



Asser v Methodist Church in Kenya Trustees Registered & 2 others (Appeal E009 of 2024) [2024] KEELRC 1420 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1420 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E009 OF 2024**

**M MBARŪ, J
MAY 16, 2024**

BETWEEN

JAPHET URUJI ASSER APPELLANT

AND

**METHODIST CHURCH IN KENYA TRUSTEES REGISTERED 1ST
RESPONDENT**

REV. ISAYA DEYE 2ND RESPONDENT

BISHOP SEMI SALAT PEMBE 3RD RESPONDENT

RULING

1. The appellant filed an application dated 8 March 2024 under the provisions of Section 1A, 1B, 3A, 63(e) and 80 of the *Civil Procedure Act*, Order 42 rule 6, Order 51 rule 1 of the *Civil Procedure Rules*, Article 159(2)(d) of the *Constitution* seeking orders that;
 1. Spent.
 2. An order to set aside and/or stay execution of the ruling delivered on 7 March 2024 in Lamu ELRC Case No.E006 of 2023 by Hon. M. M. Wachira (PM) pending hearing and determination of this appeal.
 3. An order to stay the court proceedings in Lamu ELRC Case No.E006 of 2023 pending hearing and determination of this appeal.
 4. The costs of this application be provided for.
2. The application is supported by the affidavit of the appellant and on the grounds that upon being dissatisfied with the ruling delivered on 7 March 2024 in Lamu ELRC Case No.E006 of 2023 he has preferred an appeal herein which has a high chance of success. Unless proceedings before the trial court



- are stayed, he stands to lose his position as the superintendent Bishop, Lamu Circuit of the Methodist Church in Kenya and shall stand to suffer irreparable damage in terms of financial losses. If the orders sought are not granted, the outcome of the appeal will be rendered nugatory.
3. In his affidavit, the appellant aver that before the trial court, the respondents filed an application dated 7 December 2023 seeking orders to restrain the appellant from carrying out functions of the Methodist Church in Lamu Circuit and to release motor vehicle KBA 999C and seeking to stop the appellant from referring himself as the Minister in charge of Lamu Circuit pending the hearing of his claim.
 4. In reply to the application, the respondents filed the Replying Affidavit of the 2nd respondent, Isaya Deye who aver that the instant application is an abuse of the court process and should be dismissed. The Memorandum of Appeal does not raise any arguable issue to justify a stay of execution and proceedings. The prayers sought in the appeal were not sought before the trial court and if allowed will lead to the destruction of property and loss of life as has happened in some churches within Singwaya Synod such as Bondeni and Golbanti.
 5. Isaya Deye aver that after the ruling on 7 March 2024, the Minister stationed by the conference Rev John Nduyo has reported and services have been conducted. The appellant has ignored to attend disciplinary invitation in violation of church standing orders. He will not suffer any prejudice if the orders sought are not granted and the High Court in Civil Case No.7 of 2023 (Malindi) directed the 2nd respondent to take over the Synod of Singwaya as the Bishop. The application is without merit and should be dismissed with costs.
 6. Both parties attended and made oral submissions which are analyzed in this ruling.
 7. Before the trial court, the appellant, in response to the claim filed a Notice of Preliminary Objection dated 27 December 2023 on the grounds that the 2nd and 3rd appellant had no locus standi to sue under their capacity and that the 3rd appellant is not a registered trustee of the Methodist Church.
 8. The trial determined the issue of *locus standi* with regard to the 2nd and 3rd appellant and held that such matters cannot be determined without the call of evidence to ascertain the facts of whether there was registration as a trustee.
 9. The objections were dismissed.
 10. On the subject application dated 7 December 2023, the case was that the appellant was transferred from Lamu Circuit to Narok/South Rift Mission effective 15 August 2023 but he failed to report or give reasons for his conduct. He was issued with a notice to show cause and suspended from 26 September 2023. The appellant was called for a meeting of the conference on 6 December 2023 but declined to attend. In response, the appellant admitted receipt of the letter dated 1st August 2023 transferring him from Lamu circuit to Narok but contested the same that Standing Order 103(7) (a) effectively required the transfer of Ministers from 1st January and that he should not be moved until he has served for at least 3 years unless there are exceptional reasons. That he handed over motor vehicle registration No. KBA 999C to Rev. Funana on 31 December 2022 but the Revered requested him to park the vehicle in the garage in Mpeketoni township where the vehicle is to date.
 11. The learned magistrate analyzed the facts, affidavits and submissions and held that the application had merit and allowed the same and that allowing the appellant to continue occupying and holding his position in Lamu Circuit upon suspension would be to allow defiance of such suspension and the respondents had a *prima facie* case to justify the application.
 12. With regard to the subject motor vehicle registration, KBA 999C the learned magistrate held that there was a High Court Order in Civil Case No.7 of 2023 directing Rev. Funana to stop interfering with



the running of Singwaya Synod and that the appellant ought to release the vehicle to Rev Semi Salat. The motor vehicle should be released as directed by the High Court since the claim that it is parked at a garage in Mpeketoni is not acceptable since the vehicle is owned by the Methodist Church in Kenya.

13. Aggrieved, the appellant filed this appeal on the grounds that the learned magistrate erred by dismissing his application by failing to appreciate his evidence and submissions.
14. Should the court stay execution and proceedings in Lamu ELRC Case No.E006 of 2023 to allow the hearing of the appeal herein?
15. The instant suit is pending a hearing before the trial court.
16. An application for stay of proceedings pending hearing and determination of an appeal against an interlocutory ruling can be granted under the principles addressed in the case of *Mbogo v Shab* (1968) EA 93 and *Pitbon Maina v Mugiria* (1982 & 1988) 1 KAR where the court held that it will not set aside judgment or proceedings where an applicant is a person who has deliberately sought to obstruct or delay the course of justice in *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that the general principle in granting or refusing stay is if there is no 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.
17. In the case of *MFI Document Solutions Ltd v Paretto Printing Works Limited* (2021)eKLR the court gave guidance on how a court should exercise discretion in an application for a stay of execution;
 1. The power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle is granting or reusing 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. (Sic)(Trial court judgement).
 3. A judge should not refuse a stay if there is a good grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
 4. 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 of costs as ordered with cause the order for stay of execution to lapse.
18. On the other hand, in the case of *Kenya Shell Limited v Kibiru* [1986] KLR 410, the court held that;

It is usually a good rule to see if Order XLI 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 a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money.
19. Balancing these rights, at the heart of a stay application, the issue of the substantial loss to be suffered is relevant. It is the foundation of a stay application pending an appeal. in *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR the court in determining a similar question held that;

The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal



under Order 42 Rule 6 of the *Civil Procedure Rules*. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entail that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.

20. In this case, the appellant has been taken through the motions of a transfer letter which he admits was issued on 1st August 2023. He failed to comply as directed on the basis that under the Standing Orders a transfer is only due from 1st January and that one should have served for at least 3 years unless there are exceptional circumstances.
21. A transfer of an employee is a prerogative of the employer who is allowed to reorganize its operations as necessary. Upon notice and time to move to a different location and work site, the employee should oblige. Given reasonable notice, an employee cannot be found to assert that they will only move under their terms. Such is insubordination.
22. The appellant does not deny that he has since been suspended from his office. Through notice dated 26 September 2023, he acknowledged receipt of such notice.
23. The invitation to attend a meeting and conference on 6 December 2023 has not been denied. Cumulatively, the appellant is suspended from office. He cannot refuse these directions from the employer. An employer is allowed to suspend the employee and remove him from the workplace for given reasons as held in *Professor Gitile Nairuli v University Council Multimedia University College* and another and *Ian Changamu v Co-operative University of Kenya* (2022) eKLR where the court recognized the employer’s managerial prerogative to initiate internal disciplinary proceedings against an employee through a suspension.
24. In this regard, the motions of hearing the suit are still ongoing. The appellant is yet to be heard on his response to the claim by the respondents herein. He will have a fair chance to articulate his responses and call evidence.
25. To stay execution of the ruling delivered on 7 March 2024 would effectively take the appellant back to the shop floor on the background of his suspension. This would not foster industrial peace. It would only mar the issues for determination.
26. To stay proceedings before the lower court would also mean stopping a judicial process for no good cause. Having determined that the issue of locus standi with regard to the 2nd and 3rd respondents requires a call of evidence, the appellant will submit the same and be heard on the merits. On the issues relating to the cause of action, such is best gone into by the trial court.
27. Stay of proceedings in an ongoing case should be the last resort. It should only be issued in exceptional circumstances. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR the court held that the grant of stay of proceedings should be exercised sparingly and in exceptional cases. And in the



case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR the court outlined the principles the court ought to consider in an application seeking a stay of proceedings. One such principle is that;

... The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal.

28. In the penultimate, the ruling delivered on 7 March 2024 by the learned magistrate is based on sound judicial reasoning. It cannot be faulted.
29. Accordingly, the application dated 8 March 2024 is without merit and is hereby dismissed. Effectively this renders the appeal moot. Parties shall revert to the trial court for hearing and determination. Costs of the application and appeal awarded to the respondents.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

