



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 67 OF 2013

1. EDMUND KIRIGHA
2. IRENE MULINGE
3. ROSE OKOYA
4. ROSE MUGHO
5. JANE NJOKI
6. MERITATON KIRIGHA
7. CAROL OMOLLO APPELLANTS/APPLICANTS

V E R S U S

1. ERASTUS KADU
2. MOSES MALOMBE
3. RALPH THOMPSON RESPONDENTS

RULING

1. The Appellant filed this appeal against the lower Court's decision of 29th May 2013. The ruling of that date dismissed the Appellant's application dated 17th April 2013 which was seeking the Court's finding that the Respondents were in contempt of the Court.
2. The Appellants now by their Notice of Motion dated 11th June 2013 seeks the following prayers-

“(b) That the Honourable Court be pleased to issue an injunction against the decision of the Honourable EKHUBI B. M. on the 29th May 2013 in CMCC No. 553 of 2013 until further orders of the Honourable Court.

“(c) That the Honourable Court be pleased to find that the Respondents were actually in contempt of the Chief Magistrates Order in the Application dated the 17th April 2013 in CMCC 553 of 2013 and consequently punish the Respondents to jail for 21 months for being in contempt.

- d. *That further proceeding in CMCC 553 of 2013 be stayed until this application is determined.*
- e. *That the costs of the application and costs in the Notice of Motion application dated 17th April 2013 in CMCC 553 of 2013 be borne by the Respondents.”*
3. I wish to state from the outset that prayer (c) cannot be entertained at this stage because to entertain it would be tantamount to granting the appeal. That prayer is dismissed with costs to the Respondent.
4. For the consideration of prayer (b) it is important for this Ruling to refer to the lower Court's ruling of 29th May 2013. The Appellant sought for the lower court to find that the Respondents had interfered with the running of the affairs of the Fellowship Baptist Church situated in Tudor. The learned Magistrate in his ruling of 29th May 2013 had this to say of the Appellant's application for contempt-

“In the instant case it is incumbent upon the applicant to establish beyond doubt that the action of the defendant have interfered with the running of the affairs of the Church. On the issue of the Administrator it is clear that his/her contract of employment has been determined. We were not told whether his/her contract was extended or otherwise such that the alleged action by the Defendant could amount to interference in the running of the affairs of the Church.

On the other issue of calling for meeting; I find that the applicant has not established how it breached the said order. The applicant ought to have demonstrated that in furtherance of the meeting certain decisions were made that directly interfered with the daily operation of the Church. The standard of prove is much higher than that of propensity of probability. The Applicant could have buttressed their assertions with minutes of the said meeting.

No evidence was presented before me that the resident Pastor had been locked out from accessing the Church. By the very nature of this application mere allegation would not suffice. We are not told how he has been blocked from carrying on his duties. Has he been restrained from preaching to the congregants or barred from accessing the Church premises.

From the above reasons, I am afraid that the Respondents cannot be liable for committal to a Civil jail. This application fails and it is accordingly dismissed.

No order as to cost.

Dated, signed and delivered on this 29th day of May, 2013.

EKHUBI B. M.

Ag. SRM

29.05.2013”

5. The Respondents have submitted that that lower Court ruling is incapable of being stayed as sought in this application because it contained a negative order. The Respondents are certainly correct in that regard. The ruling as reproduced above did not require any party to act in any manner for such an order to be the subject of stay. It was a negative order and being so is incapable of being stayed. This was clearly stated in the case The **Municipal Council Of Mombasa -Vs- Summit Cove Lines Company Limited Civil Appl. No. Nai 26 OF 2011 (UR)** where the Court stated-

“The order of 4th February, 2011 dismissing the application to stay or discharge the order of 31st January 2011 was a negative order which is not capable of being stayed.”

It follows that prayer (b) is also rejected.

6. The Appellant failed to support prayer (d) in the Motion with any evidence or submission before Court. The Appellants are the Plaintiffs in the lower Court case. It is that very case that they seek to stay the proceedings by prayer (d). It is not clear why they would seek such a stay. In submissions before Court their learned Counsel did not address that issue. That prayer has no merit and it is rejected.
7. Prayer (e) seeks costs of the Notice of Motion being considered and the cost of Notice of Motion dated 17th April 2013 filed before the lower Court. Section 27 of the Civil Procedure Act Cap 21 provides that costs follow the event unless the Court shall for good reason otherwise order. As can be seen from above all the prayers of the Notice of Motion that is being considered have been rejected. It follows that the Appellants are not entitled to costs in respect of that Notice of Motion. In respect of the Motion before the lower Court, it is the ruling of that Motion that this appeal is directed toward. It would therefore be premature to award costs before the appeal has been heard.
8. In the end the Notice of Motion dated 11th June 2013 is without merit and is dismissed with costs being awarded to the Respondent. Any stay granted in this matter is hereby vacated.

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE