



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1220 OF 2016

**PAUL NDUNGU NDICHU.....
CLAIMANT**

VERSUS

**AMOS MATHENGE KABUTHA.....1ST
RESPONDENT**

**REGISTERED TRUSTEES OF AFRICA
INDEPENDENT**

**PENTECOSTAL CHURCH OF AFRICA.....2ND
RESPONDENT**

**THE CENTRAL BOARD OF THE AFRICA INDEPENDENT PENTECOSTAL CHURCH OF
AFRICA**

(Through the Executive Officials namely

the Assistant Secretary General and Secretary General).....INTERESTED PARTY

RULING

1. By a ruling delivered on 27th October 2016, **Wasilwa J** directed the Archbishop of the Africa Independent Pentecostal Church of Africa (AIPCA) to vacate office.
2. The Judge further directed the parties to conduct elections within two (2) months. In the meantime, the Chairman of the Bishop Synod, Philip Kubai would take over as the Spiritual Head for not more than 135 days.
3. The 1st Respondent thereafter moved the Court under certificate of urgency seeking a stay of execution of the aforesaid ruling for 45 days. The application which is supported by the 1st Respondent’s own affidavit sworn on 2nd November 2016 is based on the following grounds:
 - a) That the orders by **Wasilwa J** were issued in the absence of the 1st Respondent and his Counsel;
 - b) That in light of the above ,stay of execution was not sought at the time the orders were issued;
 - c) That the said orders are serious in nature and will impact heavily on the Church;

d) That the 1st Respondent intends to appeal the entire decision by **Wasilwa J**;

e) That the 1st Respondent stands to suffer irreparable damage and great prejudice if the orders sought are not granted.

4. In a replying affidavit sworn by Paul Ndungu Ndichu on 14th November 2016, it is deponed that the Constitution of AIPCA is self-executory. In this regard, it was never contested that upon retirement of the Archbishop the Bishop Synod Chairman would take over the functions of the Archbishop for a period of 135 days after which the National Delegates would elect a new Archbishop.

5. Ndichu further depones that what was in contention was who the Bishop Synod Chairman was and that the Court had determined that it was Bishop Philip Kubai. There was therefore no positive order issued by the Court capable of being stayed.

6. Regarding the issue that the ruling had been delivered in the absence of the 1st Respondent and his Counsel, Ndichu states that the ruling date had been given in Court where all parties were represented. In any case, the presence of the 1st Respondent's Counsel was not a guarantee that a stay order would have been granted.

7. Ndichu takes the view that the Court lacks jurisdiction to stay the finding and declaration that the Archbishop is retired and that Bishop Philip Kubai is the Bishop Synod Chairman; the only available remedy being review by this Court or an appeal to the Court of Appeal. He adds that it is an illegality for the 1st Respondent to stay in office as the Archbishop of the AIPCA and that the stay orders granted on 3rd November 2016 have the effect of furthering this illegality.

8. The 1st Respondent's application was canvassed *inter partes* on 23rd November 2016. Counsel for the 1st Respondent who is the Applicant in this application told the Court that his law firm which had come on record on 28th October 2016 had filed a Notice of Appeal on the same day. The grounds of appeal had however not been filed.

9. In opposing the application, Counsel for the Claimant submitted that the Notice of Appeal already filed operated as an appeal and this Court had therefore been rendered *functus officio*. Counsel also rehashed the principles for granting of stay pending appeal, the principle one being that the Applicant has an arguable appeal.

10. The issue for determination in this application is whether the 1st Respondent has made out a case for granting of stay of execution pending appeal. Before determining this question I need to dispense with the submission made by Counsel for the Claimant that because a Notice of Appeal has already been filed, then this Court is *functus officio* and cannot therefore grant any orders.

11. In making this submission, Counsel relied on Rule 2 of the Court of Appeal Rules which defines an appeal to include an intended appeal. He however appears to have lost sight of Order 42 Rule 6(1) of the Civil Procedure Rules which affords a party the option to seek stay of execution either in the trial court or in the appellate court. That being the case, I find that the 1st Respondent's application for stay of execution is properly before this Court.

12. I will now deal with the application on merit. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the following conditions for granting of an order for stay of execution pending appeal:

a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;

b) That the application has been made without unreasonable delay;

c) That the applicant has given adequate security for the due performance of such order as may be binding on them.

13. Additionally, there is the well established condition developed under caselaw that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see ***Banking Insurance & Financen Union (Kenya) v Murata Sacco Society Limited [2015] eKLR***).

14. All the 1st Respondent has done is to file a Notice of Appeal and the current application which seeks stay of execution for 45 days. There is nothing to show that he has an arguable appeal that would be rendered nugatory if the order sought is not granted.

15. Even applying the principle in ***Syner-Med Pharmaceuticals Ltd v Glaxo Group Limited [2010] eKLR*** to the effect that a trial court considering an application for stay pending appeal should not venture into the merits of the appeal, the 1st Respondent's application does not make the non-frivolous mark.

16. The application is therefore dismissed with costs to the Claimant.

The interim orders granted on 3rd November 2016 are vacated.

17. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF NOVEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Makokha for the Claimant

Mr. Musyoka for the 1st Respondent