REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
Civil Appeal 10 of 2005

OBED OCHWANYI & 20 OTHERS ……..……. APPELLANTS

VERSUS

THE BOARD OF TRUESTEE,

CHURCH OF GOD IN EAST AFRICA …….…….. RESPONDENTS

AN INTERLOCUTORY APPLICATION SEEKING ORDERS FOR STAY IN AN APPEAL AGAINST THE RULING OF THE HONOURABLE MRS. R. A. OGANYO SRM, DELIVERED ON JANUARY 25TH, 2005 IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT VIHIGA IN CIVIL CASE NO.256 OF 2004
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R U L I N G

The Applicants, OBED OCHWANYI & 20 others, made to this court on 3-3-05 an application of that date seeking orders that this court be pleased;

1. "------ to grant temporary stay of the Ruling and orders given by the Honourable Mrs. R. A. Oganyo on 15/1/05 in Vihiga in the SRM Civil Suit No.256 of 2004" and

2. "to grant a stay of the Ruling and orders given by the Honourable Mrs. R. A. Oganyo ----------"

The applicants had prior to the said application lodged an appeal on 10-2-2005 in this court. In the memorandum of appeal, the Appellants put forward thirteen (13) grounds of Appeal.

The Application was supported by an affidavit sworn by Obed Lindsay Ochwanyi, the first Applicant.

In brief, the Applicants had been sued in the lower court by the Respondent. The latter had contended that the Applicants were once members and clergy of the Appellant church and had after they had ceased to be such members and clergy of the said church "*persistently interfered with the activities of the Plaintiff church and its branches and sought therefore perpetual injunction restraining the Appellants from interfering with the running of the affairs of the said church*."

For that reason, the Respondent filed suit against them in the S.R.M. Court at Vihiga suit No. 256 of 2004 seeking injunction to restrain them from the acts complained of. On 25.1.05, the learned trial magistrate after hearing an interlocutory application by the Respondent dated 22-11-04 made an interlocutory order of injunction restraining the Applicants/Appellants from interfering with the running of the affairs of the Respondent in the churches enumerated in the plaint in the said suit or in any other churches and/or premises in the said churches. It is against the said injunction order that the

Applicants/Appellants appealed and brought the application dated 2/3/05 supported by an affidavit sworn by Obed Lindsay Ochwanyi, the 1st applicant seeking an order for stay of the Ruling and orders of the trial magistrate dated 25.1.05 pending the hearing and determination of the appeal.

The application was opposed by the Respondent which filed grounds of opposition and a Replying affidavit sworn by James Obunde, the Secretary General of the Board of Trustees of the Church of God in E.A (Kenya).

I have perused the said application and its supporting affidavit as well as the Replying affidavit of the Respondent. Mr. Kiveu, learned counsel for the Applicants urged the court to allow the application and grant the orders for stay. He submitted that the applicants will suffer substantial loss if they continue to be denied the venue for worship. He stated that the application was brought without delay and the applicants had come to court with clean hands and that the parameters set by Rule 4 of order 41 of the Civil Procedure Rules had been met. It was Mr. Kiveu's submission that the injunction order by the trial magistrate was not capable of compliance as it was ambiguous. He contended that the trial magistrate had in any case no jurisdiction to make the orders.

Mr. Munyendo, learned counsel for the Respondent, opposed the application and submitted that the applicants were erstwhile members of the Respondent church and as such erstwhile members were strangers. They had failed, he said, to challenge their communication from the said church. As the Applicants had admitted the jurisdiction of the trial court, said Munyendo, they were not entitled to raise the issue on appeal merely because they had lost. In his submission, Mr. Munyendo pointed out that the issue of the merits of the appeal was irrelevant under Order 41 Rule 4 of the Civil Procedure Rules. No security had been offered by the applicants as required by the said rule, he added. As the whole world knows, he argued, the Applicants were not members of the Respondent church, but rather, claimed to be pararell members of the church, whatever that meant.

I have duly considered the application and the opposition to it, and the arguments proffered by both counsel on behalf of their respective clients.

Order 41 Rule 4(1) and (2) of the Civil Procedure Rules sets the parameters for the grant of the order for stay. First, an applicant must satisfy the court that there is sufficient cause for making the application by showing that the appeal is not frivolous and is arguable and further satisfy the court that *substantial loss may result to the applicant* unless stay is ordered, that the application was brought *without unreasonable delay*, and that such security has been given as the court may order for the due performance of the order as may ultimately be binding on him.

From the material placed before me, the applicants did not purport to be members of the church of the Respondent. The gravamen of their complaint is that the orders of the trial court have shut them from access to "*Venue of worship*" and that that loss is substantial. Admittedly, the order by the trial court restrained the Applicants, not from attending the places of worship of the Respondent church, but rather, from carrying out the functions and duties in the name of the Respondent church and/or from interfering with the operations, church services and functions of the Respondent church or in any manner laying claim to or interfering with the possession and peaceful occupation of and/or use by the Respondent of its property and/or premises or its churches and in particular those named. This order was not capable of rendering, in the words of the Applicants, the latter "*religiously destitute and unable to worship or attend services in any of the said churches of the Respondent church*." Nowhere in their application did the applicants contend that they were actual members of the Respondent nor did they show that they had contested their ex-communication from the Respondent church. The fact that they used to be members in the Respondent church did not confer on them the right to usurp the powers and functions of the clergy of the Respondent church, much less claim to be entitled to the use of the properties and facilities of the Respondent church. The injunction order made by the trial magistrate was designed to protect the legal rights of the Respondent pending the hearing and final determination of the suit.

The Applicants have not shown that the trial magistrate erred in the exercise of her discretion in granting the order. At this stage, I will escew comments that may appear to prejudge the appeal and for

that reason, even assuming that the appeal could be said not to be frivolous or not to be unarguable and therefore that there is sufficient cause for making the application, the applicants have not shown that they will suffer substantial loss unless stay is ordered. Order 41 Rule 4, unlike the court of Appeal Rules, does not deal with the question whether the denial of an order for stay will render an appeal nugatory or not. What it does do is to require an applicant to show "*sufficient cause*." This behoves an applicant to show that the appeal is not frivolous and is arguable.

Although the application was duly made, it failed to meet a vital criterion under Rule 4 of order 41 of the Civil Procedure Rules, namely, that substantial loss would be suffered by the Applicants. It is my finding that the applicants have not on the material before me, shown that they are entitled to the orders they seek. Accordingly, I dismiss the Notice of motion dated 02-03-2005 with costs to the Respondent.

Dated at Kakamega this 3rd day of November, 2005.

G. B. M. KARIUKI

J U D G E