



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & OKWENGU, JJ.A)

CIVIL APPLICATION NO. NAI 252 OF 2015 (UR 211/2015)

BETWEEN

GEOFFREY ASANYO.....1ST APPLICANT

DR. CHARLES MARANGA.....2ND APPLICANT

~AND~

JOHN KIRAGU NGUNYI

JEREMY MARAMBI

STEPHEN KIOKO-*all sued as Executive Director, Executive Secretary*

Treasurer respectively of CENTRAL KENYA CONFERENCE.....1ST RESPONDENT

SAMUEL MAKORI

ALFRED GITONGA MARUNDU

NEHEMIAH MAIYO-*all sued as Executive Director, Executive Secretary & Treasurer*

respectively of EAST AFRICA UNION CONFERENCE - EKUC.....2ND RESPONDENT

KENNETH MAENA

JAPHETH OCHOROKODI

DAVID SANDE-*all sued as Executive Director, Executive Secretary & Treasurer*

respectively of WEST KENYA UNION CONFERENCE -WKUC.....3RD RESPONDENT

BLASIOUS RUGURI

ALAIN CORALIE

JEROME HABIMANA-*all sued as Executive Director, Executive Secretary & Treasurer*

(An application for injunction arising from the Order of the High Court of Kenya at Nairobi (**R. Aburili, J.**) dated on 28th September, 2015

in

H.C.C.C. NO. 317 OF 2015)

RULING OF THE COURT

This is an application under **Rule 5(2) (b) 42 and 43** of the Court of Appeal Rules for three main orders namely:

- (1) A temporary injunction restraining the 1st, 2nd and 3rd respondents jointly and severally from transacting, managing and running the affairs of Seventh Day Adventist Church in the names and style of East Kenya Union Conference, West Kenya Union Conference and Central Kenya Conference pending the hearing and determination of the appeal.
- (2) Officials purportedly elected between 3rd and 8th September 2015 be restrained from assuming office and transacting the affairs and business of the Central Kenya Conference, the alleged East Africa Union Conference and the alleged West Kenya Union Conference of Seventh Day Adventist in any manner whatsoever pending the hearing and determination of the appeal.
- (3) The officials of the 1st respondent whose term expires on 30th November 2015 do remain in office and discharge the mandate and mission of the Adventist until lawful elections are carried out in tandem with the Constitution and By-laws of the 1st respondent.

The fifteen grounds upon which the application is based are enumerated in the body of the motion.

The application is also supported by the affidavit of **Geoffrey Asanyo** in which he deposes, amongst other things, that he has an arguable appeal based on the grounds enumerated at paragraphs 14 of the affidavit and that unless the injunction is granted the individuals elected pursuant to the flawed election would assume office and thus render the appeal nugatory.

On 11th September 2015, the applicants herein filed a suit in the High Court against the respondents herein seeking in the main prayer, the nullification of the election of officials of Central Kenya Conference purportedly elected in the election held on 6th, 7th and 8th September 2015 at Karura SDA School, Nairobi, conducted by the officials of the respondents. The applicants averred that the elections were officiated by East Kenya Union Conference which was neither a registered Limited Company nor as a society and thus lacked legal capacity to officiate the elections and that the President of East Kenya Union Conference was not a recognized President of any legally existing society and therefore lacked legal capacity.

The applicants further averred, *inter alia*, that the respondents in their working document failed to allow several churches accredited to Central Kenya Church to participate in the elections; that the respondents failed to give badges to several delegates to facilitate entry into Constituency Assembly Hall to participate; that the presiding officer was openly biased in that the elections were prematurely held and should have been held between 28th and 30th November 2015; and that the church constitution and by-laws governing elections were not complied with.

The applicants also sought a permanent injunction to restrain the 2nd and 3rd respondents from running

the affairs of Seventh Day Adventist in the name of East Kenya Union Conference, a declaration that the only legal entity authorized to conduct the affairs of the union is the Seventh Day Adventists Church, East Africa Union and an order compelling the 1st respondent to conduct fresh elections.

The applicants simultaneously filed an interlocutory application seeking the same prayers sought in the present application. The application was supported by the affidavit of **Dr. Maranga** the 2nd applicant herein.

The application was opposed on the grounds contained in the replying affidavit of **Dr. Blasious Ruguri** – an ordained minister of the Seventh Day Adventist Church and the President of the East and Central Africa Division and on the grounds contained in the further affidavit of **Samuel Makori**, also an ordained minister of the Seventh day Adventist church.

The High Court (**Roselyne Aburili, J.**) in an exhaustive ruling dismissed the application on 28th September, 2015. The High Court considered the issues raised in the application by the applicants.

On the issue of the legality of the two entities, the court observed that the applicants had not challenged the process through which the entities were created or sought to quash the decision of November 2013 which established the two entities and relied on the letter dated 10th September 2015 from Registrar of Societies and produced by the applicants showing that East Kenya Union Conference and West Kenya Union Conference do not exist separately and not independent of each other, and that they exist as entities under Seventh Day Adventist Church East African Union. The High Court also observed that the applicants were delegates at large and observed the elections as ex-officio delegates and that their conduct of waiting until after the elections to demand nullification of the election on the ground that the entity presiding over them was illegal, and claim that the process denied delegates and participating churches the right to free and fair elections was a sign of bad faith and an afterthought.

The High Court further observed:

“In addition the arguments by the applicants that the elections and criteria were breached are all allegations that were not substantiated from pleadings, affidavits and submission.”

The High Court ultimately made a finding that the applicants had not established a *prima facie* case with a probability of success.

The High Court next considered whether or not the applicants would suffer irreparable damages which could not be compensated by an award of damages if the orders sought were not granted. It observed that the applicants had brought the application in their individual capacity; that the church’s individual delegates who were alleged to have been disenfranchised were not parties to the suit; that the officials in office prior to the elections had not raised a voice of dissatisfaction and that the officials elected were not made parties to the suit. In the circumstances, the court made a finding that the applicants had not demonstrated that they would suffer any irreparable loss.

Lastly, the court considered the effect of granting an order of injunction and concluded that the effect would be to allow the former church officials who were not parties to the suit to remain in office and also to restrain the elected officials who were not also parties to the suit from assuming office.

The applicants have filed **Civil Application No. 251 of 2015** against the decision of the High Court.

The application which is based on the same grounds in the plaint is opposed on the grounds contained in the replying affidavit sworn by **Alfred Gitonga Marundu** – an ordained pastor of Seventh Day Adventist Church and the Executive Secretary of the East Kenya Conference. He deposes in paragraph 16 and 17 thus:

“16. THAT if the orders sought herein are granted the same would be drastic, would be in vain

as the former officials who were not re-elected vacated office and have assumed re-assigned new responsibilities within the church without any complaint. That the respondents have assumed office and are discharging their pastoral and administrative duties.

17. THAT I wish to affirm that the elections of the officials of the Seventh Day Adventist Church is a solemn process carried out by a nominated committee and is considered a spiritual affair involving serious prayers and soul searching devoid of any campaigns, canvassing or politics. No one offers himself as a candidate to any position for elections within the Church. The applicants were not eligible as candidates for any position as they were delegates at large being ex-officio members during the session at which elections were conducted”

The jurisdiction of this Court to grant orders under **Rule 5(2)(b)** of the **Court of Appeal Rules** is discretionary. It is trite law that before an order is granted in favour of an applicant, he has to demonstrate, *inter alia*, that the appeal is arguable and that unless the orders are granted, the appeal if ultimately successful would be rendered nugatory.

We have considered the grounds of appeal enumerated in the affidavit of Geoffrey Asanyo, the respective affidavits and oral submissions. The grounds of appeal raise both factual and legal issues. The High Court delivered an exhaustive 64-page ruling and in some cases made final findings of fact in interlocutory stage on contested facts after extensive examination of relevant documents.

Those final findings are likely to embarrass the judge who will ultimately try the suit. The applicants have already filed the appeal. In the premises we are satisfied that the appeal is arguable.

Nevertheless, the applicants have still to satisfy the Court that unless the orders sought in the application are granted the appeal, if successful would be rendered nugatory. As the Ruling of the High Court and the replying affidavit has shown, the applicants were not eligible for the election for any church office. The elected officials prior to the impugned elections are not parties to the suit and they have not raised any complaint about the validity of the elections. They are not also parties to this application. The rights of the applicants individually have not been affected by the election and as the High Court has correctly found, the applicants have not demonstrated how the assumption of office by elected officials would adversely affect their rights as members of the church. Furthermore, if the appeal ultimately succeeds, the status quo prior to the impugned elections could be restored.

On the other hand, if the application is allowed, the rights of the elected officials will be adversely affected without giving them a hearing and the former officials who have no complaint against the validity of the elections would be given an extended term against the constitution of the church.

Moreover, the orders sought cannot be granted in their present form. The order of injunction to prohibit the 1st, 2nd and 3rd respondents, in essence, from operating the two alleged illegal entities of the church cannot be granted at an interlocutory stage. It can only be granted after trial, and after determination of their legal status. The orders to restrain the elected official from assuming office and restore the former officials into the office has been overtaken by events as the ruling of the High Court and the replying affidavit demonstrates. Even before the ruling of the High Court was delivered the status quo had changed and the result of the elections fully implemented. An order of prohibitory injunction as sought cannot issue to change the status quo.

Lastly, we apologize for the delayed ruling. The delay was caused by the removal of the appeal records from two of the judge's chambers and storing them in the Court's archives as finalized matters. It is only after the letter from the applicants' counsel was recently received complaining about the delay that the judges' files were recently traced in the archives and retrieved. That matter is under investigation by the Registrar of the Court.

For the foregoing reasons, the application is dismissed with costs to the respondents.

DATED and delivered at Nairobi this 9th day of December, 2016.

E. M. GITHINJI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

H.M. OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR