



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE, & KIAGE, JJ.A)**

**CIVIL APPLICATION NO. 71 OF 2016 (UR 52/16)**

**BETWEEN**

**THE REGISTERED TRUSTEES OF**

**THE ANGLICAN CHURCH OF KENYA.....APPLICANT**

**AND**

**JAMES MAINA MAIGWA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN NJOGU GACHAU ..... 2<sup>ND</sup> RESPONDENT**

**PAUL MWANGI WARUI .....3<sup>RD</sup> RESPONDENT**

*(Application for stay of execution of the judgment and decree of the High Court of Kenya at Nyeri (Ongaya, J) dated 9<sup>th</sup> September, 2016*

*in*

***Employment & Labour Cause No. 190 of 2015***

***Consolidated with Cause No. 192 & 193 of 2015)***

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**RULING OF THE COURT**

By the motion dated 7<sup>th</sup> October 2016, and brought under **Rule 5(2) (b)** of the Court of Appeal Rules the Registered Trustees of the Anglican Church of Kenya (the applicant) seeks as against the respondents James Maina Maigwa, John Njogu Gacha and Paul Mwangi Warui an order staying the execution of the Judgment and decree of the Employment and Labour Relations Court at Nyeri (Ongaya J) by which the applicant is required to reinstate the respondents to their full priestly employment with the applicant and to pay to them various sums amounting to **Kshs. 6,888,590**. The application is premised on the usual grounds namely; that the applicant has an arguable appeal and that the same would be rendered nugatory unless the stay sought is granted. It is also supported by an affidavit sworn by Desmond Mtula, the applicant's Managing Director.

The gist of that affidavit, which the applicant's learned counsel **Mr. Mayende** relied on when urging the application is that the respondents were each awarded Kshs. 2 million for psychological trauma following the unlawful termination of their employment as priests. They were also to be paid various sums being full pay and benefits and reinstated as at 1<sup>st</sup> October 2016. Following an application for stay pending appeal before the learned Judge, the applicant was ordered to deposit the sum of Kshs. 6 million into an interest earning account in the joint names of the parties' advocates, by 1<sup>st</sup> November 2016. It would seem the order was not complied with.

Both in the supporting affidavit and in submissions before us, the applicant has made an offer to deposit the entire decretal sum in a joint interest earning account in the names of both advocates so that the question remaining for our decision is whether the order of reinstatement should be stayed pending appeal. It is the applicant's case that it has an arguable appeal. It has annexed a memorandum of appeal raising a number of complaints on how it perceives the learned Judge to have erred including failure to consider the circumstances under which the terminations occurred; failing to consider the practicability of reinstatement and awarding the sum of Kshs. 2 million as compensation for psychological trauma which was excessive and without legal basis. As Mr. Onsare who appeared with Ms. Onsare for the respondent did consider that the awardability and quantum for the Kshs. 2 million for psychological trauma is a point properly to be taken and contested on appeal, the first limb of arguability stands satisfied since an arguable appeal is not one that must necessarily succeed, it just needs to be non-frivolous. A single *bona fide* ground to be urged and answered suffices. See, for a thorough discussion of the applicable principles in this Courts' decision in **STANLEY KANGETHE KINYANJUI VS. TONY KETTER & 5 OTHERS [2013] eKLR.**

That leaves the question of whether a reinstatement of the respondents pending appeal would render the appeal nugatory. According to Mr. Mayende, the respondents held very sensitive positions in the church and the accusations of sodomy and homosexuality leveled against them which led to their termination were read before the congregations where they served as priests. To the applicant, therefore, it would be undesirable, disruptive and impractical for the respondents to hold their former offices while the appeal is pending because church ministers ought to have faith, credit and trust and these have been lost. Mr. Onsare's answer to those submissions is that the applicant has many dioceses across the country and there is nothing that would prevent the applicant from complying with the order of reinstatement by either post the respondents to different dioceses or have them serve in different capacities.

Further opposition is in the form of a replying affidavit sworn on 16<sup>th</sup> November by **Paul Mwangi Warui**, the third respondent, on behalf of his co-respondents and himself which terms the application misconceived, the court below having heard a similar application and granted it on terms which the applicant has deliberately ignored and disobeyed.

As we have indicated, all we need to decide is whether the applicant's intended appeal would be rendered nugatory unless a stay of execution is granted. The term nugatory, from the Latin '*nugatorious*' means something worthless or futile, one that is trifling or of no value. The term has to be given its full meaning and it is always a question of fact dependent on the peculiar circumstances of each case. See **RELIANCE BANK LTD vs. NORLAKE INVESTMENTS LTD [2002] 1 EA 232.** An appeal may thus be said to be nugatory if its eventual success turns out to be merely academic by reason of some great harm, loss or prejudice having occurred in the interim.

Would the reinstatement of the respondents to the employment of the applicant render the appeal, if it succeeds, nugatory" We are not so persuaded. The applicant's fears are that the respondents' positions as shepherds of the spiritual flock have become untenable by reason of the damaging nature of

the sodomy and homosexual accusations leveled against them and which strike at the heart of their credit, faith and trust that the parishioners need to have in them. Those allegations were the reason for the respondents' removal but we now have a judgment of the court below that has held those terminations were unfair and ordered their reinstatement. Indeed, the order for reinstatement having been made on 9<sup>th</sup> September, 2016 and a stay having been declined by the court below, the position as it stands is that the applicant ought to have complied.

We think that the argument that the allegations made against the respondents' resumption of their pastoral duties has become untenable is easily falsified and seems to speak more to the applicant's embarrassment of appearing to eat humble pie in obedience to the court order as opposed to any real hardship. It must also be recalled that the intended appeal could go either way and so it is not impossible to suppose that this Court's final orders could as well confirm or reverse the findings of the court below. Mere inconvenience or embarrassment at compliance with a court order does not appear to us to amount to rendering the intended appeal nugatory. We do not see that the reinstatement of the respondents poses the applicant any prejudicial hardship or will occasion any irreversible loss. If they succeed in the appeal, they will relieve the respondents of their duties, pronto.

The nugatory aspect has not, with respect, been established, yet to succeed an applicant must establish both aspects. See **RELIANCE BANK LTD vs. NORLAKE INVESTMENTS LTD [2012]1EA 227; GITHUNGURI vs. JIMBA CREDIT CORPORATION LTD [1988] KLR 838.**

The upshot of our consideration of this application is that it must fail for failing to establish the nugatory aspect. It is accordingly dismissed with costs to the respondents.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of June, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

***I certify that this is a true***

***copy of the original***

**DEPUTY REGISTRAR**



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