



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 140 OF 2019**

**BETWEEN**

**JEREMIAH MUEMA NDETI & OTHERS.....PETITIONERS**

**VERSUS**

**THE REGISTRAR OF SOCIETIES.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**REV. DR. SILAS YEGO.....1<sup>ST</sup> INTERESTED PARTY**

**REV. ABRAHAM MULWA.....2<sup>ND</sup> INTERESTED PARTY**

**REV. JOHN KITALA.....3<sup>RD</sup> INTERESTED PARTY**

**REV. DAVID MULEI MBUVI.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

**THE PETITION**

1. The Petitioners in the instant Petition dated 25<sup>th</sup> March 2019 seek the following orders:-

*1. The Respondent do within a period of ninety ( 90) days from the date of Judgment supply the petitioners' through their advocates with the following information, records and documents;*

*a) Details of registration including certificates, constitutions, office bearers and returns made by Africa Inland Church between 1961 and 1981.*

*b) All the returns, documents, constitutions and inventories filed by Africa Inland Church between 1981 and the date of Judgment in this Petition.*

*c) All certificates, constitutions, office bearers and returns made by Africa Inland Church Kenya from the time it was registered to the date of the Judgment.*

*d) All certificates, constitutions, office bearers and returns made by the following societies;*

*i) Africa Inland Church Kenya (Central Area) under certificate number SOC/56708.*

*ii) Africa Inland Church Kenya (Central Rift Area) under certificate number SOC/ 56709.*

*iii) Africa Inland Church Kenya (Coast Area) under certificate number SOC/56710.*

*iv) Africa Inland Church Kenya (Kitui Area) under certificate number SOC/56711.*

*v) Africa Inland Church Kenya (Machakos Area) under certificate number SOC/56712.*

*vi) Africa Inland Church Kenya (Marsabit Area) under certificate number SOC/56713.*

*vii) Africa Inland Church Kenya (Nairobi Area) under certificate number SOC/56714.*

*viii) Africa Inland Church Kenya (Makueni Area) under certificate number SOC/ 56715.*

*ix) Africa Inland Church Kenya (Nakuru Area) under certificate number SOC/56716.*

*x) Africa Inland Church Kenya (North Rift Area) under certificate number SOC/56717.*

*xi) Africa Inland Church Kenya (Nyanza Area) under certificate number SOC/56718.*

*xii) Africa Inland Church Kenya (Southern Area) under certificate number SOC/ 56719.*

*xiii) Africa Inland Church Kenya (South Rift Area) under certificate number SOC/ 56720.*

*xiv) Africa Inland Church Kenya (Turkana Area) under certificate number SOC/56721.*

**2. The Respondents do pay costs of this Petition.**

### **THE PETITIONERS' CASE**

3. The Petitioners have brought this suit on their own behalf and on behalf of other 2096 members of Africa Inland Church. On 29<sup>th</sup> January 2019 they discovered the existence of constitutional petition No. 395 of 2012 between the 1<sup>st</sup> and 4<sup>th</sup> Interested Parties and that their membership, funds, properties and resources had been channeled to two entities; Africa Inland Church and Africa Inland Church-Kenya without being made aware which specific entity their funds were transferred to.

4. They have received letters from their local pastors and leaders threatening to take up their resources, properties, places of worship and spiritual leaders imposed on them by one of the parties in the said petition. As such their right to worship, conscience and religion has been jeopardized by the respondents in conspiracy with other people.

5. On or about 22<sup>nd</sup> January 2010 the Respondents conspired with other people, to register fourteen other entities with almost similar name to the church (mentioned in prayer (d) (i)-(xiv) of the Petition); to dissolve the church without the consent of the members or following legal procedure; formed Africa Inland Church – Kenya and moved their membership without consultation; and registered more than three versions of the church's constitution. Their membership and funds were also moved to the said other entities where some of the Petitioners and 2096 other persons have been registered in more than two of the entities making it difficult to know who should be held accountable for the loss or damage to their assets, finances and property.

6. That despite requesting for information from the respondents on 28<sup>th</sup> February 2019, the respondents have failed to respond to the said request neither have they given reasons why they cannot or will not provide the information.

7. The Petition is supported by the affidavit of Jeremiah Muema Ndeti sworn on 25<sup>th</sup> March 2019.

### **THE RESPONDENT'S CASE**

8. The Respondents though duly served with pleadings and the Attorney General filing Notice of Appearance none of them filed response to the Petition. The Petition is deemed as unopposed on part of the Respondents.

### **THE 2<sup>ND</sup> & 3<sup>RD</sup> INTERESTED PARTIES' CASE**

9. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents filed replying affidavit sworn by Rev. Abraham Mulwa on 23<sup>rd</sup> March 2021 and a Notice of Preliminary Objection dated 15<sup>th</sup> March 2021. In the preliminary objection, they sought that the petition be struck out for the reasons that:-

*a. The matters raised in the petition have already been litigated substantively and determined by the High Court and are res judicata in Nairobi Petition No. 395 of 2012; Rev. Bishop Silas Misoi Yego & 2 others vs. Minister for State for Provincial Administration Internal Security, Commissioner of Police, David M. Mbuvi & 4 Others*

*b. The 4<sup>th</sup> interested Party is doing proxy litigation through the Petitioners to circumvent the court's decision in High Court Petition No. 395 of 2012 in which the 4<sup>th</sup> Interested Party was the 4<sup>th</sup> Respondent and which case was heard and determined by competent Court and arrived at a decision.*

*c. The 4<sup>th</sup> Interested party did not appeal the decision in High Court Petition No. 395 of 2012 but has instead, through proxies, chosen to file the present suit; and*

*d. This Honourable Court lacks the requisite jurisdiction to entertain the present Petition.*

10. In the replying affidavit he deposed that the Petitioners are not members of the AIC church but belong to a group that attempted to take over the leadership of the church through the 4<sup>th</sup> Interested Party whose claim was defeated in the Judgment delivered in Petition No. 395 of 2012.

11. He contends that annexure JN3 are documents issued by the Africa Inland Church Central office and that the AIC/ AIC Kenya has never issued such documents or authorized their use in this matter. There is also no proof that the petition has been brought on behalf of 2096 other members of the church as claimed.

12. He avers that the petitioners are proxies of the 4<sup>th</sup> Interested Party and the Petition is a direct challenge to the Judgment delivered in Petition No. 395 of 2012 as follows:-

*i) Annexure JN-10 contains the 4<sup>th</sup> interested party's rubberstamp.*

*ii) The phone numbers provided in annexure JN-3 are registered under the names of the 4<sup>th</sup> Interested Party and David T. Waweru (5<sup>th</sup> Respondent in Petition No. 395 of 2012)*

*iii) The postal address in Annexure JN-3 is the document that the 4<sup>th</sup> Interested Party has used and claimed to be his over the years.*

*iv) The 9<sup>th</sup> Petitioner has filed several suits in court on behalf of the 4<sup>th</sup> interested party and actively participated in Petition No. 395 of 2012. He was also a party in one of the consolidated suits HCCC (Machakos) No. 241 of 2011; Rev. Bernard Nguyo & others vs Bernard Wambua & others hence false that they only made the findings they allege in 2019.*

v) *The claims and reliefs sought in the Petition are similar to those sought by the 4<sup>th</sup> Interested Party and his cohorts over the years which have never been granted by Court.*

13. He refuted that the church has ever been dissolved as alleged and that the church has registered 14 other churches of AIC – Kenya and averred that the certificate numbers alluded to by the petitioners are for administrative purposes by the Registrar of Societies. He maintained that the issues raised in the petition were settled by the Court in Petition 395 of 2012 hence this suit is an appeal veiled as a Constitutional Petition.

#### **THE 4<sup>TH</sup> INTERESTED PARTY CASE**

14. The 4<sup>th</sup> Interested Party supported the Petition through his replying affidavit dated sworn on 11<sup>th</sup> August 2021.

#### **ANALYSIS AND DETERMINATION**

15. Having carefully considered the Petition, the Interested Parties responses, and parties' submissions and from the same the following issues arise for determination: -

a. *Whether this suit is res judicata.*

b. *Whether the orders sought should be granted.*

#### **A. WHETHER THIS SUIT IS RES JUDICATA**

16. The 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties, argued that this Petition is *res judicata*; that the issues in the present Petition were directly and substantially in issue in the former suit, (*thus Petition 395 of 2012*) the parties were litigating under the same title; the issues raised have been conclusively determined in *Petition 395 of 2012*; that the Petitioners are acting as proxies of the 4<sup>th</sup> Interested Party; the Judgment applies *in rem*; and urged the court to allow the Preliminary Objection with costs.

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties relied on *Section 7 of the Civil Procedure Act* and the cases of *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR*; *ELC Petition No. 250 of 2015 John Omolo Oracha & 3 others v Kenya Petroleum Refineries Ltd & 3 others*; and *Petition No. 188 of 2015; Clement Ogotu v Kenya Railways Staff Retirement and Benefits Schemes & 2 others* in support of their Preliminary Objection.

18. The Petitioners in opposition argued that the Petition is founded on a different cause of action and the Petitioners, Respondents and Interested Parties save for the 4<sup>th</sup> interested party were not parties to Petition No. 395 of 2012, the prayers sought are different. There is also no evidence adduced by the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties showing that they are proxies of the 4<sup>th</sup> Respondent.

19. What amounts to a *Res judicata* is provided for under *Section 7 of the Civil Procedure Act, Cap. 21 Laws of Kenya*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR*, the Supreme Court outlined the elements that must be satisfied conjunctively for the *doctrine of Res judicata* to be invoked. What it is required to be demonstrated is, *the suit was directly and substantially in issue in the former suit; that former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that formerly heard and determined the issue was competent to try the subsequent suit or in which the issue is raised.*

20. The 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties have argued that the Petition herein is *res judicata* as the issues raised herein are similar to the issue therein, to wit, the issue of the African Inland Church being a separate entity from the African Inland Church Kenya; the issue of Leadership; the issue of other separate entities; and that the petitioners are acting as proxies of the 4<sup>th</sup> Interested Party hence between the same parties, same subject matter, litigated upon and determined by a court of competent jurisdiction and final judgment *in rem* granted.

21. The Petitioners argued that the issue in the former suit was concerning the leadership of the church, while the issue herein is concerning supply of information from the Respondents. It is further argued that the parties are not similar save for the 4<sup>th</sup> Interested

Party and the prayers sought are also not similar.

22. I have carefully looked at the petition referred to, the parties, the orders sought and the orders granted in the said Petition. In one aspect I do agree with the 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties, that the issue of leadership, the issue of the Africa Inland Church and Africa Inland Church Kenya being distinct and the issue of other separate entities were determined. I also by virtue of the evidence presented by the 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties agree that the Petitioners were aware of the on goings in the church and are acting as proxies of the 4<sup>th</sup> Interested Party. The Petitioners are however seeking information from the respondents which said information has not been granted nor reasons for failure to grant advanced by the Respondents. I do agree with the Petitioners that this issue was not handled in the said Petition. It is a fresh issue as sought. The preliminary objection therefore in my view lacks merit.

#### **B. WHETHER THE ORDERS SOUGHT SHOULD BE GRANTED.**

23. The Petitioners substantively reiterate the contents of the Petition and submit that it is their right under *Article 35 of the Constitution* to be supplied with information to enable them protect their rights. They maintain that there is no communication that was or has ever been given to them to show that they were excommunicated and how they ceased to be members of the said church.

24. It is Petitioners contention that they have complied with the law in Petitioning for the information. It is urged that on 26<sup>th</sup> February 2019, they requested for the information from the Respondents who neither responded to their letter nor supplied the information of why they cannot or will not provide the information. The period for supply of information lapsed on 21<sup>st</sup> March 2019 or thereabout resulting to filing of the Petition on 5<sup>th</sup> April 2019. The Respondents have not denied holding the information requested for nor given reasons for such failure. The information requested for does not also fall under the exemptions provided under *Article 35 and Section 4 of the Access to Information Act*.

25. The Petitioner places reliance on *Nairobi Law Monthly v Kenya Electricity Generating Company [2013] eKLR* and *Katiba Institute vs President Delivery Unit & 3 others (2017) eKLR* urging that it does not matter whether or not the Petitioners are members of the church or the question of who is the leader of the church as that issue was decided. The access to information should not be qualified unless the information falls under *Section 6 of the Access to information Act*. The respondents and the Interested Parties have not shown that this information falls under the ambit of that Section.

26. Similarly the 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties argued that the petitioners have failed to demonstrate how the information they seek will assist in protecting their rights.

27. Reiterating their averments in their replying affidavit the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties argued that *Article 24 of the Constitution of Kenya* provides limitations to fundamental rights and freedoms and this includes the need to ensure that the enjoyment of rights and freedoms by any individual does not prejudice the rights and fundamental freedoms of others. The AIC has a congregation of over four million members and their rights ought to be protected against the claims of 10 Petitioners at the behest of the 4<sup>th</sup> Interested Party.

28. It is further submitted that the Petition is clothed in disguise to those claims of leadership by David Mbuvi and his followers and everyone has a duty to obey Court Orders (Petition 395 of 2012) hence this petition is an attempt to challenge the judgment of this Honourable Court. Further, relying on *Petition No. 188 of 2015 (supra)* and *Petition No. 429 of 2017; Brian Asin & 2 others v Wafula W. Chebukati & 9 others* the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties urged the Court to dismiss the Petition in its entirety with costs which should also be borne by the 4<sup>th</sup> Interested Party.

29. *Article 35 (1) of the Constitution of Kenya* provides that every citizen has the right of access to information held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom. *Section 4 of the Access to information Act* echoes the wording of *Article 35 (1) of the Constitution*, it further provides that every citizen's right to access information is not affected by any reason the person gives for seeking access or the public entity's belief as to what are the persons reasons for seeking access. Such information the said section provides, shall be provided expeditiously.

30. *Section 5 of the said Act* provides for the information to be disclosed by public entities. *Section 6 of the said Act* provides for circumstances where the right of access to information is limited. *Section 8 of the Act* provides for the application process and *Section 9* provides for the processing of the application.

31. The Petitioners have submitted that they requested for information from the Respondent's vide letter dated 26<sup>th</sup> February 2019 which said information has not been granted and reason for such failure advanced. In their Petition, they aver that the information sought is for the purposes of keeping them abreast with whom to hold accountable for their resources, assets and properties. They urge that they have discovered that their membership has been transferred and they have received letters threatening to take up their resources, properties, assets and places of worship. They have also argued that contrary to the allegation by the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, they have never been excommunicated from the church nor their membership ceased.

32. The 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties have urged that the Petitioners have not demonstrated how the information they seek will enable them protect their constitutional rights or that they have proved that their constitutional rights are being threatened or violated. It is further submitted that their right is not absolute and is limited in relation to other church members. It is also submitted that the petition is clothed in disguise to those who follow the leadership of the 4<sup>th</sup> Interested Party and that court orders need to be obeyed. I wish to state herein that contrary to submissions by 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, this matter has nothing to do with leadership of the Church as that matter is already determined by this Court in *Petition No. 395 of 2012*.

33. In the case of *Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR* the judge in a similar petition such as this where information was being sought held that:-

***“31. The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.*”**

34. Similarly similar issue was dealt with in the case of *Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others (2013) eKLR* where the Court stated of what the state should bear in mind when considering the request to access information:-

***“34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...*”**

***36. The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”***

***“[56]... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a)... they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens.” (Emphasis mine)***

35. It is evident from the above cited provisions of the Constitution, the *Access to Information Act* and the cited authorities that the state is obligated to supply information in its possession. There is no provision for any escape route, not to provide the information under *Article 35 (1) (a) of the Constitution* and the interest of the requester is immaterial. I do not find as a valid argument by the 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties that as the Petitioners and the 4<sup>th</sup> Interested Party were excommunicated as basis for Respondents to deny them the information sought, that the affairs of the church are not their personal business, and that the Petition has been brought on behalf of the 4<sup>th</sup> Interested Party a justification to oppose the application. The Petitioners have sought for information and followed the procedure envisaged under the *Access to Information Act* and the information is within the possession of the 1<sup>st</sup> Respondent as provided for under *Article 35 of the Constitution*. Such information I find that it does not fall under the ambit of that limited by *Section 6 of the Access to Information Act*, which information in addition is not being sought from the Interested Parties but the Respondents, and which information is held by the state and which is accessible by citizens and which information has not been said not to be available. This Court cannot speculate on the information as the Respondents have deliberately failed to file response. The Petitioners rights as provided by the Constitution is clear that the Respondents have constitutional obligation to provide the information to requesters as of right and expeditiously to the requesters.

36. *The upshot is that the Petition is meritorious and I proceed to order as follows:-*

*a) The Preliminary Objection by 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties is without merits and is accordingly dismissed.*

*b) The Petitioners Petition against the Respondents is granted in the following terms:-*

*a. The Respondents do within the next ninety (90) days from the date of this Judgment supply the Petitioners through their Advocates with the following information, records and documents:-*

*b. Details of registration including certificates, constitutions, office bearers and returns made by Africa Inland Church between 1961 and 1981.*

*c. All the returns, documents, constitutions and inventories filed by Africa Inland Church between 1981 and the date of Judgment in this Petition.*

*d. All certificates, constitutions, office bearers and returns made by Africa Inland Church Kenya from the time it was registered to the date of the Judgment.*

*e. All certificates, constitutions, office bearers and returns made by the following societies;*

*i. Africa Inland Church Kenya (Central Area) under certificate number SOC/56708.*

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*xiii. Africa Inland Church Kenya (South Rift Area) under certificate number SOC/ 56720.*

*xiv. Africa Inland Church Kenya (Turkana Area) under certificate number SOC/56721.*

*c) I have considered the nature of the Petition and responses as well as the parties relations, and I find that this is public Interest Litigation involving members of one Church now under the leadership of the 2<sup>nd</sup> Interested Party as per Judgment of this Court in Petition No. 395 of 2012 and I have in the interest of justice and maintaining peace and unity amongst the members of the*

*said church direct that each party bear its own costs.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF MARCH, 2022.**

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**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**



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