



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 4 OF 2010

METHODIST CHURCH OF KENYA

REGISTERED TRUSTEE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL AND 8 OTHERS.....RESPONDENT

RULING

1. The application under consideration is the one dated 3rd April 2013. The Applicants, who are the Respondents in this Petition, are seeking the following orders:
 - a. **That there be a stay of ruling and orders given by this honourable court by J. A. Makau on 14th March, 2012 pending the hearing and determination of the application interparties.**
 - b. **That there be a stay of Ruling and Orders given by this honourable court by Hon. J.A. Makau on 14th March, 2012 pending the hearing and determination of the intended appeal.**
 - c. **That this application be heard inter-parties on such date at such time as this honourable court may direct.**
 - d. **That there be a stay of execution of the judgment of this court dated 22nd October, 2010 the resultant decree and any subsequent order pending determination of an intended appeal.**
 - e. **That the costs of this application be provided for.**
2. The application is premised on the following grounds:
 - (a) **That the Respondents/Applicants have filed and served a Notice of Appeal dated 27th October, 2010 and also applied for certified copies of the proceedings for purposes of an appeal.**
 - (b) **That if the said stay of the orders issued by this honourable court is not granted, the Respondents/applicants' intended appeal will be rendered nugatory and the Respondents/applicants will suffer irreparable damage.**
3. **Those unless the orders sought are granted, the Petitioners/Respondents threatens to execute the orders of this honourable court to the detriment of the Respondents/Applicants.**

4. **That substantial loss will result to the Applicants unless the orders sought are granted.**
5. **That the amended application has been made without any unreasonable delay.**
6. **That this amended application ought to be granted in the interest of Equity and Justice.**
7. The Application is further supported by affidavit by Mr. Cliff Menge, Litigation Counsel.
8. The Application is opposed. The Respondent have filed a replying affidavit which is sworn by the Presiding Bishop of the Petitioner/Respondent dated 17th April 2012 together with annexures.
9. The Application was urged by Mr. Menge, Litigation Counsel on behalf of all the Appellants. I considered his submissions, both oral and written together with the cases he cited in support of the application.
10. The application was opposed Ms Wamucii argued the application on behalf of the Petitioner who is the Respondent in the application. I have considered the submissions by Ms Wamucii both oral and written, together with the cases cited in opposition to the application.
11. The application has been brought pursuant to Order 42 Rule 6 of the CPR. Order 42 Rule 6(1) provides.

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

12. The provisions herein above is clear that in the case of a second appeal, the court appealed from may grant a stay of execution of its order subject to sufficient cause being shown.
13. The Appellant’s application herein seeks to stay the judgement of this court delivered on 22nd October, 2010 together with the resultant decree or order. The application also seeks to stay a ruling by both Hon. Makau J, dated 14th March, 2012. The stay is sought pending an intended appeal in the Court of Appeal.
14. The Applicant has to satisfy the conditions of stay set out under Order 42 Rule 6(2)(a) and (b) of the Civil Procedure Rules which provides as follows:

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

(a) unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.”

15. Ms. Wamucii for the Respondent has urged that this application has been brought after inordinate delay. Ms Wamucii urged the court to consider the abuse of court process by virtue of fact the Respondents first made an application dated 6th May 2011 after filing Notice of Appeal to the Court of Appeal dated 27th October 2010. Ms Wamucii urged that instead of arguing that Application the Appellants filed a second one, dated 3rd April, 2012. That is the application under consideration.
16. Mr. Menge did not respond to claims the application is an abuse of the court process. I have

taken the liberty to look at both applications and noted that the application dated 3rd April 2012 is an Amended Notice of Motion. It amends the initial application dated 6th May, 2011. Being an amendment of the initial application. I find as follows:

- a. **It is not an abuse of the court process. A litigant can amend their application at anytime, subject to leave where necessary, as long as the application sought to be amended is not res-judicata.**
- b. **Being an Amendment of the application dated 6th May, 2011, it was not necessary to withdraw the earlier application.**

17. Ms. Wamucii has urged that the Notice of Appeal filed by the Applicants was filed in respect of the Judgment of this court delivered on 22nd October 2010. Counsel urged that no Notice of Appeal has been filed in respect of the ruling and resultant orders of Hon. Makau, Judge's Ruling of 14th March, 2012.

18. Mr. Menge for the Appellants urged that the Appellants filed on 27th October, 2010 a Notice of Appeal in the Court of Appeal against the Judgment delivered on 22nd October, 2010. They then applied for copies of the proceedings, soon thereafter, annexure CM1"b" and are yet to receive the same. In the Appellants written submissions, Appellants Counsel urged that as the Appellants waited to pursue their appeal in the court of Appeal, another order was made by Hon. Makau J. Counsel urged that it is as a result of that ruling that the application was filed.

19. I have considered submissions on the issue of whether the Applicant can obtain a stay to the ruling of Hon. Makau J which has not been appealed against. The Notice of Appeal the subject of these proceedings was filed in 2010. By then the ruling of Hon. Makau, J. had not been delivered.

20. The most important point however, is the fact that the ruling of the Hon. Makau J. was delivered pursuant to the judgment of 22nd October, 2010. The Appeal has not been filed and we cannot speculate at this stage that the grounds of that appeal will not include the ruling of 14th March, 2012.

21. The ruling of 14th March 2012 is a consequence or in other words resulted from the Judgment of 22nd October 2010. The appeal against the judgment will affect all other decrees, orders and or rulings made subsequent to and resultant from the said judgment. It is not necessary for the Appellants to file another appeal in respect to the ruling in question as that would be superfluous.

22. Ms Wamucii urged that the Appellants had not satisfied the conditions set under O.42 r 6(2) of the Civil Procedure Rules which are proof of substantial loss and provision of security for due performance of the decree or order.

23. Mr. Menge urged that being a land matter a stay should follow. Counsel relied on **Mugah vs Kunga (1998) eKIR** where court held:

“The practice of this court, in the case of land, which is a sensitive issue is that the parties should be allowed to come to this court to have the issues involved in their dispute, determined by the court of last resort, John Kuriavs Kalen Wahito Civil appeal NAI 19/83 (unreported).

For the parties to come to this court, the court is to considered whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. This approach was laid down in Butt V. Rent restriction Tribunal, Civil Appeal NAI 6 of 1979, which practice has been followed ever since. The courts' view is that status quo should be maintained until the appeal is heard and determined. It is for these reasons that we allow the application in terms of the following orders.

- a. **that the orders made on December 5, 1986, January 7, 1987 and February 23, 1987 are hereby stayed until the final determination of the intended appeal in High Court Civil Suit No. 3645 of 1983 OS.**
- b. **The status quo shall be maintained until the final determination of the intended appeal.”**

20 . Mr. Menge urged that since the Appellant is the government of Kenya no security should be required as a pre condition for the orders sought.

- 24.I agree that the subject matter herein is land and a dispensary built on the said land. There appears to be three claimants over the land and Dispensary, the Petitioner which is Methodist Church in Kenya; the Applicant/Respondents who include the Government and Ministries there under and thirdly the community of place the Dispensary is located.
- 25.The Appellants are seeking to have the position on the ground maintained. It has been urged, and Petitioners did not controvert, that the government has sent Medical Doctors, nurses and other staff; and that it provides equipment and medicines to run the facility. The community is benefiting from those facilities. There is no guarantee that the facility will continue to run to the standard the Appellants have maintained or at all. I agree that it is desirable to have the dispensary to continue running under the Appellants Control pending the outcome of the intended appeal.
- 26.Regarding security for due performance of the decree Order 42 Rule.8 specifically dictates that no security should be required from the government where it or its officer sued in official capacity are parties.
- 27.The government is a substantive party in these proceedings. It would be illegal of this court, and per in curium to require the government of Kenya to provide any security as a condition to granting the stay sought.
- 28.I have considered this application and I am satisfied that the Appellants have shown sufficient cause for grant of the stay sought. I am also satisfied that the circumstances of the case require that the Applicants continue running the Dispensary the subject of this application pending the outcome of this appeal.
- 29.Having come to the conclusion I have of this application. I order.

1. **A stay be and is hereby issued against the execution of the Judgment of this court dated 22nd October 2010 pending outcome of the intended appeal.**
2. **A stay be and is hereby issued against the execution of the ruling of this court dated 14th March, 2012 pending the outcome of the intended appeal.**
3. **The Stay granted in (1) and 2 will be subject to the Applicants filing the intended appeal within six months from the date herein.**
4. **The costs of this application is awarded to the Respondent to this Application in any event**

DATED SIGNED AND DELIVERED THIS 27TH DAY OF MARCH, 2014.

LESITJ.

JUDGE.