



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 6 OF 2018**

**REV. JOHN JUMA AND 3 OTHERS.....PETITIONERS**

**VERSUS**

**REV. PATRICK LIHANDA AND ANOTHER.....RESPONDENTS**

**AND**

**REV. ZEDEKIA ORERA AND 4 OTHERS.....INTERESTED PARTIES**

**AND**

**PENTECOASTAL ASSEMBLIES OF GOD (PAG-K)**

**THROUGH REV. JOSEPH OTONDO.....APPLICANT**

**AND**

**REV. REUBEN SABATIA ASAMBU & 453 OTHERS.....INTERESTED PARTIES**

**RULING**

1. On 17<sup>th</sup> July 2020, I delivered a ruling, on an application dated 2<sup>nd</sup> June 2020, which had sought stay of proceedings herein pending mediation or arbitral proceedings that the applicant sought to enter into. I dismissed the said application for reasons that were set out in that ruling.
2. Upon the said dismissal, Mr. Musiega, advocate for the applicant, in that application, rose and made an oral application for temporary stay of proceedings and stay of any orders pending the filing of a formal application for stay pending the filing of an appeal at the Court of Appeal. The oral application was opposed by Mr. Ondego and Mr. Mokuia for the other parties. In the end, I did not grant the stay order sought orally, instead I directed Mr. Musiega to file, within seven days, a formal application for stay of proceedings.
3. Mr. Musiega did comply with those directions, for he filed, on 22<sup>nd</sup> July 2020, on behalf of the applicant, a Motion, of even of date, seeking stay of proceedings herein to await the hearing and determination of an appeal that the applicant intended to file. The affidavit in support was sworn by Rev. Joseph Otondo, on 21<sup>st</sup> July 2020. He states that he was obliged as a church minister, to find a solution to the problems, that had beset their church, through a conciliatory process instead of pursuing litigation, which, according to him, is adversarial and an antithesis to Christian brotherhood. He avers that he desired for a second opinion of an appellate court with respect to what he had sought at the High Court, and that the Court of Appeal shall be left with nothing to hear should the High Court proceed to hear and finalise this matter.
4. The application dated 22<sup>nd</sup> July 2020 was opposed by the other parties, who filed various responses to it. The petitioners filed grounds of opposition, dated 27<sup>th</sup> July 2020, and a replying affidavit by Elkana Salamba, sworn on 27<sup>th</sup> July 2020. The 1<sup>st</sup> respondent filed grounds of opposition, dated 7<sup>th</sup> August 2020, and a replying affidavit, sworn on 14<sup>th</sup> August 2020, by Rev. Dr. Zedekiah Orera.
5. The parties thereafter filed detailed written submissions, complete with judicial opinions that they relied upon.
6. I have had occasion to peruse the application, grounds of opposition, the rival affidavits, the written submissions and the authorities cited, and I have made note the arguments made.

7. The only issue for me to determine, with respect to the application, dated 22<sup>nd</sup> July 2020, is as whether the proceedings herein should be stayed pending the appeal that the applicant intends to file at the Court of Appeal.

8. In the *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, the principles upon which stay of proceedings may be granted are summarised as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

9. The courts have had occasion to address the question of staying proceedings pending appeal, and to develop principles upon which such stay may be granted.

10. The Court of Appeal, in *Municipal Council of Mombasa & another vs. Kenya Transport Association* [2011] eKLR, said as follows with regard to the matter:

“... the general principle is that a stay of proceedings is made very sparingly and only in exceptional circumstances as it has the effect of driving the claimant from the “judgment seat” (see *Halsbury's Laws of England* 4<sup>th</sup> Ed. Re-issue paragraph 926 page 290). The case of *Silverstein vs. Chesoni* [2002] I KLR 867 illustrates the Court’s reluctance to stay proceedings.”

11. While in *Kenya Wildlife Service vs. James Mutembei* [2019] eKLR, the court said:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

12. It was said in *Global Tours & Travels Limited Nairobi HC Winding Up Cause No. 43 of 2000*, that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

13. It can thus be said that for an order of stay of proceedings to be granted, the applicant must establish, *inter alia*, that:

- (a) There is a *prima facie* arguable appeal;
- (b) The application was brought expeditiously; and
- (c) The interests of justice demand that the order of stay be granted.

14. I have considered all the above, together with the record of what has transpired in the matter so far. It is my finding that the issue of stay of proceedings has already been pronounced on by this court, in its ruling of 17<sup>th</sup> July 2020. The court declined, in a substantive ruling, on an application for stay of proceedings, to grant stay. The applicant is now inviting the court to consider making the same order in a similar application, albeit crafted differently. It sounds like the court is being asked to review its said order or to sit on appeal on it, but in a rather roundabout way. The only recourse available to the applicant, in the circumstances, in my view, is by way of an appeal to the Court of Appeal, which court, I trust, does have the power to order stay of proceedings that are ongoing or pending before this court.

15. In any case, I find that in the interests of justice, balance of convenience and expeditious disposal of suits, stay of proceedings ought not to be granted, as the issues being canvassed, in the plethora of suits in this cause, deserve to be heard and determined at the earliest and without any further delay.

16. Consequently, I find that the application, dated 22<sup>nd</sup> July 2020, has no merit, and I hereby dismiss the said application, with costs. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 16<sup>th</sup> DAY OF October 2020**

**W MUSYOKA**

**JUDGE**