REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 7 OF 2020

REVEREND PATRICK LIHANDA .....1ST APPELLANT

NEBERT MUDAKI.....2ND APPELLANT

JOTHAM AMUKOYE.....3RD APPELLANT

EZEKIEL ALUSIOLA.....4TH APPELLANT

PENTECOSTAL ASSEMBLIES OF GOD (K).....5TH APPELLANT

VERSUS

GEDEON KAVISI.....1ST RESPONDENT

SAMUEL OUMA.....2ND RESPONDENT

EDWARD MAVISI.....3RD RESPONDENT

JULIUS ESHIBANE.....4TH RESPONDENT

RULING

1. The appellants herein filed an application, by way of Notice of Motion, dated 7th February 2020, under certificate of urgency, seeking for stay of execution of the orders that had been made on 4th February 2020, in Kakamega CMCCC No. 100 of 2019, pending the hearing of the appeal herein. The application was based on grounds set out on the face of it, and was supported by an affidavit sworn by Nebert Mudaki, the 2nd appellant herein, on 7th February 2020.

2. The respondents replied to the application by an affidavit, sworn by Gedeon Kivisi**,** the 1st respondent herein, on 19th February 2020; which prompted Patrick Lihanda, the 1st appellant to swear a supplementary affidavit on 21st February 2020.

3. The appellants' case is that their appeal raises triable issues, and it would be fair and just if the decision appealed against was stayed pending the hearing and determination of appeal. They depose that the decision of the lower court , declaring them unfit to hold office would cause confusion and disorder in the business and affairs of the church , as the orders would prevent them from carrying out their duties in the church. The appellants state that they are ready to provide such security, for the due performance of any order that may ultimately be binding upon them. They argue that although the High Court in Kisumu had ordered that the different suits filed in various courts be transferred and consolidated with Kakamega HC Constitutional Petition No. 6 of 2018, the court, in Kakamega CMCC No.100 of 2019, had not taken that into account. It is submitted that as a registered society, the 5th appellant is governed by a church constitution which expressly prohibits members from pursuing litigation as a solution to disputes as it establishes dispute resolution mechanisms through articles 23 and 24 of the constitution. It is argued that that ousted the jurisdiction of the trial court. It was also stated that the church elections were held in Vihiga County and therefore the geographical jurisdiction with the Vihiga Magistrate's Courts.

4. The appellants further argued that the trial court had issued permanent orders at an interlocutory stage, and according to them, the main suit in Kakamega CMCCC No. 100 of 2019 was still pending. They further argued that by being removed from office by the trial court's orders, the respondents had barred them from even accessing the church and denied them the right to religious worship, which is their constitutional right.

5. During the oral arguments, Mr. Musiega, the advocate for the 1st and 5th appellants told the court that the orders of the trial court contradicted that of this court in Kakamega HC Constitutional Petition No. 6 of 2018, and that the dispute was already before this court, which meant that the trail court had no jurisdiction. He added that the court ought to be guided by Order 42 Rule 6(2)(a)(b) of the Civil Procedure Rules, 2010 on the conditions to be met before a court grants stay. He stated that the appellants had satisfied the conditions set therein by filing the application for stay on time. It was further submitted that the court had discretion to consider the issue of security, but that given the nature of the dispute, security may not be necessary as the claim was not monetary. He added that should the court find it ideal to order the appellants to give security, then they were willing to abide by the order. He stated that the appellants had also fulfilled the requirement that if the order for stay is granted, no substantial loss will be occasioned on the respondents.

6. He asserted that the orders made by the trial court were vague, as they referred to all the appellants, including the 5th appellant suggesting that even the church could not hold a position within the church itself. He contended that the decision of the trial court rendered the appellants jobless and helpless, unable to fend for their families. He stated that the trial court did not hear the appellant's application, dated 30th April 2019, and thereby infringing on their rights to a fair trial under Article 50 of the Constitution of Kenya. he submitted further that the 1st appellant still held the office of General Superintendent as the Chief Magistrate's Court in Kisumu had appointed a caretaker committee to run the affairs of the from 8th March 2019 to 8th September 2019, which period had lapsed. He submitted that it was not appropriate to institute fresh cases in light of the consolidated cases already in the court pending determination.

7. In their reply, the respondents, through the 1st respondent, deposed that the appellants were misleading the court in that the trial court perused the pleadings before it and orally heard both parties before arriving at the conclusion that gave rise to the ruling. The 1st respondent further deposed that the appellants were not holding any legal offices in the 5th appellant, since courts had issued numerous orders, which the appellants had refused to obey, and thus acted in manner which bordered on contempt. The 1st respondent added that the conduct of the 1st appellant had led to the numerous cases being filed in various courts, and that he had continued to blatantly disobey court orders that had been issued by various courts including the trial court. The 1st respondent stated that the appellants had failed to disclose very important facts to the court with the sole aim of misleading the court and that the appellants' application was bad in law and ought to be dismissed. It was deposed that the 1st appellant stood suspended from office by virtue of the court orders in Kakamega Constitutional Petition No. 6 of 2018 made on 5th November 2018 and 5th December 2018, and Kisumu CMCC No. 543 of 2018 made on 8th March 2019. It was added that the appellants are in force by virtue of an impugned election that was held on the night of 4th and 5th March 2019, which election is subject to contempt proceedings pending before the court. The respondents contend that the appellants' application and the whole appeal have been brought to court with bad intentions of disrupting the peaceful running of the system of the church, and contrary to the orders that are still in force, that have been issued by the courts of jurisdiction, including this court.

8. Mr. Wasilwa, submitting for the respondents, stated that the issue to be determined was whether there was an arguable appeal, reflected in the application and whether there was substantial loss or hardship for the party seeking stay orders adding that the said orders sought were equitable in nature. Mr. Wasilwa submitted that paragraph 3 of the 2nd appellant's affidavit, in support of the application, violated Order 19 Rule 3 of the Civil Procedure Rules, 2010, and ought to be struck out, as the assertion that the 1st appellant was elected as the General Superintendent was "false, disrespectful and misleading." he also impeached paragraph 7 of the 2nd appellant's affidavit, stating that the assertion that the appellants stood to be prejudiced and suffer substantial loss was "bare and had no flesh in it," and urged the court to ignore it. He added that the appellants had not demonstrated the substantial loss they were likely to incur both quantitatively and qualitatively. He stated that the orders of the court in Kakamega Constitutional Petition No. 6 of 2018, made on 5th November 2018 and 5th December 2018, barred the 1st appellant from conducting elections of the 5th appellant, pending hearing and determination of the petition therein. He added that in Hamisi SRMCC No. 15 of 2019, the 1st appellant was restrained from accessing the 5th appellant's headquarters. He also stated that there was another order issued by the court in Kakamega Constitutional Petition No. 6 of 2018 on 18th March 2019. It was his submission that the conduct of the 1st appellant did not warrant him to be granted the equity of stay. He further stated that the appellants ought to have sought leave for them to appeal as the appeal arose from finality of a decree.

9. Before I get into the issues for determination it is important to state that this court is alive to the fact that the 5th appellant has been involved in a plethora of suits touching on its administration, and the 1st appellant has been at the centre of the dispute. It would be an exercise in futility for the court to determine this matter without going back to the other cases before it, and other courts, to ascertain the status and position of the parties herein, in light of the various court orders on record and known to the court.

10. The issue of the elections and governance of the 5th appellant was first brought to the attention of the court in Kakamega HC Constitutional Petition No. 6 of 2018. A number of orders have been made by the court in that case, as follows:

> a. On 8th November 2018, the court granted inter alia injunctive orders against the 1st appellant and other members of the 5th appellant pending hearing and determination of the petition, restraining and inhibiting them from convening, or holding any meeting of management or committees or organs of the church in connection with, or in relations with or in preparation of the PAG Kenya Business conference and suspended a Notice dated 11th July 2018 that purported to convene the Pastors Conference, General Conference and the Business Conference or any other National Conference. The court further granted injunctive orders inhibiting the 1st appellant and his agents or anyone working under him from receiving names of Pastors from District Overseers or any other person, registering Pastors, compiling and constituting the names into a Register or list of voters in connection with or relating to the election of the 5th appellant. The Court also ordered that Kakamega Misc. Application No.129 of 2018, Kakamega Misc. Application No. 131 of 2018, Kisumu CMCC No. 421 of 2018 and Kakamega Misc. JR No. 145 of 2018 be consolidated and heard together with that Petition in an effort to save the judicial process the embarrassment of different courts issuing conflicting orders and preventing an abuse of the court process. There is no evidence of this order ever being discharged, varied and/or set aside by way of an appeal or review and to the court's knowledge, the said petition has not yet been heard and determined.
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> b. On 30th November 2018, the court ordered inter alia that the parties try mediation and report back to the court on 4th December 2018 at 11.AM on the progress made. There is no evidence of this order ever being discharged, varied and/or set aside by way of an

appeal or review.

c. On 5th December 2018, the court ordered inter alia that the elections of the 5th appellant scheduled for 5th and 6th December 2018 be suspended until further orders of the court. The court further ordered that parties conduct mediation within a month and report to the vacation duty judge on 7th January 2019 or any other earlier date as the parties may agree. The court further ordered that the mediation file that had been opened in Kisumu High Court be closed and a new one be opened by the Deputy Registrar, Kakamega High Court. There is no evidence of this order ever being discharged, varied and/or set aside by way of an appeal or review. I must also point out that in the ruling of the court, it was held that the action of Mr. Musiega's clients, who included the 1st appellant, of making arrangements for elections was in contempt of the court order dated 8th November 2018 in (a) above.

d. On 18th March 2019, the court ordered inter alia that leave be granted for contempt proceedings against the 1st appellant, his counsel Mr. Musiega and another and that an interim conservatory order be issued to the effect that the returns and/or any such declarations made pursuant to the purported elections held on the night of 3rd/4th March 2019 be suspended and that the 1st appellant and another were restrained from submitting any such names to the registrar of societies and they were further restrained from holding themselves out as bona fide officials of the 5th appellant pending hearing and determination of the application dated 14th March 2019 that was filed therein. There is no evidence of this order ever being discharged, varied and/or set aside by way of an appeal or review and to the court's knowledge, the said application is yet to be heard and determined.

11. In Hamisi SRMCC No. 15 of 2019, the learned trial magistrate issued temporary *ex parte* orders on 5th March 2019 *inter alia* restraining the 1st appellant and other defendants in that case from accessing and/or gaining entry into or within the 5th appellant station pending hearing of the application filed therein. There is no evidence of this order ever being discharged, varied and/or set aside by way of an appeal or review or that the said application has been heard or determined to vacate the said order. On 26th August 2019, the said subordinate court ordered *inter alia* that the matter be transferred to this court and that the status quo of restraining the 1st appellant and other defendants in that case from accessing and/or gaining entry into or within the 5th appellant station pending hearing of the said application be maintained. Again, there is no evidence of this order ever being discharged, varied and/or set aside by way of an appeal or review or that the said application has been heard or determined to vacate the said order.

12. In Kisumu Civil Suit No. 543 of 2018 filed in the Chief Magistrates Court at Kisumu, the subordinate court ordered on **8th March 2019** *inter alia* that pending the hearing of the said suit, the 1st appellant together with others be restrained from carrying out executive administration and any duties pertaining to the 5th appellant as well as utilizing funds of the 5th appellant. The court further ordered that an exclusive caretaker committee be appointed to the exclusion of the 1st appellant and the defendants in that suit for a period of six months from the ruling date thereof to enable it solve any governance matters of the 5th appellant. On 6th September 2019**,** which was after the expiry of the six-month period, the said subordinate court ruled that the status quo as per the orders of 8th March 2019 be maintained. Again, there is no evidence of these orders ever being discharged, varied and/or set aside by way of an appeal or review or that the said suit has been heard or determined to vacate the said orders.

13. In Kisumu Civil Case No.19 of 2019, a case filed in the High Court at Kisumu by the 1st appellant, the court ruled on 4th February 2020 that the 1st appellant's action of filing that application was in total disregard of the decision of the court in Kakamega Constitutional Petition No. 6 of 2018 as it was within the knowledge of the 1st appellant that this court was seized with most of the matters between the parties therein. The court further noted that the 1st appellant was not displaying good faith and was bent to abusing the court process. It was thus ordered that the said the said matter Kisumu Civil Case No.19 of 2019 together with Kisumu CMCC No. 543 of 2018, Hamisi SRMCC No. 15 of 2019, Hamisi SRMCC No. 81 of 2018, Milimani CMCC No. 1899 of 2019, Vihiga PMCC No. 123 of 2019, Kisii CMCC No. 156 of 2019, Vihiga PMCC No. 157 of 2019, Vihiga PMCC 158 of 2019, Vihiga PMCC No. 159 of 2019, and Kisumu CMCC No. 421 of 2018 be transferred and heard by this court. Similarly, there is no evidence of this order ever being discharged, varied and/or set aside by way of an appeal or review.

14. It is also worth pointing out that the court *in* Kakamega Constitutional Petition No. 6 of 2018 held that the said mediation settlement agreement, upon which the 1st appellant stated was used to conduct the elections on the night of the 3rd and 4th March 2019 was not adopted by the court and was thus not an order of the court to sanction the said elections. In any case, the ruling of the court dated 18th March 2019, suspended the purported outcome of the impugned elections.

15. From the above, it can thus be said that all the orders of the different courts are still in force and that a summary of those orders and status quo are as follows:

i. The administration and governance of the 5th appellant church is no longer being undertaken by the 1st appellant but by a caretaker committee which is not supposed to include the 1st appellant. This essentially means that the 1st appellant is no longer the holder of the office of General Superintendent in the 5th appellant

ii. Elections of the 5th appellant church stand suspended and that as far as the court is concerned, any subsequent elections that were held without authorization by the court were deemed to be a nullity. The 1st, 2nd, 3rd and 4th appellants cannot hold themselves to be officials and/ or pastors of the 5th appellant based on that election.

iii. All the cases that were transferred to the court and that were to be heard together with **Kakamega Constitutional Petition No. 6 of 2018** are still alive and have not yet been heard and determined.

16. Having established the *status quo* of the subject matter, I now come to the instant application to determine whether the court should grant

a stay of execution of the ruling of/orders issued on 4th February 2020 in Kakamega CMCCC No. 100 of 2019 in light of the court orders in force.

17. It is not in doubt that the decision to grant an order of stay of execution pending appeal is a discretionary one and that Order 42 Rule 6(2) (a) and (b) of the Civil Procedure Rules, 2010 cited by the appellants provides as follows:

> "No order for stay of execution shall be made under subrule (1) unless–
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> (a) the court is satisfied that substantial loss may result to the appellant unless the order is made and that the application has been made without unreasonable delay; and
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> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the appellant."

18. The Court of Appeal in *Butt vs. Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:

> "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
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> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
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> 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the appellant at the end of the proceedings.
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> 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
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> 5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

19. I have no doubt that the instant application was filed within reasonable time, that is, four days after the ruling of the learned trial magistrate. As conceded by the appellants, this is not a monetary claim and as such, the issue of security is not necessary, and I agree with them. The most important issue to determine is what substantial loss will be occasioned on the appellants if a stay of execution is not granted in light of the circumstances of the case.

20. From the appellants' case, they stated that the orders of the learned trial magistrate were "prejudicial" and "will cause substantial loss" to them. A deduction from their oral submissions by Mr. Musiega and pleadings is that they draw salaries from the 5th appellant for their own survival and that of their family members and that the ruling of the learned trial magistrate removed them from employment. It would appear that the 1st, 2nd 3rd and 4th appellants draw their alleged employment from the impugned elections that were held on the night of 4th and 5th March 2019. As stated before, that election was declared a nullity by the court and that all results or returns from the same were suspended by the court. The appellants cannot therefore be officials or employees of the 5th appellant based on that election. Furthermore, the 1st appellant was removed from employment on 8th March 2019 when a caretaker committee was appointed and remains in charge of governance and administration of the 5th appellant church to date. The 2nd 3rd and 4th appellants, appear to be taking instructions from the 1st appellant, and acting as his agents and yet the 1st appellant is not the one in charge of running the affairs of the 5th appellant church at the moment. This is clearly against the order of the court barring the 1st appellant from undertaking duties of the church through his agents likes the 2nd, 3rd and 4th respondents. This demonstrates that the appellants have not approached the court with clean hands and the court cannot come to their aid in the circumstances. In any case, I find that the appellants have not demonstrated the substantial loss that will be occasioned to them if the order of stay of execution is not granted. As was conceded by the appellant's counsel, Mr. Musiega, this was not a monetary claim and thus the issue of salaries does not therefore suffice, and if it does, then it fails for want of proof.

21. Before concluding, let me address the issue of obedience of court orders. The Court of Appeal, in the case of *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government vs. Miguna Miguna & 4 others* [2018] eKLR, stated as follows:

> "Before we go into a determination of the twin principles for grant of stay, we need to make it clear that as a Court we do not take lightly allegations of contempt of court.
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> No court should.
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> When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

We note that authorities have been placed before us which espouse the position that once a party is found to have breached, disobeyed or violated court orders such person will not be given audience before court until he first purges his contempt. In HADKINSON vs. HADKINSON [1952] 2 ALL ER 562, the English Court of Appeal returned these categorical holdings;

> "Held (per Somervell and Romer, L.JJ.), that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.
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> Held Per Denning L.J,.: The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice."

The Court of Appeal for Ontario, Canada, in denying audience to the Attorney-General of Ontario who had been in flagrant and prolonged contempt of court orders, stated as follows in ONTARIOATTORNEY GENERAL vs. PAUL MAGDER FURS LTD 10 0.R. (3d) 46;

> "As previously observed, even following the finding of contempt of court and while invoking the court's jurisdiction in appealing the order of Chilcott J., the appellant persisted in its defiance of the law.
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> It is in this context that the appellant seeks to have the discretion of the court exercised in its favour and to stay the hands of the Crown from enforcing the penalties imposed by Chilcott J.
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> This is not a case of an appellant who has been found to have committed an act of contempt and is fined, who has a record of committing such offences in the past and who, while the appeal is pending, has ceased to commit the act which is the subject matter of the contempt proceedings. Under those circumstances, it may well be that the fine should not be enforceable until the appellant has had a reasonable opportunity to exercise its right of appeal.
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> In this case for a period of over 11 years the appellant has exhibited a brazen disregard for the rule of law, has shown contempt for the orders of the superior trial court of this province and sought to make a mockery of the administration of justice. At the same time, it seeks to invoke the judicial process to suspend the operation of the very orders that it has defied for years. To stay the order of Chilcott J. pending appeal would be to countenance that conduct and to bring the administration of justice into disrepute."

> "**……**this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evince a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law. While the right to fair hearing is sacrosanct and is one of the non-derogable rights in Article 25of the Constitution, we affirm with this Court in A. B. & ANOTHER vs. R.B. 2016 eKLR that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court. (See also COMMUNICATIONS COMMISSION OF KENYA vs. TETRA RADIO LTD, [2013] eKLR.)"

22. Enough said. Parties are required to obey court orders regardless of whether they favour them or not. The court will not hesitate to deny audience to any contemnor until the said contempt is purged.

23. That being said, I find the appellants' application lacking in merit and that the orders for stay of execution of the decision of the learned trial magistrate in Kakamega CMCC No. 100 of 2019 sought by the appellants ought to be denied. The application dated 7th February 2020 is accordingly dismissed. The appeal dated 7th February 2020 should be set down for hearing, to be heard together with Kakamega HC Constitutional Petition No. 6 of 2018**.** The appellants shall bear the costs of the application.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF MARCH, 2020

W MUSYOKA

JUDGE