



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 16 OF 2015

(An appeal from the Ruling/Order of the Senior Principal Magistrate, Embu in CMCC No. 13 of 2015 dated 1/4/2015)

REV. ELIZAPHAN KIMOTHO.....APPELLANT

VERSUS

REV. JOHN NJERU..... 1ST RESPONDENT

REV. JOSEPH NJUE KITHEO.....2ND RESPONDENT

REV. EVANS N. NJIRU.....3RD RESPONDENT

REV. SAMUEL MUGUNA HENRY.....4TH RESPONDENT

BENSON NYAGA.....5TH RESPONDENT

R U L I N G

This is a ruling on an application dated 10/4/2015 brought under Order 42 of the Civil Procedure Rules (2010), Section 1A , 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. It seeks for the following orders:-

- 1. That there be made an order for a temporary stay of enforcement, implementation or execution of the order made by the Chief Magistrate's court (Hon. Kibiru - Ag. CM) on 1/4/2015 in Embu CMCC NO. 13 OF 2015 pending the hearing and determination of this application inter-parties and thereafter pending the hearing and determination of this Appeal.*
- 2. That costs of this application be costs in the course.*

In the supporting affidavit the applicant states that he was the plaintiff in Embu CMCC No. 13 of 2015 where he sought orders for an injunction in the application dated 4/2/2015. The orders were issued on a temporary basis pending the determination of the application inter parties. The application was dismissed on 1/4/2015. The grounds for dismissal as given by the honourable court were that Meru High Court had struck out some cases involving the church in HCC Constitutional Petition No. 14 of 2015. The applicant argues that the case before the Chief Magistrate was not among the cases listed for dismissal by the Judge in the constitutional petition.

The applicant was aggrieved by the ruling of the learned magistrate and lodged this appeal. It is argued that this application for stay of implementation of the ruling should be allowed so that the appeal is not rendered nugatory. It was further argued that the application has been brought without delay and it is based on arguable grounds.

In a replying an affidavit sworn by the 3rd respondent on behalf of himself, the 1st, 2nd, 4th and 5th respondents, it is argued that this application has no merit and ought to be dismissed. The respondents

state that the applicant flouts the laid down procedure of the church constitution regarding disputes resolutions. The judgment in Meru High Court petition confirmed the leadership of the 4th respondent in the EAPC church. It is argued that if the orders sought are granted, the mandate of the respondents as leaders will be curtailed.

On dismissing the application in the lower court, the magistrate considered the provisions of the church constitution. The order for dismissal is not capable of being implemented and it is likewise incapable of being stayed. The applicant filed the case in the magistrate's court in order to stop a lawful transfer instead of using the laid down mechanism. The applicant has failed to abide by the church rules and is now using the court process to disrupt the smooth running of the church.

This application was disposed of by way of written submissions which were filed by both parties. The applicant was represented by Mithega & Kariuki Advocates while Victor Andande & Company represented the respondents.

The applicant argues that his application was dismissed on extraneous basis without determination of the issues. The applicant further submits that ruling of the judge in the Constitutional Petition cannot take away the jurisdiction of the court in determining disputes before it. The ruling of the judge in the petition was stayed by Court of Appeal in Nyeri which fact is not disputed by the respondent. The respondents have been disrupting church services. The applicant in support of his argument relies in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] eKLR**.

The respondents submit that the applicant is misleading the court by stating that the ruling in the Meru constitutional petition was stayed. The orders given by the Court of Appeal were to maintain status quo meaning that the 4th respondent was to retain his position as the overseer. The applicant has not proved that the respondents are not church members. Neither has he challenged the existence of the church constitution which provides for disputes resolutions.

The respondents cited the case of **FEISAL AMIN JANMOHAMMED T/A DUNYIA FORWARDERS VS SHAMI TRADING CO. LTD [2014] eKLR** in support of the argument that a dismissal order is negative and cannot be stayed.

The respondents further argued that the church should operate within an organizational structure. Its members are therefore bound by the internal rules and regulations which they have agreed to abide. In support of this argument the respondents relied on the case of **BISHOP ABSOLOM NDUNGO & 26 OTHERS VS ATTORNEY GENERAL & 2 OTHERS [2012] eKLR** where it was held that the functions of a church are within its organizational structure which binds its members.

It is further argued that the applicant is not telling the court the truth concerning the grounds of dismissal of his application. The Meru High Court decision indicates all the mentioned in paragraph 7 of the petition with an exception of HCCC No. 30 of 2013 be struck out on grounds that they were filed in violation of Article 21 of the Church Constitution. The court issued a permanent injunction restraining the members, leaders or any other

person acting on behalf of the petitioner church to prefer a suit in violation of the dispute resolution mechanism in the church constitution. The magistrate in CMCC No. 13 of 2015 was bound by the judgment of the High Court.

The applicant argues that his appeal is arguable and that he is entitled to the orders sought so that his appeal is not rendered nugatory. He further argues that the magistrate dismissed his application without determining the issues. The existent of Meru High Court Constitutional Petition No. 14 of 2014 is not disputed. The court in its judgment delivered on 26/2/2015 made the following orders among others:-

1. *That all suits concerning disputes arising from the functions of East African Pentecostal Churches (EAPC) listed in paragraph 7 of the judgment and pending in various subordinate courts be struck out on grounds that they were filed in violation of Article 21 of the church constitution.*
2. *That a permanent injunction do issue restraining every member or members or leaders or any persons acting on behalf of the petitioners church from preferring suits in courts of law in violation of church constitution.*

The principles for granting stay pending appeal were explained in the case of **BUTT VS RENT RESTRICTION TRIBUNAL [1982] KLR** where it was held that:-

1. *The power of the court to grant or refuse stay of execution is discretionary. The discretion should be exercised in such a way as not to prevent an appeal.*
2. *The general principle in granting or refusing stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judges discretion.*
3. *A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*
4. *The court in exercising its discretion will consider special circumstances of the case and unique requirements.*
5. *The court in exercising its powers can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause orders for stay to lapse.*

Similarly it was held in the case of **CHRIS MUNGA N. BICHAGE VS RICHARD NYAGAKA TONGI & 2 OTHERS [2013] eKLR** that for an applicant to be successful in an application for stay pending appeal, he must satisfy the court as to the following:-

1. *That his appeal is arguable and not frivolous.*
2. *That if the stay is not granted the appeal will be rendered nugatory if it succeeds.*

At the time judgment was delivered in the Meru Constitution Petition, CMCC No. 13 of 2015 was pending in court

having been filed on 4/2/2015 while the application in question was filed on 4/4/2015. The suit was therefore affected by the orders of the judge in that it was pending in the subordinate court at the time the orders were made. The Meru High court ruling which had been brought to his attention was binding on the learned magistrate.

It is not denied that the church has a dispute resolution mechanism in place contained in Article 21 of its constitution. The existence of this mechanism was the basis for the orders of the judge in the Meru Constitutional Petition. The applicant is a member and a leader of the church and so is the respondents. Both parties are bound by the church dispute resolution mechanism.

The applicant failed to annex evidence to prove his allegations that the Meru High Court judgment was stayed by the Court of Appeal. This allegation was denied by the respondents who said that the court ordered that status quo be maintained. In effect, the Meru High Court judgment is still valid until further orders from the Court of Appeal.

In view of the requirements under Order 42, and considering the orders in the Meru Petition, the applicant had failed to convince this court that he has an arguable appeal.

It was argued that the order for dismissal is negative and incapable of being stayed. The order did not direct any of the parties to do anything or to refrain from doing any act. I rely on the respondents' case of **FEISAL AMIN (supra)** which dealt with a case with similar facts. The court held that an order of the court merely dismissed the application for setting aside judgment on grounds that it did not order anything or refrain from doing anything or to pay any sum. It was thus a negative order which was incapable of execution save in respect of costs only.

The order made by the magistrate in CMCC No. 13 of 2015 was a negative order which does not require to be stayed. It did not direct any of the parties to do any act or to refrain from doing any act. Granting orders of stay in this application would not change anything in relation to the issues raised in the applicant's application dated 10/4/2015.

It is my considered opinion that this application is not merited and I dismiss it with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Ithiga for Kariuki for Appellant/Applicant