



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal No.1 of 2011**

JOSHUA NGUSALE.....1ST APPELLANT/APPLICANT

ICHOLAS SAVWA.....2ND APPELLANT/APPLICANT

KENNEDY SAMBI.....3RD APPELLANT/APPLICANT

LUCAS ASENJI.....4TH APPELLANT/APPLICANT

NOEL MAKUNGU.....5TH APPELLANT/APPLICANT

PHINORA ATONYA.....6TH APPELLANT/APPLICANT

SUDI LUVANDA.....7TH APPELLANT/APPLICANT

RASOHA KIVAYIRU.....8TH APPELLANT/APPLICANT

PATRICK ADALO.....9TH APPELLANT/APPLICANT

BEATRICE MACHAYO.....10TH APPELLANT/APPLICANT

AND

**WYCLIFFE L. AHOYA.....INTERESTED
PARTY/APPELLANT/APPLICANT**

VERSUS

REV. ELIJAH UKIRU.....RESPONDENT

**(Suing for and on behalf of AFRICAN DIVINE
CHURCH)**

RULING

1. The Application dated 3rd January 2011 is premised on the provisions of Section 1A & B, Section 3A and 53 of the Civil Procedure Act and Order XXXIX Rules 2, 2A and 3 of the Civil Procedure Rules. The substantive prayer for determination is prayer 3 thereof, where the Applicants pray that the orders issued on 22nd December 2010 in Vihiga SRMCC No.51/2010 be stayed pending the hearing and determination of the Appeal herein.

2. The Supporting Affidavit of Joshua Ngusale sworn on 3rd January 2011 sets out the case for the Applicants which is as follows;

3. That the Respondent, Rev. Elijah Ukiru had filed the suit in the Subordinate Court seeking inter-alia orders of injunction against the Applicants and to restrain them from carrying out any activities within certain premises listed in the order issued on 22nd December 2010. That the Application seeking those orders was never served on any of them and that their constitutional right to worship at a place of their choice was thereby curtailed.

4. Further, that they were later arrested at the instigation of the Respondent on the pretext that they had breached the court order aforesaid and so the orders sought were necessary to protect them for further harassment.

5. The Respondents filed grounds of opposition on 14th February 2011 and I deem it fit to reproduce them as follows;

“1. The Application is premised on a misconception of the principles of the law applicable in review in civil matters and the law generally.

2. The Application does not satisfy the minimum legal requirements for stay pending Appeal.

3. The Application is and remains incompetent for want of Statutory Written Consent of the Co-Appellants and for being founded on extraneous, irrelevant and inadmissible matters.

4. The Constitutional right to worship does not amount to a licence to the Appellants who are not members to interfere with the premises and operations of the African Divine church as they have done in the past and wishes to do.

5. The Application if granted will defeat the overriding objective as stated in Section 1A & B of The Civil procedure Act, Cap. 21 Laws of Kenya.

6. The Application is an abuse of the process of the Honourable court and is a waste of judicial time.

7. The purported Appeal stands no chances of succeeding.”

6. Parties relied wholly on the Supporting Affidavit and the above grounds and I wish to opine as follows;

7. Firstly, it is not in doubt that the issue in contest is whether the Applicants had a right to worship at certain premises that housed the adherents of the Africa Divine Church and whether there is need to stay the order stopping them from doing so pending the hearing of the Appeal.

8. Secondly, it is my view that the Respondent has only raised one serious issue for consideration; that the Constitutional right to worship does not amount to a license to the Applicants to interfere with the operations of the Africa Divine Church. However, that issue must also be looked at in the context of the circumstances of this case and the prayer for an order of stay specifically.

9. Thirdly, and as a corollary to the above, a party seeking stay orders must show evidence of substantial loss if the order is not granted. The Applicants have stated that the only loss that they have suffered is the fact that they cannot worship at a place of their choice. Much as I would like to ensure that such a fundamental right is not breached, I am certain that in the nature of the matter before me, where there is acrimony between worshippers of a certain Church and a court of law determines that one faction should stay away from certain premises of worship, I see no substantial loss occasioned to that faction as they can worship their God elsewhere. Article 32 of the Constitution is worded so that private worship is a right as is public worship and I see no derogation from the general right when a court stops wrangling between factions for the duration of a case.

10. Fourthly, the Applicants would best be advised to pursue the conclusion of the Lower Court suit and to ensure its determination on merits.

11. In any event, I see no serious issue before me and the Application dated 3rd January 2011 is dismissed with costs to the Respondent.

12. Orders accordingly.

I. LENAOLA

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY L. KIMARU, JUDGE AT KAKAMEGA
THIS 5TH DAY OF JULY, 2011**

**L. KIMARU
JUDGE**