



REPUBLIC OF KENYA



**Methodist Church in Kenya Trustees Registered & another v M'Mipwii & 12 others
(Civil Appeal (Application) E282 of 2023) [2025] KECA 436 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KECA 436 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E282 OF 2023
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA
MARCH 7, 2025**

BETWEEN

**METHODIST CHURCH IN KENYA TRUSTEES REGISTEREDS
REGISTERED 1ST APPLICANT
REV JOSEPH NTOMBURA MWAINI 2ND APPLICANT**

AND

**STEPHEN KANYARAU M'MIPWII 1ST RESPONDENT
ISAIAH DEYE 2ND RESPONDENT
MISHECK KANAKE 3RD RESPONDENT
DR GERISHON MWITI 4TH RESPONDENT
GEOFFREY KINOTI KATHURIMA 5TH RESPONDENT
KOBIA MICHUBU 6TH RESPONDENT
MARTIN BAARIU MURIUKI 7TH RESPONDENT
MATHEWS AGERI KABURU 8TH RESPONDENT
EMMANUEL MAINGI RUKARIA 9TH RESPONDENT
HELLEN KAMENCHU 10TH RESPONDENT
JACOB GITUMA IBUATHU 11TH RESPONDENT
RICHARD YARO ABIO 12TH RESPONDENT
GLADYS MWITI 13TH RESPONDENT**

(Being an application for stay of execution from the Ruling and orders of the High Court of Kenya at Nairobi (C. Meoli, J.) dated 12th June 2023 in HCCC E315 OF 2021)



RULING

1. The application before us is brought pursuant to rule 5(2) (b) of the *Court of Appeal Rules* (however being a recent application the 2022 Rules should apply) by the Notice of Motion dated 23rd June 2023, supported by the affidavit of even date, sworn by Reverend Joseph Ntombura Mwaine who describes himself as the Chief Pastor, the Principal Executive and Presiding Bishop of the Methodist Church in Kenya. The Applicants seek orders:
 - i. That pending the hearing and determination of the appeal, this Court do issue an order restraining the respondents from interfering/intermeddling with the affairs of the Methodist Church in Kenya, harassing staff, disposing of property, drawing funds, incurring or accruing expenditure or in any manner appropriating the lawful assets of the Methodist Church in Kenya.
 - ii. That costs be provided for.
2. There are two replying affidavits on record, both sworn on 4th July 2023 by the 1st respondent, Stephen Kanyaru M'Impwii, the former Presiding Bishop of Methodist Church in Kenya (MCK), on behalf of the 2nd, 3rd, 5th, 9th, 11th 12th and 13th respondents and the 7th respondent, Martin Baariu Muruiki, on behalf of the 6th and 8th respondents.
3. The brief background to this matter is that the 2nd applicant filed a suit against the respondents, seeking reliefs in the nature of protection against the respondents from what was described as intermeddling with the affairs of the Methodist Church (hereafter the church). The respondents lodged their defence and counterclaim, seeking removal of the 2nd applicant from office as his term had expired, but according to the 2nd applicant in the spirit of forgiveness, and with a view to fostering harmonious fellowship, lodged a Notice of Withdrawal dated 14th March 2023, entirely withdrawing and wholly discontinuing the High Court suit against all the respondents with no order as to costs. Despite the withdrawal, the High Court nevertheless directed that the respondents' counterclaim would persist, and proceeded to hear the attendant Notice of Motion application dated 26th August 2022, and subsequently delivered a ruling in favour of the respondents, granting a restraining order against the applicants from discharging their mandate to the effect that:
 - “ a) A temporary injunction be issued restraining the Methodist Church in Kenya Trustees Registered and Rev. Joseph Ntombura by themselves, their agents or servants or any person acting in their behalf from executing and or effecting the decision of the standing conference committee of the MCK and related notice published in the Daily Nation of 17th December 2021 purporting to excommunicate the 1st to 9th Plaintiffs in the counterclaim pending the hearing and determination of this suit.
 - b) A temporary injunction restraining the Reverend Joseph Ntombura Mwaine from exercising the mandate, powers or discharging any duties or functions conferred upon or reserved for the office of the Presiding Bishop of the Methodist Church in Kenya, or exercising any mandate, functions or powers incidental to the office of the Presiding Bishop of the Methodist Church in Kenya, pending the hearing and determination of this suit.”



4. The applicants' lament is that the Counterclaim dated 26th August 2022 on which the temporary orders were anchored offended the mandatory requirements of Order 7 rule 8 of the *Civil Procedure Rules, 2010*, as it was lodged in court on 28th December 2021, over 8 months later, without leave of the Court yet Order 7 rule 1 of the *Civil Procedure Rules* requires that a counterclaim be delivered to the court together with the defence for service on the plaintiff, within a period of 14 days.
5. The applicants describe the orders issued as draconian, disproportionate and final in nature, since they have effectively restrained the Methodist Church in Kenya Trustees Registered and the Presiding Bishop from discharging their ecclesiastical mandate, thus creating a leadership vacuum, which is being exploited by the respondents; and rendering the entire Methodist Church in Kenya headless and dysfunctional.
6. The applicants maintain that their appeal has good chances of success; among the issues raised on appeal are that the trial court erred in failing to find that the issues raised at the High Court were matters reserved for the Employment and Labour Relations Court by dint of Article 162 (2) (a) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act, 2011*; and whether the learned Judge erred in drawing facts, placing reliance and anchoring findings on the 1st appellant's application which was already marked as withdrawn.
7. They also complain that their right to a fair hearing and observance of the principles of natural justice have been impaired; and that should the application be denied, the respondents shall proceed to conduct the affairs of the Church outside the law, much to the loss of the applicants and the Church at large; in addition, that the suit touches millions of faithful and it is in the public interest that the application be allowed.
8. 1st, 2nd, 3rd, 5th, 9th, 11th, 12th and 13th respondents describe themselves as active faithful who are in good standing with the Church. Their position is that the 1st applicant did not convene any trustee meeting to authorize the filing of the instant application; that the Church is governed by the Deed of Foundation and Deed of Church order which lays down the day to day running of the Church; that the 2nd applicant's tenure was characterized by, inter alia, high handedness, dictatorship, divisiveness and poor governance; and that to weaken the structure, governance and accountability of the Church, the applicants introduced standing order 116(3) barring the institution of any suit against the Church.
9. As a result, the respondents and other members of the Church convened a meeting to discuss the way forward since the applicants were unresponsive to the issues affecting the Church; that before the meeting ended, the applicants' agents stormed in to evict the respondents from the premises causing chaos that compelled the police to step in to restore calm; and that the applicants, through a notice in the Daily Nation of 17th December 2021 purported to excommunicate and defrock the respondents from the Church.
10. It is the respondents' contention that despite the applicants' withdrawal of the claim, they were at liberty to proceed with their counterclaim which was filed within the *Limitation of Actions Act* as an independent claim; and that the ruling complained of by the applicants is based on the respondents' application dated 26th August 2022, and not the counterclaim or the withdrawn suit.
11. That after the 2nd applicant stepped down, the Church has been operating under an acting presiding Bishop, one Isaya Deye, and that therefore, the question of flock without a shepherd does not arise; that the application has been overtaken by events by effluxion of time and the stepping down of the 2nd applicant, followed by the appointment of an acting presiding Bishop; and that there is nothing to preserve pending the hearing of the appeal, so the appeal cannot be rendered nugatory.



12. The 6th, 7th and 8th respondents refer to section 33(4) of the Church Standing Orders which provides the term for presiding Bishop as two terms of five years each, to point out that the trustees have not approved the filing of this appeal, nor any advocates purporting to act in this appeal for or for the trustees; that the trial court was right in finding that the counterclaim could persist after the withdrawn suit; and that the appeal raises no triable issues.
13. Our task is simply to determine whether the applicant has satisfied the requirements necessary for granting an order for stay of execution. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings, the applicable principles are the same. To succeed in an application under rule 5 (2) (b), the applicant has to establish that:
 - “(i) The appeal is arguable
 - (ii) The appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.”
14. Is the Appeal arguable? In the case of *Wasike v Swala* [1984]eKLR 591, this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the Court. The principles that guide the Court in the discharge of its unfettered discretionary mandate under a rule 5(2)(b) application are aptly restated in the case of *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR.
15. As stated above, an arguable appeal need not be one that will succeed but one that is sufficient for interrogation and one that is not frivolous. In this case, once the suit was withdrawn, then the statement of defence was rendered moot as there was nothing to defend, but the counterclaim remained alive. We take note that the counterclaim was a separate cause of action filed on 26th August 2022, together with a Notice of Motion which sought a mandatory injunction to remove the 2nd applicant from office, as his term had expired. In effect the counter claim and the notice of motion sought the same thing. This Court detects some frivolity in the intended grounds of appeal as the applicants withdrew their suit; and as the respondents correctly put it, the counterclaim remained in existence as a separate suit. It is our considered view that the intended grounds of appeal raises no arguable issues, and we therefore find that the applicant has not satisfied the first prerequisite for granting relief in an application under rule 5(2)(b).
16. We now turn to consider whether the appeal will be rendered nugatory should the injunction not be granted? On this aspect, this Court has held in the case of *Reliance Bank Limited v. Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case, and in so doing the court is bound to consider the conflicting claims of both sides.
17. In the case of *African Safari Club Limited v Safe Rentals Limited*, Nai. Civ. App 53/2010, this Court held that:
 - “...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”



- 18. For the second prerequisite, the position is that an appeal would be rendered nugatory if the consequential effects for the failure to grant the relief sought would be either irreversible or highly prejudicial so as to render of no consequence the intended appeal or appeal if ultimately successful.
- 19. In short, the Court is to decide which party’s hardship is greater. With that in mind, from the pleadings before the Court, the respondents’ responses are that there is no leadership vacuum as the Church has been operating under an acting presiding Bishop, Isaya Deye from 5th April 2023; that the functions and business of the church are running in normal mode; and that he has embarked on the task of healing and reconciling the fractured Church faithfuls. The applicants on the other hand have raised the issue that the appeal will be rendered nugatory, but unfortunately, they have not demonstrated how having another leader step in to promote reconciliation, and steer the church will lead to the members suffering any loss, whether spiritual, physical, or financial. We find as a fact that there is nothing to preserve.
- 20. In light of the above, it is our finding that declining the reliefs sought will not result in any irreversible consequence or one that would likely be reversed after considerable hardship or expense so as to be prejudicial to the applicants.
- 21. By parity of reasoning, the applicants have failed to prove the second limb under rule 5(2)(b); and being required to establish both limbs under the rule, then the Notice of Motion dated 23rd June 2023 must fail. The same is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2025.

H.A. OMONDI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

