



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC CIVIL APPLICATION NO. 136 OF 2020

BETWEEN

DR. REV.SILAS YEGO (Presiding Bishop AIC Church).....1st APPLICANT

REV. GEOFFREY GICHUNGE

(Deputy Presiding Bishop AIC Church).....2nd APPLICANT

REV. JOHN KITALA

(Administrative Secretary AIC Church).....3rd APPLICANT

THE REGISTERED TRUSTEES,

AIC CHURCH, KENYA.....4th APPLICANT

AND

ELDER AMOS NYAIGA OGADA

(AIC Kisumu City Region).....1stRESPONDENT

ELDER MARTIN ORWA OBUYA

(AIC Kisumu City Region).....2ndRESPONDENT

ELDER JOSHUA DUME AYIECHO

(AIC Muhoroni Region).....3rd RESPONDENT

ELDER DAVID OUKO ANYANGO

(AIC Kisumu City Region).....4th RESPONDENT

RULING

1. On 07.07.2020 the court in **KISUMU CMCC NO. 555 OF 2018 AMOS NYAGA OGADA & 4 OTHERS Vs REV. SILAS YEGO & 3 OTHERS** granted leave to the Respondents to cite the Applicants for contempt of court and ordered that the 1st to 3rd Applicants be committed to civil jail for 6 months for contempt of court orders issued on 11.04.19.

2. By an application dated 13.07.2020 brought under Order 42 Order and 51 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Applicants pray for stay of the said order pending appeal.

3. The application is based on the grounds among others that the Applicants are aggrieved by the order dated 07.07.2020 and intend to file an

appeal which has a high chance of success.

4. The application is supported by the affidavit sworn by the 3rd Applicant on 26.05.2020 in which he reiterates the grounds on the face of the application. The affidavit raises four main issues

i. That the magistrate's court had no jurisdiction to issue the orders it issued

ii. That the 1st to 2nd Applicants have retired and it would be highly prejudicial to the Applicants to be held in contempt of court

when they are no longer holding the positions in which they were sued in

iii. That the responsibility of the 4th Applicant is limited only to matters concerning the property of the church

iv. That the Central Church Council consists of over 80 members all over the country and any decision pertaining to creation of the Church Council as demanded by the Respondents must be approved by the said organ

5. Annexed to the affidavit is a draft memorandum of appeal (*marked C*) and letter dated 21.01.2020 (*marked D*) in which the Registrar of Societies confirms that Rev. Abraham Mulwa and Rev. Paul Kirui are the Presiding Bishop and Deputy Presiding Bishop respectively.

6. The application is opposed by way of a replying affidavit sworn by the 1st Respondent on 03.08.2020. He avers among other issues That:

i. KISUMU CMCC NO. 555 OF 2018 was settled by consent on 11.04.19 in which it was agreed among others that the Central Church Council was to within 30 days pass a resolution creating GREATER CENTRAL LAKE REGION

ii. That the consent was voluntary

iii. The Applicants had time to implement the consent while they were still in office

iv. That the Applicants represented the Central Church Council

v. The Board of Trustees comprises of the Presiding Bishop, Deputy Presiding Bishop and Area Church Council Bishops who represent the Central Church Council

vi. The chair of the Board of Trustees is the Presiding Bishop

vii. That the demands for creation of the GREATER CENTRAL LAKE REGION was valid

Analysis and Determination

7. I have considered the affidavits and annexures thereto and submissions filed on behalf of the parties. The main issue for determination is whether the Applicants ought to be granted stay of execution pending appeal.

8. An order for stay of execution is a discretionary order. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** held that discretion ought to be exercised in a manner that would not prevent an appeal.

9. Order 42 (6) of the Civil Procedure Rules provides:

(2) No order for stay of execution shall be made under sub rule (1) Unless—

a. The court is satisfied that substantial loss may result to the applicant unless the order is made

b. That the application has been made without unreasonable delay; and

c. 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 applicant.

10. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay and the party seeking stay bears a specific burden regarding proof of substantial loss in a case such as before us.

11. From the affidavit evidence, the Applicants have raised novel issues among them the magistrate's court's jurisdiction to issue the orders it did and the fact that the 1st and 2nd Applicants have retired and are incapable of complying with the court's order. These issues are no doubt triable and ought to go on appeal.

12. The Respondents in their submissions have also raised a novel issue of leave to appeal by the Applicants and I find that that is a matter for determination in the appeal.

13. The upshot of the foregoing is that the notice of motion dated 13.07.2020 is considered and found to have merit and the same is allowed on the following terms: THAT:

1) There be a stay of execution of the Ruling and Order in **KISUMU CMCC NO. 555 OF 2018 AMOS NYAGA OGADA & 4 OTHERS Vs REV. SILAS YEGO & 3 OTHERS** delivered on 07.07.2020 pending the hearing and determination of the appeal

2) The Kshs. 50,000 deposited by each of the Applicants shall remain in the custody of the court until the determination of the appeal or until other/further order of the court

3) Costs of this application shall be in the appeal

DATED AT KISUMU ON THIS 22nd DAY OF *October* 2020

T.W. CHERERE

JUDGE

Court Assistant - Ms. Amondi

For Applicants - Mr. Amalemba for Swahili Amalemba & Associates

For Respondents - Mr. Mwamu for Mwamu & Company Advocate