



REPUBLIC OF KENYA



**Katoto v Mwanzia & 4 others (Civil Appeal E488 of 2022)
[2023] KEHC 1969 (KLR) (Civ) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1969 (KLR)

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

CIVIL

CIVIL APPEAL E488 OF 2022

JN NJAGI, J

MARCH 10, 2023

BETWEEN

ONESMUS MUTHOKA KATOTO APPELLANT

AND

JORAM MWANZIA 1ST RESPONDENT

ONESMUS NZIOKA MUTISO 2ND RESPONDENT

JAMES KIMUYU 3RD RESPONDENT

ZACHARIA MUMINA MUTHOKA 4TH RESPONDENT

STANLEY KYALO KIMANTHI 5TH RESPONDENT

RULING

1. The appellant/applicant has filed an application dated July 4, 2022 seeking for orders that:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to grant stay of execution of the ruling of Hon AN Makau delivered on June 10, 2022 pending the hearing and determination of the appeal.
2. The application is premised on grounds on the face of the application and supported by the affidavit of the Applicant and the affidavit of one Leonard Munyao Wambua, the Chairman and Presiding Bishop of the Eagle Rise Christian Church. The grounds in support of the application are that the Applicant is an ordained pastor with the said church. That on the December 5, 2022, the head office of Eagle Rise



Christian Church transferred him from Zimmerman branch Church to Imara Daima Church. That on the June 10, 2022, the trial Magistrate in Nairobi Milimani CMCC No E155 of 2022 delivered a ruling directing that the 1st Respondent continues with the running of the Eagle Rise Christian Church branch at Imara Daima Estate. The Applicant was aggrieved by the said decision and filed the appeal herein.

3. The Applicant contends that the 1st Respondent is not an ordained, trained or appointed pastor of the church as evidenced by the affidavit of the Bishop, Leonard Munyao Wambua. That it is not sensible for the court to impose someone who is not ordained to be a pastor. That on July 3, 2022, the Respondents went to the church with goons and threw him out of the church. That the Respondents have been away for the last six months in which period they formed their own church. That by the trial court ordering that the 1st Respondent takes over the pastoral duties of the Imara Daima Church has caused infighting and confusion in the church. It was contended that the appeal may be rendered nugatory if the orders sought are not granted. That the Applicant is willing to abide by the directions of this court. That the Respondents will not suffer any prejudice if the prayers sought are allowed.
4. The application was opposed by the Respondents through the replying affidavit of the 1st Respondent, Joram Mwanzia, sworn on July 5, 2022 in which he deposes that he is a pastor with the subject church. That the pastors of the church who administer in the country are in two classes – the ordained and the un-ordained pastors. That he belongs to the latter category and has been pastoring at Imara Daima Church with the mandate of the Presiding Bishop for the last 6 years, four as the Assistant Pastor and two as the Pastor in Charge. That they adduced sufficient evidence before the trial court in support of their case and that is why the court ruled in their favour. That the Presiding Bishop was not a witness in the case at the lower court and his affidavit is un procedurally before the court. That there is no truth that the Respondents started their own church.
5. The application was canvassed by way of written Submissions. The Applicant submitted that the cornerstone of granting orders of stay of execution pending appeal is that substantial loss will be suffered. The applicant relied on the definition of the term substantial loss in the case of [*Antoine Ndiaye v African Virtual University*](#), Nairobi HCCC Number 422 of 2006.
6. The applicant submitted that the 1st respondent is not an ordained pastor of the subject Church by the appointing authority. That the Applicant will suffer substantial loss in the event that stay is not granted as he is the rightful appointed pastor of the subject church branch.
7. It was submitted that the application was filed timeously after the lower court's ruling on June 10, 2022.
8. On security, the applicant submitted that order 42 rule 6(2) of the [*Civil Procedure Rules, 2010*](#) implies that the court has discretion to give the kind and nature of security the Applicant will furnish to the court. That the applicant will abide by the terms and conditions that this honourable court will impose on him.
9. The respondents on their part submitted that the evidence of Leonard Wambua as contained in his affidavit was not availed to the trial court and is thereby new evidence being introduced at appeal stage without leave of the court and should be expunged from the record.
10. The Respondents submitted that the application has not met the threshold of granting injunctions in that the applicant has not demonstrated the loss that he will suffer if the orders sought are not granted. That he can still be transferred to another church and he will therefore not suffer any loss.



11. It was submitted that the issue whether or not the 1st Respondent is ordained or not is an issue to be determined in the main hearing. That what was uncontroverted is that the 1st Respondent was the Presiding Pastor of Imara Daima church for a period of two years.
12. It was submitted that the Applicant has not made out a prima facie case with a probability of success. That on a balance of convenience, it is more convenient for the court to order the parties to maintain the status quo as at the time the case came up.
13. I have read the ruling of the learned trial Magistrate. The Magistrate opined that the issue as to who between the Applicant and the Respondent is the lawful pastor of the branch church will be determined after evidence in the case was adduced. That pending the hearing of the suit, the 1st Respondent should continue running the subject church as he was doing before.
14. In prayer 2 of the notice of motion, the applicant was seeking for temporary injunction pending the hearing and determination of the application inter partes. The said order was granted pending inter partes hearing. There is no application for injunction pending the hearing and determination of the appeal. It is therefore not open for this court to consider issues relating to injunction. The issue before the court is whether the application for stay of execution pending appeal is warranted.
15. The principles that are applicable in an application for stay of execution are set out in order 42 rule 6 of the [Civil Procedure Rules, 2010](#). These are that an applicant must demonstrate that:
 1. He/She will suffer substantial loss unless the orders sought are granted.
 2. The application was brought without unreasonable delay.
 3. The applicant has offered such security as may be binding on him on due performance of the decree.
16. The impugned ruling was delivered on June 10, 2022. The instant application was filed on July 5, 2022. The application was thus brought without undue delay. That condition has therefore been met.
17. On the issue of substantial loss, the Applicant did not raise the issue either in his Notice of Motion or in the supporting affidavit. He could therefore not raise the issue in his submissions as they were not part of the application. It is trite law that the issue of substantial loss is the cornerstone of an application for stay of execution as it is substantial loss that has to be prevented by granting the application. Where there is no substantial loss to be suffered an appeal would not be rendered nugatory – see [Kenya Shell Limited v Kibiru & another](#) (1986) KLR 410. The Applicant did not demonstrate that he will suffer substantial loss if the orders sought are not granted. This condition has therefore not been met.
18. The third condition is security. The Applicant has not offered any security. The condition has not been met. The sum effect is that the Applicant has not demonstrated why this court should grant orders for stay of execution in his favour.
19. The 1st Respondent avers that he has been the Pastor in Charge of the subject church for the last 2 years before the Appellant was transferred to the church. The balance of convenience is that he should continue with his pastoral duties at the Imara Daima church pending the hearing and determination of the appeal.
20. The upshot is that the application dated July 4, 2022 lacks merit and is dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF MARCH 2023.



J. N. NJAGI

JUDGE

In the presence of:

Miss Owuor for Applicant

Mr. Muithya for Respondent

Court Assistant – Simon

30 days Right of appeal.

