



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 16 OF 2016

**REV. PATRICK LIHANDA
APPELLANT/APPLICANT**

VERSUS

ALFRED KIMANO & 8 OTHERS

***(Suing in their capacity as the Board of Trustees of PAG (K) Pastors
and Staff Provident Fund) RESPONDENT***

[Being an appeal from the Ruling of Hon. B. Kasavuli Senior Resident Magistrate dated 4th March, 2016 in WINAM PMCC NO. 14 OF 2016 – ALFRED KIMANO & 8 OTHERS (Suing in their capacity as The Trustees of PAG (K) PASTORS & STAFF PROVIDENT FUND)]

RULING

The Respondents being aggrieved by the non remittance of a sum of Kshs.800,000/= to their provident fund filed a plaint in the Winam Senior Resident Magistrate's Court for recovery of that amount from the appellant as provided under section 53A of the Retirement Benefits Act. They also sought injunctive orders to restrain the appellant/Applicant from discharging or performing the functions of his office as the General Superintendent of the Pentecostal Assemblies of God Kenya pending the hearing and determination of the application (sic) and to permanently restrain him from dealing with the funds, books or records of money belonging to the Plaintiff.

Simultaneously with the suit they filed a Notice of Motion dated 9th February 2016 in which they sought orders as follows:-

“1 . This application be certified as urgent and heard ex parte in the 1st instance.

2. Pending the hearing and determination of this application an order of injunction be issued restraining the Defendant whether acting by himself, agents, servants, employees and or in any manner whatsoever from collecting, receiving and or in any way distribution monies of PAG Kenya Pastors and Staff Provident Fund and or interfering with the management operations of PAG Kenya Pastors and Staff Provident Fund and that he be restrained from functioning as the General Superintendent.

3. An interim order of injunction do issue restraining the defendant whether acting by himself, his agents, servants and/or employees from discharging or performing the duties of General

Superintendent, its functions or Superintendent of the Pentecostal Assemblies of God Kenya pending the hearing and determination of this application. **remaining in the office of General**

4. Pending the hearing and determination of this application an order of injunction be issued restraining the defendant whether acting by himself, agents, servants, employees and or in any manner whatsoever from operating, accessing, withdrawing any monies from account Number 0080185021207101 held at Eco Bank Kisumu Branch and Account Number 0091334372 held at Barclays Bank Kisumu Branch and these to remain frozen until this application is heard and determined.

5. An order be issued to compel the Defendant to produce to an Auditor appointed by the Plaintiff Scheme all books of account, reports, Cheque books and all relevant documents relating to the Plaintiffs and do render an account of all the monies received by him.

6. A warrant of arrest do issue against the defendant to show cause why he should not furnish security for the sum of Kshs.847,979.20 and his appearance in Court.

7. Pending the hearing and determination of this suit a permanent injunction be issued restraining the Defendant whether acting by himself, agents, servants, employees and or in any manner whatsoever from collecting, receiving and or in any way distribution monies of PAG Kenya Pastors and Staff Provident Fund and or interfering with the management operations of PAG Kenya Pastors and Staff Provident Fund and that he be restrained from functioning as the General Superintendent, discharging or performing the duties of General Superintendent of the Pentecostal Assemblies of God Kenya, operating, accessing, withdrawing any monies from Account Number 0080185021207101 held at Eco Bank Kisumu Branch and Account Number 0091334372 held at Barclays Bank Kisumu Branch and these to remain frozen until this suit is heard and determined.

Prayers 1, 2, 3 and 4 were granted at the ex parte stage. Being aggrieved and before the application could be heard inter partes the appellant filed a Notice of Motion dated 15th February 2016 in which he sought orders of stay and discharge of those orders and to strike out the suit. That application was heard and dismissed with costs to the Respondents. Being aggrieved he appealed to this Court and has by the Notice of Motion dated 10th March 2016 sought a conservatory order to allow him to continue discharging his duties which were stopped by the lower court. He has also sought a stay of execution of the injunctive orders and all consequential orders thereto issued against him on 9th February 2016, and extended on 4th March 2016. He also seeks a temporary injunction to restrain the respondents from harassing, threatening or intimidating or in any other manner interfering with the discharge of his duties pending the hearing and determination of the application and appeal. The gist of his application as can be discerned from the grounds and supporting affidavit is that he is bound to suffer substantial loss if stay is not granted and a conservatory order issued in his favour and his appeal succeeds. And further that the monies the subject of the litigation have since been refunded by the person who had taken it and there will therefore be no prejudice suffered by the respondents.

The application is opposed on grounds:-

“1. The application dated 9th March 2016 is incompetent and bad in law and is frivolous and is an abuse of the due process of this honourable court.

2. This honourable court lacks jurisdiction to hear and determine the application dated 9th March 2016.

3. The appellant has not shown he will suffer substantial loss if the orders of stay of execution are not granted.

4. There is no decree or order capable of being stayed by this honourable court.

5. The application dated 9th March 2016 raises new issues that were not subject matter before the law court.

6. The appeal filed herein is so hopeless and has no chances of success.

The application was canvassed before me on 14th March 2016 with Mr. Njuguna Advocate appearing for the appellant/Applicant and Mr. Kahi Advocate being for the respondents. I have considered the application and the rival submissions very carefully.

On 4th March 2016 the Winam Senior Resident Magistrate issued ex parte orders which inter alia restrained the appellant/Applicant from exercising the functions of his office as the General Superintendent of the Pentecostal Assemblies of God Kenya pending hearing and determination of a Notice of Motion filed by the Respondents. The applicant's application to have that order set aside or varied was dismissed and he has appealed. Counsel for the respondent has correctly submitted that a prayer seeking for the stay of an order dismissing an injunction application is futile. Indeed that was the holding of the Court of Appeal in **Umoja Service Station Ltd. & 5 Others V. Hezy John Ltd. Civil Application No. 39 of 2006** cited with approval by my brother Odunga, J in **Republic V. The Commissioner For Investigations & Enforcement "Ex-parte" Wananchi Group Kenya Limited [2014] eKLR**. In the present case the applicant had not, in his dismissed application, sought an injunction. What was dismissed was his prayers first to discharge the ex parte injunction made against him and secondly his prayer to strike out the entire suit for alleged want of jurisdiction. The ruling of the Trial Magistrate is very clear on that. In my understanding his appeal seeks to challenge the ex parte order barring him from exercising the functions of his office. It is that order that he seeks to stay. In my view therefore there is in this case an order capable of being stayed and the holding of the Court of Appeal cited above is not relevant. Whereas I also appreciate that a conservatory order would not properly issue

in this case there being no allegation of violation of a constitutional right I am satisfied that the applicant has shown sufficient reason to warrant an order staying execution of the impugned order. The applicant has demonstrated that he is likely to suffer substantial loss should this stay not be granted and his appeal succeeds. At the risk of being seen to be going into the merits of the matter, the Trial Magistrate rightly held that he was dealing with the matter under the Retirement Benefits Act. That Act at Section 53A donates the power to institute proceedings for recovery of contributions not remitted by an employer. The Respondents were therefore well within their right to institute the suit to recover the sum of 800,000/= claimed. What the Act does not give them is the power to remove from office such an employer. The ex parte order granted by the Winam Senior Resident Magistrate was clearly precipitated by the non remittance of the contributions and whereas the Retirement Benefits Act deals with the non-remittance of contributions constitution of the church sets out the method of dispute resolution in circumstances where members are aggrieved by the conduct of the officers of the church. Such alternative method of dispute resolution ought to be given a chance. The applicant cannot be compensated for the loss he shall suffer by being shut out from his office should this stay be refused and his appeal succeeds. The amount allegedly lost has been reimbursed and I am satisfied therefore that his application has merit.

Accordingly the order restraining him from exercising the functions of his office is vacated and/or set aside pending hearing and determination of the application in the lower court inter partes and pending the hearing and determination of this appeal. The other orders shall remain in place. Each party shall bear their own costs. It is so ordered.

Signed, dated and delivered at Kisumu this14th..... day ofApril.....2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. Njuguna for the Appellant

N/A for the Respondent

CC: Felix Magutu