



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 285 OF 2014

BOARD OF TRUSTEES OF AFRICAN INDEPENDENT

PENTECOSTAL CHURCH OF AFRICA CHURCHPLAINTIFF

VERSUS

PETER MUNGAI KIMANI.....1ST DEFENDANT

JOHN WAINAINA MWAURA.....2ND DEFENDANT

ISAACK NJOROGE MWIHAKI.....3RD DEFENDANT

PAUL MWANGI WAWERU.....4TH DEFENDANT

JAMES NJOROGE KAMANDE.....5TH DEFENDANT

JOSEPH MBUGUA MWAURA6TH DEFENDANT

MICHAEL KARIUKI NDUNGU.....7TH DEFENDANT

ISAACK NDUNGU KIHAMA.....8TH DEFENDANT

WILSON WANYOIKE KINUTHIA.....9TH DEFENDANT

PETER GITAU KANGETHE.....10TH DEFENDANT

JOHN WANYOIKE MURIGI.....11TH DEFENDANT

ISAACK MACHARIA MBURU12TH DEFENDANT

HARUN MWAURA MWANGI.....13TH DEFENDANT

RULING

1. By an application dated 21st March 2016 under certificate of urgency, the defendants/applicants herein seek from this court orders of stay of the orders made by this court on 14th March 2016

pending hearing an determination of an appeal in the Court of Appeal. The application is brought under the express provisions of order 42 Rule 6 of the Civil Procedure Rules and supported by an affidavit sworn by Peter Mungai Kamau on 1st March 2016 and a supplementary affidavit sworn on 14th April 2016 by the same deponent. The grounds upon which the application is predicated are that:

- i. This court on 14th March 2016 validated and extended injunctive orders in favour of the plaintiff which orders the plaintiffs, their agents, servants and cronies have used to create tension, intimidation, oppression, threats, violence and to destabilize the AIPCA in Gatanga Diocese which is in Muranga County during the holy week and the Easter season .
 - ii. The defendants being grossly dissatisfied with the court's ruling of 14th March, 2016 have lodged an appeal against the same.
 - iii. The parties were co-existing harmoniously and peacefully before the court issued the said orders on 14th march 2016 a fact the court grievously omitted to consider to the utter prejudice of the defendants and peace of the AIPCA Church in Kenya.
 - iv. The orders herein issued on 14th March, 2016 have been used to excommunicate the defendants from the church.
 - v. The defendant's appeal is notoriously meritorious.
 - vi. No prejudice whatsoever will be suffered by the plaintiff trustees herein.
 - vii. It is fair and just in the circumstances of this suit and the instant application for the court to exercise its discretion in favour of granting the applicants the orders sought.
2. In the affidavit sworn by Mr Peter Mungai Kimani, the 1st defendant, the defendants/applicants aver that on 14th March 2016 the court issued orders restraining the suspension of the defendants from their serving ministries; that being extremely dissatisfied with the said ruling the defendants had lodged an appeal against the same; which appeal is notoriously meritorious. That the learned judge failed to realize that the parties were co-existing peacefully for over one year before she reinstated the injunctive orders on 14th March 2016 which are now being used by Amos Kabuthu Mathenge, the self imposed spiritual leader of the church, his agents to cause violence and destabilize the church; That after the orders of 14th March 2016 the plaintiff, Amos Kabuthu Mathenge, his agents and followers started issuing threats to the defendants stating that they should not even be seen in worship places; That the said agents of the Archbishop had been spreading propaganda and rumours even in Kikuyu radio stations castigating and demonizing the defendants in a brazen misinterpretation of the order; That this court should have realized that Gatanga AIPCA church was in peace and harmony without any court orders and the church congregation had gotten used to their spiritual leaders; That it is extremely demoralizing to ask the defendants to go back to positions they left years ago and to start wearing different attires for their ministries; That the defendants were now fearing for their lives especially during the Easter period where they had been threatened not to attend the Holy Oil Ceremony; That there is urgent need to suspend and stay the said orders of 14th March 2016 for the sake of peace and harmony in the church at Gatanga Diocese and in the whole country; That unless the said orders are stayed, they will continue to cause grave injustice and suffering to the congregation of Gatanga Diocese since their spiritual leaders cannot perform their rightful solemn duties; That this court greatly misapprehended the facts and the law and especially in failing to properly investigate the issue of summons allegedly served upon the defendants which was not true; That it is fair and just in the circumstances of this suit and the instant application for the court to exercise its discretion in favour of granting the applicants orders sought since there is no prejudice at all that will be suffered by the plaintiff Board of Trustees as there are no issues of church properties involved in this case.
3. The application by the defendants was opposed by the plaintiff who filed an affidavit in reply sworn by Eliud Njua Juma on 13th April 2016 and filed the same day. In the said replying affidavit, the deponent deposes, contending that the application by the defendants is unmerited and is ill willed as the applicants appear to be vexatious litigants since they cast aspersions about the court and the judge handling the matter; That the application is meant to prefer an

appeal before the same court through the backdoor whereas such an act is untenable in law; That the ruling by this court was merited and based on considered analysis of the law and the facts; That this court cannot issue the orders sought as that would be tantamount to sitting on an appeal arising from its own decision and that the probability of the success of the intended appeal is out of the purview of the court; That the orders of 14th March 2016 were based on an in-depth analysis whereby the court gave a comprehensive ruling and any assertion of peaceful co-existence cannot be a basis for issuance of stay rather it ought to have been a ground for opposing the said application; That it is rather unusual, vexatious and frivolous to cast aspersions against the Archbishop by asserting that he is a self-imposed spiritual leader whereas the defendants have previously acknowledged his leadership in these proceedings where he is not even a party; That no threats had been made, issued or alleged against the Archbishop who is not a party to these proceedings hence the allegations against him are uncalled for and offends the rules of natural justice; That any allegations of rumours through vernacular radio is unknown to the deponent, is unjustified and made in bad faith; That the applicant/defendant's suspensions are still in force hence they are not suited to officiate any ceremonies of the church and that if they did so they would be committing an offence actionable by the church as spiritual discipline ought to be upheld; That the church has laid down processes of being a clergy hence it is not demoralizing since the applicant had been accused of misrepresenting themselves as holding various clergy positions; that claims of threats against the applicants is devoid of evidence and only imaginary; That no prejudice/harm shall be suffered if orders of 14th March 2016 are sustained as there are no chaos or disturbance caused arising from their issuance since there is a functional clergy house parishioning and ministering the defendants; That there was no misapprehension of any facts which facts are not even disclosed hence the orders sought herein are underserved; That this court is functus officio, that this court is being invited to reconsider its findings since no stay was sought in the first instance hence this application is an afterthought meant to delay the speedy disposal of the suit based on flimsy reasons not predicated on any legal principle.

4. In a rejoinder, the 1st defendant/applicant swore a supplementary affidavit on 14th April 2016 contending that Eliud Juma hails from Nyeri Diocese of AIPCA Church and had no idea of what was happening in Gatanga Diocese after the ruling of 14th March 2016; That for the sake of peace and harmony in Gatanga Diocese the defendants are willing to abide by any conditions that the Honourable court may wish to grant to give them a chance to ventilate the appeal as they serve the church; That the language used by the deponent in his replying affidavit is derogatory and uncalled for; That the defendant had continued to receive threats on their lives and cannot even excise their freedom of worship.
5. The parties' advocates orally urged the application before me on 20th April 2016 and I set the ruling for 10th May 2016 but upon being assigned other duties by the principal judge, I was out of the station and was unable to deliver the ruling on schedule and parties were issued with notice for today.
6. Mr Kirimi counsel for the applicants submitted relying on the grounds on the face of the application, the supporting and supplementary affidavits and case law while urging this court to exercise its discretion in favour of the applicants because the orders made by this court on 14th March 2016 despite their clarity, they had been misused and misinterpreted by agents of the Church Archbishop to scuttle the activities of AIPCA Gatanga Diocese. Mr Kirimi submitted that on a close look at the orders of this court made on 14th March 2016, the defendants were not barred from enjoying their freedom of worship. However it was contended that the plaintiffs had barred the defendants from worshipping in the church.
7. Further, that the appeal as filed challenging orders of this court was arguable since the findings of this court were in error as to whether or not summons to enter appearance were issued in this case and that this court also considered extraneous matters which were not part of the proceedings but were only introduced in the submissions. Mr Kirimi submitted that since his clients have a meritorious appeal, it shall be rendered nugatory if successful. That the applicants who are members of the AIPCA Gatanga Diocese Church are under pressure of the church suspension and that their congregations are suffering as there is no one to preach to the congregation. That the plaintiff and especially the Archbishop are intending to take over the

- churches presided over by the applicants who were properly ordained. That the applicants would suffer because they would have no congregation to go to. Further, that the applicants would also suffer disrepute and character assassination; and their freedom of worship and freedom to exercise their right to worship had been curtailed and that they may not recover their positions if the appeal is successful. In addition, Mr Kirimi submitted that no prejudice will be suffered by the plaintiffs who are church Trustees whose role is to protect church properties. He further submitted that there was no evidence that any of the church properties was in danger of wastage and destruction. That Eliud Juma was not a member of Gatanga Diocese hence he does not know what is happening on the ground and that it was the Archbishop who was harassing the applicants.
8. Mr Kirimi submitted that the applicants were willing to abide by any reasonable conditions that the court would give to enable them enjoy a stay. He relied on two cases **CA 114/2013 Kenya Airports Authority V Mstubell Welfare Society [2014] e KLR** and **Charles Ngatia Nyuyo Vs Ekira Gathoni & Another [2014] e KLR**
 9. Mr Kirimi maintained that the appeal need not be successful at the end of the day for stay to be granted but that should the appeal succeed, the appellants will suffer irreparably. Further, that the application had been timeously filed and his clients would suffer substantial loss if stay pending appeal is denied.
 10. According to Mr Kirimi, the orders of 14th March 2016 have destabilized the church and despite this court's hardened advise to the parties to keep peace, the plaintiffs continue to castigate the defendants/applicants. That the applicants had complied with this court's orders to set down this matter for hearing which is good faith and that they intend to expedite the appeal as they have already applied for typed proceedings.
 11. In opposing the application by the defendants/applicants, Mr Mathenge counsel for the plaintiff/respondent submitted, relying on his client's replying affidavit sworn by Eliud Juma on 13th April 2016 and contended that the orders of stay as sought are illegal and inequitable. He submitted that there was no evidence that the applicants had been promoted, by who and what instruments of promotion they possessed. It was submitted on behalf of the respondent that the applicants were under suspension which had not been lifted and neither had they sought to lift the said suspension. That as a result, the applicants cannot perform any rites of the church as clergymen. That the applicants had not disclosed what extraneous matters this court considered by its orders of 14th March 2016. Further, it was submitted that in any event, the applicants had since filed their defence to the suit which is an illustration that parties are anxious to conclude this matter. It was submitted that it would be seriously prejudicial if stay was granted as it will mean the church having two sections of clergymen. Further, that there was no evidence that the applicants had been prohibited from worshipping in the church and when. In addition, Mr Mathenge urged that the Archbishop should be left out of the issues since he was not privy to the matters at hand. Further, that allegations of propaganda made in radio stations was farfetched.
 12. Mr Mathenge submitted that the orders being sought are discretionary and without a proper basis for allegations of excommunication which is a procedural matter for the church, the applicants are not entitled to the reliefs sought.
 13. On the claim that the respondents had misinterpreted the courts order, it was contended on behalf of the respondent that this was a baseless claim since the applicants had not sought for interpretation or pronouncement of the said orders to the parties hence that cannot be a ground for stay orders being granted. Further submissions were that the applicants were under the stewardship of the Archbishop and yet they had not notified him of the matters concerning their being barred from worshipping in the church. On the authorities relied on by the applicant's counsel, Mr Mathenge submitted that the **Kenya Airports Authority** case related to different circumstances concerning the right to resettle landless Kenyans. On the second decision of **Charles Ngatia**, it was submitted that the matter arose from a suit for revocation of title of land as opposed to the issues before hand which relate to spiritual and doctrines of ministries of a church. It was submitted that the Trustee Mr Juma is a Trustee of the Gatanga Church and that in any event, the applicants have not demonstrated that they have their own church buildings and facilities. That all the existing facilities belong to Gatanga Church (Diocese) and cannot be allowed to be used by parallel groups. It was submitted that the injunction granted by this court did not prohibit the applicants from worshipping in the church but from

- misrepresenting themselves as church ministers to the congregations. Further, that allegations that the applicants were performing functions of the clergy violated the church standing orders. Mr Mathenge urged the court to dismiss the applicant's application with costs..
14. In a brief rejoinder, Mr Kirimi counsel for the applicants submitted that the applicants were clergymen before the orders were issued and that it would appear the respondents were shifting the burden to the applicants to prove that they were properly ordained. It was submitted that the applicants had now filed a defence and counterclaim to the suit seeking for lifting of their suspension. On the issue of extraneous matters, counsel stated that the submissions filed on 30th November 2015 by the applicants were clear. It was contended that the issues affected the Archbishop since he had not countered the allegations against him. It was also submitted that issues of the church standing orders were irrelevant. Mr Kirimi urged the court, to exercise its discretion for the sake for peace and grant the orders sought.

Determination

15. I have carefully considered the application by the applicants /defendants, the grounds in support, the supporting and supplementary affidavit as well as the replying affidavit by the respondent/plaintiff. I have also considered the parties' advocates oral rival submissions and the authorities cited by the applicant's counsel.
16. In my view, the only issue for determination in this matter is whether the applicants have satisfied this court on the conditions for stay of an injunction issued against them pending the hearing and determination of the appeal to the Court of Appeal, challenging the ruling/orders of this court made on 14th March 2016. To answer that single question, it is important to provide some background information on the origin of the current dispute.
17. On 4th day of December 2014, this court after hearing both parties to an application for injunction made by the plaintiff issued an order granting the respondents an injunction sought in their application dated 15th September 2014 and filed on the 16th September 2014 restraining the defendants/ applicants herein, their agents, servants, employees or any other persons acting through them and under their direction or supervision from holding any meeting, presiding over the AIPCA Gatanga Diocese Church leadership activities, roles or in any other manner from engaging in the leadership affairs of the said Church pending hearing and determination of the suit herein or the lifting of their suspension whichever was the earlier.
18. The court further ordered that in order to prevent any mischief that may result should the beneficiary of the injunctive relief use it as both a shield and a sword at the same time, and for avoidance of doubt, the defendants were not barred from congregating with the rest of the church membership, and or attending church services as worshipers.
19. The court further ordered that in view of the nature of the dispute involving church leadership, the injunctive order was conditional upon the plaintiff expediting the process of readying of the suit for hearing and disposal within 120 days from the date of the ruling failure to which the temporary injunction granted would lapse.
20. Following the above ruling the applicant's counsel Mr Kirimi sought for typed copy of ruling which was handwritten at that time and leave to appeal if necessary. He also sought for stay of execution of the said orders pending the filing of the said appeal. The court did grant leave to appeal but declined to grant stay orders for reasons that the applicants/defendants were under suspension from the Church leadership and further, that there was no such prayer for lifting or stay of the said suspension. The record shows that in the intervening period, the Church Trustee who had been actively involved in the conduct of this matter on behalf of the plaintiff/respondent Mr Timothy Gachoya fell ill and eventually died. The respondent/plaintiff also did file an amended plaint on 27th March 2015 and a supplementary list of document on 27th March 2015.
21. On the same date of 27th March 2015, the plaintiff filed an application under certificate of urgency dated 26th March 2015 seeking to extend the validity of the temporary injunction issued on 4th December 2014 and for directions as to the hearing and disposal of the suit.
22. As at the time of filing of that application on 27th March 2015, the injunctive orders issued on 4th December 2014 had not lapsed. They were to lapse on 4th April 2015 hence, the prayer that their validity be extended. In response /opposition to that application the defendants filed the following

documents;-

- a. Notice of withdrawal of Appeal dated 15th May 2015,
- b. Notice of preliminary objection to the entire suit and leave to have the suit struck out on the grounds that the suit had abated;
- c. Authority by the rest of the defendants to the 1st defendant Peter Mungai Maina dated 21st May 2015.
- d. A replying affidavit by Peter Mungai Maina sworn on 21st May 2015.
- e. Notice of appointment of advocates for the 1st-8th, 12th and 13th defendants dated 21st May 2015 by Kinyanjui Kirimi and Company Advocates.

23. On 29th June 2015, the plaintiffs filed Notice of withdrawal of suit against the 9th, 10th and 11th defendants.

24. In the ruling of 14th March 2016 determining that application dated 26th March 2015 filed on 27th March 2015, this court did find that the suit herein had not abated as there were clear summons to enter appearance on record issued and served upon the defendants, with a duly sworn affidavit of service by the process server who effected service. The court also exercised its discretion and extended the validity of the injunctive orders and provided reasons for such orders which reasons are on record, backed by statute law and case law.

25. It is that ruling that the defendants are dissatisfied with and which they have expressed their intention to challenge before the Court of Appeal. They did file a Notice of Appeal which they have annexed to their application dated 21st March 2016. The applicants/defendants have also filed a defence and counterclaim to the plaintiff's suit herein. The defence and counterclaim are not filed on a without prejudice basis.

26. In my ruling of 14th March 2016, I allowed the application for extension of the injunctive order made on 4th December 2014 for a further 12 months from the date of the ruling and I also dismissed the preliminary objection by the defendants who had contended that the suit had abated contending that no summons to enter appearance had been issued and or served upon the defendants. In my ruling, I found that the preliminary objection was misplaced since there was on record clear evidence of issuance and service of summons to enter appearance upon the defendants which the defence counsel appeared not to have seen and which he had stated in his submissions, that this court should investigate.

27. I also exercised my discretion *suo motu* and in the interest of justice and granted the applicants/defendants leave of 14 days to file and serve their statements of defence although they were out of time and directed the parties to comply with pre-trial requirements under Order 11 of the Civil Procedure Rules within 45 days and I set a mention date for 17th May 2016 to confirm compliance. The mention date never came to be as it was interrupted by this application seeking for stay of the orders of 14th March 2016 pending hearing and determination of the appeal following the filing of a notice of appeal.

28. The conditions to be fulfilled for a grant of stay pending appeal are clearly set out in the provisions of Order 42 Rule 6 of the Civil Procedure Rules namely:

- a. That the applicant shall suffer substantial loss if stay is not granted; and that the appeal, if successful shall be rendered nugatory;
- b. That the application has been made without unreasonable delay; and
- c. Such security for due performance of decree as the court may order has been deposited.

29. Rule 5(2) of the Court of Appeal Rules also sets out principles for granting of stay pending appeal and these are:

- a. That the appellant must demonstrate that there is an arguable appeal and that if stay is not granted the appeal if successful shall be rendered nugatory.

30. However, I must emphasize that the arguability of the appeal is not for this court to determine as

- to do so would be straying into the territory of the appellate court.
31. Applying the above established principles for stay pending appeal, and commencing with the condition as to whether the applicants have brought this application without unreasonable delay, I note that the decision/ruling of this court was made on 14th March 2016 and the application herein was made on 23rd March 2016 which was within 9 days of the date of the ruling. On the other hand, the Notice of Appeal was filed on 29th March 2016 with the Court of Appeal. It is dated 21st March 2016 and lodged with the Deputy Registrar of the High Court on 23rd March 2016.
 32. In my humble view, the application was made timeously, within 9 days of the date of the ruling.
 33. On whether security for the due performance of decree is necessary in this matter, in my view, this not being a monetary or proprietary decree, it would not be necessary to order for such deposit of security for the due performance of decree. Furthermore, the appeal is against an interlocutory order and not against decree. The substantive suit is still pending hearing and determination, the defendants having filed their statement of defence and counterclaim in accordance with the orders of this court made on 14th March 2016.
 34. The other condition for fulfillment before stay can be granted is whether the applicants have demonstrated that substantial loss will result if stay is denied and that therefore the appeal if successful shall be rendered nugatory.
 35. To answer the above question on substantial loss, this court notes that prior to the filing of the application dated 27th March 2015, there was in place an injunctive order of 4th December 2014 against the defendants. Therefore, although the applicants contend that there was relative peace in church and that the orders of 14th March 2016 had brought chaos, or been misinterpreted by the respondents to mean excommunication of the defendants from worshipping and or performing their rites as clergy of the Gatanga AIPCA Diocese Church, this court does not find any basis in that argument.
 36. Furthermore, the allegation that the orders of 14th March 2016 were misinterpreted by the respondents is self defeatist for reasons that the applicants counsel conceded in his submissions that the said orders were clear. And if they were not clear, then this court does not understand why the applicants never sought for a clarification of the said orders to the parties to enable compliance by both parties.
 37. In addition, following the orders of 4th December 2014, the applicants filed a Notice of Appeal which they later withdrew. From the tone of the application herein, the applicants no doubt seek to stay the orders of 4th December 2014 albeit the application is couched to refer to the orders of 14th March 2016. This is because it has not been demonstrated how the orders of 14th March 2016 would cause substantial loss or hardship to the applicants who have gone ahead to implement them by inter alia, filing a defence and counterclaim to the plaintiff's suit.
 38. Further, this court was not shown any evidence that the applicants, between 4th April 2015 when the injunctive orders lapsed and 14th March 2016, when this court extended the validity of the injunctive orders, had been peacefully performing their religious /church rites as clergymen legitimately and that therefore the orders of 14th March 2016 had disturbed status quo, being that their suspension from church leadership had been lifted during that period.
 39. The applicants equally never demonstrated before this court that the plaintiff or Arch Bishop Amos Kambuthu Mathenge or his alleged cronies had barred them or excommunicated them from being worshipers or worshipping in the Church as alleged and neither was there any evidence that there were threats and or violence meted out by the plaintiffs to the applicants. Threats to life and violence are culpable and cognizable crimes under our Penal Code Cap 63 Laws of Kenya. There is no evidence that the applicants ever reported any such threats and or violence to the law enforcement officers, being, the Police, to take appropriate action against those issuing threats or violence. The allegations of threats and violence therefore remain bare unsubstantiated allegations.
 40. This court further finds that besides the preliminary objection that the suit herein had abated, which was dismissed and the opposition to the application for extension of the injunctive orders, there was no application by the defendants seeking to discharge the injunction which was not permanent and neither was there any evidence that they had at that time sought for the lifting

- of their suspension from adorning themselves as church leaders. By this application, for stay, the applicants are by no means seeking orders installing them as church leaders and lifting their suspension, without any formal specific prayers for such orders to be made in their favour.
41. The applicants, in my view, are also seeking through the backdoor, to discharge the injunction which was extended, without saying so specifically. Further this court notes that the application for extension of the injunction was not permanent in nature. Furthermore, the applicants have now complied with the order of this court of filing and serving their defence and counterclaim upon the plaintiffs. In that regard, I find that to grant stay of injunction will not serve any interest of justice in this case. No substantial loss has been demonstrated to be suffered by the applicants if stay is declined. It has also not been demonstrated that the appeal if successful shall be rendered nugatory if stay is not granted. In my humble view, to grant the orders sought will be to assist the applicants procrastinate the expeditious disposal of cases in an efficient and cost effective manner. In any case, the period within which the applicants allege there was peace was during the subsistence of the injunctive orders since it has not been shown that the applicants, despite the injunctive orders of 4th December, 2014 had been allowed by the plaintiff to act in breach thereof and that when the said orders were validated after a short stint of lapse is when hell broke loose in the Church.
42. Excommunication of worshippers or church leaders takes a process. This court has not been shown any letter or instrument of excommunication from the Church top leadership to the applicants and neither have the applicants demonstrated that there has been or is an attempt to excommunicate them from the church without following the laid down procedures and as per the Church Constitution. If there was any such attempt to excommunicate them unprocedurally, nothing prevents the applicants from seeking the protection of this court since the court order of 14th March, 2016 was clear.
43. It is for those many reasons that I decline to grant the orders sought by the applicants/defendants in their notice of motion dated 21st March 2016 which I find unmerited.
44. Accordingly, the notice of motion as filed by the applicants is dismissed. In the spirit of promoting harmony and reconciliation between and among the parties to this dispute, which I have always beseeched these parties 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 and the dispute being one over the church leadership.

Dated, signed and delivered in open court at Nairobi this 31st day of May, 2016.

R.E. ABURILI

JUDGE