



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 488 of 2008

REVEREND SAMWEL ATUNGA OMAGWA.....PLAINTIFF/APPLICANT
VERSUS
REVEREND FRANCIS NYAMWARO.....1ST DEFENDANT
REVEREND BISHOP WALTER OBARE.....2ND DEFENDANT
TRUSTEES EVANGELICAL LUTHERAN CHURCH
IN KENYA.....3RD DEFENDANTS

RULING

1. By his Notice of Motion application dated 14/05/2009 and filed in court on the same day, the Plaintiff asks for an order for stay of execution of the orders made on 30/04/2009 pending the hearing and determination of an intended appeal to the Court of Appeal. The Plaintiff also prays that the costs of this application be provided for.
2. The application is premised on grounds that (a) the Applicant has filed notice of appeal; (b) the Applicant's intended appeal has high chances of success and (c) the Applicant is exercising his statutory right of appeal.
3. The application, which is brought under XLI Rule 4 of Civil Procedure Rules and Section 3A of the Civil Procedure Act is also supported by the affidavit of Reverend Samwel Atunga Omagwa dated 14/05/2009. The Applicant says that he is aggrieved by this Honourable Court's ruling delivered on 30/04/2009 dismissing his application for interim orders; that his intended appeal is arguable and that if the order of stay is not granted, the said intended appeal may be rendered nugatory.
4. From the Record, the Plaintiff lodged the Notice of Appeal dated 6/05/2009 on the same 6/05/2009. The Notice of Appeal was received by the Court of Appeal on 11/05/2009.
5. The application is opposed. The Defendants filed both a Replying Affidavit sworn by Bishop Walter Obare on 30/06/2009 and Grounds of Opposition dated 19/06/2008. Both of these documents were filed on 30/06/2009. The court is not sure about the date of the Grounds of Opposition which are shown to be dated 19/06/2008, long before the ruling which is the subject of this application was made.
6. By agreement of the parties, this application proceeded by way of written submissions. The Plaintiff's submissions dated 8/12/2009 were filed on the same day. The submissions are brief. The Plaintiff reiterates the position that he is aggrieved by the ruling of this honourable court made on 30/04/2009 dismissing the Plaintiff's application dated 10/11/2008 and staying this suit pending the hearing and determination of HCCC No. 1349 of 2004. The Plaintiff says that this court ought to allow this application so that he is able to exercise his statutory right of appeal. The Plaintiff submits that unless this court's orders of 30/04/2009 are stayed, the Defendants are likely to take further adverse action against the Plaintiff. The Plaintiff argues that if he is

defrocked, as is likely to happen, an award of damages will not compensate him adequately. The Plaintiff also says that the fact that he has filed Notice of Appeal is an indication that he is serious with proceeding with the intended appeal.

7. The Defendant's/Respondent's submissions were filed in court on 5/11/2009. The Defendant contends that the Plaintiff's application lacks merit and should be dismissed on grounds that the Plaintiff stands to suffer no loss if the orders sought are not granted. The Defendant contends further that the Plaintiff has not complied with the provisions of Order XLI Rule 4(2)(a) of the Civil Procedure Rules in that the Plaintiff has failed to demonstrate what substantial loss he stands to suffer if the order for stay is not granted. Order XLI Rule 4(2) of the Civil Procedure Rules provides:-

“4(2) No order for stay of execution shall be made under sub-rule (1) unless

(a) The court is satisfied that substantial loss may result to the Applicant 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.

8. It is the Defendant's case that the Plaintiff is currently gainfully employed with the Lutheran Heritage Foundation and that the Plaintiff's present application is only aimed at destabilizing the Defendant church.
9. Secondly on this point, the Defendant contends that having defrocked the Plaintiff, there is no other worse adverse action that the Defendant can take against the Plaintiff and that for this reason, the Plaintiff's application must fail; especially in view of the fact that the Defendant has completely severed its relationships with the Plaintiff.
10. The Defendant also says that the Applicant can be adequately compensated in damages if the intended appeal succeeds. The Defendant contends that, the Plaintiff has not demonstrated what loss or damage he stands to suffer should the order for stay not be granted.
11. It is also the Defendant's case that the Applicant has no arguable appeal. The Defendant contends that the Plaintiff has not placed any material before court pointing out what is arguable about the intended appeal. The Defendant further contends that the action which the Plaintiff had sought to prevent by his application dated 10/11/2008 had already taken place by the time the application was filed and therefore the appeal cannot be said to be arguable. Further that issuing an order for stay in the circumstances would be an action in futility on the part of the court.
12. The Defendant also says that the Plaintiff's intended appeal will not be rendered nugatory in the circumstances of this case, and that in any event, even if the appeal succeeds, the Plaintiff's remedy lies in payment of damages. Further that the order of 30/04/2009 is not such as would be executed against the Plaintiff. In its further submissions, the Defendant says that the Plaintiff's application is fatally defective for failure by the Plaintiff to annex a copy of the order sought to be stayed. The Defendant contends that the court has no way of knowing whether the order sought to be stayed is capable of execution since the Plaintiff has not annexed a copy of the said order for the court's eyes. For this failure, the Defendants contend that the Plaintiffs application is fatally defective and urge the court to dismiss the same.
13. Finally, the Defendant says that the Plaintiff is a vexatious litigant. The Defendant says that despite the fact that the court ordered this case to be stayed pending hearing and final determination of HCCC No. 1349 of 2004 the Plaintiff is still vexing the court with applications on this file. The Defendant wants the Plaintiffs application dismissed with costs to themselves.
14. After considering the two sides of this application, the question that arises for determination is whether the Plaintiff has met the parameters for granting such an application. Under Order XLI Rule 4 of the Civil

Procedure Rules, an Applicant on an application such as the instant one must meet the following criteria if he is to succeed:-

- (a) *he must demonstrate to the court that substantial loss may result to him unless the order is made;*
- (b) *he must show that his application has been made without unreasonable delay; and*
- (c) *he must have given such security for the due performance of such order or decree as may ultimately be binding on him.*

Can it be said that the Plaintiff herein has met the criteria set by the rules?

15. I shall start with the criteria for security. The Plaintiff says at paragraph 9 of his supporting affidavit that he is prepared to abide by such conditions as the honourable court may impose if the orders sought herein are granted. The Applicant has thus made an offer for security should the order sought herein be granted. I now move on to the next criterion that should be met by the Plaintiff, and this is whether the application herein was made without undue delay. The ruling which is the subject of the intended appeal was delivered on 30/04/2009. The application herein was filed on 14/05/2009. The application herein was thus made without undue delay, with just two weeks between the date of the ruling complained of and the filing of the instant application.
16. The final criterion is whether the Plaintiff has demonstrated that substantial loss will accrue to him unless the order for stay is granted. The Defendant does not think that the Plaintiff has done so. The Plaintiff gives two reasons why he wants the order for stay granted:- (i) that failure to issue the order will render the intended appeal nugatory and (ii) that his appeal is arguable and therefore he ought to be allowed to ventilate the appeal. I have looked at this honourable court's ruling of 30/04/2009. This court does not have the benefit of looking at the extracted order or even the Plaintiff's Memorandum of Appeal for it to gauge whether indeed such an appeal would be rendered nugatory if the orders of 30/04/2009 are not stayed pending the intended appeal. In my view therefore, I do not think that the Plaintiff has satisfied the criterion of substantial loss as provided under Order XLI Rule 4(2)(a) of the Civil Procedure Rules. If anything, and the Plaintiff has not controverted this piece of evidence, the Plaintiff is already gainfully employed by the Lutheran Heritage Foundation.
17. What is the sum total of what I have said above? The sum total of what I have said above is that the Plaintiff's application dated 14/05/2009 must fail. Order XLI Rule 4(2) requires an Applicant to fulfill all the three conditions before an order for stay can be granted. This is clear from the use of the conjunction "and" punctuating the three conditions. The Plaintiff has not met the main condition of demonstrating substantial loss.
18. In the result, the Plaintiff's application dated 14/05/2009 lacks merit. The same be and is hereby dismissed with costs to the Defendant/Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of March, 2010.

R.N. SITATI
JUDGE

Delivered in the presence of:-

Mr. Moindi for Oyugi (present) for the Plaintiff/Applicant

M/s Ochichi & Co. (absent) For the Defendant/Respondent

Weche – court clerk