



Kariuki & 3 others (Suing on their behalf and as Officials of the Bethel Church of God) v Moilo & 2 others (Suing on their own behalf and in their Capacity as National Officials of Bethel Church) (Civil Application 202 of 2016) [2023] KECA 64 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 64 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 202 OF 2016
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

**JOHN NJUKI KARIUKI 1ST APPLICANT
JAMES MURIGI WANJIKU 2ND APPLICANT
PETER MUIRURI KABIRU 3RD APPLICANT
GERALD WAMBUGU KIHU 4TH APPLICANT
SUING ON THEIR BEHALF AND AS OFFICIALS OF THE BETHEL CHURCH
OF GOD**

AND

**JOSEPH MOILO 1ST RESPONDENT
FRANCIS NDUNGU KAGGIA 2ND RESPONDENT
JOSEPHAT GITAU 3RD RESPONDENT
SUING ON THEIR OWN BEHALF AND IN THEIR CAPACITY AS NATIONAL
OFFICIALS OF BETHEL CHURCH**

(Being an application for suspension/stay of execution of injunctions pending the lodging hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Okongo, J.) dated 18th December 2015 in ELC Case No. 863 of 2015)

RULING

1. The Notice of Motion Application dated 30th August 2016 brought pursuant to Rules 5(2) (b) of the Court of Appeal rules, and supported by the affidavit of even date, sworn by Bishop Njuki Kariuki, seeks orders to: suspend /stay the execution of orders contained in the ruling delivered on



- 18th December 2015 in ELC case No. 863 of 2015 pending the lodging, hearing and determination of the intended appeal; restrain the respondents by themselves, their servants and agents from entering, remaining or being on the applicants parcel of land known as Bibirioni T249 and T252, Rironi Plot No. 531 and 893; Limuru/Ngecha/T217 pending the lodging, hearing and determination of the appeal.
2. The application was served on the respondents who have not filed any response or submissions.
 3. The applicants and respondents are two former factions of a church known as Bethel Church, which had differences spanning over two decades, and they eventually agreed to part ways on 15th December, 2014 and become autonomous churches. According to the applicant, under the separation agreement, each faction was to retain the properties it had acquired during the period of strife; the respondents were, with the consent of the applicants to use the name Bethel Church which the two factions had used before; all the properties of the applicants which were in the name of Bethel Church were to be transferred to them by the respondents; and that the status quo regarding places of worship was to remain.
 4. The applicants were to use a selected name under which they would be registered, and so they chose the name Bethel Church of God. However, a dispute again reared its head in February 2015 over the ownership of the subject matter of the dispute, namely Bibirioni T249 and 252, Rironi Plot No. 531 and 893 and Limuru/Ngecha /T217. Violent disruption of worship services, culminated in the respondents filing the application dated 9th September 2015 seeking a declaration that the applicants and their Church known as Bethel Church of God had no locus to claim or interfere with any assets registered or controlled by Bethel Church; injunctive orders to restrain the applicants from interfering with any of their worship centres; a prohibitory order restraining the applicants church from using the name Bethel as part of its name; and a mandatory order requiring the applicants to look for and register a fresh name dissimilar to that of the respondents, as well as surrender of all titles and other documents in favour of the respondent's church.
 5. Apparently, the applicants had also filed an application dated 23rd September 2015 seeking injunctive reliefs against the respondents, which the trial court declined to give. The trial court found merit in the respondent's application and declared that the registration of Bethel Church of God was bad in law as it was too similar to the rival faction, which was first in registration and would cause confusion; a prohibitory order restraining the applicants from using that preferred name and for them to register a fresh dissimilar name, and to surrender to the respondents all the titles and other documents in favour of Bethel Church.
 6. The applicants were aggrieved and filed an application seeking conservatory orders, which would in effect suspend the orders issued on 18th December 2015 pending the lodging of the appeal on grounds that: the trial court lacked jurisdiction to grant the orders; the trial court overlooked the fact that the respondent's application dated 9th September 2015 was for mandatory injunction,; but conclusively determined the application dated 9th September 2015 at an interlocutory stage; and that the court ignored the fact that what they were seeking was the enforcement of a separation agreement dated 27th and 30th January 2015, which split Bethel Church into two factions, and on terms that each faction would retain the properties it had acquired in the name of Bethel Church.
 7. It is the applicant's lament that the respondents have since embarked on excluding them from their places of worship on the suit properties, yet neither party had objected to the terms of the separation agreement; that unless the orders sought for are granted, the respondents will continue to violently evict the applicants from their church; and that the appeal will be rendered nugatory if the orders sought are not granted as the applicants are not able to worship in their churches.



8. 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; and
 - ii. the Appeal is likely to be rendered nugatory if the stay is not granted, and Appeal succeeds.
 9. The principles for granting stay are well settled. This court in *Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others* [2000] eKLR held that the jurisdiction of the court under a 5(2) (b) application is original and discretionary and that it is trite law that to succeed an applicant had to show that his appeal is arguable and, secondly, that the appeal would be rendered nugatory should stay not be granted.
 10. An arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court. Also, an arguable appeal is one that is not idle and/or frivolous, and at least a single bonafide issue needs to be raised by the applicant. [See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR].
 11. Having considered the grounds set out in the motion, it is this Court’s view that the appeal is arguable and raises the issues of whether the Superior Court issued final orders at an interlocutory stage without the demonstration of special circumstances by the respondent, and also touches on the issue of ownership of the suit properties.
 12. As to whether the appeal would be rendered nugatory, this Court has held in the case of *Reliance Bank Limited vs. 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.
 13. In the case of *African Safari Club Limited vs. Safe Rentals Limited*, Nai. Civ. App 53 of 2010, this Court held:

“ ... 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.”
 14. In short, the court is to decide which party’s hardship is greater. With that in mind, this Court is convinced that if the applicants prayer for stay of execution is denied and the appeal eventually succeeds, the applicant will be adequately compensated by an award for damages.
 15. The applicants have raised the issue that the appeal will be rendered nugatory because the suit properties will be out of reach as there has been continuous eviction by the respondents.
 16. This Court has on several occasions stated that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party. We take note in this regard that that some eviction has taken place in some of these establishments, and it is our view that whichever faction is entitled to a disputed boundary can be reinstated.
- This Court finds that there is no real and imminent danger of the respondents disposing of the suit property should stay not be granted.



17. The applicants having failed to establish the second limb so as to satisfy the requirement under Rule 5(2) (b) of this Court’s Rules, this Court finds that the notice of motion dated 30th August 2016 lacks merit and the same is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

