REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E207 OF 2021

BENSON MUSONGA MUSONYE.....1ST APPELLANT/APPLICANT

MAURICE MUTOGI KADENGE.....2ND APPELLANT/APPLICANT

WYCLIFFE LISALISTA IDAMBIRA.....3RD APPELLANT/APPLICANT

ZADOCK MEMBO WANGILA.....4TH APPELLANT/APPLICANT

AGNESS WAUDO NANJALA.....5TH APPELLANT/APPLICANT

EUNITA OBUYUMBI KAGASI.....6TH APPELLANT/APPLICANT

DANCAN AMALEMBA.....7TH APPELLANT/APPLICANT

STELLA MUKHOVI MILATSIA.....8TH APPELLANT/APPLICANT

JOSEPH WANAMBISI KHISA.....9TH APPELLANT/APPLICANT

(Suing for and behalf of 110 members of Friends Church Quakers Medical)

VERSUS

THE BOARD OF TRUSTEES FRIENDSCHURCH

(QUAKERS)NAIROBI YEARLY MEETINGS.....RESPONDENT

RULING

1. The notice of motion dated 26th April 2021 by the appellant/applicants is brought under Order 40, Order 42 Rules 6 (1) and (6) Order 51 of the Civil Procedure Rules, Sections 1A,1B,3,3A 63(e) and 79G of the Civil Procedure Act. The application seeks the following orders:

a) *Spent.*

b) *That this Honourable court be pleased to issue a temporary, injunction, restraining the respondent, agents, servants or any other persons acting on their behalf from interfering in any way including withdrawing funds from*

i. *ECO BANK MEDICAL FRIENDS CHURCH ACCOUNT 0013205000662101 ACCOUNT*

ii. *C.I.C GROUP MONEY MARKET MEDICAL FRIENDS CHURCH ACCOUNT 00039-001-00404-ACCOUNT*

c) *That costs of this application be provided for.*

2. The application is supported by the grounds on its face plus the sworn affidavit of Maurice Mutongi Kadenge the 2nd appellant/applicant. He avers that the trial court issued a temporary injunction on 26th of November 2020 (BMM2) to avoid wastage of resources of the church

pending the hearing of the suit (annexture BMM2). Further vide a Ruling dated 6th April 2021 the court vacated its earlier orders (Annexture BMM3) hence this appeal.

3. He depones that the appeal stands a good chance of success but in the event that the execution proceeds then the whole suit will be an academic exercise owing to the fact that there will be no form of dispute between the parties. He further avers that they risk not being able to recover the assets and monies that are held in the two accounts owing to the fact no proper elections have ever been conducted.

4. He depones that they felt aggrieved by the decision of the trial court since it did not pay attention to the issues raised in the application dated 26th November 2020, plaint and submissions. He avers that the defendants have not in any of their pleadings stated what form of prejudice they will suffer if the orders are granted.

5. He deposed that in the event that no stay of execution is granted then it would prejudice the appellants and other members. He further depones that it would be just and fair that there be a stay of execution of the ruling delivered on the 6th April 2021 against the appellants pending hearing and determination of the appeal.

6. In opposing the application, the respondent filed grounds of opposition supported by three affidavits. The replying affidavit of one Hannington Muchera Imbayi sworn on 7th June 2021 plus annextures HM1-3 and 5 was objected to by the applicants. The court upheld the objection and ordered them expunged from the record.

7. In the grounds of opposition dated 7th June 2021, it stated that the application does not disclose any reasonable cause of action and it is therefore scandalous, frivolous and vexatious. Further that the applicants have no justifiable reason in not having made this application for stay in the trial court since there had been no rejection of the same and therefore this honourable court has no jurisdiction to entertain this application.

8. It is further stated that there is no evidence of substantial loss that the applicants shall suffer as a result of non-issuance of an order of stay or that it has good chances of success or that it has arguable issues. That the applicants have not shown that the enforcement of the trial court's order will render their proposed appeal nugatory if stay orders are not granted.

9. It is further argued that the respondent shall be deprived of the fruits of the judgment if it is eventually issued in its favour and that the balance of convenience demands that the application of stay be dismissed.

10. Mr. Abisai Ambenge the chairman of the trustees of the respondent swore a replying affidavit on 7th June 2021. He avers that the funds and property cited in the memorandum of appeal and notice of motion do not belong to the appellants but to all members of the church under the care of trustees as per article XXXI of the constitution of Nairobi Yearly Meeting (NYM). The board of trustees exercises a stewardship over the funds on behalf of the members and no losses or harm will occur to the appellants. (Annexed "AA2")

11. He depones that they have the mandate and capacity to hold in trust all the assets of NYM and to allow the bank accounts to be managed only by the nominated officials according to the constitution and that the current nominated officials are NYM medical friends church, as such he believes that an injunction cannot issue on an event that has already taken place. (Annexed "AA3")

12. Ms. Sussie Ndanyi Agoi the administrative secretary of 1st respondent swore a replying affidavit on 7th June 2021. She avers that it came to her attention that disputes had arisen in the leadership at Medical Friends Local Church and she consequently formed a reconciliation team which held meetings and reached an agreement of all members of both sides to carry out fresh nomination of the church leadership. It was on 13th September 2020 agreed that the outgoing officials were to hand over to the new ones. She therefore requested the returning officer to call the nominations which he did by a letter dated 13th November 2020 that established the program for nomination of the new office bearers for MFC (Annexture SNA2).

13. She avers that the nomination process was concluded, returns filed with the returning officer on 21st November 2020. Nomination clearance certificates were issued on 29th November 2020 (SNA3) approving the new leadership of Medical Friends Local Church. That she organized installation of the new leaders and no one lodged a petition as permitted by their constitution.

14. She deponed that the announcements of nominations were channeled through the church structures as required under the NYM constitution. She further deponed that the change of signatories has already been surrendered to the nominated officials of MFC and it behoves the appellants/applicants to facilitate the surrender of the banking instruments to the new leaders who were nominated in accordance with the NYM constitution.

15. She depones that the appeal now pending before court is structurally different from the suit the subject of the appeal in that the primary suit was instituted for and on behalf of 244 members. The current appeal is lodged by 110 members, who are alleged to have signed the sheet thus making the appeal lodged without authority of all members who may be adversely affected by the decision.

16. She further avers that the notice of motion lacks merit, therefore the conservatory orders should not be granted as the ruling the subject of the appeal was sound. That it is clear that the appellants/applicants did not name the suit subject and the bank accounts subject of the application.

17. The deponent avers that the orders sought if granted have the potential of crippling the functions of MFC since the funds belong to members of the church who should have liberty to determine its use. Further that the applicants have no prejudice to suffer as they are no longer leaders and they may be compensated by damages should their appeal be sustained.

18. Directions were given for the application to be disposed of by way of written submissions which was complied with by both parties.

19. Onyango Ndolo & co. advocates for the appellant/applicants filed submissions dated 22nd June 2021. M/s Wambulwa gave brief facts of the case and identified seven issues for determination namely:

i. *Whether there is an arguable appeal on the grounds set out in the memorandum of appeal.*

ii. *Whether the applicant will suffer substantial loss unless the stay order is granted.*

iii. *Whether the application was made without unreasonable delay*

iv. *Whether the intended appeal will be rendered nugatory if stay pending appeal is not granted.*

v. *Whether security for costs is payable in the circumstances.*

vi. *Whether the applicants have met the threshold for grant of injunctive orders sought.*

vii. *Whether costs are payable.*

20. On the first issue counsel submitted that the intended appeal is arguable because the ruling of the lower court delivered on the 6th April 2021 is irrational and against the weight of the evidence adduced. Secondly that unless stay of execution pending appeal is granted there is a threat of the applicants losing millions of shillings to the respondent whose source of income is unknown. That if the money is withdrawn recovery will be a problem thus rendering the appeal nugatory. On this argument counsel relied on the Court of Appeal case of **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others eKLR** where it was stated as follows: -

"*The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."*

21. She further relied on the case of **Stanley Kangethe Kinyanjui v Tony Ketter and 5 Others (2013) eKLR** where the court held that:-

"*On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.* ***Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd,*** *Civil Application No. Nai 345 of 2004."*

22. On the second issue counsel submitted that the execution of the ruling of 6th April 2021 will cause substantial loss to the applicant since the ruling does not reflect the evidence on the court record. She further submitted that the respondent will misuse the funds in the suit accounts and that the evidential burden shifts to them to show that they would be in a position to refund any money that shall have been illegally withdrawn.

23. On this she relied on the case of **Nairobi Civil Application No.238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR)** which was cited with approval by the High Court in **Stanley Karanja Wainana & Another v Ridon Anyangu Mutubwa (2016) eKLR**. where it was held that: -

"*This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge"*

24. On the third issue, she submitted that the appellant/applicants are members of the Quakers church and therefore subscribers by dint of contributions to the two suit accounts which have money and that if the respondents are not restrained they will proceed to illegally and fraudulently withdraw monies from the said accounts. That the said money forms the substratum of the appeal. On this counsel relied on the case of **Consolidated Marine v Nampijja & Another, Civil App.No.93 of 1989** where the court held that:-

"*The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory."*

25. On the fourth issue, she submitted that the application together with the appeal were filed within time in compliance with section 79G of the Civil Procedure Act. On the fifth issue counsel submitted that there is no requirement for security of costs since the appeal is against a ruling/order and not a decretal sum.

She relied on the case of **Mwaura karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others (2015) eKLR, (**ii) ***Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd (2019) eKLR*** (iii) ***Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others (2014) eKLR*** to support her argument**.**

26. On the sixth issue, counsel submitted that based on the evidence and material placed before this honourable court, the appellant/applicants have satisfied the conditions upon which a temporary injunction can be granted as set out under order 40 (1) (a) and (b) of the civil procedure rules 2010.That the applicants at paragraph 12 of the supporting affidavit have shown that the lower court did not pay attention to the issues raised in the application, plaint and submissions before it.

27. On whether the applicants have established a prima facie case. She relied on the case of **Mrao Ltd v First American Bank of Kenya and 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 Others v Jane W. Lesaloi and 5 Others, (2014) eKLR** where the Court of Appeal defined a prima facie case as:

> *"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

28. She submitted that from the face of the record the applicants raised serious issues for trial and have demonstrated that this application is not intended to buy time neither is it frivolous nor vexatious and so they have established a prima facie case.

29. Counsel contends that if the injunction orders are not granted as prayed then they stand to suffer irreparable injury as the respondents either by themselves, agents, officials, employees or agents will proceed to withdraw the monies in the suit accounts thereby making the church unable to achieve its goals of church construction. That the funds in question belong to members of the church and if illegally withdrawn may never be recovered.

30. On whose favour the balance of convenience lies, she relied on the case **Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 Others (2016) eKLR** where the court dealing with the issue expressed itself thus: -

> *"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right…Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."*

31. In her submissions, counsel argued that the applicants have supplied evidentiary documents that show the illegal conduct of the respondent regarding the mismanagement of funds and even after the applicants demanded for answers on such illegal withdrawals none of the officials have ever tendered answers to the members. It is her contention that the respondent should pay the costs of this application since it has caused the applicants the hardship of having to move this court to issue stay orders so as to preserve or protect the assets of the church from being wasted by it at the expense of the applicants.

32. In rebuttal, Mr. Aswani for the respondent filed the submissions dated 9th July 2021. Counsel gave a brief background of the matter and submitted that the applicants have not satisfied the requirements of Order 42 of the civil procedure rules and as such they have no right to come to this honourable court for lack of jurisdiction to deal with the matter. On this he relied on the case of **Redland Enterprises Limited v Premier Savings & Finance Limited (2002)2KLR 139** where it was held:

> *"2. Order XLI RULE 4 clearly shows that an appeal court has jurisdiction to grant stay when the court appealed from rejects such application"*
>
> *Which also states clearly at page 140 line 33 the following*
>
> *"The order appealed from is not exhibited and the court is unable to tell what is complained of"*
>
> *And in the case of **Kwahola Pharmacy v Copy Cats Limited (2002)2KLR 269** it was held at page 272 from line 2*
>
> *"the proper practice is that the first application should first be laid in the court that issued the decree or order appealed from. This should continue to be the practice."*

33. Counsel submitted that the applicants failed to satisfy the requirements of Order 46 Rule 6 of the Civil Procedure Rules 2010 since no application for stay was first made before the trial court. That the applicants have not placed sufficient material to show clearly what is the nature of their case in the lower court.

34. He contends that it is very unfair for the applicants to submit that the lower court did not read and consider their documents before refusing their application as they did not specify the assets in the documents which they were referring to at that stage. He further submitted that the blame for the decision of the honourable lower court lies squarely on the applicants and that their appeal against the lower court's decision on the matter due to their failure to identify the correct assets has no substance as such is misleading and should be rejected.

35. On this counsel relied on the case of **Kwahola Pharmacy** (supra) **at page 272 line 36** where it was stated:

"It only argued that its appeal has high chances of success. It referred this Court to the Memorandum of Appeal. However, as indicated hereinbefore, no copy of proceedings or judgment or even decree of the lower Court was attached to this application. It is not therefore possible to know the nature of the lower court's case. The applicant did not explain why the proceedings, the decree or the judgment was not attached, as those documents would be the ones to enable this Court get insight to the real case of the applicant and to understand genuinely or whether or not the said grounds of appeal have substance that would show or make the appeal arguable or one with chances of success."

36. He contends that the applicants have not placed before this court material to show that they have legal rights to the two accounts which are higher than the respondent who is the trustee of the moveable and immovable properties of the Friends Church (Quakers). He further submits that the officials are nominated for 3 years and after the 3 years those not nominated must hand over to incoming officials of the church. Counsel further submitted that the applicants ceased to be officials of the Medical Local Church upon installation of new members on 29th November 2020 and if they felt aggrieved the constitution provided them a remedy.

37. He submitted the parties have alternative forms of dispute resolution enshrined in their constitution and the applicants failed to utilize them. They therefore have no capacity to ventilate their grievances in this honourable court after ignoring the procedures and the conditions laid out in Article 159 clause 3 of the Kenyan Constitution.

38. On whether the application meets the threshold for granting the injunctive orders sought counsel relied on the case of **Patrick James Mbogo & Another v Bank of Africa Limited (2020) eKLR** quoting the Court in **Nguruman Limited v Jan Bunder Nelson & 2 Others 2014 eKLR** reiterating that:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

"If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

39. It is his submission that the applicants have not established a prima facie case worth consideration as they have not shown that the funds in the bank accounts belong to them personally. Further that they have not alleged that the church is incapable of meeting any damages or that any injury they may suffer will be irreparable. On this counsel relied on the case of **Nguruman Limited** (supra).

40. He argues that the applicants have not demonstrated any prejudice they would suffer should the court decline to grant the orders sought as they are no longer officials of the church and as such the funds belong to the church. He further argues that the management of the funds in the said banks has been transferred to the new office bearers and any orders now being sought by the applicants will be incapable of enforcement.

41. On this argument counsel cited the case of **Anita Chelegat O'donuvan and 2 Others v Fredrick Kwame Kumah & 2 Others (2015) eKLR** where the court in citing the ruling in **Kayla Soi Farmers' Cooperative Society v Paul Kirui & Another (2003) eKLR** states the following:

"As said "EQUITY LIKE NATURE, WILL DO NOTHING IN VAIN "on the basis of this maxim courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant "IT""

42. Counsel contends that the applicants have not shown any substantial loss or any prejudice to be suffered should the order not be granted but the respondents have shown that it is responsible for the proper running of the church and safeguarding the interests of the many members of the MFC who are not in support of the suit instigated by the applicants.

43. On this submission counsel referred to the case of **Tarbo Transporters Limited v Absalom Dova Lumbaisi (2012) eKLR** where the court held as follows with respect to striking the balance: -

"[62] Accordingly whilst I reject the narrower scope of the Respondent's argument, the Applicant should be seeking to show how the inability of the Respondent to refund the decretal sums, will translate into substantial loss. That connection is the more plausible ground that their appeal, if successful, will just be but a pious aspiration, a barren result. That way, the inability of the Respondent to refund is considered as a factor that produces the undesirable results on the right of appeal of the Appellant and not a

comparison with other persons or class of persons. Each case is determined on its merit, and so the fact of inability or ability to refund is a matter of evidentiary necessity and not a question of differential treatment.

[63] The burden of proving that the Respondent will not be able to refund to the Applicant any sums paid to the Respondent lies on the Applicant. But where the record shows some financial limitations on the part of the Respondent, it may as well raise evidential burden on the Respondent to file an affidavit of means. See the case of ***ICDC V Daber Enterprises Ltd, Court of Appeal Civil Application NO NAI 223 OF 1999.*** *Evidential burden should not be confused with legal burden of proof. The former in civil cases, rests on the person alleging whereas the latter arises when prima facie evidence has been established against a party who would fail without further evidence…..."*

Analysis and Determination

44. I have considered the application, grounds of opposition, affidavits and the written submissions plus authorities cited by both counsel. The issue falling for determination is whether the plaintiff/applicant has satisfied the threshold for grant of an interim injunction. Besides this I wish to point out to counsel for the respondent that the provision dealing with the application for stay of execution is Order 42 Rule 6 and not Order 46 Rule 6 of the civil procedure rules as submitted by him. I want to believe it was a typing error but I had to point it out as it is on record.

45. The conditions for consideration in granting an injunction are now well settled. In the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358,** the court set out the conditions that a party must satisfy for the court to grant an injunction. It stated thus: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

46. The test for granting of an interlocutory injunction was considered in the case of **American Cyanamid Co. vs Ethicom Limited (1975) A AER 504** where three elements were noted to be of great importance namely:

i. *There must be a serious/fair issue to be tried,*

ii. *Damages are not an adequate remedy,*

iii. The balance of convenience lies in favour of granting or refusing the application.

47. The circumstances for consideration before granting a temporary injunction are provided for under **order 40 Rule 1 of the Civil Procedure Rules** which provides:

1. Where in any suit it is proved by affidavit or otherwise—

(a) *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*

(b) *that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."*

48. In the instant case the suit accounts are at the center of the wrangle. Each of the parties believes it has the right to own and run the accounts. They are not able to trust each other with the running of the said accounts.

49. According to the applicants the trial Magistrate had granted interim orders via an application dated 26th November 2020, to the suit accounts to avoid wastage of resources pending hearing and determination of the application but they were vacated on the 6th of April 2021.Being dissatisfied they filed this appeal dated 13th April 2021.

50. On the other hand the respondent states that the applicant should have first filed an application for stay at the lower as this honourable court has no jurisdiction to entertain this suit. They further believe that the monies in the account belong to the church members and that the applicants have not demonstrated that they will suffer substantial loss if the said orders are not granted.

51. Further the respondent stated that there are alternative methods of solving their issues as enshrined in their constitution. As far as it is concerned the church has new leadership with new officials and signatories. The church also has other properties besides the bank accounts.

52. In **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR,** the court cited with approval the following passage by Steven Mason & McCathy Tetraut in an article entitled **Interlocutory Injunctions: Practical Considerations** saying**:**

"As stated by the Supreme Court in **R. J. R. Macdonald Vs. Canada (Attorney General)** once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a

limited review of the case on the merits. It is usually a brief examination of the facts and law."

53. In the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another, (1990) eKLR** the court held as follows on what a party seeking an injunction must demonstrate:

> *"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."*

54. Further in the case of **Nairobi Kiru Line Services Ltd v County Government of Nyeri & 2 others [2016] eKLR**

> *"As for the balance of convenience, I reiterate what I stated above, "the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.""*

55. The impugned ruling that forms the basis of this appeal is at page 37-43 of the notice of motion. The learned trial Magistrate has at pages 42-43 of the said ruling given the reasons for his decision. The reason is that the applicants who were the plaintiffs did not give specifics of what they wanted injuncted. This was their general prayer in the notice of motion:

> *"That pending the hearing and determination of the suit, the court also issue a temporary injunction restraining the defendants or its authorized agents from interfering with the assets of Friends Church (Quakers) Medical Local Church." I have confirmed this from the copy of the application marked page 17 of the application."*

56. When the applicants filed the notice of motion dated 26th April 2021 before this court they decided to specify the accounts against which an injunction should be issued. They have therefore introduced new material in this application which was not in the application before the Magistrate's court without the leave of this court. Order 42 Rule 27 of the civil procedure rules provides:

> *"(1) The parties to an appeal shall not be entitled to produce additional evidence,*
>
> *whether oral or documentary, in the court to which the appeal is preferred; but if—*
>
> *(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or*
>
> *(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce Judgment, or for any other substantial cause,*
>
> *the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.*
>
> *(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission."*

57. A party cannot be allowed to remedy its omissions and commissions before the trial court on appeal without the leave of the appeal court It is nowhere indicated that an attempt to give details of the accounts was rejected by the trial court. That is the scenario prevailing in this matter. In any event the respondent is the board of Trustees entrusted with the administrative running of the church and the officials are accountable to the church for their actions. I will not want to say much lest I get into the realm of the appeal itself.

58. For the above reasons I find that the applicants have failed to establish a prima facie case to warrant the issuance of the orders sought. The application dated 26th April 2021 is therefore dismissed. Costs to abide the Appeal.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE