



Victorious Gospel International Church of Kenya (Suing through John Mboi, James King'ori, Lawrence Kamutu and David Kuria) in their capacities as chairman, Secretary, Treasurer and Ass. Secretary respectively) v Karanja & 9 others (Miscellaneous Application 150 of 2011) [2024] KEHC 2706 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION 150 OF 2011**

HI ONG'UDI, J

MARCH 14, 2024

BETWEEN

VICTORIOUS GOSPEL INTERNATIONAL CHURCH OF KENYA (SUING THROUGH JOHN MBOI, JAMES KING'ORI, LAWRENCE KAMUTU AND DAVID KURIA) IN THEIR CAPACITIES AS CHAIRMAN, SECRETARY, TREASURER AND ASS. SECRETARY RESPECTIVELY) PLAINTIFF

AND

CYRUS NJOROGE KARANJA & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9 OTHERS DEFENDANT

RULING

1. The Notice of motion application dated 23rd November 2023 by the applicant herein prays for the following orders;
 - i. Spent.
 - ii. Spent.
 - iii. That this honourable court be pleased to issue an Order of Stay of Execution and or implementation of this honourable court (sic) with specific reference to the orbiter dictum of his lordship Hon. Justice H.K Chemitei delivered on 28th September 2023 which clause of the judgment the defendants have either deliberately or by sheer ignorance of the terms of the judgment to storm into the plaintiff's churches and to physically assault the worshippers and flush out the pastors from the churches.
 - iv. That the costs of this application be provided for.



2. The application is premised on the grounds on its face as well as the affidavit of John Kingori the ordained pastor of the applicant sworn on even date. He deponed that the applicant filed a suit against the respondents seeking that an order of a permanent injunction restraining the respondents by itself, its agents or servants and other persons from dealing with, disrupting or in any manner interfering with the day to day management of the affairs of the applicant's churches at Karagita Rimunga Subukia, Mara-njau Kasambara and Nyahururu plus costs of the suit.
3. Mr. King'ori deponed further that judgment was delivered on 28th September 2023 and that the learned judge disallowed the applicant's case with costs to the respondents. He added that his lordship made no positive orders capable of execution against the applicant or the respondents. Also, that the observations by the learned Judge at paragraphs 30 and 33 of the Judgment were purely "obiter dictum" and clearly incapable of execution or implementation.
4. He went on to depone that on 12th and 19th October 2023, the respondents' relying on and using the "obiter dictum" of the Judgment and "ungranted invisible orders" stormed the applicant's church at Karagita in Naivasha, disrupted the church service, flushed him out of the pulpit and locked the church entrance with two humongous padlocks. He added that no express or implied orders were granted to the respondents to storm into the applicant's churches or run the church's affairs or wreak havoc on worshipping.
5. Mr. King'ori deposed that they had already filed a Notice of Appeal against the Judgment delivered on 28th September 2023 and unless the orders sought are granted the applicant shall suffer substantial religious and spiritual loss before the intended appeal is heard and decided.
6. The respondents in response filed a replying affidavit sworn on 1st December 2023 by one Stanley Kamuiru Njau, who averred that the application was misconceived, incompetent, an abuse of the court process and the same had no merit to warrant any exercise of discretion by this honourable court. He added that he was aware that the judgment delivered on 28th September, 2023 dismissed the suit with costs.
7. Mr. Njau averred that the court gave a negative order which was incapable of being stayed as prayed by the plaintiff/applicant. He added that there was nothing in the said judgement that could be stayed and or implemented as all that the court did upon considering all the facts was dismiss the suit against them with costs.
8. He went on to depose that the applicant had already moved the Court of Appeal and the instant application ought to be addressed by the said court. He denied the respondent having invaded and or physically assaulted the worshippers as claimed by the applicant and that the said allegations were meant to put them in bad light before this court. He urged the court to dismiss the application.
9. The application was canvassed by way of written submissions.

The Applicant's submissions

10. These were filed by Karanja Mbugua Advocates and are dated 19th January, 2024. Counsel reiterated the contents of the applicant's supporting affidavit and went on to submit that the applicant was ready and willing to deposit any such security as the court deemed fit and just.



The Respondents submissions

11. The respondents' submissions were filed by Waiganjo and Company advocates and are dated 22nd January, 2024. Counsel submitted that the applicants' suit having been dismissed, there was no decree that was capable of being executed to warrant the orders sought in the application.
12. He placed reliance on the judicial decisions in *Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 others* [2008] eKLR and *Electro Watts Limited v Alios Finance Kenya Limited* [2018] eKLR. He urged the court to be guided by the aforementioned authorities and dismiss the instant application with costs.

Analysis and Determination

13. I have considered the application, the affidavits and the submissions by both parties. I opine that the main issue for determination is whether the application dated 23rd November 2023 is merited.
14. It is not in dispute that this court in its Judgment dated 28th September 2023 dismissed the applicant's suit with costs to the respondents. What the applicants' application is seeking is stay of execution or implementation of a specific reference to the orbiter dictum of his lordship Chemitei J in the said judgment the same being paragraphs 30 and 33. It is my view that the said prayer is speculative as the applicant failed to demonstrate how the respondent relied on those paragraphs to eject the worshippers in the church at Karagita Naivasha.
15. Moreover, the order issued in the said judgment was for dismissal of the applicant's suit which is a negative order.
16. The Court Appeal in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR, while dealing with a similar matter on stay of a negative order stated as follows:

- “16. In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

17. The same reasoning was applied in the case of Raymond M Omboga v Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be



no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

17. This court adopts the sentiments by the Court of Appeal in the above cited authority and finds that the order it issued is not capable of being stayed because there is nothing that the applicant has lost. The best placed forum for, the plaintiff/applicant's application is the Court of Appeal where it has filed an Appeal challenging this court's decision.
18. The upshot is that the applicant's application lacks merit and is hereby dismissed with costs to the respondents.
19. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 14TH DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

