



Bett & 13 others v Good News Church of Africa & 3 others (Civil Appeal E136 of 2021) [2022] KEHC 16821 (KLR) (Civ) (22 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E136 OF 2021

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

ISSAC BETT 1ST APPLICANT
REV. PETER MWANGANGI 2ND APPLICANT
WILLIAM KILUNGYA 3RD APPLICANT
PATRICK KISULU 4TH APPLICANT
REV. JAPHETH MUTUSE 5TH APPLICANT
JAMES NDEMANGE 6TH APPLICANT
TOM MUTUSE 7TH APPLICANT
HENRY KIBIWOTT TANUI 8TH APPLICANT
JEREMIA MWENGEA 9TH APPLICANT
SYLVESTOR MAKALI 10TH APPLICANT
BONFACE MUASYA 11TH APPLICANT
PAUL LANGAT 12TH APPLICANT
NICHOLAS MUEMA 13TH APPLICANT
JOYCASTER WAVINYA NZONGULO 14TH APPLICANT

AND

GOOD NEWS CHURCH OF AFRICA 1ST RESPONDENT
RAPHAEL NZUKI KITUVA 2ND RESPONDENT
BONFACE NZUKI KITUVA 3RD RESPONDENT



RULING

1. The live prayers for determination in the motion dated 9th March 2021 filed by Rev. Issac Bett, Rev. Peter Mwangangi, William Kilungya, Patrick Kisulu, Rev. Japheth Mutuse, James Ndemange, Tom Mutuse, Henry Kibiwott Tanui, Jeremia Mwengea, Sylvester Makali, Bonface Muasya, Paul Langat, Nicholas Muema, Joycaster Wavinya Nzongulo and Stanley Makali (hereafter the 1st to 14th Applicant/Applicants) seeks that the Honorable court be pleased to stay, vary, set-aside, quash and or review the orders issued by the lower court on the 22nd February 2021 pending hearing and determination of this appeal and that honorable court be pleased to stay, vary, set-aside, quash and or review the orders issued by the lower court on the 24th August 2020 pending hearing and determination of this appeal.
2. Further that the honorable court be pleased to stay all proceedings before the lower court pending the hearing and determination of this appeal and that the court be pleased to issue orders directing the warring factions and administrative councils in the 1st Respondent's church to observe and work within their constitutionally mandated duties as elected and or appointed and as envisaged by the church constitution and or members pending the hearing and determination of the appeal.
3. The motion is expressed to be brought under Article 36, 48 & 50 of the Constitution of Kenya, 2010, Section 17, 18, 19, 20, 24, 27 & 29 of the Societies Act, Section 1A, 1B, 65, 77, 78 & 79 of the Civil Procedure Act and Order 42 Rules 1 & 6 of the Civil Procedure Rules, inter alia. The grounds on the face of the motion are amplified in a lengthy supporting affidavit and further affidavit sworn by Sylvester Makali (hereafter the 10th Applicant), who who describes himself as a member of Good News Church of Africa (hereafter the 1st Respondent) Pumwani Branch hence conversant with pertinent issues, competent and authorized to depose on his own behalf and on behalf of his co- Applicants.
4. To the effect that the 1st Respondent is engulfed in wrangles that have fragmented the church into warring factions between elected leaders negatively impacting on the members of the church; that on account of the foregoing Good News Church of Africa, Raphael Nzuki Kituva, Boniface Mbiti Mbwang'a and Wilson Musyoka Mailu (hereafter the 1st, 2nd, 3rd & 4th Respondent/Respondents) successfully moved the lower court and obtained orders on 22nd February 2021 which are the subject of the instant appeal; that the Respondents are the cause of anarchy in the 1st Respondent church and in order to steal a march and subject the church to seemingly ineluctable confusion and discord, they have devised various methods of frustrating duly elected leaders and other members who try to expose their disgraceful character or oppose them in one way or another; and that the 2nd Respondent has lost favour with the 1st Respondent flock including the Pumwani Local Church where he last served as a senior pastor on account of misappropriation of church funds and his dictatorial style of leadership.
5. Further that the orders obtained on 24th August 2020 by the Respondents in respect of their contempt application has curtailed the 1st Respondent's internal dispute resolution mechanism that had been activated by the church and was led by the 1st to 8th Applicant; and that court orders issued on 22nd February 2021 are both ambiguous and incapable of enforcement without being clarified or interpreted. He further deposes that the foregoing orders are incapable of being implemented in respect of the 9th to 14th Applicant without causing a constitutional disorder in the church or infringing on the constitutional rights of the Applicants.



6. On grounds that the said order in effect seeks to bar about half of the Pumwani Local Church Council members from performing their constitutional duties affecting its requisite quorum for meetings thus indirectly paralyzing its activities; that the order directly interferes with the church constitutional arrangements; and that if the 9th to 14th Applicants being duly elected Pumwani Local Church Council members are barred from performing their duties, the Pumwani Church shall have no Local Church Council to perform administrative duties.
7. The deponent asserts that the impugned court order was made without due consideration of the Applicants' evidence on record pertaining to germane facts or issues involving the 2nd Respondent. In conclusion the deponent asserts that unless the court intervenes and grants the prayers sought the Applicants and the church stand to suffer irreparable harm by infringement of their constitutional rights.
8. The motion is opposed through the replying affidavit of the 2nd Respondent dated 12th May 2021. The deponent states that he is the archbishop of the 1st Respondent and duly authorized by his co-Respondents to depose. He asserts that the 2nd to 4th Respondent are duly elected officials of the 1st Respondent or a term of five years pursuant to elections conducted in 2016 and are thus authorized to conduct day-to-day running of the 1st Respondent pursuant to the law and church constitution. The deponent takes issue with the motion on grounds that the orders issued by the lower court on 22nd February 2021 were not ambiguous as alleged by the Applicants as the same were necessitated by the anarchy in the 1st Respondent church; that the Applicants have not satisfied the conditions for granting the orders sought as set out in the decision of *Global Tours & Travels Limited – Nairobi HC Winding Up Cause No. 43 of 2000*; and that the Applicants have not established that they have an arguable case as the grounds raised in the memorandum of appeal touch on the main suit that is yet to be determined.
9. The deponent further states that the motion does not demonstrate how the intended appeal will be rendered nugatory. Finally, that the deponent asserts that the trial court established that the 2nd to 4th Respondent were duly elected officials of the 1st Respondent when it ordered no interference with its affairs and hence the instant motion is devoid merit and ought to be dismissed with costs.
10. In a rejoinder by way of a further affidavit deposed by 5th Respondent who describes himself as the Assistant Chairperson and or Assistant Bishop and member of the Central Church Council of the 1st Respondent asserts that the replying affidavit is characterized by false depositions and material representation; that it is not true that the 2nd Respondent is the Arch-Bishop of the 1st Respondent as the said position was created under the 2018 amended constitution as an elective position and can only be held after the elections under the church electoral procedures, constitution and the Societies Act; that the 2nd, 3rd and 4th Respondents constituted themselves into the office of Arch-Bishop which caused the splitting of the 1st Respondent's office bearers and the Central Church Council, and the said Respondents purport to run the church in the capacities which are unconstitutional prompting the members to resist their illegal conduct; and that the 2nd, 3rd and 4th Respondents have no constitutional mandate to run the 1st Respondent's day to day affairs.
11. The deponent goes on to depose that the Applicants have established a prima facie case with overwhelming chances of success as set out in *Samuel Ndegwa Waitbaka v Agnes Wangui Mathenge & 2 Others* [2017] eKLR; an arguable appeal as held in *University of Nairobi v Ricatti Business East Africa* [2020] eKLR; that the appeal was filed timeously; and that the Appellants' concerns are founded on the interest of justice.
12. He asserts that the court order restrains church officials from entering their residential houses, conducting their duties, attending church services, collecting offerings & other monies which may be



remitted to the upper councils thereby paralyzing the operations of the 1st Respondent. In conclusion he avers that the Respondents shall not suffer any prejudice as they are the cause of the anarchy in the church whereas the appeal has a high chance of success and if the orders sought are not granted it will render the same nugatory.

13. The motion was canvassed by way of written submissions. A perusal of the lengthy submissions filed by counsel for the Applicants, reveals that the submissions essentially canvassed the substantive issues in the main appeal. With respect to counsel, his submissions barely addressed the motion that is for determination before the court. The bare submissions are that the orders issued by the trial court were ambiguous and ought to be stayed. Counsel cited the decision of *Oilfield Movers Limited v Zabara Oil & Gas Limited* [2020] eKLR in that regard. It was further asserted that unless the court issues stay orders the appeal shall be rendered an academic exercise and of no value to the Applicants. The court was thus urged to allow the motion as prayed.
14. On the part of the Respondents counsel anchored his submissions on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. While calling to aid the decisions in *Pius Mbiti & Another v Daniel Mutiria & Another* [2017] eKLR, *Henry Sakwa Maloba v Bonface Papando Tsabuko* [2020] eKLR and *Machira t/a Machira & Co. Advocates v East Africa Standard (No. 2)* [2002] 2 KLR 63 counsel argued that in dealing with the issues of substantial loss, the Applicants ought to establish that the execution of the subsisting orders will create a state of affairs that will irreparably affect or negate the very essential core of the intended appeal. That while there is no decretal sum due for payment in the instant matter, the Applicants have failed to prove that they shall suffer substantial loss if the lawful courts order is enforced and stay of execution is denied. Hence the intended appeal will not be rendered nugatory by this court declining the orders sought for by the Applicants.
15. Concerning expedition in bringing the motion, counsel relied on *Jaber Ali & Another v Priscilab Boit & Another* [2014] eKLR to contend that there was delay as the motion ought to have been filed instantaneously. Submitting on the issue of security it was asserted that the question in dispute is not a decretal sum that would warrant furnishing of security. However, the Applicants are under an obligation to sufficiently demonstrate a guarantee to rectify any prejudice occasioned to the Respondents.
16. Citing section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the *Civil Procedure Rules* and the decision in *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR counsel argued that it was grossly erroneous for the Applicants to pursue an appeal and simultaneously seek review of the lower court orders. Further that the prayer for setting aside was not available to the Applicants at this interlocutory stage. In conclusion counsel called to aid the decisions in *Global Tours & Travels (Supra)* and *Kenya Wildlife Services Limited v James Mutembei* [2019] eKLR to argue that the Applicants have not satisfied the conditions for granting of an order of stay of proceedings and that the instant motion is destitute of merit but also unfounded on cogent issues and cardinal principles of law as such ought to be dismissed with costs.
17. The court has considered the material canvassed in respect of the motion. First, this court could not at the interlocutory stage set aside the orders of the lower court as sought herein. That would determine the appeal prematurely. Second, the Applicants cannot simultaneously pursue both an appeal and the prayer for review or variation of the subject orders in the lower court. Besides, a review application should be made before the court that made the order sought to be reviewed, in this instance, the lower court. The provisions of Sections 80 of the *Civil Procedure Act* and Order 45 Rule 1 *Civil Procedure Rules* are clear. Those latter provides that:

“(1) Any person considering himself aggrieved—



- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.
18. Hence, a party cannot pursue the remedy of an appeal while simultaneously seeking review of the same decision appealed from. There is a long line of authorities on this point including *Republic v Registrar of Companies, Interested Party Githunguri Ranching Co. Ltd* [2016] eKLR where the court cited the Court of Appeal decision in *Francis Origo & Others V. Jacob Kumali Mungala* [2005] eKLR to the effect that the option of review was closed to a party who had first filed an appeal in connection with the same decision sought to be reviewed.
19. Odunga J’s observations in *Republic V Cabinet Secretary for Transport & Infrastructure & 76 others* [2015] eKLR, were cited by Aburili J. in *Republic V. Registrar of Companies* as follows:
- “To apply for a review with the intention of opening up fresh grounds for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed (as is the case herein) is an abuse of the process of the court.”
20. Aburili J concluded in her decision that:
- “From the above established principles and anchored in substantive and procedural law, it is clear that a party cannot file a Notice of Appeal (or appeal as herein) and an application for review in the same cause, challenging the same judgment/decreed or order. He has only one option. In this case the applicant has gone both ways. Accordingly, I have no difficulty in finding the application for review highly incompetent and a gross abuse of the court process. I... dismiss it”.
21. In *Kisya Investments Ltd. V. Attorney General & Another* Civil Application No. 31 of 1995 it was held that a party who had filed a Notice of Appeal could not apply for review but if the application for review is filed first, the party is not prevented from filing an appeal subsequently even if a review is pending. However, as stated in the *Chairman Board of Governors Highway Secondary School V. William Mmosi* Civil Application No. 277 of 2005, once the review application is determined the appeal lapses as the two remedies cannot be pursued concurrently or sequentially. Therefore, the two remedies are mutually exclusive. The prayer for review herein is misconceived in every respect.
22. The Applicants prayer for stay of proceedings pending appeal, is brought under Order 42 Rule 6 of the *Civil Procedure Rules* which provides that:
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application



for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

23. The Applicants’ present motion was apparently prompted by the order issued on 22.02.2021 in the lower court pursuant to a contempt application brought against them. However, the contempt application was in respect of orders issued earlier on 24.08.2020 against the Applicants. Indeed, the Applicants’ affidavit material herein and the lengthy memorandum of appeal repeat the complaint that the order of 22.02.2021 confirmed the earlier order of 24.08.2020. Moreover, the prayers in the memorandum of appeal seek inter alia that:

- “ 1. This Appeal be allowed;
2. The Ruling made, and consequential Orders dated 22nd August 2020 and the Orders dated 24th August,2020 which the said ruling seeks to enforce be set aside and/or quashed”.

24. The substantive orders challenged on this appeal are therefore those issued on 24th August 2020. Yet, the memorandum of appeal herein is dated 9th March 2021, almost seven months since August 2020. Evidently, no leave was sought to file the appeal out of time. Consequently, the appeal herein is incompetent. Whether the appeal is competently before the court is a jurisdictional matter.

25. It is evident on a plain reading of Order 42 Rule 6(1) of the [CPR](#) that an order to stay proceedings pending appeal presupposes the existence of a competent appeal. The filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#). Although the provision does not expressly say so, this can be inferred from the rule. Equally, Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).

26. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the [Civil Procedure Rules](#) must be preceded by the filing of a competent appeal. Therefore, until there is a competent appeal, the court would be acting in vacuo by considering the Applicant’s prayer for stay of proceedings pending a non-existent appeal. The Court of Appeal in [Abubaker Mohamed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR while citing with approval the decision of the High Court in [Rosalindi Wanjiku Macharia vs. James Kiingati Kimani \(Suing as the](#)



Legal Representative of the Estate of Martin Muiruri (Deceased) [2017] eKLR adopted the foregoing reasoning.

27. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to Order 42 Rule 6 (1) of the *Civil Procedure Rules*, and on Order 42 Rule 6 (6) of *Civil Procedure Rules*, left no room for doubt that an application for stay of execution , or as in this case, of proceedings pending appeal, could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited v Captain Francis E. K. Hinga* [2012] eKLR).
28. The erroneous invocation of this court’s appellate jurisdiction is not a mere technicality that is curable under the provisions of Section 3A of the *Civil Procedure Act* and Article 159(2)(d) of the *Constitution*. In *Peter Nyaga Muvake -v- Joseph Mutunga* [2015] eKLR, the Court of Appeal while considering an invalid notice of appeal for want of leave stated inter alia that:
- “Without leave of the High Court, the Appellant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*; the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave, which has not been sought and obtained is dead in the water.”
29. In the circumstances, the court’s appellate jurisdiction has not been properly invoked and the motion dated 9.03.2021 is hereby struck out with costs to the Respondents. The Applicants are directed to take the necessary steps to regularize the memorandum of appeal within 14 days of this date, failing which it will equally stand automatically struck out.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF DECEMBER 2022

C.MEOLI

JUDGE

In the presence of:

For the Applicants: N/A

For the Respondents: N/A

Court Assistant: Adika

