REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 218 OF 2002

DISCIPLES OF CHRIST CHURCH……APPELLANT

VERSUS

FRANCIS N. MUNGAI & 48 OTHERS…...…..RESPONDENTS

RULING

This is an application made under the provisions of **Order XLI Rule 4(1) (2) (a) & (b) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.**

The Applicants have sought the orders of this Court to set aside the order of stay made on the 25th of February 2003 by the Lower Court. The Applicants have further prayed for the orders of this Court to vary the said stay order issued by Lower Court, and issue an order restraining both the parties to the suit from conducting the church services in the said churches pending the hearing of the Appeal and only leave the Nursery Schools to ran as normal. The Applicants have further sought the orders of this Court to determine what constituted the status quo in this matter. The Application is supported by the annexed affidavit of John Wainaina and on the grounds stated on the face of the application. The Application is opposed. The Respondent has filed a replying affidavit opposing the said Application.

At the hearing of the Application, Mr Makori, Learned Counsel for the Applicant urged this Court to allow the Application. Mr Makori's argument was essentially addressing the issues that were raised by the Respondent in its Memorandum of Appeal. The said Appeal is yet to be admitted to hearing. Neither has the record of Appeal been prepared to make this Court make an informed determination on the issues in dispute between the Applicant and the Respondent. Mr Karanja, Counsel for the Respondent submitted that the Applicant's application cannot be granted as they were making an application to stay orders which had already been stayed by the lower Court.

The Respondent submitted that no basis had been laid by the Applicants to enable this Court to grant them the orders sought. The Respondent further submitted that the status quo as exists today is the proper status quo which was ordered by the lower Court pending the hearing and determination of the Appeal filed herein. The Respondent prayed for the Application to be dismissed with costs.

I have read the Application filed by the Applicants in this case and the response filed by the Respondent. The genesis of the matter in issue in this application was the injunction which was granted by the lower Court pending the hearing and determination of the Appeal filed herein. The trial Magistrate had earlier dismissed the Respondents' (in this application) application for injunction. The said dismissal provoked this Appeal. It appears that after the application for injunction was dismissed, there erupted a serious breach of peace between the litigants in this suit. An Application was made before the trial Magistrate who ordered that status quo to be maintained pending the hearing and determination of the Appeal. The trial Magistrate also restrained the Applicants from interfering with the activities of the Respondent pending the hearing of the said Appeal. The order of stay (which was in the form of an injunction) was issued on the 25th of February 2003. The Applicants filed the current application on the 24th of June 2003, four months after the stay order had been granted.

As stated earlier at the beginning of this ruling, it is evidence from the arguments put forward by the Applicants that the Applicants were in effect arguing against the Appeal before the Appeal was formally admitted to hearing. In their anxiety to have the order of stay issued against them vacated, the Applicants have not drawn the boundary between the application to set aside the stay order and the Appeal itself. The Applicants are in essence asking this Court to make a ruling concerning the matters in issue in the Appeal before the said Appeal has been admitted to hearing and listed for hearing.

This Court would prejudice the hearing of the Appeal were it to make the decision that the Applicants have sought in this Application. As stated earlier, this Court has not had the benefit of reading the Record of Appeal consisting of the pleadings and the proceedings before the trial Magistrate's Court. The Application to set aside the stay order issued, in so far as it addresses the matters in issue in the main appeal, cannot therefore be allowed. Since the granting of the said stay order, it appears that peace has been maintained between the litigants herein. That is as it should be.

Pending the hearing and determination of the Appeal filed herein, the status quo as ordered by the Lower Court should not be interfered with. I find that the Application by the Applicants herein lack merit.

On a procedural but important point, the Appellant in this Appeal is represented by the firm of Karanja-Mbugua & Company Advocates. The said firm of Advocates filed the Appeal herein. The firm of Ogeto & Ogeto presumably are on record as acting for the Respondents in the Appeal. The Application dated the 24th of June 2003 is stated to filed by Ogeto & Ogeto, "the Advocates for the Appellants." The firm of Ogeto & Ogeto are not the Advocates of the Appellant. The firm of Karanja-Mbugua & Company Advocates are on record as representing the Appellant. Even if I was inclined to grant the orders sought by the Applicants, this Court would be precluded from issuing the same on the grounds that the Application before the Court is incompetent on account of the fact that it was filed by a firm of Advocates not properly on record. On the face of it, if the application is taken as it is, it would seem that the Appellant herein was dissatisfied with the orders which were issued by the lower Court in its favour! For the above two reasons, the Application filed by the Applicants is hereby dismissed with costs to the Respondent.

DATED at NAKURU this 1st day of October, 2004.

L. KIMARU

AG. JUDGE