



**Mandila & 2 others v Swali (Civil Appeal 20 of 2021)
[2024] KEHC 14583 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 20 OF 2021
SC CHIRCHIR, J
NOVEMBER 19, 2024**

BETWEEN

ALFRED MANDILA 1ST APPELLANT

DAVID NAMBALE 2ND APPELLANT

PHILIP LUCHELI NDINA 3RD APPELLANT

AND

MOSES SWALI RESPONDENT

RULING

1. What is coming up for determination is the Application dated 17th November 2023 .It is premised on Sections 1,1A, 1B, 3,3A and 63 of the [Civil Procedure Act](#), and Order 42 rule 6 of the civil procedure Rules.
2. The Applicant seeks orders as follows:
 - a. (Spent).
 - b. That this honourable court be pleased to order for stay of execution of its judgment and decree made on the 21st day of July 2023 pending hearing and determination of this application.
 - c. That this Honourable court be pleased to order stay of execution of its judgment and decree made on the 21st July 2023 pending hearing and determination of the applicant’s intended appeal at the court of appeal
 - d. That the costs of this application be provided for.



The Applicant's case

3. The application is supported by the grounds appearing on face of the Application and the affidavit in support annexed thereto.
4. The applicant's case is that the respondents were previously members of Evangelical Free Mission in Kenya where he had been elected as the Secretary General. He further states that when the respondents lost an election as church officials in the year 2010, they proceeded to form a splinter group.
5. It is further stated that the respondents then obtained an ex parte order vide Butali SPMCC No 128 of 2012 where the court declared them as officials of the church . The order was later set aside, and suit subsequently withdrawn. The respondents filed another suit before the same court being PMCC NO. 276 of 2018 seeking that the church documents be handed over to them. The court determined that the respondents were not the officials of the church and dismissed the suit. That decision prompted the Appeal to this court, wherein this court (Musyoka J) found it in favour of the respondents herein , and overturned the judgment of the lower court, allowing the prayers sought.
6. The Applicant states that he is aggrieved by the judgment of this court and has since filed a Notice of Appeal against the judgment. The Notice of Appeal is attached to the Affidavit in support.
7. It is stated that the respondents have commenced the execution proceedings which if effected , have the effect of shutting down the operations of the church ,and thus rendering the Appeal nugatory.
8. It is further stated that the respondents stand to suffer no prejudice if the orders sought are granted pending the hearing of the intended appeal and that he is willing to abide by the court's direction with regards to the costs.

The Respondent's case.

9. The respondents filed a preliminary objection and grounds of opposition. The grounds in the two documents are the same, namely that the Application is resjudicata and that this court has become functus officio and therefore it has no jurisdiction to entertain this Application.
10. The Application was prosecuted through written submissions.

Applicant's submissions

11. On whether the court is functus officio, the Applicant submits that the application is a post- judgment recourse under order 42 rule 6 (1) ; that the Application does not require the court to relook at its decision but to preserve the substratum of the suit pending the appeal process.
12. On the issue of res judicata, it is submitted the Applicant has never filed a similar Application before and therefore the claim of resjudicata has no basis.
13. On the conditions precedent to an order for stay pending Appeal, the Applicant submits, firstly , that he will suffer substantial loss not capable of being compensated by damages; that the Appeal is arguable and the appeal would then be rendered nugatory if the stay is not granted . To buttress his submissions in this regard, the Applicant has relied on the case of Re estate of Harish Chandra Hindocha (2021) and Cabinet secretary, minister of Health vs. Aura & 13 others (civil application E 583 of 2023 (2024) KECA (19th January 2024).
14. It is the Applicant's further submissions that the order against which the order is sought directs the release of the church's official records to the splinter group; that if the documents are released it would



paralyze the operations of the Evangelical Free Mission in Kenya , the original church .That such a move will be as good as shutting down the operations of the Head quarters of the Evangelical free mission in Kenya, he argues.

15. On whether the Application has been brought without undue delay, the Applicant submits that the Notice of appeal was filed on 24/7/2023 ,three days after the judgment; his Advocate applied for proceedings and this Application was brought on 17/11/20. There was thus no inordinate delay in bringing the present Application.
16. The respondents did not file any submissions.

Analysis and determination

17. I have considered the Application , the preliminary objection and the grounds of opposition, and have identified the following issues for determination:
 - a) whether this court is functus officio
 - b) whether the present Application is resjudicata
 - c) Whether the Applicants has satisfied the conditions for granting stay pending Appeal.

Whether this court is functus officio

18. In the case of Leisure Lodge Ltd Vs Japhet Asige and another (2018) EKLK the court had this to say about the question of when the court has become functus officio:

“On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.

19. In Telkom Kenya Ltd vs John Ochanda, the court of Appeal had this to say about the doctrine: “..... the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file”.
20. Iam duly guided by the aforesaid decisions and I need not belabour the position expressed . It suffices to state that Applications of this kind are facilitative in nature . It is never about revisiting the decision that has already been rendered or conducting a retrial of the suit.

Whether the Application is resjudicata.

21. The doctrine of res judicata is set out under the provisions of Section 7 of the *Civil Procedure Act*. It provides as follows:-

“No court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



22. The doctrine was expounded in the case of Bernard Mugo Ndegwa vs James Githae and 2 Others [2010] eKLR, where the court held that a party who raises the defence of res judicata must show that:-

- (i) The matter in issue is identical in both suits;
- (ii) The parties in the suit are substantially the same;
- (iii) There is concurrence of jurisdiction of the court;
- (iv) The subject matter is the same; and
- (v) There is a final determination as far as the previous decision is concern

22. The onus was upon the respondents to demonstrate that there has previously been an Application between the parties herein , seeking for stay pending Appeal. They have not discharged that burden. There is no basis upon which this court can therefore determine whether the present Application is resjudicata

Whether the Applicant has satisfied the conditions for stay.

23. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules outlines the mandatory conditions to be met prior to grant of stay. It sates as follows:

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- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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- (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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by applicant.

24. The guiding principles when granting stay have been the subject of many past decisions of the superior courts. In Butt v Rent Restriction Tribunal [1982] KLR 417 the Court of Appeal stated ;

“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good



grounds for granting it merely because in his opinion a better remedy may become available to the applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

Substantial loss

25. In the instant case, the applicant’s aver that they stand to suffer substantial loss if the church’s official documents are released to the respondents who moved away and formed a splinter Church. The documents listed in the submissions include : Certificate of Registration of Evangelical free mission in kenya, the church’s seal, stamps and record of properties of the church.It is submitted that the release of the said documents to the splinter group would be tantamount to shutting down the operations of the original church.
26. The Applicant’s complain is valid in this regard. The aforesaid documents is what gives the church the legal existence , the legitimacy and the mandate to carry out its daily operations without any hindrance. The release of the documents will considerably affect the operations of the church. It would amount to substantial loss.

Whether the Appeal would be rendered nugatory

27. I have perused the records and taken note of the fact that the subject matter of the suit and hence the Appeal before this court was only on the release of the aforesaid documents. The moment those documents are released, that would mark the end of case. The respondents would have achieved what made them to move the court in the first place. The Appeal, if it succeeds, would serve no purpose. Am satisfied that the Applicant has satisfied this condition.

Whether the Application was brought without undue delay

28. The High court judgment was delivered on 21st July 2023 and the Notice of appeal filed on 24th July 2023, that is about three days later . The present Application was filed on 17th November 2023. It is my finding that there was no undue delay in bringing the Application.

Security for due performance of the decree

29. I have considered this condition and the Applicant’s willingness to abide by any condition that the court may make. The security contemplated under Order 42 rule 6 of the Civil Procedure Rules is that which acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. (Emphasis added) If the Applicant appeal fails , he will have to release the official records of the church. That is what the Applicant is to perform under the decree. In my view , bearing in mind the purpose of security as aforesaid, and the subject matter of this litigation, provision of security is not suitable.
30. Am satisfied that the Applicant has convinced this court that he is deserving of the orders sought.
31. Consequently , pending the hearing and determination of the intended Appeal at the court of Appeal, a stay of execution of the judgment of this court delivered on 23rd July 2023, and the decree arising therefrom , is hereby issued.
32. Each party to meet their own costs.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF NOVEMBER 2024.

S. Chirchir



Judge.

In the presence of :

Godwin Luyundi.

