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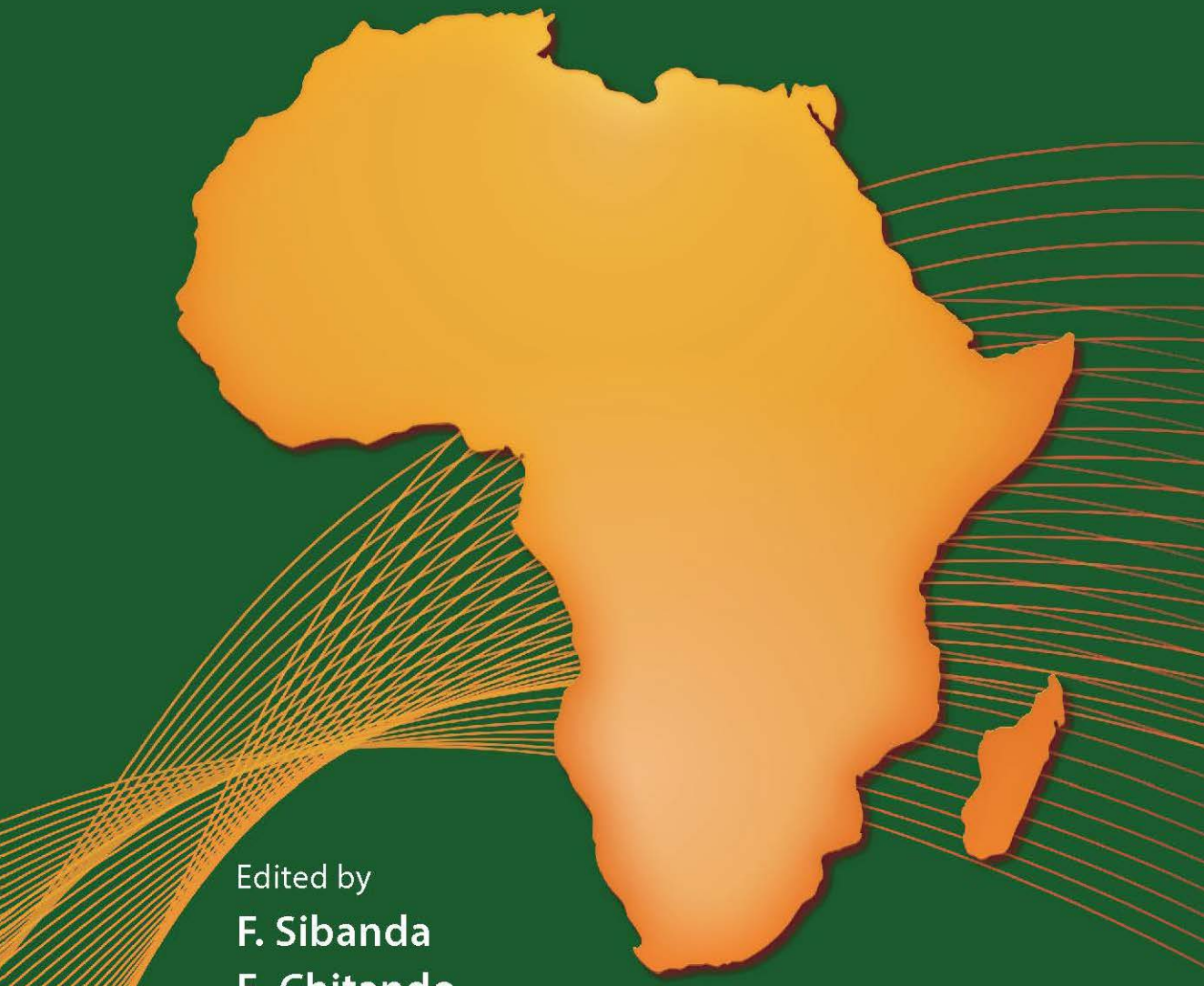

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AFRICAN CONSORTIUM FOR LAW AND RELIGION STUDIES

8 The Kenyan judiciary and its role in the resolution of church disputes

Wambui Njogu[1]

> If any of you has a dispute with another, do you dare to take it before the ungodly for judgment instead of before the Lord's people?[2]

INTRODUCTION

Freedom of religion, conscience, thought, opinion and belief, as well as the right to manifest these rights and freedoms through worshipping in a community with others, are well set out under the web of human rights instruments.[3] They are also constitutionally guaranteed in Kenya. The Constitution of Kenya, 2010, is very precise in this regard when it states: "Every person has the right to freedom of conscience, religion, thought, belief and opinion. . . .Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief in human dignity."[4] In Kenya, spirituality is considered not just an important component of human development but also a means of satisfaction in life by many. For these reasons, the majority of Kenyans opt to exercise these rights by aligning themselves to various Christian churches, in line with the constitutional provisions which allow them the freedom to join various Christian associations and to participate in activities of those associations.[5]

Many people flourish in these spiritual spaces. Indeed, research has shown that participating in religious communities and church activities translates to what Nigerian law and religion scholar Idowu Akinloye refers to as human flourishing.[6] According to Akinloye, human flourishing is manifested in greater life longevity, enhanced happiness and lower cases of depression.[7] And as scholars have observed, in addition to presenting an opportunity to acquire spiritual growth, churches play

1 Lecturer, Kenyatta University School of Law, Arts and Social Sciences; Advocate of the High Court of Kenya.

2 Bible, 1 Corinthians 6:1 (New International Version (NIV)).

3 See Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art 18; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art 19; the African Charter on Human and Peoples Rights, dopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986, art 8.

4 Constitution of Kenya, 2010, arts 32(1) and (2).

5 Constitution of Kenya, 2010, arts 33(1) and 36 (1), respectively.

6 Akinloye I. 2019. "Human Flourishing, Church Leadership and Legal Disputes in Nigeria", in Green MC (ed). *Law, religion and human flourishing in Africa*. Stellenbosch: African Sun Media, 25-41.

7 Akinloye, "Human Flourishing, Church Leadership and Legal Disputes in Nigeria".

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an integral part in facilitating socio-economic development, hence significantly enhancing people's living standards.[8] In fact, the work of theologians Pauline Mwaura and Daniel Nzengya highlights the many development initiatives Christian churches have undertaken. Such development activities have served to improve the lives of poor communities in many parts of Sub-Saharan Africa.[9] Spiritual expression and growth, socio-economic empowerment and human flourishing attainable in churches therefore becomes imperative. Churches, however, can fail to fulfil these core mandates, when they become unstable, due to several factors, among them improperly resolved leadership and other disputes.

The legal framework governing registration of churches in Kenya is mainly contained in the Societies Act.[10] Churches can also be registered as Trusts, while some come into legal existence as Public Companies Limited by Guarantee. Whichever legal form a church takes, there is a requirement by the law, that there be in place a Constitution or a Trust Deed clearly reflecting the leadership and governance structures within the institution. Many also have an organogram detailing the hierarchical relationships between the different cadres of leaders and their respective roles. Internal dispute resolution mechanisms are also defined. The law regulating churches therefore grants them autonomy to establish leadership structures and to resolve their affairs internally and independently.

Leadership wrangles and other disputes, however, sometimes end up in courts. When this happens, courts adopt different approaches to resolve these disputes. Some courts accord parties the opportunity to determine the disputes internally through legally prescribed institutional mechanisms. Others make certain determinations with negative impacts for congregants, such as closure of the institutions. When disputants resort to litigation through courts, the situation can get extremely acrimonious. This, coupled with the expenses and cumbersomeness that comes with court processes almost invariably negatively impacts evangelism, pastoral care and congregational growth thereby impacting the congregants' constitutional right to worship in a community as envisaged under the Constitution. Unresolved disputes also adversely affect spiritual and socio-economic benefits enjoyed by the community.

This chapter undertakes an examination of selected leadership and other disputes litigated in Kenyan courts and reveals that resorting to litigation is not the most appropriate approach. Indeed, the courts, in the cases examined, have made this position very clear. The chapter makes recommendations for the use of internal

8 Kioko JM. 2020. "The Role of The Church in Social-Economic Development of The Community: Focus on Redeemed Gospel Church in Makueni County", *European Journal of Social Sciences Studies* 5(4):113-129.

9 Mwaura P and Nzengya D. 2022. "Examining the Role of the Church in Socio-Economic Development of the Rural Poor in the Sub-Saharan Region: Insights from Previous Research and Future Research Directions, *African Multidisciplinary Journal of Research*, Special Issue II: 147-158.

10 Societies Act, ch 108 of the Laws of Kenya.

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mechanisms availed by the church's founding documents in the first instance, as well as other mechanisms alternative to litigation as contained in the law before resorting to court. As courts have suggested, such measures are likely to get the disputes resolved in a manner that does not negatively impact delivery of the spiritual and socio-economic needs of the people.

THE ROLES OF THE CHURCH IN SOCIETY

Christian churches are numerically the largest religious institutions in Kenya, playing significant roles for the people they serve.[11] In addition to providing places for spiritual development, their structures provide congregational centres for communities seeking to exercise their rights and freedoms to religion, thought and conscience individually and as groups. Churches serve as educational hubs by building schools and tertiary institutions, thus promoting the right to education at different levels. They engage in provision of health care services through church-owned hospitals, hence promoting the right to health and in provision of clean water and sanitation, thereby augmenting the government's obligation to provide clean and safe water and reasonable standards of sanitation as contemplated by the Constitution.[12] Other social economic initiatives undertaken by churches in Kenya include feeding the destitute, a service which falls in the category of social economic rights.[13] Churches help hunger amongst rural communities by facilitating agricultural programs amongst other socio-economic empowerment activities.[14] They are therefore avenues through which people achieve spiritual fulfilment and enjoy socio-economic rights guaranteed by the Constitution and key human rights instruments.

The presence of churches and their overall impact in society is therefore generally large and widespread critical for spiritual, moral, social and developmental impact, which is why their stability is key to enable them to perform these pivotal roles. Unfortunately, instability brought about by conflicts abounds in most churches in Kenya. Disputes either pit leaders against each other, the congregation against their leaders or members of the congregation against each other.[15]

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11 Kamara E. 2000. "Interdisciplinary Approaches to Third World Studies: The Role of the Christian Church in Socio-Economic and Political Development in Kenya", *Journal of Third World Studies* 17:165-176.

12 Constitution of Kenya, 2010, arts 43(1)(b) and (d).

13 Constitution of Kenya, 2010, art 43(1)(c).

14 Moyer J, Sinclair AJ and Spaling H. 2012. "Working for God and sustainability: The activities of faith-based organizations in Kenya", *Voluntas: International Journal of Voluntary and Nonprofit Organizations* 23(4):959-952.

15 Moyer et al "Working for God and sustainability".

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CHURCH LEADERSHIP DISPUTES: ORIGIN AND BIBLICAL BASIS

Church wrangles are neither strange nor unusual. Indeed, wrangles in churches have a biblical basis. From a theological perspective, counsellor Moses Kihiko Kibe opines in his work that there is always a spiritual angle to Christian warfare, attributing the devil to most feuds affecting churches.[16] His argument is perhaps given biblical credence by the Apostle James, who in practical instructions written to God's people points out the devil's temptations to Christians towards anger and wicked conduct.[17] The Bible also documents many instances of conflict. The Acts of the Apostles for instance, captures a disagreement between Barnabas and Paul, relating to whether John Mark should accompany them.[18] In view of these biblical parallels, it would not be incorrect to say that disputes and conflicts amongst believers have a biblical origin.

Further, research has shown that conflict is a natural and normal phenomenon in human life.[19] Christians holding leadership positions in churches are first and foremost human and therefore open to conflict. Being human in nature, Christians will differ for countless reasons. They will differ because of varying opinions, social and educational backgrounds and age. Other differences will be brought about by levels of understanding, maturity, power struggles, control of church finances and assets and pure greed. Such conflicts, especially when they are prolonged and remain unresolved, can be disastrous not just for the institution, but for the congregants, as well. This is probably why the Bible admonishes Christians against instituting lawsuits against each other.

IMPACT OF LEADERSHIP CONFLICTS IN CHURCHES

Tension, strife, confrontations and conflict in churches usually lead to violent reactions which can be quite destructive. Protracted conflicts threaten not just the survival of the institutional structure and the institution itself, but the spiritual, physical and economic wellbeing of the congregants. If the conflict degenerates to physical violence, as it sometimes does, then the result may be destruction of church property, injury to limbs and sometimes loss of life, moving into the realm of criminality. Other adverse effects of conflict within the church leadership include the excommunication of members or leaders perceived to be authors of the conflict. Additionally, some of the members of the congregation may opt to disaffiliate themselves with the church, leading to a numerical decline in membership.

16 Kibe MK. 2004. *Resolving Church Splits in Kenya: Causes Impact and Healing.* Nairobi: Kings Script Publishers.

17 Bible, James 1:1-27.

18 Bible, Acts 15:26.

19 Al-Rawashdeh MSAM and Al-Majali DSA. 2017. "The phenomenon of International Conflict in International Relations", *The International Journal of Social Sciences and Humanities Invention* 4(5):3488-3502. See also Kimani JG. 2021. "Role of Church Justice and Peace Commission and Conflicts Management in Pastoral Communities", *European Journal of Conflict Management* 2(1):22-41.

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This causes slow or retarded development in the Church, which in turn impacts the Church's congregational and socio-economic growth.[20] More significantly, unresolved conflict makes it impossible to evangelise, thus adversely impacting the core mandate of the Church.

It cannot be denied that conflict, even in a church setting, may be beneficial and can positively help disputants improve by affording them an opportunity to work towards better relationships.[21] However, most of the time, the impact can be very negative and long-standing when not properly handled in a timely manner. Usually, by the time the disputes reach the level of the courts, the situation has regressed so much that the church is in crisis. The long-term impact may be disastrous and irredeemable. Indeed, litigating church disputes almost always leaves all the parties in tatters and should be avoided at all costs. Cases of leadership disputes litigated in Kenya examined below illustrate why.

LITIGATING CHURCH DISPUTES: LESSONS FROM CASE STUDIES

The Anglican Church of Kenya (ACK)Emmanuel Church, Kengeleni litigation

Cases of leadership squabbles ending up in courts in Kenya are not uncommon. A classic example is a series of conflicts involving the Anglican Church of Kenya (ACK) Emmanuel Church, Kengeleni of the Mombasa Diocese in Frere Town, Mombasa. The divisions caused severe retrogressive effects on everyone concerned, with the disputes litigated through several lawsuits for many years. To put the nature of the leadership disputes in this church in context, it is important to first briefly delve into the history of the church.

The ACK Emmanuel Church, Kengeleni is one of the oldest churches in Kenya, having been established by the pioneer Church Missionary Society (CMS) round about 1889.[22] This was also the time trading in slaves along the coastal region of Kenya was declining.[23] The Arab slave traders at the coastal town of Mombasa had had a thriving business trading in slaves over the years but with slavery being abolished, freed slaves needed to be settled. In the coastal region, the freed slaves were settled in Frere Town, a settlement founded for this purpose and named in honour of Sir Bartle Frere, who had been very instrumental in the abolition of slave

20 Mwabonje JK *et al*, 2019. "Can Church Conflict Inhibit Moral Development and Christian Formation? A Study of Emmanuel Church Kengeleni, Diocese of Mombasa in the Anglican Church of Kenya", *Kabarak Journal of Research & Innovation* 8(1):12.

21 Magondu TW. 2012. *Conflict Management by The Catholic Church in Kenya*, M.A. thesis in international studies, University of Nairobi.

22 The Church Missionary Society (CMS) were amongst the earliest missionaries who came to evangelise in Kenya in the nineteenth century.

23 Stovold KE. 1946. *The CMS in Kenya: The Coast, 1844-1944*. Nairobi: East African Literature Bureau, 18.

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trade in that region of East Africa.[24] The CMS missionaries had already commenced missionary work in this area and when the first freed slaves were handed over to them, they settled them in Frere Town.[25] When the ACK Emmanuel Church, Kengeleni was established in 1889, its core objectives was to cater for the socio-spiritual needs of those freed slaves settled in Frere town and their descendants.[26] The noble reasons behind the establishment of ACK Emmanuel Church, Kengeleni notwithstanding, leadership wrangles have historically and perennially stalked the church. Squabbles between the descendants of the freed slaves and other communities in the church were constant for several decades. The disputes were attributed to multiple factors. Ethnicity, struggles for leadership positions, scramble for control of resources, accusations and counteraccusations regarding misuse of church funds, church assets and misappropriation of church funds amongst others were some of the reasons cited. The wrangles escalated rapidly, eventually spilling into court through several cases between 2003 and 2007.[27]

Studies revolving around the conflicts in ACK Emmanuel Church, Kengeleni demonstrate that they had enormous negative consequences on the institution, both in its spiritual and socio-economical roles. Retarded development, escalating rivalry, strained relations and enhanced negative publicity were all reported.[28] The conflicts further negatively affected the church's numerical growth, particularly because physical attendance became problematic. Church services would be marred with physical confrontations between the warring groups, with parties hurling rotten eggs at each other inside the sanctuary. Many congregants opted to stay away from the physical church building.[29] A group of leaders obtained court injunctive orders against their rivals, but these only served to worsen the situation. Operations of the church and its educational activities were paralyzed for days on end.[30] Courts issued injunctive orders freezing the church's bank accounts with others restraining the collection of school fees from parents or guardians of students of a primary and nursery school run under the auspices of the church, which meant that the educational needs of the communities relying on the church could not be met.

Without these critical finances, all church activities, including payment of salaries, stalled. The security situation deteriorated so much that the church was at some point closed, due to increased cases of hooliganism which disrupted orderly worship services. Parishioners would often be forced to retreat to a hall and abandon the consecrated places. Physical attacks on church clergy meant that

24 Stovold, *The CMS in Kenya.*

25 Gathogo J. 2011. *The Pangs of Birth in African Christianity*. Düsseldorf: Lambert Academic Publishing, 26.

26 Gathogo, *The Pangs of Birth in African Christianity*.

27 *Fredrick Karisa Shungu & 3 Others V Rev. Geoffrey Guyo Did.* [2012] *e*KLR.

28 Kapanga JM. 2018. *An Analysis of Church Conflict: The Case of Emmanuel Church Kengeleni-Mombasa Diocese (2000-2010)*. Master of Arts Thesis in Religious Studies, Pwani University.

29 Kapanga, *An Analysis of Church Conflict.*

30 Kapanga, *An Analysis of Church Conflict.*

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pastors could not hold services in the consecrated areas of the church. At the height of the conflicts, not even prayers could be held in the sanctuary.[31] A church that had been tasked with the mandate of spreading the gospel of Christ in the coast and in the interior of Kenya, a place where formal and informal education commenced and spread to many areas in Kenya, and a place where freed slaves were, for the first time enjoying their civil and political rights by taking leading role in politics as contemplated by human rights instruments, was now wrecked by leadership squabbles and was on the verge of collapse.[32] Tension and fights for control of the church's assets, which included a nursery and primary school, residential houses for the clergy, several parcels of land and property worth millions of shillings escalated day by day.

Church attendances dropped, and the dropping numbers meant a drop in finances. Personal relationships were not spared either. Marriage relationships fragmented, depending on which side of the divide each of the spouses was supporting. Evangelism, pastoral work and socio-economic empowerment activities were relegated to the back burner. Time which would have otherwise been spent on these activities was spent in physical and verbal confrontations within the church precincts and in litigation before courts.

Generally, the image of the ACK Emmanuel Church, Kengeleni, which is meant to reflect the Body of Christ, was grossly undermined. Indeed, during the course of the litigation, even the court expressed its strong displeasure with the course the church had taken when it stated, "There is a comprehensive arrangement under the Church Constitution for internal remedies, prior to the invocation of the High Court's jurisdiction. Religious commitments and related activities, involve peculiarities in respect of which the regular judicial process ought not to be the first line of dispute resolution. This Court will allow room to the play of such internal remedies as may have been provided for."[33] Here, the court was generally demonstrating its disinclination to being drawn into the church dispute, instead proposing that churches should try and utilise internal mechanisms to resolve their disputes before requiring it to assume jurisdiction in respect of matters of religion.[34]

The African Independent Pentecostal Church of Africa Church (AIPCA) litigation

Church leadership disputes escalating to similar unmanageable levels were also seen in the *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani and others* case. In 2014, the Board of Trustees of the African Independent Pentecostal Church of Africa Church (AIPCA) in Gatanga Diocese of

31 Kapanga, *An Analysis of Church Conflict.*

32 Nkonge D. 2011. "Equipping Church Leaders for Mission in the Anglican Church of Kenya", *Journal of Anglican Studies* 9(2):154-174.

33 Nkonge, "Equipping Church Leaders for Mission in the Anglican Church of Kenya".

34 Nkonge, "Equipping Church Leaders for Mission in the Anglican Church of Kenya".

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Muranga County filed a suit against thirteen of its members.[35] The claim raised by the Board of Trustees was that the thirteen, whom the Board dismissively described as "mere followers of the AIPCA church", were not just misrepresenting themselves as such, but were guilty of unlawfully claiming to hold various leadership positions in the church. According to the Board, they were doing so without either lawful authority from the church or approval from the Central Board of Trustees. Consequently, the Board was seeking injunctive orders from the court to bar them from presiding over any church activities, holding any church meetings, engaging in any matters of the church or undertaking any roles involving the affairs of the church. In addition, the Board on several occasions sought the involvement of police to ensure compliance with the orders they were seeking. On their part, the thirteen pointed out that they were holders of various leadership positions within the diverse church structures including archdeacons, deacons, pastors or church leaders within the diocese. They filed a counterclaim against the Board, accusing it of being hypocritical, using the police to harass them and engaging in activities that were contrary to the mandate of the church, thereby causing suffering and grave injustices to the congregations of the entire diocese. The High Court granted the injunctive reliefs sought by the Board.

What is clear from this suit is that, amid the accusations and counter accusations between the different factions of church leadership, acrimony within the church flock heightened, causing disintegration of church membership and fragmentation of the church generally. Where there is fragmentation and disintegration, the church and its properties usually are at risk of being wasted and the overall mandate of the church is interfered with. This is what happened in this case. And it was for that reason that the judge in the case, while declining to grant costs to the "winning" party, stated, "In the spirit of promoting harmony and reconciliation between and among the parties to this dispute, which I have always beseeched from the onset, I order that each party shall bear their own costs in view of the fact that both parties are members of the same church."[36] Although the court proceeded to give the injunctive orders prayed for on the basis of the law, it also indicated that it would have preferred that the parties tried mechanisms alternate to litigation before settling their disputes through the courts.

The Seventh-day Adventist Church (SDA) litigation

The longstanding leadership battles amongst the leadership of the Seventh-day Adventist Church (SDA) in Kenya, and the negative impact on both churchgoers and members of society who are dependent on the various roles ordinarily played by churches, is yet another example of negative consequences arising from attempting to settle church disputes in courts. To appreciate the adverse impact of the prolonged court litigation on the congregants and other benefactors reliant

35 *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others* [2014] eKLR.

36 Nkonge, "Equipping Church Leaders for Mission in the Anglican Church of Kenya".

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on it, it is important to set the historical context of the series of disputes that it experienced.

The SDA church was first established in Kenya around 1906.[37] Since its inception, the church has played significant roles through evangelical purposes and in the development of educational facilities, provision of health services and improvement of peoples' living standards in areas where the church has a presence.[38] A key philosophy underpinning the existence of the church is involvement in community development. This philosophy is based on the belief that men's and women's ultimate purpose in life should be not just to love God, but also to serve humanity.[39] To this end, the church helps support economic empowerment initiatives through extending soft loan facilities to small-scale businesses in both rural and urban informal groups, where such groups demonstrate viable economic development projects. In this way, the church helps advance social economic development and assists in improving people's lives, thus contributing to generally improved living standards for people in accordance with its teachings and philosophy.

The church has, however, been muddled with leadership squabbles, some of which have placed it and its activities in a crisis. It has found itself in court several times in the recent past, negatively impacting its image as an institution and the congregants collectively and individually. From 2015, for instance, squabbles revolving around the election of the officials split the church right down the middle, with part of a splinter group rejecting the results. The reasons for rejecting the election by one faction were mainly based on ethnicity and struggles to control current and upcoming church projects, including a multimillion tender for the construction of a church hospital.[40] The impact of these disputes threw the SDA church into a crisis. There was a split in church membership, which caused considerable anxiety amongst the congregants. Offices belonging to one group would be barricaded by the other. Members were divided depending on the group to which they were pledging loyalty, while death threats were issued amongst the splinter group members. Commotion in the church became the order of the day to a point where the situation deteriorated so much that in the interest of security, the government intervened by closing the church indefinitely, placing on guard armed security organs and police officers in riot gear. Involving the security machinery brought prolonged suffering for the congregants, who experienced fear and great humiliation. To come to a place meant for worship, peace and tranquility only to find it closed with police officers in riot gear standing guard was traumatising for many. Church and social activities were all disrupted, and since they could not be held in the consecrated facilities,

37 Ayiemba JO. *The Role of the Church in Rural Development: A Case Study of The Seventh-day Adventist (SDA) Church in South Nyanza District, Kenya*. Master of Arts Thesis, University of Nairobi).

38 Ayiemba, *The Role of the Church in Rural Development.*

39 Ayiemba JO. *The Role of the Church in Rural Development.*

40 Sang GK. 2019. "Whose Church? Ethnicity, Identity, and the Politics of Belonging in the Adventist Church in Kenya — Part 1", *Spectrum Magazine*, 11 November.

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they were relocated to nearby fields. The people's constitutional right of worship and association was clearly at risk. Closure of the physical church meant that the congregants' right to association was infringed. Other key and important mandates of the church, including the provision of education, health and other facilities to the church's beneficiaries, could not proceed, thus negatively impacting the needy members of society.

The court was very reluctant to entertain the avenue the disputants had opted for, instead urging the parties to embrace alternative dispute resolution mechanisms, as espoused in the Constitution of Kenya and by the church's internal constitutive instruments in the spirit of promoting reconciliation. This would serve to demolish the wall of partition which has been created by the dispute. The court in fact went as far as imploring the advocates for the parties, as members of the SDA church, to impress on their respective clients to avoid a divisive spirit in the church given that they would eventually live together in the same heaven. According to the court. "The church should discourage actions that threaten harmony among its members and should consistently encourage unity, for it is the purpose of God that His Children shall blend in unity."[41] This was the court demonstrating its hesitation to intervene in ecclesiastical matters, preferring that parties involved in church dispute consult more internally through alternative dispute resolution mechanisms before resorting to litigation.

The St. Mary's Mission Hospital of the Roman Catholic Church dispute litigation

It would be remiss of this chapter if it did not analyze a conflict that plagued the leadership of the Catholic Church in Kenya. The Catholic Church is one of the largest Christian churches in Kenya in terms of membership and socio-economic development activities. The aftermath of the dispute that was fought in court for several years created a spiritual and socio-economic situation that can be considered to have some of the worst consequences in the Catholic Church in Kenya.

The conflict in the Catholic Church concerned a feud over the legal ownership, control and management of two hospitals and the pieces of land on which the hospitals had been erected. The two hospitals in question are St. Mary's Mission Hospital, situated in Langata area of Nairobi within Nairobi County, and its branch bearing the same name, located in Elementaita region, Gilgil, along the Nakuru Nairobi Road within Nakuru County. Both were founded by the church with the sole aim of providing competent but affordable health care services for the less privileged and indigent members of society. Caught in the web of these disputes was Regina Pacis University, another Catholic institution established with the intention of providing higher education for economically less privileged members of society, specifically women, and which was being operated on the parcel of land housing the hospital in Nairobi.

41 *Geoffrey Asanyo & another v John Kiragu Ngunyi & 13 others* [2015] eKLR.

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The conflict pitted Father William Charles Fryda, a Catholic priest with the Order of the Maryknoll Fathers and Brothers, against the Assumption Sisters of Nairobi Registered Trustees, (ASN), a Trust whose membership consisted of a group of catholic nuns. Father Fryda, a medical doctor, had worked in the two hospitals and other facilities in Kenya, while the nuns were engaged in evangelising and community services to needy members of society. The wrangles over management, control and legal ownership between the two warring parties intensified to the point that they ended up in court, with the initial matter being filed in the Environment and Land Court (ELC) in Nakuru.[42]

Father Fryda claimed to be the legitimate owner of the parcels of land on which each of the two hospitals was erected. He further contended that he had been responsible for the construction, equipping and staffing of each of the hospitals. He further claimed that having taken on all these responsibilities, he had caused the ownership of the parcels of land and the hospitals to be registered in the name ASN Trust because at the time of acquisition of the land, he had not incorporated a body corporate with legal capacity to own property. Consequently, he entered into an arrangement with ASN, where it was agreed that as soon as he registered a legal entity which could hold property, they would immediately transfer the legal ownership to this legal entity, including the parcel of land on which the branch of St. Mary's Hospital in Elementaita, Gilgil was built, which had been donated to him by a Catholic businessman as a way of giving back to the society. Father Fryda's argument was that all had been well with the arrangements until 2009, when the initial leadership of the ASN registered trustees changed and the new leadership backtracked on the understanding, insisting that the two hospitals, together with the land on which they were erected belonged to ASN. ASN, on the other hand, vehemently refuted Father Fryda's contention and maintained that the hospitals, together with the land on which each of them was erected belonged to them. They produced ownership documents bearing the name Assumption Sisters of Nairobi Registered Trustees as evidence of legal ownership. The court agreed with their position and held that the properties in dispute, as well as the hospitals and the university built on them, legally belonged to the ASN Registered Trustees and not to Father Fryda. Aggrieved by that decision, Father Fryda lodged an appeal, seeking in the first instance orders stopping ASN from taking over control, management and legal ownership of the hospitals.[43] A three-judge appellate bench ruled in favour of ASN Registered Trustees, thus affirming the decision of the Environment and Land Court. The disputed properties were therefore vested in the hands of the Assumption Sisters of Nairobi Registered Trustees.

While Father Fryda eventually established a similar hospital next door to St. Mary's Mission Hospital Elementaita, where he continues to undertake the Christian mandate, as before, the consequences of the disputes that were litigated in court for

42 *William Charles Fryda v Assumption Sisters of Nairobi Registered Trustees & another* [2017] eKLR.

43 Civil Appeal No. 184 of 2017.

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close to ten years were disastrous. The adverse effects of the legal dispute impacted the church as an institution, Father Fryda in his priesthood and individual capacities and the community that the church had diligently been serving for years through the two hospitals and educational institution.

On the part of Father Fryda, his move to take the dispute to court also caused serious fissures in the Catholic Church. He came under immense pressure from the church to withdraw the court cases. The then Archbishop of the Nairobi Diocese, the late Cardinal John Njue, was very displeased with the actions of Father Fryda. In his view, taking church matters to what he referred to as "public court", was an embarrassment to the church and an interference with pastoral mission of the Catholic Church in Kenya. Father Fryda was pressed by the church to withdraw the suit and to resort instead to the procedures expected of a Catholic priest and while adhering to the canonical procedures of the Catholic Church.[44] When he refused to back down from the court battles, Father Fryda was suspended from priesthood, defrocked and excommunicated from the church.

The purpose of the Church in Kenya, the Catholic Church included, is to achieve the fulfilment of the mission of Christ through evangelisation and serving the poor and needy. The prolonged court battles disrupted this mission, with the beneficiaries suffering a great deal. Indigent members of the community who were dependent on the hospitals for adequate quality and affordable health care could not access it. Patients with critical illnesses such as cancer and diabetes helplessly watched as men and women of God left them "to die" as they engaged in court battles over earthly wealth.

The ASN Registered Trustees emerged victorious in both the ELC and Court of Appeal, since the two disputed hospitals were vested in their hands. However, the strongly worded statement of the ELC while passing judgement is very telling, when it comes to church disputes. To wit, the judge in the case stated:

> I just say that I would be disappointed if any party takes my judgment as a victory for one and a loss for another. What I have done is merely give the position of the law mostly on the issue of the legal ownership of proprietary rights and control of the facilities within these properties, having regard to the facts before me. I would wish the parties to take more out of this judgment. I ask the parties to sit back, reflect on all that they have gone through, assess what they have achieved together, forget the bitter fights in and outside court, embrace each other, and push forward with one mission, that of developing the best healthcare for the poor in the Kenyan society. They need to have a second look at the Christian principles that they believe in and find space for each other. Egos need to be deflated. No one should feel that they have lost for backing down to accommodate the other. There is of course no place for pride.[45]

44 In the letter written by Cardinal Njue the then Archbishop, to the MaryKnoll Fathers and Brothers Order, he appeared to side with the sisters, accusing Father Fryda of trying to "forcefully grab" the hospitals.

45 Civil Appeal No. 184 of 2017.

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These strongly worded statements from the court are a further demonstration of the court's reluctance to handle church disputes. To the court, in such cases, even though one party may feel that they have won, there really is no winner, and it is the church that has lost.

ALTERNATIVES TO JUDICIAL PROCESSES FOR RESOLUTION OF CHURCH DISPUTES

The cases analyzed above exhibit a general unwillingness on the part of the judiciary to involve itself in church disputes. Indeed, as can be discerned from the ELC's remarks following the decision in favour of the Assumption Sisters of Nairobi Registered Trustees, courts will apply the law to the facts and arrive at a judicial decision in a church dispute brought before it only because the law requires them to. The legal mandate bestowed on judges sometimes leaves them with no other alternative. Yet, in view of the general discord left in churches by litigation, courts would prefer that church disputes be resolved internally using mechanisms alternative to litigation. Such mechanisms would minimise interferences with the fulfilment of key objectives of the church.

Indeed, the views expressed by the court in the cases analyzed above are shared by many. Constant litigation affects the church's affairs, and no one really emerges a winner. These are matters that should not really be considered justiciable, unless it can be shown that all other alternative procedures have failed. As the ELC observed while determining the dispute between ASN Registered Trustees and Father Fryda dispute, a judgement delivered by the court in a church dispute does not translate to a victory for one party or a loss for another.[46] The church is the loser. Unless parties come to an amicable solution and record a consent in court, the end product of litigation will always leave one party to the litigation satisfied and happy with the outcome while the opponent will be both dissatisfied and extremely unhappy with the result, even though the law will have fulfilled its function as provided and settled the conflict, as happened in the Father Fryda and the ASN. Whether the verdict is accepted by the losing party or taken further on appeal and eventually settled within the law, the underlying issues may not have been resolved, and ultimately, everyone loses.[47] Where one side of the disputants is left with some form of dissatisfaction, they continue feeling aggrieved and tensions and confrontations may continue. This should never be a desired outcome when it comes to church leadership disputes. It is therefore essential to find workable mechanisms to resolve church disputes before they explode in the courts.

Alternative approaches should always be from the perspective of a broader context aimed at resolving the conflict through reconciliatory means. And there are many non-litigious mechanisms that can be employed, most of which have legal grounding and are anchored in the Constitution and several other legal

46 Civil Appeal No. 184 of 2017.

47 Civil Appeal No. 184 of 2017.

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instruments.[48] On its part, the Kenyan Constitution not only provides for but actively promotes the employment of alternative forms of dispute resolution mechanisms, including traditional dispute resolution mechanisms. For purposes of employment of methods alternative to litigation, Articles 159 and 189 of the Kenyan Constitution are quite instructive. Article 159(c) provides: "Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."[49] Disputants who may want to employ traditional justice systems are allowed to do so through this provision, provided the methods used do not contravene the Bill of Rights as constitutionally protected, are not repugnant to justice and morality and the results obtained are not repugnant to justice or morality. The alternatives must also not be inconsistent with the Constitution or any other written law.[50] Article 189(4) echoes the provisions of Article 159 by stating: "National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration."[51]

These Constitutional provisions open avenues acceptable in law, for use in resolving disputes without resorting to judicial processes. Peaceful and non-litigious settlement of disputes is also in line with the United Nations Charter, which seeks to promote settlement of disputes without resorting to violence.[52] Disputants in church leadership conflicts are therefore able to select an appropriate method from an array of comprehensive alternative systems, all backed by the law, to apply in settling their issues. Some of the possible workable alternatives to litigation mechanisms that can be employed to resolve church leadership conflicts include using internal dispute resolution mechanisms and employing mechanisms that are legally recognised.

Internal mechanisms. As seen, when churches are being registered in Kenya, they are required to have a constitution or a Trust Deed, clearly reflecting the leadership structures within the institution. Many of the institutions also have an organogram detailing the hierarchical relationships between the different cadres of leaders or trustees and their respective roles. The way leadership disputes can or ought to be resolved internally is also usually spelt out in the founding constitution or Trust Deed. These founding documents should therefore always be the disputants' first point of reference when it comes to solving disputes. Where this fails, then the disputants should attempt resolution through other methods which are prescribed by the law, but which are alternative to litigation.

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48 Constitution of Kenya, 2010, arts 60(1)(g), 67(1), 159(2)(c) and (3)(a-c) and art 189(4); The Environment and Land Court Act (2011), s18; The Civil Procedure Act, ch 21 of the Laws of Kenya and the Civil Procedure Rules (2010) s 59(A-B). All of these laws contain provisions promoting alternative dispute resolution mechanisms.

49 Constitution of Kenya, 2010, art 159(c).

50 Constitution of Kenya, 2010, art 159(2)(c) read with art 4, s 159(3) a, b and c.

51 Constitution of Kenya, 2010, art 189(4).

52 Charter of the United Nations of 25 October 1945, Article 1.1.

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Negotiation. When the laid-out procedures in the institution's founding documents fail to achieve desirable results, resorting to negotiation is a good option. Negotiation is an informal process whereby the disputing parties meet to identify and discuss the issues at hand with a view to arriving at a mutually acceptable solution without necessarily involving a third party.[53] The process is designed to address and manage a dispute in a positive and productive manner in the interests of and for the benefit of all concerned. Where it is backed by goodwill, the commonality of purpose gives the disputing parties the impetus to hold onto every opportunity for settlement on terms and in a process which they own and with which they identify. The negotiation process presents the disputing parties with an opportunity to manage their conflict and merge their psychological disparity in relation to their rights, interests and divergent ideas. What may have initially been perceived as incompatible goals can then be transformed into common areas of interest between the parties.

Negotiation thrives in a flexible medium of goodwill away from the fixed or established rules of legal procedure and other rigid conflict resolution systems. Since the process is very informal, the process of negotiation has a dynamic character, usually with rewarding effects. It ensures the safeguarding of relations between the parties and guarantees continuity in their interactions. This is the kind of situation that the court was routing for in the Father Fryda and Assumption Sisters of Nairobi case. Even though the parties may initially begin by arguing strenuously eventually, each side may modify their positions and try to move towards the opponent's point of view. Where negotiation fails, disputants may resort to third party interventions, whereby an intermediary can be engaged to facilitate the process through the processes of conciliation or mediation.

Conciliation. Where the parties opt for conciliation, a mutually trusted and neutral person referred to as a conciliator is engaged to help facilitate the process in an amiable and non-contentious manner. The conciliator meets with the parties to a dispute and explores ways in which the dispute might be resolved. The process of conciliation is relatively unstructured and is not riddled with any formal structures. The conciliator normally works to facilitate communication between the disputing parties to help them resolve their disputes in a voluntary process that accommodates their mutual interests. This process aims at having all the parties emerge as winners.

Mediation. Mediation is another informal and non-adversarial and non-litigious process for settling disputes whereby the conflicting parties are facilitated by an impartial mediator to find a mutually satisfying solution to the dispute. The process is informal, voluntary and consensual and accommodates mutual interests. It is however dependent on complete mutual trust between the disputants. It adopts

53 Muigua K. 2015. "Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms", presentation to the Chartered Institute of Arbitrators (CIArb) Africa Region Centenary Conference. Online at: https://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf

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a collaborative course which allows the parties to design a mutually agreeable solution to their conflict. The mediator, who is invited by the parties to help them resolve their dispute, acts impartially and employs tested communication skills to help promote a mutual resolution. The mediator in addition uses skills to find means of implementing the agreed terms. The mediator does not judge or make decisions for or on behalf of the parties. The mediator's main task is to facilitate the process, facilitate improved communication between the disputants and help create an atmosphere in which each of the disputants can freely express their views. The mediator then records the disputants' agreement on practical terms if one is arrived at. Mediation would serve as a good alternative to litigation in church disputes, especially because it is necessary for parties to maintain their relationship for the sake of continuation of the church mandate.

Dialogue. Parties to leadership disputes in churches should always be encouraged to have dialogue within themselves. Having dialogue involves engaging in conversations with a view to allowing persons or groups who differ significantly from each other to speak with each other and arrive at a common and consensual understanding.

Accommodation. In the process of accommodation, one of the conflicting parties may need to surrender their needs and interests for the sake of peace, unity and continuity of the institution. It has been demonstrated that conflicts in churches put immense pressure on relationships and yet maintaining amiable working relations within church leaders is an important objective for the continued running of the institutions. It therefore becomes important for one party to be ready to cede some ground for the sake of reconciliation.

Compromise. Where the dispute is resolved through a compromise, one party gives up a part of their goals and persuades the other party in the conflict to also give up part of their goals. This method therefore seeks a solution in which both conflicting sides give up and gain something to reach an agreement for the common good.

Collaboration. Disputing parties can be encouraged to work together to find a mutually beneficial and satisfying solution through the process known as collaboration. Here, the parties team up and confront the conflict together in the realisation that it is the conflict that is the problem and not themselves. This method results in a win –win situation which in turn enhances trust, respect, and growth in the church.

Thus, there are several alternatives that can be utilised in resolving church disputes. A hybrid of non-litigious mechanisms analyzed above can also be employed, since no one size fits all. If, however, despite all these above attempts a conflict reaches litigation levels, then the judiciary should encourage the disputants to engage the Annexed Mediation process provided for under the Constitution, the Civil

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Procedure Act and the Civil Procedure Rules.[54] Court Annexed Mediation (CAM) is a process introduced by the Judiciary to facilitate amicable settlement of disputes which have already been brought before court. This is in line with Article 159(2) (c) of the Constitution which mandates the judiciary to encourage and facilitate parties to resolve their disputes through alternative forms including reconciliation, mediation, and traditional dispute resolution mechanisms.[55] CAM has been lauded for maintaining relations for the sake of posterity, which is a critically needed in the case of Christian institutions in view of the critical roles it plays in society

CONCLUSION

Stability in churches enables the institutions to play all their roles and achieve their core mandates. However, church leaders will always have conflicts for various reasons since, as diplomacy and national security expert Makumi Mwangiru observes, conflict will always be present as long as there is human interaction.[56] The Bible has also confirmed that religious institutions are never free from conflict and will never be free from conflict.[57] Indeed, Jesus himself confirms this when he observes that as Christians, we shall experience conflict.[58] And since conflicts can never really be eradicated, healthy, non-acrimonious and non-litigious ways of dealing with them is crucial. It is always important to remember that Christians are called to peace. This is what sets them aside from non-believers. And as the different judges have pointed out in the judicial decisions analyzed, churches are ideally places of peace and harmony and the place to go to when in trouble. It is therefore imperative that all possible avenues be undertaken with the intention of managing, reducing and most preferably avoiding conflict in the *ecclesia*. Litigation through the court processes should always be a last resort. What is important is to understand the disputes and find ways to respond to them. The courts in the cases analyzed above have suggested resolution of church disputes should be steered in directions that seek to repair, rather than damage, the Church. This way, Christians will be guided to live a holistic life, while churches will fulfil their mandate that includes giving back to society.

54 Muigua K. "Court Sanctioned Mediation in Kenya: An Appraisal". Online at: https://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf

55 Kenya Judiciary. n.d. Court Annexed Mediation – The Judiciary. Online at: https://judiciary.go.ke/court-annexed-mediation

56 [56] Mwagiru M. 1998. "Understanding Conflict and Its Management: Some Kenyan Perspectives" Centre for Conflict Research and Women and Law in East Africa. Nairobi: Watermark Publications, 2.

57 Bible, Acts 6: 1-7.

58 Bible, Luke 17:1.

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