



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CONSTITUTIONAL DIVISION**

**CONSTITUTIONAL PETITION NUMBER 1 OF 2019**

**IN THE MATTER OF ARTICLES 1, 2, 10, 32, 41, 48, 50 AND 169 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 32, 41, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE AFRICA INLAND CHURCH – KENYA AMENDED CONSTITUTION, 2018**

**AND**

**IN THE MATTER OF FREEDOM OF WORSHIP, ACCESS TO JUSTICE, DISCIPLINE AND DISPUTES PERTAINING TO MEMBERS AND STAFF OF THE AFRICA INLAND CHURCH – KENYA AT THE AIC MAKUTANO MISSION CHURCH**

**BETWEEN**

**ALEXIS SAPARII (ACTING AS A MEMBER AND**

**OFFICIAL OF THE INLAND CHURCH – KENYA)**

**THE AIC MAKUTANO MISSION CHURCH.....PETITIONER**

**AND**

**REV. BISHOP DAVID KASETON – CHAIRMAN OF**

**THE AIC POKOT AREA CHURCH COUNCIL.....1<sup>ST</sup> RESPONDENT**

**REV. SIMON YOTAH –ADMINISTRATIVE SECRETARY**

**OF AIC POKOT AREA CHURCH COUNCIL.....2<sup>ND</sup> RESPONDENT**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**RULING**

**Orders Sought**

1. This Ruling relates to the Notice of Motion dated 19<sup>th</sup> September, 2019 and the Petition of even date. In the Notice of Motion, the Petitioner Alexius Saparii requested this Honourable Court to issue interim conservatory orders restraining the respondents whether by themselves, their servants and/or agents from interfering with the activities of the African Inland Church – Kenya at the AIC Makutano Mission Church whether by breaching the peace during church services or interfering with worship services pending the hearing and determination of the application and thereafter pending the hearing and determination of the Petition. The Petitioner also prayed for an order that the officer in charge of Kapenguria Police Station do assist in enforcing the interim conservatory order.

2. The application was based on 3 grounds set out on its face; namely that the Petitioner has a *prima facie* case against the Respondents and further that the order was necessary for the preservation of the substratum [of the case] which is the harmonious running of the church activities. The Petitioner also swore a long affidavit in support of the application. He deponed therein that he is a member and the chairman of The Africa Inland Church – Kenya of the AIC Makutano Mission Church in Kapenguria and was bringing, the Petition by dint of *Articles 22 and 258 of the Constitution of Kenya, 2010 and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.

3. At paragraph 6 of his affidavit the Petitioner also cites *Articles 10, 32, 48, 50 and 169 of the Constitution* in support of his case. The Petitioner's case is set out in paragraph 7 of the Supporting Affidavit which is that the Respondents proceeded to ex-communicate Pastor Samuel Maina Ndungu from the AIC Makutano and from the entire AIC Pokot area based on communication dated 19<sup>th</sup> August, 2019. The Petitioner contends that the ex-communication was done *ultra vires* the powers of the Respondents as the mandate for ex-communication falls within the church council so to do. The Petitioner also contends that the Respondents have persistently interfered with church affairs in blatant breach of the Constitution of Kenya, 2010, and further that the Respondents actions were contrary to the employment engagement as provided for in the Constitution and the by-laws of the church which recognize the application of the Employment Act, 2007 which provides for the right to a hearing under Section 41 therein and further fortified by Article 41 of the Constitution of Kenya, 2010 on fair labour practices. (emphasis is mine).

4. In the Petition, which is premised on the same facts as those upon which the Notice of Motion is premised, the Petitioner avers that the local church has a pastor as the spiritual overseer based on Chapter II Part 2 (e) of the by-laws of the Africa Inland Church – Kenya, 2015 with the current occupant of that office being Pastor Samuel Maina Ndungu who is the subject matter of these proceedings. The Petitioner avers at paragraph 8 of the Petition that

**“The acts of the Respondents and the Constitution of the Church together with its By-laws are a travesty of the Constitution of Kenya, 2010 for the reasons set out thereunder. At paragraph (b) of those reasons, the Petitioner avers that:-**

**“b). The Respondents cannot purport to remove the pastor of the church by ex-communication when it is inconsistent with the employment engagement as provided for in the constitution and the By-laws of the church which recognize the application of the Employment Act, 2007 which provides for the right to a hearing under Section 41 therein and as further fortified by Article 41 of the Constitution of Kenya, 2010 on fair labour practices.”**

5. The Petitioner also refers to Chapters XII and XIII of the Africa Inland Church – Kenya 2018 amended constitution which establishes a Church Disputes Resolution Tribunal and an Appeals Tribunal which he says are null and void and unconstitutional on the basis that only Parliament has the mandate based on *Article 169 (1) (d) of the Constitution of Kenya, 2010* to establish Tribunals.

6. The Petitioner thus prays for declaratory orders that the Respondents have jointly and severally breached the rights under *Articles 10, 32, 41, 48 and 50 of the Constitution of Kenya*, and for further orders that the Africa Inland Church – Kenya, 2018 amended Constitution and its By-laws, 2015 in so far as they establish the Tribunals, barring access to the courts and creating rules of procedure are unconstitutional and invalid under Article 2 of the Constitution of Kenya, 2010. The Petitioner also prays for an order of injunction to restrain the Respondents from interfering with the lawful running of the activities of the AIC Makutano Mission Church whether by themselves, their servants and/or agents by causing violence purporting to exercise disciplinary control

over the pastor while they are not the employer and meting out retrogressive and unconstitutional and un-prescribed employment sanctions on the pastor of the AIC Makutano Mission Church. The Petitioner also prays for costs and interests.

### **Responses to the Motion and Petition**

7. Both the Notice of Motion and the Petition were opposed. Rev. Bishop DAVID KASETON the 1<sup>st</sup> Respondent swore the replying affidavit dated 30<sup>th</sup> September, 2019 and a further Replying Affidavit dated 2<sup>nd</sup> October, 2019. The deponent avers that both the Notice of Motion and the Petition were filed prematurely because the Petitioner has offended the mandatory provisions of the AIC – Kenya Constitution 2018 as amended and its By-laws 2015 and that in the circumstances this court has no jurisdiction to entertain the application as well as the Petition. The deponent further avers that the Petitioner has overlooked the dispute resolution mechanisms which he had earlier intended to adhere to when he filed Misc. Application No. 1 of 2019, before the Principal Magistrate's Court at Kapenguria, but which application he later withdrew after the Respondents raised a preliminary objection to the same. It is the Respondents contention that the church constitution and its By-laws of AIC - Kenya bind its members since they were made to govern the affairs of the church and to regulate dealings between its members. The deponent also says that the true position on the ground is that there are leadership wrangles in the church, violation of the church constitution and its By-laws and that as of now there are two distinct factions in the church.

8. The deponent also accuses the Petitioner of material disclosure which means that the petitioner has come to court with unclean hands, namely that the Petitioner's intention is to provide a cover-up for the misdeeds of Pastor Samuel Maina Ndung'u and the fact that the Pastor's exit from the church was due to his (pastor's) discipline issues. In brief the Respondents contend that the issues raised in this matter are of a domestic nature which ought to be resolved through the laid down procedures as per the church constitution and its By-laws if peace and unity in the church are to be maintained. The deponent prays that both the Notice of Motion and the Petition be dismissed for lack of merit.

### **The Petitioner's Submissions**

9. This matter proceeded by way of written submissions. The Petitioner's counsel did not appear in court on the appointed date to highlight the submissions which were dated 2<sup>nd</sup> October, 2019 and filed in court on the same day. The Petitioner's written submissions reiterate the averments in the Notice of Motion as well as the Petition. It is contended that the matters raised in the pleadings are constitutional matters. Reliance was placed on *Geoffrey Muthinja & another -vs- Samuel Muguna Henry & 1756 others [2015] eKLR* where it was held that a matter will be certified as a competent constitutional issue only in terms of specificity and particularity as well as in capacity.

10. The Petitioner also placed reliance on the case of **Board of Trustees of African Independent Pentecostal Church of Africa Church -vs- Peter Mungai Kimani & 12 others [2014] eKLR**. The court in that case ruled, *inter alia*, that the High Court is excluded from handling matters that are in the exclusive jurisdiction of the courts contemplated in *Article 162 (2) (a) (b) of the Constitution of Kenya, 2010*.

11. The Petitioner also submits that Chapters XII and XIII of the Africa Inland Church – Kenya 2018 amended constitution are null and void as they purport to bar the Petitioner and others like him from accessing the courts and instead forcing them to adhere to Church Disputes Resolution Tribunals which, in any event can only be established under *Article 169 (1)(d) of the Constitution of Kenya, 2010*. The Petitioner's argument is that he Africa Inland Church – Kenya under the modern legislation cannot establish a Tribunal since that is within the power of Parliament. Reliance was placed on *Peter Muiruri Kaburu & 2 others -vs- Paul Wandati Kabue – HCCC No. 319 of 2009 (Milimani)* as well as the case of *Geoffrey Asanyo & another -vs- John Kiragu Ngunyi & 13 others [2015] eKLR*, for the proposition that there is no law in this country barring courts from touching disputes involving churches and that churches are not some enclaves where illegalities and violations of rights can be allowed to thrive in the name of God. It was also held in these cases that churches must operate within the sway of the Constitution and are subject to the searchlight of the courts. I agree with these propositions.

### **The Respondents' submissions**

12. The Respondents submitted that the Petition herein does not meet the threshold of constitutional petitions as by law required. Further that the rights allegedly violated under *Articles 10, 32, 48 and 50 of the Constitution* have not been specified and named to the required standard. That Pastor Samuel Maina Ndungu has not sworn an affidavit to confirm the allegations made by the Petitioner on the pastor's behalf. The Respondents also submitted that the Petitioner has admitted that the second limb of his prayer

in this matter touches on employment and that in the circumstances this court does not have the jurisdiction to deal with the matter. In this regard, the Respondents placed reliance on *Lydia Kaimuri Gikundi -vs- Postal Corporation of Kenya - Constitutional Petition No. 25 of 2018 at Meru [2018] eKLR*.

13. The facts in the Meru Petition are that the Petitioner, a former employee of the Respondent was dismissed on 3<sup>rd</sup> January, 2008, and thereafter charged in a criminal court, but she was discharged under *section 87 of the Criminal Procedure Code*. In the Petition she sought declaratory orders that her dismissal was unlawful, unfair and unreasonable. She also prayed for payment of certain monies associated with her former employment. A preliminary objection was raised on grounds, *inter alia*, that the court lacked jurisdiction to hear and determine the case and further that the case was time barred. The Petitioner relied on *Article 20 of the Constitution of Kenya 2010* in opposing the preliminary objection.

14. Though the court in the above Meru Petition agreed that there was no limitation on the articulation of rights under the Constitution of Kenya 2010, it still dismissed the Petition on grounds that the Petitioner had failed to set out particulars of any constitutional infringements. The court also made a finding that the Petition was time-barred and as such the court had no jurisdiction to entertain it.

15. The Respondents also placed reliance on the following cases:-

*1. Anarita Karimi Njeru -vs- Republic [1979] eKLR.*

*2. Mombasa High Court Constitutional Petition No. 11 of 2017 Redington (Uganda) Ltd -vs- AG of Kenya Ports Authority [2018] eKLR.*

*3. Machakos High Court Petition No. 22 of 2013 Jacob Mbau Nyaa & 8 others -vs- The Anglican Church of Kenya Diocese of Kitui & another [2018] eKLR.*

*4. Makeni High Court Petition No. 7 of 2017 Susan Kalondu Ondumwanzui -vs- Pastor John Ngurui & 23 others eKLR.*

*5. Meru High Court Constitutional Petition No. 14 of 2014 – James Marangu M'Mukethia & 1750 others versus Samuel Muguna Henry & 4 others [2015] eKLR.*

in urging this court to dismiss both the application and the Petition.

### **Analysis and Determination**

16. I have now read though the entire proceedings as well as the rival submissions and the supporting authorities. The main issue for determination is whether this court has jurisdiction to determine the matter before it and if so, whether the Petition herein meets the threshold of a Constitutional Petition.

17. It is not in doubt that in this case the Petitioner's complaint arises out of an employment issue between one Pastor Samuel Maina Ndungu and the two respondents who are the chairman of the Area Church Council of Pokot area and the Administrative Secretary of the Area Church Council of the Pokot area respectively. By a letter dated 19<sup>th</sup> August, 2019, Rev. Simon Yotah informed the said pastor, following some serious allegations of sexual abuse within the church, that he was ex-communicated from AIC Makutano and entire AIC Church in Pokot and Uganda. It is this letter that sparked these proceedings.

18. My own detailed reading of the proceedings is that though this matter is camouflaged as a Constitutional Petition, it is in fact an employment dispute between the Petitioner's principal and the Respondents. In this regard and pursuant to *Article 162 (2) (a) and (b)* this court lacks the jurisdiction to entertain the claim. The Article provides as follows:-

#### ***“162. System of Courts***

*1. The Superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2).*

*2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to;*

*a. employment and labour relations; and*

*b. the environment and the use and occupation of, and title to, land.*

3. ....

4. ....”

19. The Employment and Labour Relations Court as well as the Environment and Land Court have been fully operational in this country for upwards of six years. This means that the Petitioner in this case should have taken his dispute to the Employment and Labour Relations Court for hearing and determination. His attempts to remove the central issue of his dispute through submissions came in too late in the day and did not elevate his claim to a purely constitutional issue for determination by this court.

20. I also find that even if this matter had been brought as a purely Constitutional Petition, the same would still fail, for lack of particularity and specificity of the alleged violations under *Articles 10, 32, 48 and 50 of the Constitution*.

### **Conclusion**

21. In light of the foregoing I find and hold that I have no jurisdiction to entertain the Petition herein as the same is a matter for the Employment and Labour Relations Court. Since the Notice of Motion was hanging on the hem of the garment of the Petition, it must meet the same fate as the Petition. Accordingly the Petition dated 19<sup>th</sup> September, 2019 and the accompanying Notice of Motion of even date be and are hereby struck out.

22. I make no order as to costs.

**Ruling delivered, dated and signed in open court at Kapenguria on this 30<sup>th</sup> day of October, 2019.**

**RUTH N. SITATI**

**JUDGE**

In the Presence of

M/s.chebet h/brief for Mogambi for Petitioner

Mr. Lowasikou h/brief for Chebii for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Mr. W.Juma - Court Assistant



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