REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 6 OF 2018

REVEREND JOHN JUMA.....1ST PETITIONER

REVEREND SIMON ALOVI.....2ND PETITIONER

REVEREND TOM OLENDO.....3RD PETITIONER

VERSUS

REVEREND PATRICK LIHANDA.....1ST RESPONDENT

REVEREND PATRICK OYONDI.....2ND RESPONDENT

AND

REVEREND ZEDEKIAH ORERA.....1ST INTERESTED PARTY

REVEREND ELISHA KIMAIYO.....2ND INTERESTED PARTY

THE REGISTERED TRUSTEES PENTESCOSTAL

ASSEMBLIES OF GOD.....3RD INTERESTED PARTY

THE MEMBERS OF THE PENTECOSTAL

ASSEMBLIES OF GOD CHURCH KENYA

(P.A.G.) APPEALS & ARBITRATION TRIBUNAL....4TH INTERESTED PARTY

THE CHURCH COUNCIL.....5TH INTERESTED PARTY

AND

IN THE MATTER OF THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 8 OF 2018

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTALD RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ARTICLES 1, 2, 22, 23, 27, 32, 36, 38 AND 81 OF THE

CONSTITUTION OF KENYA, 2010 AMONG OTHERS

AND

IN THE MATTER OF THE SOCIETIES ACT

AND

IN THE MATTER OF THE PENTECOSTAL ASSEMBLIES OF GOD – KENYA, CONSTITUTIOIN

BETWEEN

ELIJAH KATHIARI MIKWA.....1ST PETITIONER

DANIEL NYAKUNDI OYARO.....2ND PETITIONER

MARK KAKAI NANGALAMA.....3RD PETITIONER

SOLOMON KIPKEMBOI MAYO.....4TH PETITIONER

AND

PENTECOSTAL ASSEMBLIES OF

GOD-KENYA CHURCH.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

THE REGISTRAR OF SOCIETIES.....3RD RESPONDENT

REV. PATRICK MUSUNGU LIHANDA.....4TH RESPONDENT

RULING OF THE COURT

1. This ruling determines the Notice of Motion dated 18.12.2018 filed by Rev Patrick Lihanda and Rev Patrick Oyondi the applicants herein.

2. The application seeks for the following orders:

> ***a. Stay of further proceedings in this matter and in the proceedings related to the court annexed mediation or before the mediators save for the hearing of this application remain stayed until the date fixed for interpartes hearing of the application;***
>
> ***b. The order of stay granted in this matter remain in force after the interpartes hearing and or after the date fixed for the aforesaid hearing until the final determination of the application;***
>
> ***c. The final order granted on this application be that all proceedings in this matter and those other matters consolidated with this petition shall remain stayed until the appeal to the Court of Appeal initiated by the Notice dated 7th December 2018 is finally determined;***
>
> ***d. Costs occasioned by the instant application abide the outcome.***

3. The application is premised on the 8 grounds on the face of the Notice of Motion and supported by an affidavit sworn by Rev Patrick Lihanda and the oral submissions made in court by the applicants' counsel Mr Musiega.

4. The 8 grounds basically set out the basis upon which the application is brought and giving the background to the proceedings leading to the ruling of 5th December 2018 by the Hon Justice Njagi.

5. According to the applicants, they have filed a Notice of Appeal against the said ruling and that there is need for stay because the court has set in motion a speedy mediation process by directing the parties to report back to court on 7th January 2019. That therefore should the mediation process go on as directed by the court then the appeal as intended shall be rendered nugatory and useless that the applicants have a right of appeal without being impeded by the mediation process that is under legal challenge. Further, that the purpose of the appeal is not to scuttle the mediation process, that the orders sought are in the interest of justice and that the applicants are ready to abide by any terms that this court may make.

6. The application is further supported by the affidavit sworn by Rev Patrick Lihanda restating the above grounds and giving the brief history of the subject dispute as summarized in the ruling of Hon Njagi J made on 5th December, 2018.

7. The application was vehemently opposed by the Respondents who are the petitioners and the interested parties who filed a preliminary objection and replying affidavits and whose contents are contained in the written and oral submissions made in court during the hearing of the application herein hence I shall not reproduce the said depositions as they are contained in the submissions below.

8. The application was canvassed by way of oral submissions with Mr Musiega counsel appearing for the applicants, Mr H.M Wasilwa appearing for the Respondents Petitioners and Mr Ochieng Odinga appearing for the interested parties Respondents opposing the application and urging the court to dismiss the application with costs.

9. In his submissions, Mr Musiega asserted that immediately after the ruling of 5th December 2018 his clients filed a Notice of Appeal on 7.12.2018 and that therefore this Court has jurisdiction to entertain the prayer for stay pending appeal.

10. Counsel for the applicants reiterated the prayers in the application and grounds thereunder and the depositions by his client Rev Patrick Lihanda contained in the supportin g affidavit sworn on 18th December 2018 and the annexed Notice of Appeal PL1(a).

11. According to Mr Musiega, the applicants have explained that they will lose substantially if the Orders of 5.2.2018 are executed and more so, if the Court annexed mediation proceeds. That Mediation proceedings are the subject of the appeal which is a valid appeal for purposes of these proceedings and and that they are only due to file the record of appeal which has been delayed by non-availability of Court proceedings from the superior Court.it was submitted that the Applicants have complied with minimum requirement for stay so that the appeal is not rendered nugatory. That the application was filed 2 days after the ruling impugned was delivered so they acted promptly. The applicants also undertake that they will abide by the terms that this Court may issue.

12. Referring to the reply filed by the Respondents and the Preliminary Objection filed by the Respondents, it was submitted that in the Reply by the firm of Mokua by Dr. Zedekiah Orera, it addresses an earlier appeal which had been filed against an earlier ruling of the Court and not the present application arising from our Notice of Appeal dated 7.12.2018. it was submitted that specifically the said Replying affidavit introduces Civil Application No. 100 of 2018 which was filed in the Court of Appeal on 19.11.2018 seeking stay of the earlier orders of the same Court issued on 8.11.2018 which re totally unrelated. Counsel emphasized that this application relates to the ruling of 5.12.2018 hence the Reply is irrelevant. That in any case, Rev Oira was the General Secretary of the Church until 5th December 2018. That counsel also introduces issues of Church Management of Church funds which have no relevance here.

13. Further, that the said deponent also introduces the Kisii case which was filed by totally different people who appear interested in the Kakamega HC Petition No 6/2018. The court was urged to disregard extraneous matters being introduced.

14. On the affidavit sworn by Arnold Otengo Advocate on 26.12.2018, it was submitted that the said Replying affidavit is incompetent because the advocate cannot assume the role of a witness in highly contentious matters. That the Advocate has to choose being a lawyer or witness. Counsel urged the court to disregard his affidavit and expunge it from the record.

15. It was also submitted that the persons Elijah Kathian Mkwa, Daniel Nyakundi, Mark Kakai and Solomon Kipkemboi Maiyo are not Petitioners and that they swore affidavits to the effect that they never gave any instructions to Mr Otengo Advocate to file the petititon on their behalf.

16. On the Preliminary Objection filed by Mr H.M.Wasilwa advocate on behalf of his clients the respondents/ petitioners, it was submitted that the competence of the appeal is for the Court of Appeal not for this Court to determine.

17. Further, that Article 50(1) of the Constitution gives the right to a party who is aggrieved to seek redress in one Court or another hence the provision of the Civil Procedure Act must be read in the context of the right to seek justice without obstruction.

18. Counsel submitted that if this Court finds that Section 75 of Civil Procedure Act and Order 43 of Civil Procedure Rules and Section 7 of Civil Procedure Act are offended then it should find that the Constitutional provisions are paramount.

19. On the issue of seeking leave it was submitted that this is a procedural requirement and a technicality cured by Article 159 (2) (d) of the Constitution. Further, that Preliminary objections should be on a matter of law not where evidence or inquiry is required. In this case it was submitted that we are dealing with a Constitutional Petition and therefore the Civil Procedure Act and Rules made thereunder do not apply. That the Rules applicable are as per Article 258 of the Constitution on the management of Constitutional Petitions.

20. It was submitted that the Mutunga Rule 32 provides for stay pending appeal and no leave to appeal is provided for.

21. In opposing the application, Mr Wasilwa Advocate for the Respondents submitted relying on the preliminary objection filed and raising three main issues namely:

(1) Jurisdiction

(2) Estoppel by record

(3) Estoppel by conduct

(4) Resjudicata

(5) Res subjudice

22. It was submitted that there is no valid Notice of Appeal under section 75 of Civil Procedure Act and Order 43 (3) of the Civil Procedure Rules hence this Court has no jurisdiction to grant the remedy of stay.

23. Further, that neither the Constitution of Kenya in its substantive nor procedural rules demean or amend the procedural imperative in the Civil Procedure Act. According to the Respondents, the Mutunga Rules do not amend the Civil Procedure Act and the Rules made thereunder. That the Mutunga Rules do not mention requirements for leave but appeals generally are governed by Order 43 of the CPR. That an application made under the generic Mutunga Rules is not excluded by Order 43(3) of CPR and Section 75(1) of CPA. It was submitted that therefore in the absence of leave to appeal as a condition precedent, the Notice of Appeal is not nullity. Reliane was placed on the judgment by Olga Sewe J in **Edith Njoroge V. Brooks Holdings Co. Ltd [2018] eKLR citing Mandara Vs. Rattan Singh [1965] E.A. 118 where the court persuasively held that** Leave is necessary to appeal against the Order.

24. It was further submitted that the right of appeal goes to jurisdiction hence **Article 159 (2) (d)** cannot cure the defect. The case of See the case of **Mumo Matemu Vs. Trusted Society was cited in this regard as quoted by Olga Sewe J in her ruling in the Edith Njoroge case(supra).**

25. On Estoppel, the respondent's counsel submitted that the Motion that culminated in the impugned Ruling is stay of proceedings and that the applicant is flip flopping on proceedings. Reliance was placed on the case of **George Kihara Mbiyu V Margaret Mbiyu [2018] eKLR.**

26. **On Resjudicata** it was submitted that Resjudicata applies even in interlocutory proceedings. That this application was finally determined in the Ruling subject of Notice of Motion dated 13.11.2018 where Justice Njagi declined stay which is being brought here.

27. On estoppel by conduct, it was submitted that the applicant agreed to Court annexed mediation by their own affidavit on oath and their Advocates submissions hence they are estopped from challenging a process they consented to.

28. On Estoppel by record, it was submitted that the Order directing mediation on page 526 of Kisii case was by active consent of the applicant as per the record of 30.11.2018 and recorded which was captured as a consent. Accordingly, it was contended in submission that a consent cannot be reviewed without another consent in the absence of any of the known vitiating factors.

29. On subjudice, counsel for the respondents submitted urging this court to examine its own past decisions on the same as it prevents abuse of Court process.

30. It was submitted urging the court to invoke 232 of the Constitution on efficient, effective and economic use of resources. According to the respondents, the conduct of the applicant does not make sense of efficient, effective and economic use of resources. That in Petition 16/2018, in Kisii H.C., Kakamega HC Pet. 6/2018 and the substance therein supported by these Applicants, the Kisii HC application dated 11.12.2018 is related to this application as they were filed on the same day and that the effect is to unlock the disputed church elections.

31. It is was submitted that it is useful to recall that the applicant's Counsel admits that the Court Order for Court annexed mediation binds all parties hence the stay sought was not necessary and as such, section 120 of Evidence Act is applicable and the applicants are estopped from challenging the mediation process.

32. On whether the preliminary objection is a pure point of law, counsel for the respondent submitted that he had raised issues of law but that those issues do not fall exclusively in the **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 690** case.

33. On allegations that some parties had disowned the petition, it was further submitted that in Constitutional Petitions, the applicable law for withdrawal of a party is section 5 of the subsidiary legislation - Mutunga Rules and that the Court may even proceed to hear the Petition despite the withdrawal. Therefore the allegation that some parties never instructed an Advocate do not hold any water.

34. On jurisdiction of the court to determine the constitutional petition the decision of this court in the AIPCA Vs. Samuel Muguna case was cited.

35. On behalf of the Petitoners in the Nairobi Petition, Mr Ochieng Odinga advocate submitted relying on the two replying filed on 26.12.2018 and the one sworn on 8.11.2018, in Petition 364/2018 consolidated with this Petition. He also relied on affidavit by Rev. Zedekiah Orera Sworn on 27.12.2018 and the Replying affidavit sworn on 17.12.2018 by Rev Zedekiah Orera.

36. Mr Ochieng further fully associated himself with the submissions made by Mr H.M.Wasilwa on behalf of the respondents.

37. It was submitted that no further affidavits had been filed to controvert the assertions in the replying affidavits. That the power of the Court to grant or refuse stay is a discretionary power which ought to be considered depending on special circumstances and unique requirement of each case. This court was urged to be guided by 2 doctrines of Equity:

(1) He who comes to Equity must come with clean Hands.

(2) A party should not benefit from his own wrong doing.

38. According to Mr MOchieng, this court should consider the conduct of the Applicants who have orchestrated a scheme of events aimed at defeating the cause of justice. That on 8.11.2018 the Court suspended PAG Elections scheduled for 5th and 6th of December 2018 and that despite that Ruling, the Applicants proceed to prepare for elections, an illegal Bank Account was opened and funds collected but today there are no funds in the said Account as at now. That at Page 512 of the Kisii bundle, Para 14, the Court found the Applicant to be in contempt of Court orders which contempt is still outstanding.

39. That the Applicants have not disclosed that there is C.A. No. 100/2018 arising from the ruling of 8.11.2018 in which ruling the Court suspended PAG elections. That said decision is also in Order 1 of the Orders of 5.12.2018.

40. That the Court of Appeal considered the application for stay of proceedings in the Kisii file and at page 524 of the said Kisii Bundle the Court of Appeal gave directions on the same.

41. It was further submitted that the parties voluntarily entered into a consent to have this dispute resolved and hence the affidavit of 26.12.2018 annexing various communication copies to Counsels asking for Preliminary Meetings jointly but that counsel received no responses from the Applicant's Counsel as only Mr. Wasilwa responded. That the interested parties had made several attempts to meet but the Applicants had frustrated the process, and that that is what drove the interested parties to the Kisii matter.

42. On the question of expunging the affidavits sworn by the advocate Mr Otengo for the petitioners in the Kisii petition, it was submitted that the affidavits are specific to matters before this Court and within his knowledge.

43. On application of the Civil Procedure Act and Rules, it was submitted that where Mutunga Rules are silent on procedure, the Civil Procedure Act and Rules fill the gap. Further, that Appeal processes are not excluded by Mutunga Rules which latter should not be read exclusive of other rules. Counsel urged the court to dismiss the application by the applicants with costs to the interested parties.

44. Mr Mokua advocate for the interested parties submitted concurring with submissions by Mr. Wasilwa and Arnold Odinga Advocate for the petitioner and added that the law and decisions have settled applications of this nature.

45. It was submitted that there is no draft Memorandum of appeal for this court to see whether there is an arguable appeal hence it is difficult to demonstrate that the intended appeal is arguable. According to Mr Mokua, the Orders of 5.12.2018 arose from a consent of all parties and that therefore a party who seeks to challenge the consent must do so in the manner prescribed by law and not through an appeal. That an appeal was preferred against Orders of 8.11.2018 challenging elections of the church. Stay is also sought in respect of the said orders which is the same stay which is being sought herein.

46. On what substantial loss will be occasioned if stay is not granted, it was submitted that the elections which were to be held have been overtaken by events and that there is no disclosure made of what loss or substantial loss that would be occasioned if stay is denied.

47. Further submission was that the order on mediation affects all parties before the Court including the applicants. That Mediation process will resolve issues and if not parties will return back to Court.

48. It was submitted that this is a church matter which requires that all church Members sit together and resolve the issues involved. That all the 3 offices are contested. However, that the holders are pastors of the church and they can serve anywhere whether removed from those offices or not.

49. According to the interested parties, Mediation is therefore necessary and that if the Court of Appeal grants a stay well and good but that this Court should not grant stay as no loss has been demonstrated to occur to the applicants if the stay is declined. Mr Mokua urged the court to find that this application is devoid of merit and dismiss it.

50. In a brief rejoinder by Mr Musiega counsel for the applicants, it was submitted that the Applicants have not violated Section 75(1) of Civil Procedure Act and that paragraph 75(1) (h) anticipates other appeals which arise from other rules which do not require leave of Court.

51. This court was invited to infer that appeals arising from Constitutional Petitions under Rule 32 of Mutunga Rules do not require leave of court. They arise as a matter of right. On the judgement by Sewe J in the cited case of Edith Njoroge Kihara it was submitted that the same is not binding on this Court as the learned Judge was not addressed on Rule 32 of the Mutunga Rules.

52. Further submission was that the consent of 30.11.2018 was for Parties to agree if the elections were to be held by 5th December 2018 without the Constitutional change. The consent collapsed. That the parties did not consent to Orders of 5.12.2018 being made and that parties have a right to appeal against the Orders of 5.12.2018 hence the application for stay. Should be granted.

53. On allegations that his clients were in contempt of court orders in the Kisii Petition, it was submitted that there is no finding of contempt on the part of the applicants herein.

54. Counsel reiterated the prayers sought and maintained that the overriding principle is whether there is a valid appeal and not whether there is an arguable appeal.

DETERMINATION

55. I have considered all the foregoing and in my humble view the main issue for determination in this application is whether the applicant is entitled to the orders sought namely, stay of the execution of orders made by Njagi J on 5th December 2018 and stay of proceedings in this petition pending appeal.

56. As the Court of Appeal held in the case of **Siegfried Busch vs MCSK [2013]eKLR:**

> ***"A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status***

quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment..."

57. **In this case, however,** this court has been urged to dismiss the application for stay on the grounds that the court has no jurisdiction to grant the orders sought as the intended appeal is fatally incompetent as the applicant did not in the first instance apply and obtain leave of court to file an appeal against the order of the learned Judge made on 5th December, 2018.

58. It is now trite law that where the court's jurisdiction is questioned the court must first and foremost determine the question of whether it is clothed with the necessary jurisdiction to entertain the matter. On the question of jurisdiction, the Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank [2012] eKLR held:**

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings … where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

59. Therefore, a party who desires to file an appeal challenging the decision or order of the court is under a duty to demonstrate under what law that right to be heard on an appeal is conferred or if not, show that leave has been granted to lodge the appeal before the court. The above position is backed by the Court of Appeal in **Nyutu Agrovet Ltd V Airtel Networks Limited (2015) e KLR where the superior court also** held that leave to appeal does not constitute the right to appeal. The right must precede leave. The Court of Appeal in the above **Nyutu Agrovet Ltd case** (supra) cited with approval the decision by Ringera J (as he then was) in **Nova Chemicals Ltd vs Alcon International Ltd HC MISC APPL 1124/2002** where the learned judge held that:

" the point of departuremust bethe recognition that the rightof appeal, with orwithoutleave, must be conferredby statuteand the sameis never to be implied". The Court of Appeal further stated that:

"…….and even Section 75 of the Civil ProcedureAct, givingthis courtjurisdiction to hearappeals from the High court, should bereadto meanthat these provisionsof law alsoconfer the right of appeal on thelitigants.The poweror authorityto hear an appeal is not synonymouswith the rightof appeal which alitigantshould demonstratethata given law giveshim or her tocome beforethis court.To me, even ifjurisdiction and the right of appeal may be referred tosideby sideor in the same breath, the two termsdo notmean oneand the same thing.It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference.If the power and authority of or for a courtto entertain a matter (jurisdiction) is not conferred by law then that court has no businessto entertain the matter.(see owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1.

60. The Court of Appeal in **CA Nairobi 86 of 2015 Peter Nyaga Murage v Joseph Mutunga**, referring to failure to seek leave to appeal from an order stated:

" without leaveof the High Court, the applicant was not entitledto give Notice of Appeal where, as in this case, leaveto appeal is necessary by dint of Section 75of the Civil ProcedureActand Order 43of the Civil Procedure Rules, the procurement of leaveto appeal issinequa nonto the lodging of the Noticeof Appeal.Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked.In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water".

61. As was held in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others (2013) e KLR**, that:

"the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay , a general white wash, that cures and mends all ills, misdeeds and defaults of litigation".

62. The same Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others CA 290 of 2012** (five Judge Bench) stated succinctly as follows, concerning the issue of taking umbrage under Article 159(2) (d) of the Constitution.

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1 B of the Civil Procedure Act Cap 21 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases".

63. In the same breath, having already found that jurisdiction stands on a higher pedestal and in a more peremptory position than procedural rules and that the requirements for leave to appeal is a jurisdictional issue, I can only reiterate that it goes to the very heart of substantive validity of court possesses and determination and certainly does not run a foul the substantive procedure, dichotomy of Article 159 of the Constitution.

64. Nyarangi JA in the case of **Owners of Motor Vessel " Lilian S" v Caltex Oil (K Ltd (1989) KLR 1 stated:**

> ***"……jurisdictionis everything withoutit, a court hasno power to makeone more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction***".

65. The big question that begs the answer from the above exposition and plethora of decisions is whether the applicants herein ought to have sought and obtained leave to appeal against the order of Njagi J made on 5th December, 2018.

66. I have examined the provisions under which the application subject of the intended appeal was brought. I do not find any provision of the Civil Procedure Act or Rules cited.

67. The application was specifically brought under Article 23 of the Constitution seeking for injunctive or conservatory orders pending the hearing and determination of the substantive petition. I have also examined the Mutunga Rules and at Rule 32 therein I find the provision similar to section 75 of the CPA and Order 43 of the Civil Procedure Rules on Appeals and Order 42 Rule 6 of the Civil Procedure Rules on Stay pending appeal.

68. There is however no provision that leave must be sought and obtained before filing an interlocutory appeal as is in this case.

69. Rule 32 of the Mutunga Rules stipulate that an appeal or a second appeal shall not operate as a stay of execution of proceedings under a decree or order appealed. Further, that an application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

70. In addition the Rule is clear that a formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

71. From the above provisions of the Constitution on appeals from decisions and or orders arising from proceedings commenced under the Constitution this court does not find any lacunae in the rules that would necessitate importation of the provisions of the Civil Procedure Act and Rules. Accordingly, I reject the Petitioner's submission that the Notice of Appeal and therefore the application are incompetent for having been filed without leave of the Court that made that order.

72. A similar situation arose in the **Thomas Patrick Gilbert Cholmondeley v Republic [2008]eKLR Appeal** case premised on alleged violation of his Constitutional rights and in determining whether the appellant had a right to appeal against an interlocutory order in the course of proceedings, the Court of Appeal had this to say:

> ***"We must now deal with the reasons why we ruled that the appeal before us was competent and that we had jurisdiction to deal with it. In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant's fundamental rights guaranteed by section 77 of the Constitution.***
>
> ***Whether that order was made pursuant to section 60 (1) of the Constitution, and we have found it could not have been made under that section, or whether it was made pursuant to the exercise of inherent jurisdiction as the learned Judge said he was doing, the effect of the order was to violate the appellant's rights under section 77. The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial.***
>
> ***Secondly, he had the option to appeal under section 84 (1) of the Constitution. He chose to exercise this option and it is to be noted that the trial Judge readily allowed him to appeal. The Judge must have been aware that his decision touched on the fundamental rights of the appellant guaranteed by the Constitution and hence he (i.e. the Judge) readily agreed to stop the trial and allow the appellant to exercise his right of appeal under section 84 (7) of the Constitution. It was for these considerations that we held the appellant had a right of appeal to the Court and that we, therefore, had jurisdiction to hear his appeal.***
>
> ***We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."***

73. The above decision though made in a criminal matter makes it clear that in Constitutional petitions, an applicant who is aggrieved by an interlocutory order of the trial court has an unfettered right of appeal albeit stay of proceedings is frowned upon. Based on the above decision, I hold the view that the applicant in constitutional petition proceedings has an unencumbered right of appeal against any order made by the court and is not to be barred by invoking procedural requirements under the Civil Procedure Act and Rules, as such procedural technicalities have no place in matters of enforcement of constitutional rights.

74. This is not to say that in appropriate cases the Civil Procedure Act and Rules would not apply as was held in **VALLERIE NAMTILU WAFULA & ANOTHER V KENYA NATIONAL UNION OF TEACHERS (KNUT) & 2 OTHERS [2012]eKLR** that:

> ***"It is the second respondent's contention that in petitions of this nature the civil procedure Rules have no place and therefore any application expressed to be brought under the latter is incompetent. First and foremost it must be noted that under Article 22(3), the Chief Justice is enjoined to make rules inter alia providing for the court proceedings which shall satisfy the criteria that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedurals technicalities. Although the said Rules are yet to be promulgated (the rules have since been promulgated hereinbefore referred to as Mutunga Rules), the spirit of the foregoing provision as read together with the provisions of Article 159(2) (d) is clear that technicalities of procedure, more particularly in application brought for the enforcement of the Bill of Rights, should not be entertained. Even prior to the promulgation of the current Constitution the relevance of the Civil Procedure Rules was considered in Meme Vs. Republic [2014] 1 EA 124; [2004] 1 KLR 637, in which Rawal J (as she then was), Njagi J & Ojwang' AJ (as he then was) held that at a very basic level the Court is empowered to draw from the Civil Procedure rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practice and Procedure Rules and by virtue of Order 1 Rule 10(2). This decision should put the second Respondent's position on the applicability of Civil Procedure rules to Constitutional petitions to rest."***

75. The decision by Hon Justice Sewe as persuasive as it is clear that the learned judge was not dealing with Rule 32 of the Mutunga Rules. She was dealing with matters ordinary appeals arising from orders made under the Civil Procedure Act and Rules. Accordingly the decision thereof does not bind this court dealing with matters Constitutional.

76. **It was also contended that the applicant had not disclosed the substance of the intended appeal**. Whereas under Order 42 rule 6 of the ***Civil Procedure Rules***, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success, I appreciate that in such an applications, it is permitted and desirable for the applicant to disclose the nature of his intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the applicant, it is not doing so on frivolous grounds.

77. In my view the lack of the requirement to prove the existence of an appeal with overwhelming chances of success is for good cause. It is meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal. This was the position adopted in **Universal Petroleum Services Limited vs. B P Tanzania Limited [2006] 1 EA 486** where the Court held that:

> ***"The granting or otherwise of an order of stay of execution under rule 9(2)(b) is at the discretion of the court and in the exercise of that judicial discretion the court as and where is relevant considers a number of factors, notably, whether the refusal to grant stay is likely to cause substantial and irreparable injury or loss to an applicant, whether the injury or loss cannot be atoned by damages, balance of convenience, and whether prima facie the intended appeal has likelihood of success. Above all, further to considering the above factors the court takes into account the individual circumstances and merits of the case in question…At this stage one has to be careful not to pre-empt the pending appeal and for that reason, the court has to discourage a detailed discussion of the weaknesses or otherwise of the decision intended to be impugned on appeal… There is also a danger in saying or making a finding that an appeal has an overwhelming chances of success."***

78. **In Mangungu vs. National Bank Of Commerce Ltd [2007] 2 EA 285**, the Court expressed itself on the issue as follows:

> ***"Generally the merits of a party's case in a stay application is not a particularly relevant matter for consideration at this stage. Although it is true that the Court under rule 9(2)(b) has discretion to stay execution, but only on grounds which are relevant to a stay order. Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgement should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction."***

79. Accordingly, I will avoid the temptation to embark on such a potentially perilous and embarrassing voyage.

80. The above notwithstanding, the applicant at paragraphs 6 of the affidavit in support of the application has stated clearly that they intend to challenge the viability of the mediation process ordered by the court given that the major dispute was not the amendment of the Church Constitution which is not an issue before the court at the moment but rather whether the clamour for constitutional change in the church was justifiable ground to interfere with the timing of the elections. The applicant asserts that this is one of the monumental constitutional and legal issues that they intend to raise in the intended appeal.

81. It is therefore my view and I hold that the mere fact that an appeal is yet to be filed or that there is no draft memorandum of appeal attached to this application does not necessarily bar this Court from granting orders staying its decision pending an intended appeal once a notice of appeal is given.

82. Therefore, on whether the applicant is deserving of the orders of stay pending appeal, this is an application that invokes the discretionary powers of the court. This is evidenced from the language of the Constitution in Rule 32 of the Mutunga Rules which empowers this court to stay proceedings or order appealed from.

83. Of course discretionary powers must be exercised judiciously. The conditions to be met before stay is granted are provided by the Order 42 Rule 6(2) as follows:

"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."

84. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

85. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal. The principles to be applied when considering an application for stay of execution pending appeal are the same, whether the application is before the Court of APPEAL or before the High Court, save for the question of arguability of the appeal. This is so because Rule 32 of the Mutunga Rules does not set out these principles with regard to constitutional matters and that is the reason why I have invoked the above principles set out in the **Bhutt v Rent Tribunal** [supra] case.

86. In the instant case, the vast records show that the applicant herein has already lodged an appeal against the ruling made on 18th December 2018 which orders of injunction stopped the holding of church elections as scheduled and as stipulated in the Church Constitution.

87. There is also undisputed material on record that the order above stated was appealed against.

88. Further, there is undisputed fact that there is **a consent recorded by the court on 30th November 2018 to the effect** that parties were to go for court annexed mediation and which order has not been set aside or reviewed in the manner stipulated in law. See the decision in **NSS V Michael MWALO CA NRBI NO. 293 of 2014{2015}** eKlr.

89. In the said consent the applicants' counsel is recorded stating that ***"my clients are ready and willing to participate in the ADR process so long as it does not (sic) tied to the review of the Constitution…we are not against the Constitutional review" the above address by Mr Musiega was made after the court had recorded the consent at 11 a.m.***

90. In the view of this court, the ruling sought to be appealed from and from the applicant's own affidavit, the fundamental quarrel is with regard to the mediation process which the applicants appear not prepared to engage in. If that be the case, the applicants have legal avenues for pulling out of the mediation process and therefore a stay pending appeal in this case will not assist them have their grievances redressed.

91. Therefore, on whether the applicants have demonstrated that they will suffer any loss leave alone substantial loss if the stay sought is not granted and therefore whether they will be rendered pious explorers in the judicial process should the stay be denied and the intended appeal succeeds, I find that the applicants have not satisfied this court on the same and therefore they are undeserving of this court's discretion.

92. According to the applicant, if the mediation as ordered by the court proceeds in the manner and speed ordered by the court there will be nothing left for the determination by the court of Appeal hence rendering the appeal nugatory and useless.

93. This court appreciates that Article 159 (2) (c) of the Constitution mandates the courts to be guided, in the exercise of judicial authority, by the principles inter alia that justice shall not be delayed and that alternative forms of dispute resolution including reconciliation mediation, arbitration and traditional dispute resolution mechanisms shall be promoted as long as they do not violate the bill of rights or repugnant to justice and morality or results in outcomes which are repugnant to justice and morality or inconsistent with the Constitution.

94. The purpose for which disputes are brought before the court is for the court to assist the parties resolve those disputes and not to escalate the same. And more particularly where parties enter into a consent to resolve the dispute in a particular manner which is recognized by law, the court has no jurisdiction to alter the consent in the absence of another consent or unless the conditions for setting aside of the consent are established and on an application before the court for consideration.

95. The applicant has not alleged in their application that Court annexed mediation as ordered by the court which as I have stated was by consent of the parties, is in any way inconsistent with the Constitution or that it is in violation of their rights under the Constitution or that the mode of mediation Ordered by the court with the consent of the parties is repugnant to justice and morality or will result in outcomes that would be repugnant to justice and morality. Proof of the above would entitle them of stay even if the question of substantial loss is not demonstrated.

96. The applicant in my humble view cannot suffer loss and neither can the intended appeal be said to be rendered nugatory should stay be denied and the appeal succeeds since the applicants have not sought to set aside the consent for referring the dispute herein to mediation which is a constitutionally and legally recognized process and means of settling disputes. Under Article 50(1) of the Constitution, 1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Mediation process is undertaken by independent persons or bodies established by law and therefore the applicant cannot claim to suffer loss if the dispute goes for mediation yet they were part of the consent that referred such dispute to mediation. And in Article 159(2)(c) of the Constitution, the supreme law of the land espouses ADR as a form of dispute resolution.

97. The applicants will in any event have an opportunity to participate in the formulation of the mediation terms of reference and therefore they should not be seen to be working towards frustrating the mediation process that is likely to assist the parties resolve the dispute in a manner that is not so adversarial. And should they be dissatisfied with the mediation process they can seek to pull out with reasons and they will be discharged from the process.

98. To grant stay is to delay this matter further as the intended elections of the Church were stopped and therefore there would be nothing that the applicants will be expected to be planning to do in view of the injunctive orders granted by the court stopping elections in the Church.

99. This court observes that much of the submissions and contentions delved into the likely arguments before the court of appeal and for that reason, I decline to venture into issues of subjudice and resjudicata as those are the main issues that I observe the respondents and interested parties are likely to urge before the court of appeal should the intended appeal mature for determination.

100. Only to mention that the affidavits sworn by Mr Odinga Advocate simply annexed documents which form part of the court record and not extraneous evidence and as such he has not descended into the arena of the dispute as a witness for his client but brought to the attention of the court what has transpired in other proceedings related to this application.

101. In the end, I find that the application for stay of the mediation proceedings as ordered by the court following a consent between the disputants hereto and stay of execution of the order of 5th December 2018 pending the intended appeal is not merited. The application dated 18th December, 2018 is hereby dismissed.

102. The dispute being between and among men and women of the flock I order that each party shall bear their own costs.

Dated, signed and delivered in open court at Siaya this 4th day of January 2019.

R.E.ABURILI

JUDGE

In the presence of:

Mr H.M Wasilwa Advocate for the respondents in this application also holding brief for Mr Mokua for the interested parties and for Mr Ochieng Odinga for the petitioners in the Nairobi Petition

Mr Musiega Advocate for the applicants

CA: Brenda and Modestar