



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL SUIT NO. 15 OF 2016**

**BETWEEN**

**ARCHBISHOP JOHN MWERESA KIVULI II .....1<sup>ST</sup> PLAINTIFF**

**AFRICAN ISRAEL NINEVEH CHURCH .....2<sup>ND</sup> PLAINTIFF**

**AND**

**REGISTRAR OF SOCIETIES .....1<sup>ST</sup> DEFENDANT**

**RT. REV. MICHAEL AMONDI .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is another suit involving an indigenous church, the 2<sup>nd</sup> plaintiff, African Israel Nineveh Church (“the Church”) founded by the late Paul David Zakayo Kivuli in 1932. It was formally registered as a society on 30<sup>th</sup> June 1956. In recent times, it has seen constant wrangles among its leadership.

2. This suit was commenced by the 1<sup>st</sup> plaintiff who describes himself as the bona fide leader and the High Priest of the Church. The gravamen of the claim against the defendants is that sometime in 2012, the Church commenced the process of constitutional amendments. This process was not only contentious but also divisive and it ultimately led to the approval of a new Constitution which was recognised by the 1<sup>st</sup> respondent, the Registrar of Societies (“the Registrar”). Some of the parties were dissatisfied with by state of affairs. They moved the High Court at Kisumu for orders of Judicial Review seeking to quash the Registrar’s decision to approve the new Constitution and to prohibit the new office bearers from assuming their positions. They also applied for an order of mandamus to compel the Registrar to convene a meeting of all stakeholders and call for a referendum on the constitution of the society. That case, **Kisumu HC JR No. 26 of 2013 (Republic v Registrar of Societies, Safina Lungazo Aluse, Mathia Obwotho and Tosi Anono)** was heard and dismissed by Chemitei J., on 30<sup>th</sup> July 2015.

3. The applicants then moved to the Court of Appeal being **Civil Appeal No. 93 of 2015 (Paul Auma Orwa and Wilson Peterson Mbandu v Registrar of Societies, Safina Lungazo Aluse, Mathia Obwotho and Tosi Anono)**. The appeal was heard and judgment delivered on 2<sup>nd</sup> June 2016. The Court of Appeal concluded that the processes of amendment were not inclusive. It held;

*[32] The conclusion reached by the learned Judge that all “warring factions were represented” in the process is not supported by evidence. We are therefore satisfied that the Judge erred in holding that the*

*process of amending the constitution of the Church was consultative and all-inclusive. We accordingly allow the appeal and aside the Judgment of the High Court and substitute therewith an order allowing prayers 1 and 3 of the appellants' notice of motion dated 9<sup>th</sup> July 2013.*

4. The effect of the decision of the Court of Appeal was to quash the decision and approval by the Registrar ratifying the new Constitution and recognizing the appointment of an interim officials namely the Chairman, Secretary, Treasurer and Board of Governing Council and the purported replacement of current officer bearers namely the Archbishop, the General Secretary and the General Treasurer. The Court of Appeal also granted the order of mandamus compelling the Registrar to convene a meeting of both stakeholders and call for a referendum touching on the Church and its current office bearers.

5. It is the process of compliance with the order of mandamus that has precipitated this suit. The plaintiffs contended that the 2<sup>nd</sup> defendant in collaboration with the Registrar had, in defiance of the Court of Appeal decision, clandestinely planned for a meeting on 14<sup>th</sup> August 2016 at the Church Headquarters with the objective of calling for a referendum on a draft constitution they were not aware of. In the meantime, the plaintiffs contended that the legitimate office bearers had called an Ordinary General Meeting on 21<sup>st</sup> August 2016. They contended that if the referendum proceeded, it would lead to massive loss of life and property. In the plaint dated 10<sup>th</sup> August 2016, the plaintiff seeks the following relief;

1. *A declaration that the 1<sup>st</sup> plaintiff is the bona fide head/High Priest of the 2<sup>nd</sup> Plaintiff.*
2. *A mandatory injunction compelling the 1<sup>st</sup> Defendant to give due cognizance to the officials of the 2<sup>nd</sup> plaintiff elected as at 25<sup>th</sup> December 2013.*
3. *A permanent order of injunction restraining the 2<sup>nd</sup> defendant his servants, agents or anyone acting through him for engaging, interfering, trespassing and/or in any other manner whatsoever from dealing in any businesses and/or affairs of the 2<sup>nd</sup> plaintiff.*
4. *General damages for trespass.*
5. *Costs of the suit.*
6. *Interest on (4) and (5) at commercial rates.*
7. *Any other relief that this Honourable Court may deem fit in the special circumstances of this suit.*

6. The filing of the suit was accompanied by a Notice of Motion dated 10<sup>th</sup> August 2016 seeking orders restraining the respondents from proceeding with the meeting scheduled for 14<sup>th</sup> August 2016 and restraining the respondents and their agents from issuing notices and convening any meetings in relation to the business or affairs of the Church pending determination of the main suit. The application was supported by the affidavit of the 1<sup>st</sup> plaintiff and it basically reiterated the contents of the plaint which I have outlined above.

7. The 2<sup>nd</sup> defendant filed a Notice of Preliminary Objection stating that the application and suit were incompetent and *res judicata* as they violated the provisions of **section 7** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and that the suit was also *subjudice* as it offended the provisions of **sections 6 and 8** of the **Civil Procedure Act** as several suits were determined or pending determination as follows; **Kakamega - HCCC No. 39 of 2013, Judicial Review No. 26 of 2013, Kisumu CMCC No. 192 of 2014, Kisumu Civil Appeal No. 59 of 2014 and Kisumu Court of Appeal Civil Appeal No. 93**

**of 2015.** The 2<sup>nd</sup> defendant asserted the plaintiffs had no locus standi to institute the suit on behalf of the Church. The respondent filed a replying affidavit sworn on 23<sup>rd</sup> September 2016 in which it annexed the various pleadings in the suits alluded to in the objection.

8. The 2<sup>nd</sup> defendant also filed a statement of defence in which he denied the allegations made in the plaint. He contended that he was lawfully elected in election that was carried out in accordance with the direction of the Court of Appeal. He further contended that the process was undertaken openly and with sufficient notice to all stakeholders and hence the suit had been overtaken by events. He averred that for the reasons stated in the notice of preliminary objection, the matter was *res-judicata* and *subjudice*.

9. I directed the parties to make submissions on the preliminary objection. The law pertaining to the doctrine of *res judicata* is captured in **section 7** of the **Civil Procedure Act** as follows:

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally by such court.*

10. In **Uhuru Highway Development Ltd v Central Bank of Kenya & Others Civil Appeal No.36 of 1996 (UR)**, the main ingredients of *res judicata* were set out as follows:

- a. There must be a previous suit in which the matter was in issue.
- b. The parties in the former suit must be the same or litigating under the same title as the parties in which the plea is raised.
- c. The matter in issue must have been heard by a competent court.
- d. The issue must have been raised once again in a fresh suit.

11. The *subjudice* rule under **section 6** of the **Civil Procedure Act** requires the Court to stay the consideration of any suit or application where a previous suit or application is pending determination before a court of competent jurisdiction. It provides as follows;

*No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

12. Whether a matter is barred by the *res-judicata* or *subjudice* is matter of substance rather than form. It requires consideration of the nature of the cause of action. In **Kakamega HCCC No. 39 of 2013, Archbishop John Mweresa Kivuli, Rt Rev. Isaiah K. Ruto and Rt Rev. Betty Oketch** suing as the officials of the Church filed suit against **Harun Liluma** and 22 other members of the Church from various regions seeking orders to restrain them from constituting a body known as the National Coordination Committee and/or Development Committee in contravention of the Church Constitution. The suit is still pending.

13. In **Kisumu CMCC No. 192 of 2014, Archbishop John Mweresa Kivuli, Rt Rev. Isaiah K.**

**Ruto and Rt Rev. Betty Oketch** suing as the officials of the Church filed suit against **Evans Amugune Chadiva, Michael Amondi Abudho, Daniel Lanogwa Jumba and Paul Kimeli Rugut** disputing the elections of the defendants as Church officials and seeking to restrain the defendants, inter alia, from removing the plaintiff from their offices in the Church, barring them from conducting Church services and from using church assets. After an initial interim order was granted by the court, it was vacated hence the plaintiffs lodged **Kisumu Civil Appeal No. 59 of 2014**. Both suit and the appeal are still pending.

14. Both **Kisumu HC JR No. 26 of 2013 (*Republic v Registrar of Societies, Safina Lungazo Aluse, Mathia Obwotho and Tosi Anono*)** and **Civil Appeal No. 93 of 2015 (*Paul Auma Orwa and Wilson Peterson Mbando v Registrar of Societies, Safina Lungazo Aluse, Mathia Obwotho and Tosi Anono*)** whose contents I have set out above were determined. As I stated the direction of the Court of Appeal was to the Registrar to, “*convene a meeting of both stakeholders and call for referendum on the constitution ...*”. As I understand, the present suit has challenged the process adopted by the Registrar to implement the court order. In his submissions, Mr Misati, counsel for the 2<sup>nd</sup> defendant, dwelt at length on the process that was followed. He submitted that the process was fair as it involved all stakeholders. Mr Okatch, counsel for the plaintiffs, took the opposite view and contended that the process was deficient and that it why they filed suit. Ms Kamande, for the Registrar, told the court the interest of the 1<sup>st</sup> defendant was to ensure that process ordained by the court was fair to all parties.

15. What is clear is that the pending suits namely; **Kakamega HCCC No. 39 of 2013** and **Kisumu CMCC No. 192 of 2014** and **Kisumu Civil Appeal No. 59 of 2014** all pre-dated the judgment by the Court of Appeal. The current suit concerns that process after the Court of Appeal decision. This suit is neither barred by the doctrines of *subjudice* or *res-judicata* as it deals with facts arising out of the implementation of the court order. I do not read the decision of the Court of Appeal as bar to any party from contesting the process adopted by the Registrar in effecting the order of mandamus as is the purpose and intent of this case. I therefore dismiss the preliminary objection lodged by the 2<sup>nd</sup> defendant.

16. What remains are the plaintiff’s Notices of Motion dated 10<sup>th</sup> August 2016 and 15<sup>th</sup> September 2016. These applications are interlocutory in nature and having heard the submissions by the parties, I take the view that are several contentious matters to be resolved by viva-voce testimony. It is unlikely that these matters will be resolved even at the interlocutory stage. The duty of this court is to ensure that the matter is resolved without delay in a manner consistent with the overriding objectives contemplated by **sections 1A and 1B** of the **Civil Procedure Act** which provide that;

*1. The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil Disputes governed by the Act.*

*2. The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seeks to give effect to the overriding objective specified in Sub Section (1).*

*3. A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.*

*1B (1) for the purposes of furthering the overriding objectives specified in **Section 1A**, the court shall handle all matters presented before it for the purposes of attaining the following aims:*

*a. The just determination of the proceedings.*

*b. The efficient disposal of the business of the court.*

*c. The efficient use of the available judicial and administrative resources.*

*d. The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and*

*e. The use of suitable technology.*

17. Finally, as this matter was going on Rev. Wilson Peterson Mbandu filed an application for Judicial Review namely; **Kisumu Judicial Review No. 10 of 2016** against the **Registrar of Societies, Attorney General, Rev Evans Amugune Chadiva, Rev. Michael Amondi, Rev. Daniel Lanonwa Jumba and Rev. Kemeli Rugut. Rev. John Mweresa Kivuli II, Rev. Isaiah Ruto, Rev. Betty Onyango** and **African Israel Nineveh Church** were joined as interested parties. In that suit the applicant sought to quash the letter dated 19<sup>th</sup> September 2016 by the Registrar appointing or approving **Rev Evans Amugune Chadiva, Rev. Michael Amondi, Rev. Daniel Lanonwa Jumba and Rev. Kemeli Rugut** as the Chairperson, General Secretary, Deputy Secretary and General Treasurer of the Church.

**18. Kisumu Judicial Review No. 10 of 2016** raises the same issues regarding the implementation of the Court of Appeal decision and it would be consistent with the overriding objective if all the matters were heard in one swoop. Moreover, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in that matter lodged the same preliminary objection through the same advocate.

19. This court is required to apply the overriding objective to determine how to resolve the underlying dispute. Since the leadership of the Church is under contest, I shall issue interim orders to restrain either side from convening meetings to discuss affairs of the Church. Since I have disposed of the preliminary objection, I now direct that that the suit be set down for hearing and to expeditiously dispose of the matter, I now issue the following directions and orders;

**a. Kisumu Judicial Review No. 10 of 2016** be and is hereby stayed pending hearing and determination of this suit or pending further directions of this court.

**b. Rev. Isaiah Ruto and Rev Betty Onyango** are hereby joined as additional plaintiffs.

**c. Rev. Evans Amugune Chadiva, Rev. Daniel Lanonwa Jumba and Rev. Kemeli Rugut** are hereby joined as additional defendants.

**d. Rev. Wilson Peterson Mbandu** shall be an interested party.

e. The plaintiffs herein are granted leave to file and serve their amended plaint within 14 days from the date hereof.

f. The defendants shall file and serve their respective defences to the amended plaint within 14 days of service.

g. In addition, the parties shall file and serve together with their respective pleadings their witness statements and documents they intend to rely on.

h. The matter is fixed for directions to confirm compliance with these directions on **24<sup>th</sup> January 2017**.

i. The suit is fixed for hearing on **7<sup>th</sup> March 2017**.

j. Pending the hearing and determination of this suit or further orders of this court, the plaintiffs, their agents or any person otherwise claiming through them and the defendants or any person otherwise claiming through them are restrained from issuing notices and convening meetings in relation to the business or affairs of African Israel Nineveh Church.

**DATED and DELIVERED at KISUMU this 20<sup>th</sup> day of December 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Okatch instructed by Okatch and Partners Advocates for the plaintiffs.

Ms Kamande instructed by the Office of the Attorney General for the 1<sup>st</sup> defendant.

Mr Misati instructed by Nelko Misati and Company Advocates for the 2<sup>nd</sup> defendant.



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