDENT
NICANOR COSMAS BIDALI SHILESI	25TH RESPONDENT
PETROS PATRICK OKELO	26TH RESPONDENT

JUDGMENT

1. As pleaded in the Petition and Replying Affidavit, the dispute here puts the church and the persons he calls former Priests. The dispute seems to have its fuel drawn from what is said to be influence of a church called the Russian Orthodox Church which is said to have seceded from the Petitioner.
2. The Petitioner contends that it has always operated the Church houses where the Respondents served as Priests, till 2021 when there was triggered a rift in the Church leading to one sect led by Patriarchate of Alexandria the Greek Orthodox Church and another called the Russian Orthodox Church. It is averred that by individual oaths taken by some of its Priests during the month of November 2021, the Priests now Respondents denounced association with the Petitioner and its connections with the Alexandria. As a result, the Petitioner took the disciplinary step of suspending the said Priests who ceased to be its agents with the consequence that they ceased to have the capacity to officiate as such Priests in its Church houses.
3. The complaint by the Petitioner is that having renounced, denounced and removed themselves from the Greek Orthodox Church and opted to join the Russian Orthodox Church, the Respondents have persisted to use the Church houses built and all along used by the Petitioner and purporting to convert the premises owned by the Greek Orthodox Church for use and operations of the Russian Orthodox Church. That conduct is deemed by the Petitioner to portend breach of the peace and interference with the freedom of worship to its members for which reason it seeks a restraining order against the Respondent for purporting to execute priestly duties in any of the Parishes of the Petitioner.
4. The Petitioner views the allegations against the Respondent to constitute violation of its members' right to worship and the right to association. It thus prays that this Court allows the petition and issues an order of prohibition directed at the Respondents and restraining them from interfering with the affairs of the Parishes and Churches under the Orthodox Diocese of Kisumu and all Western Kenya and also awards the costs of the Petition to the Petitioner.
5. After the Replying Affidavit to the Petition was filed, there was filed a Response to the Replying Affidavit in which it was averred that the Russian Orthodox Church came to be in existence in 2021 long after the parcels of land on which the Church houses stand were acquired or donated by adherents of the Church and the Church buildings erected. It is further asserted that the relatives of the Priests



said to have donated the land did so to the Greek Orthodox Church and that being a Priest doesn't confer ownership of the Church property on the individual. The Petitioner exhibited publications on when the rift between the Greek and Russian Churches arose as well as the oaths and letters of suspension of the Respondents.

6. The Petition was resisted by the Respondents by the Replying Affidavit sworn by the 19th Respondent on the 8.2.2023. The Affidavit is sworn on behalf of all the Respondents and an authority to so plead was exhibited.
7. On the merits, the Respondents admit that they in deed sworn to denounce and renounce the Petitioner and shifted allegiance to the Russian Orthodox Church that asserts that the parcels of land on which the Churches they served in before the shift of allegiance do not belong to the Petitioner but are registered in the names of the Respondents' relatives or affiliates hence the Respondents are constitutionally entitled to enjoy their rights in accordance with article 40 of the Constitution.
8. The Affidavit then isolates seven (7) Church houses standing on parcels of land which do not belong to the Petitioner to be those which were led by the 2nd, 16th, 21st, 22nd, 23rd, 24th and 25th and exhibits documents to show that. The documents include an official church showing that the land belongs to the defunct, Kakamega County Council and reserved for Emalovolo Church, and others to be registered in individual names. There is also a letter dated 23/8/2022 showing the Russian Orthodox Church had bought a piece of land measuring one acre.
9. The short gist of that affidavit is that the land on which the seven (7) Churches stand do not belong to the Petitioner and that followers of the Orthodox Church are free to choose between Greek and Russian Orthodox Church and that some Parishes like St. Iren Ebbukame have now switched, most of Parishes abandoned by worshipers for among other reasons intimidation and high handedness of the Petitioner.
10. The Petition is thus attributed to the bitterness occasioned by the departure of its members and Priests to the Russian Church and that in bringing the Petition, the Petitioner is attempting to stifle the freedom of worship. It is then contended that the substantive prayer in the Petition is untenable because the Respondents are no longer members of the Petitioners and thus not able to interfere with its affairs when they now only allegiance to the Russian Orthodox Church. For the stated reasons the Respondents pray that the Petition be dismissed.
11. As directed by the Court, Parties have filed written Submissions and the Court has read same and derived due benefit.

Issues, Analysis and Determination

12. Having read the petition, the dispute is very minute and boils down to the question of whether when the Respondents denounced, renounced and shifted allegiance from the Petitioner to the Russian Orthodox Church, they did so with the flock and Church houses they presided over. To this Court a Church registered as the Petitioner has legal capacity to own property including land. When it owns land, it does so distinctively from its members including its clergy. Where a church member or official transacts in his official capacity as an official or clergy, the interest so acquired goes to the Church.
13. It is inconceivable that the Respondents take the position that having served as clergy of the Petitioner, when they removed themselves from the Petitioner, then they so move with the premises of the Petitioner from where they officiated the activities of the Petitioner. The Court finds that in so far as the Churches were built and operated by the Petitioner before the Respondents defected to the rival, Russian Orthodox Church, the Church houses and the property upon which they stand belong to the Petitioners and not the Priests who officiated in the said Church houses. When denouncing the



Petitioner, as is their right to associate or dissociate, they do so and separate from everything associated with the Petitioner including their Church houses.

14. In seeking to convert the Church houses from control by the Petitioners into the control of Russian Orthodox Church, the Respondent must be seen to infringe on the Petitioner's right to property. That must be restrained in terms of prayer (a) of the Petition.
15. The Court finds that the materials placed before it by the Respondents do not establish any right by them to convert what belonged to the Petitioner and hand same over to the Russian Orthodox Church. To the contrary, the actions by the Respondent is a clear deprivation of property. The Petition thus succeeds and is allowed with costs to the Petitioner.

Dated, signed and delivered at Kakamega this 29th day of February, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Okelo for the Petitioner

Ms. Lumallas for the Respondents

Court Assistant: Polycap

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