



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 211 OF 2009

HARJI KARSAN PATEL APPLICANT

AND

- 1. KUNVERJI NARAN KERAI**
- 2. PARBAT PREMJI VEKARIA and**
- 3. JADAVJI LALJI as the Chairman, Vice
Chairman and Secretary respectively of
Shree Cutch Satsang Swaminarayan**

Mandir RESPONDENTS

**(Application for injunction pending the hearing and determination of an
intended appeal from the ruling and order of the High Court of Kenya at**

Nairobi (Waweru, J. dated 9th April, 2009

in

H.C.C.C. NO. 1025 OF 2004)

RULING OF THE COURT

The applicant in the notice of motion before us dated 15th July, 2009, **Harji Karsan Patel**, is a member of **Shree Cutch Satsang Swaminarayan Mandir**, a religious society registered in Kenya under the *Societies Act, Chapter 108 Laws of Kenya*. He is also a member of that society's working Committee comprising of about 20 members. The working committee is headed by the three respondents, **Kunverji Naran Kerai, Parbat Premji Vekaria and Jadavji Lalji** as the Chairman, Vice Chairman and Secretary

respectively. The record shows that on 5th August, 2004, a meeting of the working Committee was held and it made several resolutions one of which was that the date of the society's annual anniversary celebrations be changed from 25th and 26th December, each year to 12th December each year. Those decisions were subject to ratification by an extra ordinary general meeting of all members of the Society which was called on 8th August, 2004. They were duly ratified to the chagrin of the applicant who attended both the working Committee meeting of 5th August, 2004 and the extra-ordinary general meeting of 8th August, 2004. He objected to the deliberations of the two meetings on several grounds, two of which were that no notice was given for the working committee meeting of 5th August, 2004 as he only saw a notice of its being convened on the temple's notice board on 4th August, 2004 and the notice for the meeting of 8th August, 2004 was completely inadequate, and lastly that the resolution did fly on the face of the constitution of the Society which required that such a resolution could not be made before certain advice was received.

Being dissatisfied with that resolution which changed the date of the annual celebrations of the Society's anniversary and other resolutions, the appellant filed a suit in the superior court by way of a plaint dated and filed on 29th September, 2004. Of interest, is that that plaint did not touch on any complaint about the change of date of the celebration of the Society's anniversary. It is also of interest that the applicant was the only complainant and the suit was not a representative one. It attacked only the resolution that affiliated the Society to another Society. Be that as it may, that plaint was later heavily amended and the Amended Plaint dated 17th October, 2005 complained about that resolution which changed the date of the annual anniversary celebrations from 25th and 26th December each year to 12th December each year. The applicant also filed in the superior court Chamber Summons dated 28th November, 2005, having withdrawn an earlier Chamber Summons filed with the original Plaint. In that Chamber Summons of 28th November, 2005 filed on 1st December, 2005, the applicant sought two substantive injunction orders which were as follows:

“(d) Pending the hearing and final determination of this suit, the Defendants be restrained by themselves, their servants and/or agents from holding the annual Vishranti Bhuvan celebrations of the Society on any other date other than the 25th and 26th December, 2005 and of each succeeding year;

(e) Pending the hearing and final determination of this suit the annual Vishranti Bhuvan celebrations of the Society be held on the 25th and 26th December 2005 and of each succeeding year”.

That application was placed before the superior court (H.P.G. Waweru, J.) who, after hearing it, on a delayed ruling delivered on 8th April, 2009, dismissed it. In dismissing it, the learned judge made a finding that the applicant had not demonstrated a prima facie case with a probability of success. The applicant felt aggrieved with that decision. He intends to appeal against it and he filed notice of appeal dated 20th April, 2009.

In the meantime, he has come to this Court by way of this notice of motion dated 15th July, 2009 premised on **Rules 5 (2) (b)** and **42** of the Court of Appeal Rules, in which he is seeking two orders, that:

“1. Pending the hearing and determination of the intended appeal to be filed by the applicant against the Ruling and Order of the High Court of Kenya at Nairobi (The Honourable Justice H. P. G. Waweru) given on 9th April 2009 in High Court civil Case Number 1025 of 2004, the Respondents be restrained by themselves, their servants and/or agents from holding the annual Vishranti Bhuvan celebrations of the Shree Cutch Satsang Swaminarayan Mandir on any date other than the 25th and 26th December of every year.

2. Pending the hearing and determination of the intended appeal to be filed by the Applicant against the Ruling and Order of the High Court of Kenya at Nairobi (the Honourable Justice H. P. G. Waweru) given on 9th April 2009 in High Court Civil Case Number 1025 of 2004, the annual Vishranti Bhuvan celebrations of the Shree Cutch Satsang Swaminarayan Mandir be held on the 25th and 26th December of each year”.

The grounds in support of the application are briefly that the intended appeal is arguable on grounds that the resolution changing the celebration date from the original 25th and 26th of each year to 12th December of each year was invalid, illegal, null and void as there was no notice given for the holding of the meeting that made that resolution and in any event, no open and frank deliberations were or could be held at that meeting as there were people called “*saints*” at the meeting. Further, the holding of the celebrations on any date other than on the 25th and 26th December each year would be a violation of the Society’s Constitution, rules and regulations and would set a bad example and result into a total failure on the purpose of which those celebrations were set to be held. Lastly, he contended in the application that unless the orders sought are granted and the celebrations are held he will suffer in his faith and thus the success of the appeal, if it succeeds, will be rendered nugatory.

In urging the application before us, Mr. Sarvia, the learned counsel for the applicant, alive to the principles required to be demonstrated, submitted that the intended appeal is arguable in that the meeting that changed the dates for the celebrations from 25th and 26th December each year to 12th December each year was not properly convened as no notice was issued and the applicant, who is a member of the working Committee only saw the notice on the Temple’s Notice board one day before the meeting whereas the notice of the extraordinary general meeting was hardly adequate. He submitted further that the resolution was also made in breach of the Society’s Constitution as no advice was sought and received before it was made. On the nugatory aspect, Mr. Sarvia submitted that if the orders are not granted, the celebration will be held on 12th December each year and the applicant will suffer whereas the respondents will suffer no prejudice even if the orders are granted.

Mr. Havi and Mr. Osundwa both learned counsel for the respondents opposed the application, contending in each case that notice was given as was usually given of such meetings and that no violation of the Constitution was made by making the resolutions.

The application is brought pursuant to **Rule 5 (2) (b)** of this Court’s Rules as we have stated above. The law as regards the principles that guide the Court when considering an application under that rule is now well settled. The applicant would benefit only if he demonstrates first, that the intended appeal or the appeal, if one is already filed, is arguable, that is to say, is not frivolous, and secondly, that were the appeal or intended appeal to succeed, the results would be rendered nugatory, if the application for stay is refused – see the case of **Reliance Bank Ltd. vs. Norlake Investments Ltd.** [2002] 1 EA 227 (CAK) and **Caltex Oil Company (Kenya) Ltd.** now renamed **Total Marketing Kenya Ltd. vs. Evanson Njiru Wanjihia** – *Civil Application No. Nai. 190 of 2009*. In considering such an application, the Court will also be guided by the provisions of **Section 3A** and **3B** of the Appellate Jurisdiction Act which came into effect on 25th July, 2009 through amendments to the Appellate Jurisdiction Act.

We have considered the notice of motion with all the above in mind. Having perused and considered the record, the decision of the superior court and having considered as well the submissions that were made by the learned counsel as briefly referred to hereinabove, we note, without making any final findings that certain facts stand out and are not in dispute. These are, firstly that there is nothing in the Society’s Constitution specifying the specific period of notice to be given when convening any working Committee meetings or any general meeting, be they extraordinary meetings or ordinary annual general meetings of the members; secondly that there is no specific mode of communicating such notices whether by posting, or through any media, electronic or otherwise, or by mere posting of such notices at the temple’s notice board as was done here; thirdly, that the applicant does not seem to know when the posting of the notice of the working Committee meeting he read on 4th August, 2004 was done; fourthly, that the date for the celebrations of Vishranti Bhuvan is not entrenched in the Society’s Constitution and lastly that there is no provision in the Constitution to the effect that a resolution for change of date for

Vishranti Bhuvan celebration can only be done after certain advice is received from certain circles or any provision as to how and when such advice should be given. Having considered all the above and the fact that the applicant attended and fully participated in both the working Committee meeting that passed the allegedly offensive resolutions and the extraordinary General Meeting that ratified the said resolution, we are, without making any definite and final decision on the matter, (as that must be left to the bench that will hear the appeal), not fully persuaded that the intended appeal is arguable. Even assuming without deciding that it was arguable, we cannot appreciate in what way the success of the intended appeal will be rendered nugatory.

Since December 2004, when, pursuant to the disputed resolutions, the celebrations were changed to 12th December, the appellant has witnessed those celebrations being held on 12th December now for six years. If the application is not granted, the celebrations will continue probably for the next three years before the intended appeal is heard. When the intended appeal is eventually heard and he succeeds, the date of the celebration will revert to the old dates of 25th and 26th December each year. There is no doubt his personal faith will have been dented for a few years between now and the date of the judgment in the intended appeal but when we apply the principles now operating under **Section 3A** and **3B** of the Appellate Jurisdiction Act as amended on 23rd July, 2009 and weigh his suffering against the suffering of the many other faithfuls who endorsed the change at the working Committee meeting and at the extraordinary general meeting and many who have accommodated the change, our view is that justice would not be done by granting the order. In short, the results of the intended appeal were it to succeed, would not be rendered nugatory.

That is the end of the road for the applicant in this notice of motion. It is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of February, 2010.

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR