



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 10 OF 2019

SIMON MAINA MUREITHI & 11 OTHERS.....APPELLANTS

V E R S U S

AFRICAN INDEPENDENT PENTECOSTAL CHURCH OF AFRICA

Nyahururu Diocese Board suing through

RT. REV. BISHOP SULEIMAN K. MWANGIRESPONDENT

R U L I N G

By the application dated 16/04/2019 the twelve applicants namely, *Simon Maina Mureithi, Henry Macharia Kweri, Peter Migwi Kago, John Wachira Mwangi, Erustus King'ori, Samuel Maina Ndirangu, Mary Njeri Njihia, Margaret W. Nyoro, Alice Wambui Kimani, Lucy Kagure, Grace Muthoni Gachunga and Serah Nyambura Kirumba*, seek a stay of execution of the ruling/orders dated 16/01/2019 in Nyahururu CMCC 142/2014. In the alternative, they pray that the court orders that the status quo obtaining at Africa Independent Pentecostal Church of Africa hereinafter referred to as A.I.P.C.A Nyahururu Cathedral Local Church as at 01/11/2018, be maintained pending the hearing and determination of the appeal and costs of the application (prayers 3, 4, and 5). The application is expressed to be brought under *Section 1A, 1B, 2A Civil Procedure Act, Order 42 Rule 6(1) and (2) Civil Procedure Rules*. The application is premised on two affidavits dated 16/04/2019 and 19/08/2019 sworn by Simon Maina Mureithi – the 1st Applicant.

A background of the case is that the respondent is the plaintiff in Nyahururu CMCC 142/2014 while the applicants are the defendants in that case. In the plaint, the respondent sought:

- 1. An order of declaration that the defendant's membership[in the Church Committee of Nyahururu AIPCA Cathedral Church closed on 8/6/2014 upon dissolution of the same by the Diocese Board;*
- 2. An order of injunction to restrain the defendants by themselves, their agents, servants or employees or anybody purporting to act for them from moving, performing, operating, conducting activities and programs of Nyahururu Cathedral AIPCA Church situated on Plot LR.6585/659 or presenting themselves as bona fide Committee Members of the said church.*

The respondent then filed an application dated 01/11/2018 seeking orders that;

- i. pending the hearing and determination of the said suit, or further orders of the court, there be a temporary injunction restraining the defendants by themselves or those under them from inviting, entertaining, allowing or in any other manner condoning the interested parties or any other person from conducting seminars, preaching or ministering at the A.I.P.C.A Nyahururu Cathedral Local Church without the plaintiff's written authority or consent;*
- ii. the OCS Nyahururu Police Station do enforce compliance with the order.*

In the said application, the respondent had cited *Julius Njoroge, Ayub Kigotho, Peter Chiuri, Francis Gicheha, William Njoroge, Josphat Ikaba, Philip Muraya, Naftali Mugo, Naftali Thuku and James Mukuria* as interested parties. Though the application was vehemently opposed, the same was allowed vide the court's ruling of 16/01/2019.

The applicants are dissatisfied with the court's ruling and have filed an appeal, see annexure (SMMJ). It is contended that the 1st interested party is the duly elected and recognized Arch Bishop of AIPCA as evidenced by a letter dated 30/01/2017 from the office of the Attorney General (SMM6); that under the Constitution of the AIPCA Church, the Arch Bishop does not visit local churches at the invitation of the church members or local church committee and the applicants have never invited the said Arch Bishop to AIPCA Nyahururu Cathedral Local Church; that under the Constitution and Rules, the Arch Bishop AIPCA is the spiritual head of the said church who has general authority over the whole church and therefore the applicants have no power to stop the 1st interested party from visiting AIPCA Nyahururu Cathedral Church; that the ruling of 16/01/2019 puts the applicants in an awkward situation because they cannot be able to comply with the said order;

that the applicants had by an application dated 08/11/2018 sought to have the orders varied or set aside but the same was disallowed. The applicants also contend that they have no powers to stop the 2nd interested party, Ayub Kigotho, a duly consecrated and enthroned Bishop of AIPCA and who is duly posted to Nyandarua Diocese by the 1st interested party from visiting AIPCA Nyahururu Cathedral Local Church; that there has been peace and tranquility at AIPCA Nyahururu Cathedral and all activities have been going on peacefully during the pendency of the case but they fear that one respondent may use the temporary injunction to interfere with the church worship and other activities of the church.

In reply, *Alfred Wachira Mugo*, the secretary of the Board of AIPCA Nyandarua North Diocese (formerly Nyahururu Diocese) urged that the application is incompetent, bad in law and an abuse of the court process because the order that is challenged was issued over three months before filing of this application and there is no explanation for the unreasonable delay; that the applicants have not demonstrated that they may be cited for contempt, or that they will suffer substantial loss if the order is not given; that if the application is granted at this stage, it is tantamount to allowing the appeal without hearing parties on merit. He deposed that all the interested parties were served with the application but they failed or refused to respond or participate in the proceedings. Alfred Wachira denied that Julius Njoroge is the Arch Bishop of AIPCA Society and attached a letter from the Registrar General dated 13/02/2019 (AWM1) from the Registrar General in which at clause 8 (a), the Registrar indicated that the tenure of office bearers confirmed on 05/02/2019, expired on 30/11/2017 as per the church constitution and at clause 8(c), that there was a vacuum in the church leadership since no elections had been held; that the 1st and 2nd Interested Party filed HCC 36/2019 seeking to declare the letter of 13/02/2019 illegal but so far, no orders have been made in his favour; that under this court made the orders of 17/04/2019, the 1st and 2nd interested parties, together with the applicants planned for a visit to AIPCA Nyahururu Cathedral Church on 28/04/2019 but the same was stopped vide a court's order in CMCC 84/2019 (AWM3); that the 1st and 2nd interested parties were served with the said order but never challenged it and this application is therefore an abuse of the court process.

In response to the respondent's affidavit, *Simon Maina* swore a supplementary affidavit dated 19/08/2019 in which he denies that there was unreasonable delay in filing this application because they applied for certified copy of the ruling which they were not given till March 2019; that they needed to file the application with the order which they did once they received the ruling; as regards service of the interested parties with the application dated 01/11/2018, it was deposed that there is no evidence that they were ever served, and yet orders were made against them; that the applicants are supposed to obey the said orders which is not possible; that following the rulings of 29/07/2016 and 27/10/2016, the Employment and Labour Relations Court in ELRC1220/2016 *Paul Ndung'u Ndichu vs Amos Mathenge Kabuthu & 2 Others*, the Registrar of Societies vide the letter of 03/01/2017, set the date of election as 09/01/2017 and the 1st interested party was elected as Bishop of AIPCA Church on 09/01/2017 as shown by the Registrar's letter dated 30/01/2017 (SMM6); that the said election has never been challenged or quashed by a court of law; that the letter of 13/02/2019 at paragraph 2 therefore clearly confirmed the election of the Arch Bishop but not the general leadership which was done on 09/01/2017.

It was also deposed that, as per Article VIII 8 (D) of the AIPCA Constitution, the Arch Bishop may be elected for a maximum of two terms of 5 years and the said term had not expired; that since 09/01/2017 there has been no other election. Since the said election has not been nullified, the 1st interested party remains the validly elected Arch Bishop and that the Registrar General has no power to revoke the election and therefore the Arch Bishop has the power to visit Nyahururu Cathedral without the consent of the respondent and hence the order granted by the trial court was made in error and directed at the wrong parties.

Applicant's submissions:

Mr. Kinyua Njogu Counsel for the applicants submitted that the application having been brought under Order 42 (6) (2) of Civil Procedure Rules, the applicants have to satisfy the court that if the order is not granted, they will suffer substantial loss; that the application has been made without unreasonable delay and that security for due performance of the decree has been provided.

On substantial loss, counsel argued that the applicants cannot stop the 1st interested party from visiting their Nyahururu Church, and as a result the applicants may be cited for contempt if the order is not obeyed; that the 1st interested party was duly elected on 09/01/2017 following the orders of the court in ELRC Case 1220/2016; that the letter from the Registrar dated 13/02/2019 denies the validity of the 1st interested party's election but the same having taken place, there can only be one Arch Bishop, his tenure of 5 years is yet to expire. He relied on the decision of *Republic vrs Registrar of Societies & 3 Others ex-parte Samuel Karuiki Kung'u Misc. App. 35/2016 (NRB)* and *Republic vrs Registrar of Societies & 12 Others ex-parte Francis Kirima M'ikinyua Misc App. 318/2013* where it was held that the Registrar of Societies has no power to nullify the election of officials or office bearers and that the letter dated 13/02/2019 has no legal effect on election of the 1st interested party.

Counsel further submitted that though the respondent contends that *Fredrick Wang'ombe Nderitu* is the Arch Bishop of A.I.P.C.A, there is no evidence of his election to that post; that the impugned order of injunction puts the applicants in an awkward situation because they cannot stop the 1st interested party from carrying out his powers. It was also submitted that though the interested parties were cited, leave of court was never sought to have them joined to the suit and the respondent has not availed any evidence to prove service on the interested parties and the applicants have therefore demonstrated that they will suffer loss if the order of injunction is not granted.

As to whether the application was filed within reasonable time, Counsel submitted that it is a requirement that an application for stay of execution be accompanied by the ruling or order appealed against as held in *David Karobia Kiiru vs Charles Nderitu Gitoi & Another (Nku. 27/2016)*; that the applicants applied for the ruling on the same day of the ruling but a certified copy was not availed till March 2019; that this application was filed within 30 days of being supplied with the ruling; that three months after the ruling is not inordinate delay.

On whether security should be given, Counsel relied on *Nakuru Packers Ltd vs Monica Nyambura Watitu (Nku. HCCC 71/2002)* where the court said that the applicant merely offers or undertakes to give security but it is the court that has the final word and the applicant has to give the security as ordered by the court; that it is sufficient that the applicants are willing to give such security as the court may direct.

Respondent's submissions:

On his part *Mr. Gakuhi Chege*, Counsel for the respondents submitted that the applicants have not demonstrated that they will be cited for

contempt or that they will suffer substantial loss; that allowing the application at this stage is tantamount to allowing the appeal at this stage without hearing the appeal on its merits; that the 1st interested party's status in AIPCA Society is the subject matter in Nrb. HCCC 36/2019 in which he seeks to have the Registrar General's letter of 13/02/2019 declared illegal, null and void, but so far no orders have been made in his favour; that it is after the court issued the order on 17/04/2019 directing that this matter be served and heard inter-parties that the 1st and 2nd interested party scheduled a visit to AIPCA Nyahururu Cathedral Church on 28/04/2019 but they were stopped through another court order Nyahururu CMCC 84/2019 (AWM 3) and hence the application is an abuse of the court process; that for the court to grant an order of stay, it must be demonstrated that the trial court wrongly exercised its discretion which is not the case. Counsel sought to rely on the case of Heritage Insurance Company Ltd vs Patrick Kasina Kisilu (2015) eKLR where the court held that an appellate court will not interfere with the exercise of discretion of the trial court unless the Judge is satisfied that the court misdirected itself in some matter and therefore arrived at the wrong decision.

Counsel went further to submit that an order of stay is not granted as a matter of right but the applicant must prove that the application was brought without unreasonable delay; that substantial loss will result if the order of stay is not granted and that such security for the due performance of decree is provided. Counsel relied on the decision of Kiplagat Kotut vs Rose Jebor Kipngok (2015) eKLR and Halal & Another vs Thornton & Turpin (1963) Ltd (1990) KLR 365.

As to whether substantial loss has been proved, Counsel relied on the decision in Kenya Shell Ltd vs Kibiru (1986) 410 where the court held that proof of substantial loss is the corner stone of both jurisdiction for granting of stay and he urged the court to allow the successful litigant to enjoy the fruits of his judgment as held in Machira T/A Machira & Co. Advocates vrs East African Standard (No.2) (2002) KLR 63.

Counsel urged the court to decline to grant the orders sought.

Analysis and determination:

I have now considered the application and the rival arguments. This application is brought under Order 42 Rule 6 Civil Procedure Rules which provides as follows;

“42 (6)(1) No appeal or second appeal shall operate as a stay of execution of 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 subrule (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.”*

In Kiplagat Kotut case supra J. Ombwayo when considering an application for stay had this to say:

“In view of the foregoing provisions of the law, it is important to note that stay of execution of decree pending appeal is conditional. In the case of Antoine Ndiaye vs African Virtual University (2015) eKLR, Nrb. HCC 422/2006 the learned Judge Gikonyo J. opined as follows;

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, Judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that;

- a) The application is brought without undue delay;*
- b) The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered; and*
- c) 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.”*

This court is guided by the above decision and order 42(b)(2) on the principles to consider.

See also Halal & Another (Supra). The relief of stay is a discretionary one where the court has to act judiciously within the principles set out in Order 42 Rule 2; The first issue to consider is whether the applicants have demonstrated that they will suffer substantial loss if the order of injunction is not granted. Platt JA in Kenya Shell Ltd vrs Kibiru case stated that substantial loss is the corner stone of jurisdiction to grant or not to grant an order of stay. He said; *“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules (now Order 42 Rule 6) can be substantial. If there is no evidence of substantiated loss to the applicant, it*

would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without evidence it is difficult to see why the respondents should be kept out of their money.”

In the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR* the court held; “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

The applicants contend that since the 1st interested party is the Arch Bishop of AIPCA, having been elected on 09/01/2017, he cannot be stopped from visiting Nyahururu Cathedral Local Church being its spiritual leader. The respondent allege the contrary, that the interested party is not the spiritual leader of the AIPCA church.

I have seen the letter dated 13/02/2019 authored by Mary Nguya, the Registrar General. It is addressed to Arch Bishop Julius Njoroge, Arch Bishop Fredrick Wang’ombe and Arch Bishop Samson Muthomi. The letter refers to a meeting that took place on 13/02/2019 with representation from the interim committee members of the Peace and Reconciliation Committee agreement regarding complaints and objections regarding the manner in which the letter dated 05/02/2019 was issued. The letter concludes as follows;

“In light of the above, our office has observed that;

- a) The tenure of the office bearers confirmed on 5th February, 2019 expired on 30th November, 2017 in accordance with the church Constitution. Since then, no elections have been held by the church;
- b) That the said confirmation letter was inadvertently issued based on the purported annual returns filed by the faction led by Archbishop Julius Njoroge Gitau, after the same were received in good faith;
- c) It is apparent that the said tenure having ended on 30th November, 2017, there is a vacuum in the leadership of the church since no elections has been held;
- d) The office therefore revokes the said confirmation letter issued on 5th February, 2019 pending the outcome of the Peace and Reconciliation Committee report and the timeline has been extended for a further period of six (6) months from 13th February, 2019 to meet and come up with a clear roadmap on achieving peace, uniting the church, amending the Constitution and ensuring elections are conducted.”

Thereafter, the Central Board of the AIPCA, through the National Executive Members, Julius Njoroge Gitau (1st interested party), Paul Watoro, Stanley Mburu and Stanley Muthomi filed Nrb. HCC 36/2019 against the Registrar of Societies, and 3 others and the Registered Trustees of AIPCA as and interested party, seeking inter alia;

“(1) A declaration that the purported letter of 13/02/2019 from the 1st defendant purporting to revoke a confirmation letter of National Office bearers of the AIPCA Church dated 05/02/2011 purportedly pending the alleged outcome of the peace and reconciliation committee report, which the 1st defendant further unilaterally and illegally purported to extend its tenure for a further period of six months from 13/02/2019 is illegal null and void.”

The applicant has not told the court whether there are any orders made in Nrb. HCC 36/2019 revoking the letter of 13/02/2019. As things stand and in light of the letter of 13/02/2019 “there is vacuum in the leadership of the church since no elections have been held.” It is apparent that there are serious leadership wrangles in AIPCA Church. In light of the letter of 13/2/2019, it means that the 1st interested party cannot hold himself out as the spiritual leader of the AIPCA and he would not be expected to be visiting Nyahururu Cathedral Local Church in his capacity as the spiritual leader of the AIPCA church as alleged by the applicants. Although the applicants have alleged that elections of the office bearer was done following J. Wasilwa’s ruling on 27/10/2016, the letter of 13/02/2019 indicates that serious leadership wrangles have continued to mar the AIPCA Church and no elections took place. There is evidence that the parties herein represent two factions fighting for the church leadership.

This court cannot determine on an application for stay of execution, the status of the interested parties in the said church. The applicants have pleaded that they are likely to be held in contempt of court because they cannot stop the 1st Interested Party from visiting the Nyahururu AIPCA Cathedral. However, in light of the fact that there is still a dispute as to whether the 1st Interested Party is the spiritual

head of the AIPCA Society in Kenya, he would not be expected to be visiting the Nyahururu Church without prior permission. In any event, the 1st Interested Party is aware of the letter of 13/02/2019 as he has filed a suit in an attempt to have it reversed in Nkr. HCCC 36/2019 and so far, no orders have been made.

It is the applicant's submission that the Registrar cannot revoke the election of the Interested Party or any other office bearer. In my view, the letter dated 13/2/2019 did not purport to revoke the Interested Party's election but merely made some clarification on what had taken place. I therefore find that the applicants have not demonstrated that they will suffer any loss if an order of injunction is not granted because it is not yet determined whether the 1st interested party was elected as Archbishop of AIPCA. Such an issue cannot be addressed in the pending suit application. If the court was to grant the prayer sought, it would in effect be deterring the appeal which seeks to have the order of 16/01/2019 set aside.

It was also argued that the order of the court was directed at the wrong parties i.e. that the interested parties were only cited as such and were never served with the application and yet it is the applicants who are intended to obey and comply with the court order. Having read the lower court's ruling, it was not possible to tell whether or not the interested parties were notified of the application in which orders that were meant to affect them were made. That notwithstanding, I believe that the interested parties are aware of the orders that were issued in the trial because when they attempted to visit the Cathedral, the AIPCA Nyandarua North Committee moved to court in CMCC 84/2019 where an urgent order was given barring the interested parties and Ayub Kigotho from visiting AIPCA Nyahururu Cathedral Local Church. The said order is still in force and has never been challenged on appeal. Even if the court were to grant the order sought, it would be in vain as the interested party is still barred by dint of the order of 26/04/2019 in CMCC 84/2019.

The second requirement for grant of an order of injunction/stay pending appeal is that the applicant has offered security for due performance of the decree. The applicant did not offer any security save that in his submissions, Mr. Njogu stated that the applicant is willing to give security. Having found that the applicants will not suffer substantial loss if the order is not granted, I don't think the court need to consider whether or not the applicant should offer security for due performance of the decree.

The third principle is that the application was brought without unreasonable delay. What is deemed to be unreasonable delay depends on the circumstances of each particular case. In the instant case, the impugned order was made on 16/01/2019. The instant application was filed exactly three months later on 16/04/2019. The applicant has explained the reason for the delay being that he had to procure a copy of the court's ruling which they waited for till sometime in March 2019 and thereafter they filed the application within 30 days.

In my view, though it should not have taken the applicant a whole 30 days to file this application upon receipt of the proceedings, a delay of 3 months was not inordinate delay in the circumstances.

In the end, I find that the applicants have not met the threshold for grant of an order of injunction pending appeal. The application dated 16/04/2019 is hereby dismissed with costs to the respondent. The applicants should prepare the Record of Appeal and have the appeal determined at once.

Dated, signed and Delivered at Nyahururu this 16th day of July, 2020.

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R.V.P. Wendoh

JUDGE

PRESENT:

(Virtual)

Mr. G. Chege for the respondent

Mr. Kinyua Njogu for applicant – absent

Eric – Court Assistant