



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 115 OF 2020

ELIJAH OTENYO & 14 OTHERS.....APPELLANTS/APPLICANTS

VERSUS

CHURCH OF GOD IN EAST AFRICA (KENYA)

(Suing Through Rt. Rev Dr Bryum Makokha,

Rev. James Obunde, Jeremiah Maenye And William Shimanyula)

Trustee Of The Church.....RESPONDENTS

RULING

1. This Is A Ruling On **Notice Of Motion** Dated **29th January, 2021** Seeking The Following Orders: -

i. Spent.

ii. Spent

iii. That There Be A Stay Of Execution Of The Judgment/Decree Issued In NAKURU CMCC NUMBER 868 OF 2006 14th May 2020 Pending The Hearing And Determination Of The Instant Appeal On Conditions As May Be Issued By The Court.

iv. That Costs Of This Application Be Costs In The Instant Appeal.

2. Grounds On The Face Of The Application Are That, By Ruling Delivered On The 28th January, 2021 The Lower Court Dismissed Application Dated 16th June 2020 For Reason That It Lacked Merit Thus Necessitating Filing Of This Application.

3. The Application Is Supported By The Annexed Affidavit Sworn By **Moses Esilaba** And Filed On 29th January, 2021. He Averred That Judgment Was Delivered In The Lower Court Matter Nakuru CMCC Number 868 Of 2006 On The 14th May, 2020 Granting Prayers Sought In The Plaint But The Plaintiff Seem To Interpret The Grant Of The Reliefs As An Eviction Order Or Orders Restraining The Appellants/Applicants From Not Just Interfering With The Affairs Of The Church But Rather From Ever Attending The Church At Its Current Premises.

4. He Averred That The Instant Appeal Is Meritorious And Has High Chances Of Success And That The Appellants/Applicants Are Now Threatened By The Respondents Who Plan On Taking Over And Disrupting The Running Of The Operations Of The Njoro Church Of God Which Will Expose Them To Risk Of Loss Without Any Avenue Of Recourse As They Do Not Have Alternative Avenue To Conduct Their Services, Fellowship And Affairs.

5. The Applicants Averred That The Respondents Herein Were Merely National Leaders Of The Church Of God In East Africa And Would Not Suffer Any Prejudice Or Difficulty If The Judgment Of The Lower Court Is Stayed Pending The Instant Appeal.

6. In Response, The Respondents Filed Three (3) Replying Affidavits All Dated 19th February, 2021 Sworn By **Rev. Julius Makanga Kweya, Rev. James Obunde** And **George Kirumba Mbiyu**. **Rev. Julius Makanga Kweya** Averred That The Applicants Unlawfully Took Over The Running Of The Church With His Congregants Who Were About Twenty-Five (25) In Number And The Entire Church Committee In Njoro Were Forced To Hold Church Services At Congregants Houses And Other Public Places. He Further Averred That They Were Ex-Communicated By The Church Of God In E.A (The Respondent) As Shown By The Letters Of Communication And Minutes Of The Ex-Communication And The Same Were Produced In Lower Court And Were Never Challenged By The Applicants; And **Moses Esilaba** Did Not Testify In The Suit Neither Was Authority Filed By The Appellants/Applicants Appointing Any Of Them To Testify On

Their Behalf.

7. **Rev. James Obunde** Averred That The Respondent (Church Of God In E.A Kenya) Run The Affairs Of Njoro Church Of God As Per The Constitution Of The Church And The Appellants/Applicants Interfered With The Running Of The Njoro Church Of God In 2005 By Preventing The Pastor Appointed From Taking Over The Running Of The Said Church.

8. He Further Averred That With The Decree Of This Court Having Been Passed On 14th May, 2020, The Respondent Was Ready To Resume The Running Of Affairs Of The Church And The Applicants Would Not Suffer Irreparable Damage Or Their Appeal Rendered A Nugatory As The Respondent Did Not Intend To Close Njoro Church Of God Or Sell The Property.

9. **George Kirumba Mbiyu** Averred That The Appellants/Applicants Had Filed A Similar Application Dated 16th June, 2020 In The Lower Court Case, Nakuru CMCC No. 868 Of 2006 And The Trial Court Delivered A Ruling On 28th January, 2021 Dismissing The Said Application For Reason That It Lacked Merit And That It Had Not Met All The Requirements Necessary For The Grant Of The Orders For Stay Of Execution.

10. He Averred Further That The Appellants/Applicants Have Not Demonstrated How The Appeal Will Be Rendered Nugatory Or What Irreparable Loss They Stand To Suffer In The Event The Order For Stay Is Denied.

11. The Application Proceeded By Way Of Written Submissions.

APPELLANTS'/APPLICANTS' SUBMISSIONS

12. On Whether **The Application For Stay Of Execution Pending Appeal Is Merited** Applicants Submitted That The Applicable Law Is Order **42 Rule 6 Sub-Rule 1 And 2** And Grant Of Order Stay Of Execution Pending Appeal Is Largely A Matter Of Discretion To Be Exercised By Courts By Courts As The Provision Above Is Principles To Guide The Court And Cited The Case Of **Alhyder Trading Company Limited V Lucy Jepnetich Mibe** Where The **Githua J.** Where The Court Held That Grant Stay Of Execution Pending Hearing Of An Appeal Is At The Discretion Of The Court And The Conditions Are Set Out Under **Order 42 Rule Of The Civil Procedure Rules.**

13. They Further Drew The Courts Attention To The Cases Of **Butt V Rent Restriction Tribunal, Kenya Shell Limited V Benjamin Karuga Kibiru & Another** And **Rhoda Mukuma V John Abuoga.**

14. On Whether Substantial Loss Is Likely To Result, The Appellants/Applicants Cited The Case Of **Equity Bank Limited V Taiga Adams Company Limited** Where The Court Held That The Only Way Of Showing Or Establishing Substantial Loss Is By Showing That If The Decretal Sum Is Paid To The Respondent, That Is Execution Is Carried Out In The Event The Appeal Succeeds, The Respondent Would Not Be In The Position To Pay Reimburse He/It Is A Person Of No Means. And Further Submitted That Their Appeal Would Be Rendered A Nugatory If Stay Orders Are Not Granted

15. The Applicants Further Submitted That The Application Was Brought Without Any Unreasonable Delay As Judgement In **Nakuru CMCC Number 868 Of 2006** Was Delivered On 14th May, 2020 And They Proceeded To File Their Memorandum Of Appeal On 11th June, 2020 And Requested For The Proceedings On The Same And Filed An Application For Stay On 17th June, 2020 After The Initial Stay Granted Had Lapsed; That The Delay In Filing Their Present Application For Stay Was Reasonable And Not Inordinate As The Same Was Due To Unavailability Of Typed Proceedings Which Was Beyond Their Control.

16. The Appellants/Applicants Submitted That They Did Not Have To Furnish Any Security Upfront Before Arguing The Application For Stay Pending Appeal And Relied The Case Of **Selecta Limited V Gold Rock Development.** They Urged The Court To Issue Orders Barring Any Transfer Of The Land Which Can Be Used As Security Upon The Appeal Being Unsuccessful And Cited The Case Of **David Oyiare Ntungani V Matuiya Ole Naisuaku Orket [2017] Eklr.**

RESPONDENTS' SUBMISSIONS

17. The Respondents Submitted That The Conditions For Grant Of Stay Of Execution As Provided Under **Order 42 Rule 6 Of The Civil Procedure Rules** Have Not Been Met And According To The Law It Is Mandatory For All The Three Conditions To Be Fulfilled Before An Order For Stay Pending Appeal Is Granted.

18. The Respondent Submitted That It Was Not Enough For The Applicant To Fulfil One Or Two Of The Conditions And Cited The Case Of **Trust Bank Limited V Ajay Shah & 3 Others [2012] Eklr** And **Peter Ndun'gu Ngae & 3 Others V John Mugane Karomo [2015] Eklr;** And Submitted That The Applicants Must Demonstrate Substantial Loss By Placing Before This Court Solid Information To Demonstrate The Risk Of Suffering Substantial Loss.

19. The Respondents Submitted That The Application Was Made Without Unreasonable Delay; That The Period For Filing A Memorandum Of Appeal Is 30 Days And The Application Of Stay Ought To File Within The Said Period.

20. On Security, The Respondents Submitted That The Applicants Ought To Have Provided Actual Security For Consideration By The Court Which In This Case They Did Not And Urged The Court To Find That The Appeal Will Not Be Rendered A Nugatory If The Orders Sought In The Application Were Denied.

ANALYSIS AND DETERMINATION

21. I Have Considered Averments And Submissions By The Parties Herein And Wish To Consider Whether The Applicants Have Demonstrated That The Applications Meet The Requirements Provided By **Order 42 Rule 6 Of The Civil Procedure Rules, 2010** Which Provides As Follows: -

“6.(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.

(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

(B) Such Security As The Court Orders For The Due Performance Of Such Decree Or Order As May Ultimately Be Binding On Him Has Been Given By The Applicant”.

22. From The Above Provisions, There Is No Doubt That The Applicants Are Required To Demonstrate Three Conditions Set Out Being, That Substantial Loss Will Result If Stay Of Execution Is Not Granted Rendering Appeal Nugatory, Application Has Been Filed Without Unreasonable Delay And The Applicant Is Ready And Able To Offer Security For Performance Of Decree In The Event The Appeal Does Not Succeed.

23. In The Case Of Kenya **Shell Limited V Benjamin Karuga Kibiru & Another [1986] Eklr** The Court Held That Substantial Loss Is The Corner Stone Of The Jurisdiction To Grant Stay Of Execution Pending Appeal.

24. While Exercising Discretion, The Court Is Expected To Balance The Interests Of The Parties So As To Allow The Applicants To Exercise Their Right Of Appeal While The Respondents Who Have A Decree In Their Favor Also Get A Measure Of Protection As Held By The Court In The Case Of **Nation Newspapers Limited V Peter Baraza Rabando [2007] Eklr**.

25. On Timelines Of Filing This Application, I Note That It Was Filed On 29th January 2021 And Judgment Was Delivered On 14th May 2020. Application For Stay Was Filed In The Lower Court On 16th June 2020, Almost A Month After Issuance Of The Decree. Ruling In Respect To The Application Was Delivered On 28th January 2021. This Application Was Therefore Filed A Day After Delivery Of The Lower Court Application For Stay; There Is Therefore No Delay In Filing This Application.

26. On The Issue Of Substantial Loss, I Note That The Appellants/Applicants Have Averred In Paragraph 6 Of Their Supporting Affidavit That They Can No Longer Access The Njoro Church Property While The Respondents Aver That They Were Ready To Resume The Running Of Affairs Of The Aforementioned Church And They Do Not Intend To Close Njoro Church Of God Or Sell The Property.

27. On The Part Of The Applicants, They Seek Stay Execution Of The Judgment Delivered On 14th May, 2020 In **Nakuru CMCC No. 868 Of 2006** By Stopping The Respondents From Taking Up Possession Of The Suit Property Pending Determination Of Appeal.

28. I Note From The Respondent’s Averments That Allowing Execution Of The Decree Will Result In Handing Over The Leadership Of The Church To The Respondents; And From The Averments, The Hand Over Will Not Result In Restraining The Applicants From Attending The Church Services But Are Only Restrained From Interfering With The Running Of The Services. It Is Not True Therefore That They Will Not Have A Place To Worship; And In My View, If They Succeed In The Appeal, It Will Mean Running Of The Church Will Be Handed Back To Them.

29. From The Foregoing, I Do Not See Substantial Loss The Applicants Stand Suffer If This Application For Stay Is Not Allowed. In My View Their Appeal Will Not Be Rendered Nugatory; I Agree With The Respondents That The Church Building And Land Will Still Be In Existence At The Conclusion Of Appeal.

30. I Rely On The **KENYA SHELL LTD VS KIBIRU & ANOTHER, CIVIL APPEAL NO. 97 OF 1986, NAIROBI** Where The Court Stated As Follows: -

“The Application For Stay Made Before The High Court Failed Because The 1st Of The Conditions Was Not Met. There Was No Evidence Of Substantial Loss To The Applicant...”

31. No Evidence Of Substantial Loss Has Been Demonstrated By The Applicants Herein.

32. In Respect To Provision Of Security, I Note That The Applicants Indicated That They Are Willing To Provide Any Security The Court May Order For Performance Of The Decree. However As Observed Above The Three Conditions Have To Be Met For The Orders For Stay To Be Granted.

33. The Application Herein Has Therefore Failed To Meet All Conditions As Observed Above And I Therefore Decline To Stay Orders Sought.

34. FINAL ORDERS

1. Application Dated 29th January 2021 Is Hereby Dismissed.

2. Costs To The Respondents.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 22ND DAY OF JULY, 2021

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RACHEL NGETICH

JUDGE

In The Presence Of:

Schola - Court Assistant

Mr. Murithi Advocate For Appellants

Mr. Mutonyi Mbiyu Advocates For Respondents