



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 5 OF 2010

SIMON KIMANI MBITIRU..... 1ST APPLICANT
SIMON NDIMI MUCHAI 2ND APPLICANT
SAMUEL MBUGUA 3RD APPLICANT
SHADRACK MUNDATI GATHOGA 4TH APPLICANT
GEORGE NJURUBA MUKURA 5TH APPLICANT
GEORGE KABOGO NJUGUNA 6TH APPLICANT

AND

JOSEPH KAMAU MWANGI 1ST RESPONDENT
FRANCIS KIGUNDA 2ND RESPONDENT
JEREMIAH KARIUKI 3RD RESPONDENT
KARIUKI GATHII 4TH RESPONDENT
KARANJA MUKIRI 5TH RESPONDENT
NDUNG'U GATHOGA 6TH RESPONDENT
SIMON MBUGUA KIHARA 7TH RESPONDENT
J. NDICHU..... 8TH RESPONDENT
ESTHER NYAKARURA 9TH RESPONDENT
JOHN KINUTHIA 10TH RESPONDENT
SOLOMON NJOROGE 11TH RESPONDENT
GEORGE KINUTHIA 12TH RESPONDENT

(an application for stay of execution of the ruling of the High Court of Kenya at Nairobi (Abida Ali Aroni J.) delivered on 11th December 2009

in

H.C.C.C. NO. 173 OF 2009

RULING OF THE COURT

By their motion dated 14th January 2010, expressed to be brought under rule 5 (2) (b) of the Court of Appeal Rules **Simon Kimani Mbitiru, Simon Ndimi Muchemi, Shadrack Mundati Gathoga, George Njumba Mukura and Geoffrey Kabogo Njuguna**, the applicants have invited this Court to exercise its discretion under the aforesaid rule, and grant them a temporary stay of execution of the orders of the superior court made on 11th December, 2009 restraining them from acting as office bearers of the

Kiambu branch of African Independent Pentecostal Church of Kenya pending the lodgment, hearing and determination of their intended appeal against those orders. The orders were made in **Nairobi High Court Civil Case No. 173 of 2009**. Twelve individuals, described in the plaint as chairman respectively of twelve local churches of the African Independent Pentecostal Church of Kenya (hereinafter, the church) are the respondents. The respective branches are said to be affiliated to Kiambu branch of the church.

In their plaint the respondents in this motion as plaintiffs, challenge the election of the applicants herein as the respective chairmen of twelve different local churches affiliated to the church on four main grounds. Firstly, that the election of the applicants as branch officials of the Kiambu branch was invalid as no adequate notice was given for the elections. Secondly, that the notice of the meeting for elections did not have the agenda. Thirdly, that Simon Kimani Mbitiru, the first applicant herein, supervised the elections when he was also a candidate for the office of chairman. Fourthly, that the elections were premature as they should have been preceded by local church elections and the officials of those local branches would be the ones to elect the branch officials. No local church elections had taken place. In short, they averred, that the election was invalid and for that reason they prayed that it be declared illegal, irregular, and invalid. They in addition prayed for an injunction to restrain them from acting as officials of that branch.

Filed with the plaint was a chamber summons under **O.39 rules 1, 2,3 and 9** of the Civil Procedure Rules praying for similar orders as in the present application. Aroni J. heard the application and in a reserved ruling delivered on *11th December, 2009*, ruled that no evidence had been placed before her to show the elections at all levels had been held to allow for national elections; nor was there clear evidence to show relevant election committees had been appointed in accordance with the church Constitution; and that adequate notice had not been given for the branch elections. For those reasons she was satisfied that the respondents as plaintiffs had made out a *prima facie* case with the probability of success upon trial. She did not consider the remaining two tests in **Giella v. Cassman Brown Ltd** [1973] EA 358 for the grant of an interlocutory injunction. Nonetheless she concluded that the respondents were entitled to an injunction which she accordingly granted. This application was thus provoked.

In the application before us the main complaints are twofold. Firstly, the applicants contend and it is their advocate's submission that the order of the superior court has paralysed the operations of not only the local churches but also the Kiambu branch of the church as a vacuum has been created in the leadership. Secondly, the applicants contend, that the respondents as plaintiffs having not disclosed the capacity in which they are suing and also the capacity the applicants are sued, the superior court judge erred in granting them the orders they were seeking. Mr. Jesse Kariuki, for the applicants submitted that it was obligatory under **O.1 rule 12** of the Civil Procedure Rules for the respondents to indicate in which capacity they were suing. We believe learned counsel must have had in mind **O.1 rule 8** of the same rules which deals with representative action.

The principles under which this Court acts under **rule 5(2) (b)** aforesaid are well settled. An applicant is obliged to show he has an arguable appeal or his intended appeal is arguable and not frivolous. In addition he is obliged to show that the success of that appeal or intended appeal will be rendered nugatory unless the court grants him the order of injunction or stay as the case may be. Satisfying one condition without the other will not avail the applicant of anything.

In the affidavit in support of the application for injunction before the High Court, the respondents described themselves as members of the **African Independent Pentecostal Church of Kenya**, and they represented 12 local branches of the church. Their main complaint was that the members of the church they represent and them individually had been disenfranchised because of the procedure the applicants followed in having themselves elected as branch officials. They were relying on a constitution which was diametrically different from the one the applicants were relying on. The former was described as the old constitution while the latter was described as the new constitution. In dealing with the issue, Aroni J. held that to her mind it did not matter whether one was looking at the old or the new constitution. The elaborate procedures for elections set out in either constitution in her view, were not complied with.

We have considered the parties' respective cases. The applicants drew up a notice dated 10th March 2009 addressed to the respective local chairmen A.I.P.C.K, inviting them to send 6 Christians from their respective churches to represent them in a Special General Meeting of the Kiambu Branch of the church, without stating the agenda. The special meeting was scheduled to be held on 20th March 2009. The meeting was allegedly held, and it was in that meeting the applicants were elected as branch officials. It was that notice which the respondents alleged was inadequate, and not given in accordance with the constitution. Aroni J. agreed with them. It was within her discretion to so find. In conducting elections the church was expected to follow its constitution. Prima facie, the period the local churches were allowed to pick representatives appears to have been inadequate as the period stipulated in both the new and old constitution is 14 days. That was the more so because, there were earlier elections which were held on 23rd December 2008, in which a notice of less than 14 days had been given, which were nullified on the ground that the notice of the elections was inadequate. The notice dated 10th March 2009 for a meeting to be held ten days later could not by the same token be said to have been adequate.

Besides the way the notice was worded suggests that the convenors of the meeting of 20th March 2009, did not intend, for whatever reason, to disclose to some of the members of the church the whole purpose of that meeting. Aroni J. held that the notice did not comply with both the old and new constitutions. As there was a dispute as to which constitution was the operational one, we do not wish to express any view on the matter. Suffice it to state here that on the material before the superior court it is quite clear that the applicants have not satisfied the last condition for the grant of orders under rule 5(2) (b) aforesaid.

There is however, the issue which was raised both before Aroni J. and before us regarding the status of the respondents to bring action against the applicants. Aroni J. did not think the issue could be resolved at the interlocutory stage. We agree but add that unless a matter is clear that the applicant or respondent lacks the capacity to sue or to be sued, a court should be slow to deny a party an injunction if the facts and circumstances of the case justify it.

Will the applicants' intended appeal be rendered nugatory unless we grant them the stay prayed for. We think not. We were told from the bar that since the order sought to be stayed was made a period in excess of 10 months has gone by. The church is still running. The suit in the High Court has since then remained dormant. The parties respective advocates told us that they have been inactive in that suit because they were awaiting the outcome of this motion. If the situation has been calm for at least 10 months, there is no basis upon which it can be said that the situation will get worse with time. In view of what we have stated it cannot be said that the applicants' intended appeal will be rendered nugatory unless we grant a stay.

The applicants having failed to satisfy both conditions for the grant of an order under **rule 5(2)(b)** aforesaid, we have no basis for granting them a stay. We think that this is a matter which should have been resolved through arbitration considering that the dispute relates to members of the same church organization whose main function is the spiritual welfare of its members. The High Court suggested this but apparently the parties were not agreeable.

In view of the foregoing this application fails and it is, accordingly dismissed, with costs to the respondents.

Dated and delivered at Nairobi this 26th day of November 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR