



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 53 OF 2019**

**REV. ANDREW NZEKI** (*Being sued as Chairman of*

**ALL IN CHRIST CHURCH TALA REGION.....1<sup>ST</sup> APPELLANT/APPLICANT**

**PASTOR CHARLES KITUKU KITHUSI.....2<sup>ND</sup> APPELLANT/APPLICANT**

**RONALD MUTUA KUTU.....3<sup>RD</sup> APPELLANT/APPLICANT**

**DANIEL NGILA.....4<sup>TH</sup> APPELLANT/APPLICANT**

**ABEDNEGO KYALO MUNYAO.....5<sup>TH</sup> APPELLANT /APPLICANT**

**ROBERT NZUKI MWANIA.....6<sup>TH</sup> APPELLANT/APPLICANT**

**PETER KIMEU MUTULILI.....7<sup>TH</sup> APPELLANT/APPLICANT**

**VERSUS**

**BISHOP PAUL MUEMA MWANGANGI** (*Suing as Trustee and*

*Chairman on behalf of* **GOSPEL COMMUNITY**

**CHURCH & MINISTRIES.....RESPONDENT**

***(Being an Appeal from the Judgment of the Senior Principal Magistrate's Court at Kangundo in ELC. Case No. 126 of 2019 delivered on 2<sup>nd</sup> October, 2019 by Hon. D. Orimba, Senior Principal Magistrate)***

**RULING**

1. This Ruling is in respect to the Appellants' Notice of Motion dated 13<sup>th</sup> November, 2019, brought under Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 & 3A of the Civil Procedure Act. In the Application, the Appellants are seeking for the following orders:

***a) This Honourable Court be pleased to grant an order of stay of execution of the Judgment and Decree by Honourable D. Orimba, Senior Principal Magistrate delivered on the 2<sup>nd</sup> October, 2019 and any lower court proceedings pending the hearing and determination of the Applicants' ELC Appeal No. 53/2019.***

***b) The costs of this Application.***

2. The Application is supported by the Affidavit of Daniel Ngila, the Appellant who deponed that the Respondent is in the process of executing the Judgment that was delivered on 2<sup>nd</sup> October, 2019 in favour of the Respondent; that the Respondent obtained orders that compelled the Appellants to surrender the title documents of land parcel Matungulu/Kathwei/5004 and that the said land is in the name of the Appellants' church through its trustees.

3. The 4<sup>th</sup> Appellant deponed that the church building constructed on the suit land is at risk of being interfered with if the Judgment of the lower court of 2<sup>nd</sup> October, 2019 is executed and that the Appellants and their members have been forced to worship in temporary structures

having been forced to vacate their place of worship vide the Ruling of the court delivered on 11<sup>th</sup> July, 2018.

4. According to the 4<sup>th</sup> Appellant, the execution of the Judgment of the lower court will render the Appeal nugatory and a mere academic exercise as it will mean the Respondent's church, which is currently located elsewhere, relocating to the suit property which is registered in the name of "All in Christ Church" through its trustees; that if the Judgment is implemented, they will have to relocate because their temporary church structures are close to the suit property and that the Appellants' intention is to evict them from their land.

5. In his Relying Affidavit, the Respondent deponed that he is the general overseer, trustee and founder of Gospel Community Church Ministry which is headquartered in Nakuru and has several branches in the country and that on 20<sup>th</sup> July, 2007, he established a branch of the said church known as Gospel Community Church- Mukunike.

6. The Respondent deponed that Gospel Community Church Ministry bought land on which Gospel Community Church- Mukunike is constructed; that the said land was bought by the local church council led by pastor Justus Muasya and that the Applicants, being a small faction of Gospel Community Church chased away Pastor Justus Muasya who was charged with the leadership of Gospel Community Church, Mukunike.

7. The Respondent deponed that the Applicants replaced the names on the premises of the local church from "Gospel Community Church" to "All in Christ Church" and that as a result, he filed an Application in court to restrain the Applicants from their actions; that the court allowed his Application and that the effect of the Application was to remove the Applicants from the suit property.

8. It was deponed by the Respondent that since 18<sup>th</sup> April, 2018, it is his church that has been using the suit land; that the Applicants were aggrieved by the Ruling of the court that was delivered on 11<sup>th</sup> July, 2018 and filed Machakos ELC Appeal No. 53 of 2018 that has not been prosecuted to date and that the Certificate of Title that is in the names of the 4<sup>th</sup> and 5<sup>th</sup> Applicants was obtained through misrepresentation and illegality.

9. It was averred that the deponent approached the trial court vide an Application dated 3<sup>rd</sup> November, 2019 seeking cancellation of the title issued to the 4<sup>th</sup> and 5<sup>th</sup> Applicants and that the same was allowed vide order issued on 6<sup>th</sup> November, 2019. The deponent averred that the Judgment of the trial court entered on 2<sup>nd</sup> October, 2019 has not been stayed.

10. The Respondent finally deponed that the lower court found that the suit land was bought by the members of Gospel Community Church Ministry and not All in Christ Church; that since 2<sup>nd</sup> October, 2019 when the Judgment of the lower court was made, the Applicants waited until 13<sup>th</sup> November 2019 to file the current Application and that the Applicants are guilty of inordinate delay.

11. The Application was canvassed by way of written submissions. In his submissions, learned counsel for the Applicants framed four (4) issues for determination. Firstly, whether the Applicants' Application for stay meets the threshold under the law; secondly, whether the Applicants stand to irreparably suffer if the order for stay is not granted; thirdly, whether the Applicants' Application for stay was filed in good time and finally, whether the Applicant's Appeal meets the *prima facie* threshold under the law to warrant the order for stay of execution.

12. The Applicants' counsel submitted that the suit land is in the names of the trustees, on behalf of the members; that the Applicants stand to suffer irreparably if the Respondent proceeds to execute the Judgment and orders of the trial court; and that the instant Application was filed timeously.

13. Counsel for the Respondent submitted that the Judgment of the lower court was delivered on 2<sup>nd</sup> October 2019; that the Application for stay was filed on 13<sup>th</sup> November, 2019 being 41 days after the delivery of Judgment and that the Respondent, upon expiry of the statutory 30 days for lodging Appeal, moved the lower court to execute the Judgment and Decree of the lower court through an Application dated 3<sup>rd</sup> November 2019.

14. Learned counsel for the Respondent submitted that the Respondent filed a Notice of Motion Application seeking to restrain the Applicants or any other person claiming under them from selling, using, accessing, removing or holding any official launching of the AICC church as scheduled, or at any other date, on the suit property, pending the hearing and determination of the suit.

15. It was submitted by the Respondent's counsel that the Ruling of the lower court dated 11<sup>th</sup> July 2018 effectively removed the Appellants from the said church.

16. Counsel submitted that the Applicants have not demonstrated substantial loss and that the Appellants have not been in possession of the suit land. Counsel relied on the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto (2012) eKLR* where the court held as follows:

*"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..."*

17. The court was also invited to consider the decision of the Court of Appeal in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in which the court stated as follows:

*“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial 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 cornerstone of both jurisdictions for granting stay.”*

18. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending Appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are set out in that Rule in the following terms:

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

*(2) No order for stay of execution shall be made under sub-rule (1) unless—*

*(a)The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b)Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”*

19. The record shows that the Respondent sued the Appellants in Kangundo SPMCC No. 126 of 2019. In the Complaint, the Respondent sought for an order of permanent injunction restraining the Appellants from interfering with Respondent’s access, quiet occupation, selling, using, accessing or removing anything from the church known as Mukunike Gospel Community Church, and for the Appellants to reinstate the name “*Gospel Community Church, Mukunike*” and remove the name “*All in Christ Church Mukunike (AICC-Mukunike)*”. After hearing the witnesses, the learned Magistrate delivered his Judgment on 2<sup>nd</sup> October, 2019 allowing the Respondent’s claim.

20. The Appellants annexed on their Supporting Affidavit an order of the lower court dated 13<sup>th</sup> November, 2019 which was made pursuant to the Respondent’s Application dated 13<sup>th</sup> November, 2019. In the said order, the court directed the Appellants to avail and deposit in court the original certificate of title number 2390172 for land known as Mutungulu/Kawethe/5004.

21. The record shows that prior to hearing the suit, the court considered the Respondent’s Application for injunction. In its Ruling dated 11<sup>th</sup> July, 2018, the lower court granted to the Respondent an order of injunction restraining the Appellants from interfering with Respondent’s access, quiet occupation, selling, using, accessing or removing anything from the church known as Mukunike Gospel Community Church pending the hearing of the suit. That order remained in place until the delivery of the Judgment.

22. The law relating to a stay of execution was restated by the Court of Appeal in the case of *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* as follows:

*“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial 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 cornerstone of both jurisdictions for granting stay.”*

23. In the case of *Mukuma vs. Abuoga (1988) KLR 645*, the Court of Appeal stated that the issue of substantial loss is the cornerstone of the jurisdiction of the High Court and the Court of Appeal to grant an order of stay. The court went further to state as follows:

*“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

24. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto (2012) eKLR*, the court held as follows:

*“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...”*

25. The evidence before this court shows that the Appellants have not been in use of the suit property since 11<sup>th</sup> July, 2018 when the lower court restrained them from accessing or selling the suit property. In its Judgment, the trial court confirmed the order that it granted on 11<sup>th</sup> July, 2018.

26. The *status quo* that has always subsisted is the usage of the suit property by the Respondent and not the Appellants. Consequently, the Appellants will not suffer any substantial loss if they continue using the premises that they have been using to worship pending the hearing and determination of the Appeal.

27. Although the filing of the Application by the Appellants within two (2) months of the date of Judgment cannot be said to be inordinate delay, the evidence before me shows that the Respondent has already executed the said Judgment, an action that the court cannot reverse before hearing the Appeal.

28. That being the case, I find that the Application for stay of execution is not merited. The Application dated 13<sup>th</sup> November, 2019 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2020.**

**O.A. ANGOTE**

**JUDGE**