



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**(ENVIRONMENT AND LAND COURT DIVISION)**

**CIVIL APPEAL NO.29 OF 2014**

**THE ANGLICAN CHURCH OF KENYA**

**ST. PETERS CHURCH, GATUNDUINI.....APPELLANT (APPLICANT)**

**VERSUS**

**THE SECRETARY, MURANG'A COUNTY GOVERNMENT.....1ST  
RESPONDENT**

**JAMES NDUATI KIBUTHU.....2ND RESPONDENT**

**RULING**

**Background**

1. The applicant, the Anglican Church of Kenya, **St. Peters Church Gatunduini**, brought the notice of motion dated **26th May 2014** seeking, *inter alia*, a temporary injunction to restrain the respondents from entering, building/erecting any structures and/or interfering with its possession, use and/or occupation of the parcels of land known as **Loc.12/Sub Loc 2/Kiamara/911** and **T. 270** (hereinafter the "suit properties") pending the hearing and determination of the application and the appeal herein.
2. The application is premised on the grounds that the applicant's application in the lower court which sought similar orders was dismissed. The applicant contends that the lower court's decision to strike out the application and the suit while there was no prayer for dismissal of the application and the suit was erroneous and premature.
3. The applicant explains that following the dismissal of the suit, the respondents went into the suit properties and began putting up permanent structures thereon. The applicant is apprehensive that unless restrained by way of the orders herein sought, the respondents will deal with the suit properties in a manner prejudicial to its interest thereon. For those reasons, the applicant wants the *status quo* which obtained before the application and the suit were dismissed maintained, pending the hearing and determination of its appeal. The applicant also contends that no prejudice will be occasioned on any of the parties if the order sought is granted.
4. The application is supported by the affidavit of the Vicar in charge of the applicant, **Rev. Peter Karanja Kuria**, sworn on **26th May 2014**. In that affidavit, the deponent has, *inter alia*, deposed that the suit properties were allocated to the applicant by the 1st respondent's predecessor, Murang'a County

Council on or about **8th September, 1997**; that upon allocation of the suit properties to it, the applicant caused the suit properties to be registered at the lands office in the name of the Trust Land Board on behalf of the Anglican Church (A.C) Kiamara Church.

5. It is the applicant's case that ever since that time, it had been in quiet and peaceful use and occupation of the suit properties until after coming into force of Murang'a County Government vide the 2013 General Elections.

6. The applicant further contends that after the coming into force of the Murang'a County Government, the 1st respondent interfered with its rights in the suit properties by communicating that the suit properties were community land and intimating that it would take over the suit properties and build administrative offices thereon (Chief and Administrative police offices).

7. Aggrieved by the 1st respondent's said communication/decision, the applicant instituted **Murang'a CMCC No. 405 of 2013** seeking, among other orders, a declaration that the allocation of the suit properties to it was lawful. The applicant also sought an order of injunction to restrain the 1st respondent from interfering with its occupation and utilization of the suit properties and an order to dissolve the subsisting trust in respect of the suit properties and transfer of the suit properties to itself.

8. Simultaneously with the plaint, the applicant brought the application dated **20th December, 2013** seeking to preserve the suit properties pending the hearing and determination of the suit. During the pendency of the application, the 2nd respondent applied to be enjoined in the suit and the application.

9. After hearing the application, the trial court found it to be without merits and dismissed it. Besides, the trial court dismissed the suit *suo moto*. The dismissal of the suit prompted the applicant to file the current appeal arguing that the trial court erred by dismissing the application and the suit without any prayer or prompting by the parties to the suit.

10. Terming the appeal meritorious and arguable, the deponent urges the court to grant the orders sought in order to preserve the property pending the hearing and determination of the appeal.

11. In support of the applicant's case, the deponent has annexed the following documents to his supporting affidavit:- Allocation letter dated 8th September, 1997 (**PKK-1**); Certificates of official searches in respect of the suit properties (**PKK-2 (a) & (b)**); Letter from the 1st respondent dated 2nd September, 2013 (**PKK-3**); Plaint filed in the lower court (**PKK-4**); Application filed in the lower court (**PKK-5**); Order of temporary injunction issued in the lower court (**PKK-6**); Responses to the application filed in the lower court (**PKK 7(a) & (b)**); Consent for disposal of the application by way of written submissions (**PKK-8**) and a copy of Memorandum of Appeal (**PKK-9**) filed in the suit herein.

12. In reply, the 1st respondent, **Danson N. Ngugi**, filed the replying affidavit sworn on **9th June, 2014** where he has deposed that the application is bad in law, lacking in merit and fatally defective; that he is aware that the suit properties are part of trust land vested in the County Government of Murang'a as the successor of the County Council of Murang'a and the Trust Land Board respectively to hold for the benefit of the Community living in Kiamara area of Murang'a County; that apart from the minutes of 1997 5(A) (11) of the Education Public Services and Social Services Committee there are no further proceedings concerning the intended allocation of the suit property to the CPK Church Gatunduini; that there are no records to confirm or make him believe that Anglican Church of Kenya, St. Peters Church Gatunduini was previously called CPK Church Gatunduini; that he believes that on the basis of the aforementioned minutes of 1997, someone purportedly reserved the suit properties for ACK Church and subsequently got entries made at the Murang'a Lands Registry.

13. The deponent contends that the purported reservation and/or allocation of the suit property on the strength of the minutes of 1997, if at all, to the CPK Church Gatunduini are null and void ab initio.

14. The foregoing notwithstanding, the deponent has admitted that the members of the applicant have been congregating on what he calls a small part of plot No.Loc.2/911 only. He also argues that they do so

on permission of the County Government of Murang'a. The deponent further argues that vide the minutes of **4th September, 1992** it was resolved that all future developments in respect of Kiamara Community be carried on parcel No. Loc 12/Sub-Loc 2/Kiamara/T 270 also known as 270. Further that he is aware of the impugned constructions on the suit properties.

15. Concerning those constructions, he deposes that they are not being carried out by the himself and/or the County Government of Murang'a and/or its agents but by the people of Kiamara Community in conjunction with Kangema Constituency Development Fund Committee.

16. With regard to his letter to the Governor referred to in paragraph 5 of the applicant's supporting affidavit, he explains that he was only informing the Governor of the wishes of the Community and what was happening on the suit properties. Terming the information contained therein his personal opinion, the deponent argues that his opinion was not meant to in any way affect the actual status of the suit properties. He explains that neither he nor the County Government of Murang'a has interfered with the status, occupation and usage of the suit properties. He maintains that all what the County Government of Murang'a has done is to protect the suit properties on behalf of the people of the area on whose behalf it holds it.

17. In support of the averments contained in his replying affidavit, the respondent has annexed the following documents:- Minutes of 2nd September 1999 **DNN-1**; Minutes of 4th September, 1992 **DNN-2**; Submissions filed by the 1st respondent in the lower court **DNN-3**; and the ruling in the lower court **DNN-4**.

18. Contending that the current application is in *pari materia* to the one filed in the lower court, he urges the court to dismiss it for being an abuse of the process of the court.

19. On his part, the 2nd respondent who is the Secretary Kangema Constituency Development Fund Committee filed the replying affidavit he swore on **9th June 2014**. Like the 1st respondent, the 2nd respondent has deposed that the application is incompetent, without merits, fatally defective and an abuse of the process of the court. In this regard the 2nd respondent contends that the applicant had no capacity to bring and prosecute the suit in the lower court and the appeal and application herein. Contrary to the applicant's contention that the suit properties were allocated to himself, he contends that the suit property was set a part for the benefit of the Kiamara Community of which he is a member in 1992. He argues that since the said setting apart, the properties have been held by the predecessor of the County Government of Murang'a and or its Successor in title in trust for the said community.

20. He explains that Kangema Constituency Development Fund Committee commenced the impugned developments on the suit properties to address skyrocketing incidents of crime in Kiamara area.

21. Terming the purported allocation of the suit properties to the applicant in 1997 null and void ab initio, the 2nd respondent contends that the suit properties were not available for allocation to the applicant at the said time. The 2nd respondent further contends that the suit at the lower court and this appeal is meant to antagonize elected leaders of Murang'a County at the expense of security concerns of the people of Kiamara.

22. In support of his contention, the 2nd respondent has annexed to his replying affidavit the following documents. Minutes of the Education, Public Health and Social Services Committee meetings held on **4th September, 1992** and those of **2nd October, 1992** as **JNK-1** and **2** respectively; the Court orders of **20th December, 2013** and **28th May, 2014** as **JNK 3**; Submissions in the lower court **JNK-4** and the submissions filed the applicant at the lower court as **JNK-5**.

23. By consent of the parties to the appeal the application was disposed off by way of written submissions.

### **Submissions by the applicant**

24. In the submissions filed on behalf of the applicant, a brief history of the circumstances leading to the filing of the appeal and the current application is given and reiterated that the applicant satisfied the conditions for grant of a temporary injunction pending the hearing and determination of the suit filed in the lower court. The trial Magistrate is faulted for having held that the applicant did not satisfy the conditions for grant of the temporary injunction sought and for striking out the entire suit during an interlocutory application *suo moto*.

25. It is argued that since the proceedings commenced before the trial Magistrate were adversarial in nature, the trial magistrate should not have dismissed the suit without an application by the respondents.

26. Terming the trial Magistrate's action of dismissing the entire suit even before pleadings had closed draconian, counsel for the applicant argues that by dismissing the suit, the trial magistrate demonstrated utmost bias against the applicant. According to counsel for the applicant, even if the suit was defective the trial Magistrate ought to have given the applicant opportunity to cure the defect by amending its plaint.

27. Concerning the costs awarded to the 2nd respondent, it is submitted that since the 2nd respondent was not sued by the applicant it was wrong to make an order of costs in his favour.

28. In view of the foregoing, it is submitted that the applicant has an arguable appeal with very high chances of success.

29. Arguing that it will be an exercise in futility to mount the appeal if the respondents are not restrained from carrying out the impugned developments on the suit properties, the applicant urges the court to issue the injunction sought in order to preserve the suit properties pending the hearing and determination of the appeal.

#### **Submissions by the 1st respondent**

30. In the submissions filed on behalf of the 1st respondent, it is explained that the suit properties formed part of trust land vested in the County Council of Murang'a, the predecessor of the County Government of Murang'a and that under **Section 115(1) (2)** of the repealed Constitution, the suit properties vested in the said County Council being the Council in whose jurisdiction the properties were situated. It is submitted that the Council held the suit properties for the benefit of the persons ordinarily residing in it.

31. It is pointed out that the basis of the applicant's claim is the letter of the Murang'a County Council dated **8th September, 1997** through which the Education, Public Health and Social Services Committee communicated the allotment of the suit properties to the applicant. It is pointed out firstly, that the 1st respondent opposed the application by the applicant on the ground that the applicant was not allocated the suit properties in a full Council meeting as required by law or at all. Secondly, that the applicant did not have *locus standi* to file the case and the application and thirdly, that the suit at the lower court was dismissed for the reason that the appellant did not satisfy the requirements for injunction as spelled out in the case of **Giella v. Cassman Brown Co. Ltd** (1973) E.A 358 and that the suit was a nullity for want of *locus standi* on the part of the applicant.

32. On the law applicable to application for injunction pending appeal, reference is made to the case of **Patricia Njeri & 3 Others v. National Museums of Kenya, Nairobi Civil Appeal No.492 of 2004** where **Visram j.** stated:-

**“An order of injunction pending appeal is discretionary matter. The discretion must, however be exercised judicially and not in a whimsical or arbitrary fashion. This discretion is guided by certain principles some of which are as follows:-**

- a. **The court should be guided by the principles in Giella v. Cassman Brown Co. Ltd (1973) E.A 358;**
- b. **The discretion will be exercised against an applicant whose appeal is frivolous.”**

33. On whether the applicant has satisfied the principles set down in the **Giella v. Cassman Brown** case (*supra*), it is submitted that it is the duty of this court to re-evaluate the evidence adduced before the lower court in order to determine whether a *prima facie* case has been established. In this regard, it is submitted that whereas the applicant has described itself as a religious organization duly registered under the Societies Act, there is no evidence to show that the plaintiff is the successor of CPK Gatunduini church which is alleged to have been allocated the suit property in 1997.

34. Referring to the decisions in the cases of **Bahola Mkahindi v. Michael Seth Kaseme & 2 others Malindi Land Case No.168 of 2012**; **Mrao v. First American Bank of Kenya & 20 others (2003) KLR 123**, it is submitted that upon application of the principles enunciated in those cases to the circumstances of this case it will be found that the applicant has not established a *prima facie* case.

35. The following reasons are given for that contention:-

1. **That no evidence was adduced to show that the applicant is the successor of CPK Gatunduini Church which was allocated the suit property vide the letter of 8th September, 1997;**
2. **That no evidence was adduced to confirm whether the said allocation was approved in a full council meeting as required by law;**
3. **That the minutes of the full council meeting held on 2nd October 1992 show that the council approved that future developments in respect of Kiamara Community be carried on parcel No. Loc 12/Sub-Loc 2/Kiamara/T 270 also known as T 270 (For that reason the 1st respondent contends that the parcel was not available for allocation to anyone in 1997);**
4. **That neither the 1st respondent nor the Murang'a County Government is undertaking the developments which the applicant seeks to stop (The developments are being undertaken by Kiamara Community in conjunction with Kangema Constituency Fund Committee).**

36. On whether the applicant may suffer irreparable loss unless the order sought is granted, it is submitted that since the applicant has not proved that the suit properties were allocated to it or that the intended allocation materialized, it is submitted that the applicant has not shown that it may suffer irreparable in jury.

37. On balance of convenience, it is submitted that the balance of convenience tilts in favour of Kiamara Community who have commenced developments on the suit property.

38. As to whether the intended appeal is frivolous, it is submitted that the applicant's suit was dismissed for want of capacity of the applicant to sue. With regard to that ground, it is submitted that it has been held in numerous authorities that a society under the Societies Act is not a legal person with capacity to sue or be sued. The following cases are cited in support of that contention:-

- a. **Trustees Kenya Redeemed Church & Another v. Samuel M' Obuya & 5 others (2011) eKLR;**
- b. **Muchonjo Marugu v. Nguthiru PCEA Church (2002) eKLR;**
- c. **Andrew Inyolo Abwanza v. Board of Trustees of Pentecostal Assemblies of God-Kenya & 2 others (2009) eKLR.**

39. It is also submitted that in as far as the applicant has sued an officer of the County Government of Murang'a as opposed to the County Government itself, the case against the 1st respondent is unsustainable.

40. With regard to the contention that the trial Magistrate erred by striking out the suit *suo moto*, it is submitted that where a court finds that a party has no *locus standi* as in the instant case, the court is entitled to dismiss the suit *suo moto*.

**Submissions by the 2nd respondent**

41. In the submissions filed on behalf of the 2nd respondent, it is submitted that the jurisdiction of this court has not been properly invoked. In this regard, it is pointed out that the application herein is premised on **Order 40 Rule 1, 2 and 3** as opposed to **Order 42 Rule 6(6)** of the Civil Procedure rules which applies where temporary relief pending appeal is sought.

42. Referring to the principles enunciated in the case of **Naresh Darbar vs. Thara Orchard Ltd & 2 others (2008) eKLR**, it is submitted that the applicant has not established a *prima facie* case. In support of that contention, it is submitted that there is no evidence that the applicant was awarded the suit property by a full meeting of the Muranga County Council as by law required. In that regard, reference is made to the case of **Bahola Mkalindi** (*supra*) where it was held:-

**“a *prima facie* case is not established when there is no evidence of minutes of a full council to confirm an allocation of land.”**

43. Owing to want of evidence of minutes of a full council meeting confirming allocation of the suit properties to the applicant, it is submitted that the applicant has not established a *prima facie* case. Besides, it is submitted that one of the suit properties to wit, parcel No, Loc 12/Sub-Loc 2/Kiamara/T-270 was allocated to Kiamara community by the County Council of Murang'a in 1992. It was therefore, not available for allocation to the appellant in 1997 when the applicant claims to have been allocated the same.

44. It is further contended that even if the suit properties were allocated in a full council meeting, the allocation was in favour of an entity called CPK Church Gatunduini which is not the same entity as the applicant, Anglican Church of Kenya St. Peters Church Gatunduini. The searches produced by the applicant in respect of the suit properties are said not to be matching with the alleged allocation.

### **Irreparable damage**

45. Reiterating the contention that the applicant has not proved that the suit properties were allocated to it, the 2nd respondent submits that it cannot suffer irreparable damage if the orders sought are denied. On the other hand, granting the orders sought may lead to an escalation of the security situation which the 2nd respondent sought to address through the impugned developments. According to the 2nd respondent, stopping the developments on the suit properties may lead to loss of lives.

46. Maintaining that one of the suit properties was set apart for the use of the Kiamara community whose interest he represents, the 2nd respondent argues that the balance of convenience with regard to that property, parcel No. Loc 12/sub-loc 2/Kiamara/T.270 tilts in favour of the Kiamara community which has been in possession of the suit property since 1992 and has commenced developments thereon.

### **Inequitable conduct of applicant**

47. Arguing that the applicant has withheld material information from the court by failing to disclose to the court that the impugned developments are by the Kiamara Community and not the 1st respondent, the 2nd respondent argues that the applicant is unworthy of an equitable remedy. It is also explained that no injunction is sought against the Community which is represented by the 2nd respondent.

### **Appeal not arguable**

48. Pointing out that the applicant's suit was dismissed for, among other reasons, want of capacity to sue on the part of the applicant, reference is made to the case of **Living Water International V. City Council of Nairobi Nairobi civil Case No. 190 of 2005** and argued that the lower court was right in dismissing both the suit and the application upon finding that the applicant had no *locus standi* to bring and prosecute the suit.

### **Costs**

49. On the question of costs, it is pointed out that the 2nd respondent was allowed to join the suit upon application to be enjoined as a party to the suit. There being no appeal against the decision of the lower court to enjoin the 2nd respondent to the suit, it is submitted that there is no basis for contesting the costs awarded to the 2nd respondent.

**Allowing the application would occasion greater Hardship than it would avoid**

50. It is reiterated that granting the orders sought may escalate the security situation that the community sought to address by carrying out the impugned developments. Escalation of insecurity may, on the other hand, lead to loss of life which is undesirable.

51. For the foregoing reasons the court is urged to dismiss the application with costs to the respondents.

**Analysis and determination**

52. As pointed out above, the appeal herein arises from the decision of the lower court dismissing both the application for interlocutory relief and the suit. As can be deciphered from the ruling of the lower court which is annexed in the replying affidavit of the 1st respondent, the trial Magistrate dismissed the application and the suit on the grounds that:-

**“...Applicant has not satisfied the requirements spelled out in the case of Giella v. Cassman Brown (1973) E.A 358. I find that the suit is a nullity for want of locus standi (capacity) and accordingly both application and the suit are hereby struck out with costs.”**

53. Aggrieved by the said decision of the trial court the applicant filed the instant appeal challenging the said determination on the grounds that can be summarized as follows:-

1. **The trial Magistrate erred in holding that the applicant had not established a *prima facie* case with probability of success;**
2. **That the trial Magistrate erred by striking the suit at the interlocutory stage, hence denying the applicant an opportunity to amend its plaint;**
3. **The trial Magistrate erred by awarding costs to the 2nd respondent yet the applicant did not sue him.**

54. In the case of of Patricia Njeri & 3 Others v. National Museums of Kenya and Naresh Darbar vs. Thara Orchard Ltd & 2 others cited in the 1st and 2nd respondent's submissions respectively, it is pointed out that in determining an application for injunction pending appeal the court considers or applies the following principles:-

- a. **An order of injunction pending appeal is discretionary matter;**
- b. **The discretion would be exercised against an applicant whose appeal is frivolous;**
- c. **The discretion should be refused where it would inflict greater hardship than it would avoid;**
- d. **The applicant must show that to refuse the injunction would render the appeal nugatory;**
- e. **The court should also be guided by the principles in Giella v. Cassman Brown & Co. Ltd (1973) E.A 358.**

55. In applying the foregoing principles to the circumstances of the case, I begin by pointing out that on the strength of the authorities cited by the trial magistrate to wit; Muchonjo Marugu vs. Nguthiru PCEA Church HCCA No. 378 of 1994 where it was held:-

**“The plaintiff as cited in the plaint, is not a legal entity as the church as such cannot sue in its name and can only do so through its officers. This is not mere want of form but serious legal issue as to whether the church as such had locus standi in the matter.”**

56. The trial Magistrate was also referred to the case of Living Water International V. City Council , and the case of the Trustee Kenya Redeemed Church vs. Samuel M' Obuya cited herein above.

In Living Water International V. City Council where Nambuye J. (as she then was) observed:-

**“A reading of Section 3 of the Societies Act, Cap 108 Laws of Kenya, as well as the case law on the subject goes to show, that a religious society has no legal capacity to sue, and to be sued. This being the case, the plaintiff/applicant had no capacity to not only present the interim application, but the main suit as well. Both processes were therefore a nullity and therefore proper candidates for striking out...”**

57. In Trustees Kenya Redeemed Church & Another v. Samuel M’ Obuya it was held:-

**“It is trite law that a society under the Societies Act is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers orders. It has not pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”**

58. According to the common law doctrine of precedent, which applies in our legal system, the trial Magistrate was bound to follow the above cited cases as far as they applied to the circumstances before him. The question to ask, therefore, is whether the trial Magistrate erred in applying the above cases to the situation before him to warrant interference of the said determination through the instrument of the appeal herein. In other words was the decision of the trial court without any basis hence making the appeal herein arguable or not frivolous?

59. While appreciating that by striking out the suit at interlocutory stage, the trial Magistrate denied the applicant an opportunity to amend its plaint to bring in the right parties to the suit, it is noteworthy that at the time the trial Magistrate dismissed the application and the suit, the applicant had not intimated its desire to amend its pleading in order to bring on board the right parties to the suit. In its submission in support of the application, despite the issue of *locus standi* having been raised through the submissions of the respondents’, the applicant did not bother to file a reply to those issues to intimate that it would, before trial, amend its plaint to capture the right parties.

60. In view of the foregoing, there being evidence that the suit by the plaintiff was by an entity without legal capacity to sue or be sued and given the fact that the suit was also against an officer of the County Government of Murang’a as opposed to the County Government itself, I find the decision of the trial Magistrate to the effect that the applicant had no capacity to file both the suit and the application to have been right and incapable of being overturned through the appeal herein.

61. On whether the trial Magistrate erred by dismissing the suit *suo moto*, having found that there was no representation to the trial Magistrate that the applicant intended to amend its plaint to bring on board the right parties to the suit and being of the view that, in the circumstances of the case, there was no basis for sustaining a suit filed by a party without *locus standi* or capacity to sue or against a party wrongly sued, I find and hold that the trial Magistrate was right in terminating the suit at that point.

62. As for the issue of costs awarded to the 2nd respondent, I agree with the 2nd respondent’s submissions that since the applicant did not appeal against the decision of the lower court to enjoin him in the suit, it cannot be heard to say that the 2nd respondent is not entitled to costs. Be that as it may, having noted that the suit at the lower court was not defended by any of the parties to this appeal, I am of the view that the trial court should only have awarded the respondents the cost of defending the application and not the suit.

63. The upshot of the foregoing is that the appeal herein is equally bad in law having been filed by a party without legal capacity to sue. The appeal and the application herein are dismissed for want of capacity on the part of the applicant to bring and prosecute the same. Costs of defending the application for temporary injunction pending appeal are awarded to the respondent.

64. For avoidance of doubt, the respondents are only entitled to the costs of defending the application at the lower court and the application filed in this appeal and not the costs of the suit and appeal which have

been dismissed before they were argued.

**Dated, signed and delivered at Nyeri this 23rd day of March 2015**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Ms Odipo holding brief for Mr. Mulani for the 1st respondent and Mr. Mituga for the 2nd respondent

Rev. Karanja for the appellant

Counsel for the appellants not present

Lydia – Court Assistant