



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT

CIVIL APPEAL CASE NO. 281 OF 2014

DAVID OMENO.....APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF AFRICAN

DIVINE CHURCH BOYANI..... RESPONDENT

RULING

1. Before me is a Motion on Notice dated 21st July 2014 expressed to be brought under **Sections 3A and 63 (e) of the Civil Procedure Act, Orders 42 Rule 6, and 50 Rule 5 of the Civil Procedure Rules**. The application seeks a stay of execution of the ruling made on 26th June, 2014 in **Nairobi CMCC. NO. 7383 of 2013** pending the hearing and determination of the intended appeal. The grounds upon which the application is made were set out on the body of the Motion and the Supporting and Supplementary Affidavits of David Omeno sworn on 21st July and 12th November, 2014, respectively.
2. It was contended by the Applicant that he is a Chief Vicar of African Divine Church Boyani and in charge of ten Assemblies in Nairobi. That vide a ruling delivered on 26th June, 2014, the Applicant was restrained from interfering with the affairs of the Respondents Church, that the Applicant had since filed an appeal against the said order and was awaiting for the certified copies of the proceedings to enable him lodge a Record of Appeal. The Applicant further contended that the intended appeal has high chances of success; that unless the said order is stayed, he will be locked out of church whereby the congregation will disintegrate. According to the Applicant, the Respondent had violated the Constitution of the church in failing to follow the procedure laid down for removal of a pastor.
3. Learned Counsel for the Applicant Mr. Moindi submitted that the Respondent had not followed the dispute resolution mechanism laid in the Constitution of the church before resulting to the filing of the suit in the lower court, that the Applicant had denied that he had referred himself to as “Bishop”. He submitted that it would be detrimental to the Applicant who is only trained as a Pastor of Respondent church to continue to be restrained by the impugned orders and in the premises that the same should be stayed. Counsel urged that the application be allowed.
4. The application was opposed vide the Replying Affidavit of Rev. Elija Olembo Ukiru sworn on 29th October 2014. It was contended that the application was misplaced as it sought to stay a negative order; that it sought to introduce new matters not pleaded in the lower court; that the Applicant is not a Vicar of the Respondent but that he had started a splinter church in Nairobi that had disorganized the Respondent church; that the issues raised in the application are best argued

- on the appeal. It was further contended that the Applicant and other church members had engaged in subversive and divisive activities in the 2012 – 2013 period whereupon they were taken through the laid down disciplinary procedures of the Respondent but failed to heed the church's directions and that there were various disciplinary letters from the church on this issue. That in the premises the application should be dismissed.
5. Mr. Mwangi learned Counsel for the Respondent submitted that the application was only by one individual whose interests should be weighed against the greater interests of the Respondent church; that the Applicant was holding himself out as holding a position he never held in the Respondent church and a case in point is a wedding card produced wherein the Applicant was referred to as Bishop. That the Applicants activities were creating confusion within the church and that the issue of disciplinary process can only be undertaken on appeal. Counsel therefore urged that the application be allowed.
 6. I have considered the Affidavits on record and the submission of Counsel. In an application for stay of execution, the principles governing the grant of the same are well settled. These are that the application should be made timeously; that if the stay is not granted the Applicant would suffer substantial loss and that there should be security for the performance of the decree or order appealed against. Learned Counsel seem to have dealt on the merits of the appeal rather than address these principles. Nevertheless, this court will endeavour to refer to the relevant areas in the Affidavits and the submissions that tend to address the foregoing.
 7. On the first principle, the order appealed against was given on the 26th June, 2014. The present application was filed on 21st July, 2014 a period of less than 30 days from the date of the Ruling. I have always held the view that under the first principle in order **42 Rule 6** of the **Civil Procedure Rules**, for an application to be said to have been made timeously or without undue delay, the same should be brought preferably within 30 day period given by the law for the filing of an appeal from the lower court to the high court. I say so because, in moving the court within such a period, it is a manifestation of a party's willingness or readiness to pursue its/his rights in the appellate level within a reasonable time, thereby putting the opposite party on notice so as not to change his/her position. My view therefore is that an application brought outside the 30 day period may not be timeous and the delay ought to be explained in the Affidavit in support of such an application. In the circumstances of this case, a period of 25 days is reasonable. Accordingly, the application was made timeously.
 8. On the second principle of substantial loss, it was contended for the Applicant that he is only trained as Pastor with the Respondent church; that the net effect of the order by the lower court is to lock him out of the church and there will be disintegration of the congregation; that the Respondent had so far not appointed or sent any pastor to the ten (10) assemblies of which the Applicant is in charge thereby creating a vacuum thereat. Further, it was submitted that having been trained only as a Pastor for the Respondent church, the Applicant will be doing nothing between now and the time of the appeal. That the foregoing constituted substantial loss.
 9. In response, the Respondent denied that the Applicant was in charge of ten (10) assemblies and that the Applicant had started a splinter group. That the Applicant's activities were creating confusion within the church.
 10. It is clear from the record that the Applicant may have been only trained as Pastor of the Respondent church; this the Respondent has not denied. It is clear that vide the orders of the lower court the Applicant will be prevented from undertaking his duties as trained. The allegations that the Applicant has started a splinter group is first being raised in the Replying Affidavit and was not part of the pleadings in the lower court. The Respondent has not denied that it has not sent or appointed a replacement Pastor for the congregation the Applicant was hitherto pastoring. In this regard, it lends credence to the Applicant's belief and contention that the intention of the Respondent is to have the congregation which the Applicant was pastoring disintegrate. There is no shepherd of the herd as it were. If the Appeal is finally successful in my view, there will be no congregation to which the Applicant will return to. I am therefore satisfied that the second principle has been established.
 11. As regards the contention that the application seeks to stay a negative order, I am not in agreement with the contention. The order appealed against restrains the Applicant from doing certain acts. It forbids him from undertaking his calling. In my view, the requiring of a party to refrain from doing certain acts cannot be said to be negative. To my mind therefore, the order is capable of

- being stayed.
12. There was a lot of contention at the hearing of the application as to whether the Respondent had undertaken disciplinary procedures against the Applicant in accordance with its own constitution. Indeed, the Respondent's counsel insisted that the Respondent had produced correspondence in the lower court to prove this fact. When the court called for the original record, it turned out that no such correspondence had been produced before that court. Counsels for both parties confirmed this fact. In the circumstance, although it was an issue canvassed by the parties, I will restrain myself from making any observations or findings on it as I believe that that issue will be central in the appeal.
 13. As regard the last principle, security for the performance of the order, the Applicant swore that he is prepared to abide by any and all the conditions that the court may impose for the grant of the orders sought.
 14. Accordingly, I find the application to be merited. I allow the same on condition that the Applicant will not purport to act as Bishop of either the Respondent Church or any rival church.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2015.

A. MABEYA

JUDGE