



**Kilonzo & 2 others (Suing on behalf of Newlife Prayer Centre & Church) v Societies & another
(Civil Application E201 of 2024) [2024] KECA 1219 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1219 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E201 OF 2024
DK MUSINGA, K M'INOTI & PM GACHOKA, JJA
SEPTEMBER 20, 2024**

BETWEEN

**FRANKLINE KILONZO 1ST APPLICANT
ALICE NAFULA WANYAMA 2ND APPLICANT
EZEKIEL OMBOK ODERO 3RD APPLICANT
SUING ON BEHALF OF NEWLIFE PRAYER CENTRE & CHURCH**

AND

**THE REGISTRAR OF SOCIETIES 1ST RESPONDENT
STATE LAW 2ND RESPONDENT**

*(Application for injunction pending the hearing and determination of
an appeal from the judgment and decree of the High Court of Kenya at
Nairobi (Ngaah, J.) dated 19th April 2024 in HCJR No. E117 of 2023)*

RULING

1. The principle is well established in this jurisdiction that where *the Constitution* or statute has provided a dispute resolution mechanism, that mechanism must first be utilised before resorting to the courts. More than thirty years ago, in *Speaker of the National Assembly v. Karume* [1992] KLR 21, this Court held as follows:

“Where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”



2. More recently, the Supreme Court, whose decisions are binding on all courts by dint of Article 163(7) of *the Constitution*, reiterated as follows in *Albert Chaurembo & 7 Others v. Maurice Munyao & 148 Others* [2019] eKLR:

“...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

3. Shorn of all semantics, the application before us is an invitation to fault the High Court for abiding by the principle enunciated above. The short background to the application is as follows.
4. At all material times, the Newlife Prayer Centre & Church (NPCC), of which the three applicants herein were officials, was registered as a society under the *Societies Act*, Cap 108 Laws of Kenya (the Act). By dint of section 30 of the Act, the NPCC was obliged to furnish annually to the 2nd respondent, the Registrar of Societies, prescribed returns, accounts and documents. Failure to submit the returns constitutes a criminal offence and continued default upon demand by the 2nd respondent is a ground for cancellation or suspension of registration of a society under section 12 (1) (e) and (i) of the Act.
5. NPCC defaulted in filing its annual returns and on 13th April 2023, the 2nd respondent demanded that it files its returns for the year 2021/2022. NPCC did not comply and on 27th April 2023, the 2nd respondent asked NPCC to show cause within 21 days why its registration should not be cancelled. On 18th May 2023, the 2nd respondent notified NPCC in writing that its registration had been canceled, and on 18th August 2023 vide Gazette Notice No. 11016 the 2nd respondent published the cancellation of NPCC’s registration with effect from 19th May 2023.
6. Section 15 of the Act provides an elaborate mechanism for redress of grievance by Societies that have been refused registration or whose registration has been suspended or cancelled. The section provides as follows:

“ 15. Appeal from order of refusal, cancellation or suspension.

1. Any society aggrieved by the Registrar’s refusal to register it, or by the cancellation or suspension of its registration under section 12 may—
 - a. in the case of a political party, appeal to the High Court within thirty days of such refusal, cancellation or suspension; or
 - b. in the case of any other society, appeal to the Cabinet Secretary within thirty days of such refusal, cancellation or suspension and the Cabinet Secretary shall consider, determine and communicate his decision on the appeal within ninety days of the appeal.
2. A society aggrieved by the decision of the Cabinet Secretary under subsection (1)(b) may appeal to the High Court within thirty days of the decision.



7. By dint of the above provision, NPCC was obliged to first appeal to the Cabinet Secretary, and if it was still aggrieved by the decision of the Cabinet Secretary, lodge a second appeal to the High Court.
8. Instead of invoking the prescribed mechanism, on 26th August 2023, NPCC moved directly to the High Court and applied for an order of certiorari to quash the decision of the 2nd respondent canceling its registration, an order of mandamus to compel the 2nd respondent to accept its belated returns, and an order of prohibition to stop the 2nd respondent from acting on the decision that cancelled its registration. The 2nd respondent opposed the application vide a replying affidavit sworn by Mary Garrett Nyariki, who justified the cancellation of NPCC's registration as within the law.
9. The matter was heard by Ngaah, J., who, by a ruling dated 19th April 2024, struck out the application for failure to utilise the prescribed mechanisms. The learned judge found that although section 9(4) of the *Fair Administrative Action Act* allows the High Court, on application by an applicant and in exceptional circumstances, to exempt a party from exhausting the prescribed dispute resolution mechanism, NPCC had neither applied for exemption nor provided exceptional circumstances. In addition, instead of approaching the High Court by way of appeal, it had opted for judicial review.
10. NPCC was aggrieved and filed a notice of appeal on 24th April 2024, followed by the application now before us, seeking an order of injunction to restrain the respondents from interfering with its operations pursuant to the cancellation of registration, pending the hearing and determination of its appeal. In a bid to demonstrate that its appeal is arguable, NPCC relied on written submissions dated 27th May 2024 and submitted that the High Court erred in failing to exempt it from the obligation to exhaust the alternative mechanism and by abdicating its responsibility to protect NPCC's rights and fundamental freedoms.
11. It was further contended that the appeal will be rendered nugatory unless the order of injunction is granted because NPCC will have to close down and wind-up its projects, thus violating its members' freedom of association and worship.
12. For its part, the 2nd respondent opposed the application vide written submissions dated 7th June 2024, the substance of which is that NPCC's appeal is frivolous and not arguable. It was contended, erroneously in our view, that there is nothing to stay in this application because the High Court merely dismissed NPCC's application. We say that argument is erroneous because the principle that this Court will not entertain a challenge to a negative order under rule 5(2) (b) of the Court of Appeal Rules applies in applications for stay of execution, not in an application for injunction like the present one.
13. We have considered the application. The principles that guide this Court in an application under rule 5(2) (b) are succinctly set out in *Stanley Kangethe Kinyanjui v. Tony Ketter & Others* [2013] eKLR, which both parties have cited. The applicant must demonstrate that his or her appeal or intended appeal is arguable, and that unless the order sought is granted, the appeal will be rendered nugatory if it succeeds.
14. The applicant must satisfy both considerations (See *Stephen Wanyee Roki v. K-Rep Bank & 2 Others* [2015] eKLR). An appeal that the Court finds to be frivolous is not an arguable appeal. And if the Court finds that the appeal or intended appeal is not arguable, it does not have to consider whether it will be rendered nugatory. This is simply because the second consideration as to whether the appeal or intended appeal will be rendered nugatory is always premised on the possibility that the appeal will succeed. It is only an appeal which the Court finds to have chances of succeeding that risks being rendered nugatory by intervening irreversible circumstances, which may reduce it to a pyrrhic victory. An appeal that appears to the Court to have no chances of success cannot be rendered nugatory. And a frivolous appeal is one that hardly has any chances of success.



15. At this stage the Court does not determine the issues to be canvassed in the appeal definitively. At the same time the Court does not shy away from calling out a frivolous appeal when it encounters one. In *Paul Karumbi Keingati & 4 Others v. Dr. Ann Nyokabi Nguthi & 4 Others* [2015] eKLR, this Court explained as follows:

“This Court has stated that in determining whether an applicant has presented an arguable appeal, it will not minutely delve into the issues, to avoid embarrassing the bench that ultimately hears the appeal. However, to the extent that we must determine whether there is an arguable appeal disclosed, we cannot avoid determining, on prima facie basis, whether indeed an arguable appeal is disclosed. A finding at this stage that an arguable appeal is disclosed or that none is disclosed does not bind the Court when it finally hears the appeal. Many are the times when on first impression an appeal is certified arguable and a relief under rule 5(2)(b) granted, only for the matter to be found bereft of merit upon the hearing of the appeal.”

16. In this case, the record speaks for itself. NPCC did not apply for exemption under the *Fair Administrative Action Act*, nor did it present before the High Court any exceptional circumstance to justify refusal to invoke the prescribed mechanism. In light of the consistent decisions of this Court and the Supreme Court that a party must first invoke the dispute resolution mechanisms provided by the law before resorting to the High Court or courts of equal status, we are satisfied that the intended appeal is not arguable.

17. Accordingly, this application is hereby dismissed with the order that each party bears its own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

D. K. MUSINGA, P.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

