



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 201 OF 2000**

**JOSEPH KAMAU NJIGUA .....PLAINTIFF**

**VERSUS**

**THE CHURCH COMMISSIONER FOR KENYA .....1<sup>ST</sup> DEFENDANT**

**ANGLICAN CHURCH OF KENYA.....2<sup>ND</sup> DEFENDANT**

**VICAR REVEREND ABRAHAM FIO DEMBO.....3<sup>RD</sup> DEFENDANT**

**CONSOLIDATED WITH NAIROBI HCCC. NO. 44 OF 2010(OS)**

**ST. POLYCARP PARISH MLANGO KUBWA(SUING THROUGH  
THE CHURCH COMMISSIONERS FOR KENYA).....APPLICANT**

**VERSUS**

**JOSEPH KAMAU NJIGUA.....1<sup>ST</sup> RESPONDENT**

**JUJA DEVELOPMENT COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Applicants herein are the Original Defendants in HCCC No. 201 of 2000 and they have filed a Notice of Motion dated 30<sup>th</sup> October 2013 seeking orders of stay of execution of the judgment delivered herein on 10<sup>th</sup> July 2013 and consequential decrees pending the hearing and determination of the intended appeal against the said judgment. The Notice of Motion is supported by an affidavit and supplementary affidavit both sworn by Rev. Peterson Kithaka on 30<sup>th</sup> October 2013 and 16<sup>th</sup> November 2013 respectively, on behalf of the Applicants.

The Applicants are aggrieved by the judgment delivered herein decreeing the 1<sup>st</sup> Respondent the registered proprietor of the leasehold over the suit property herein, namely Nairobi/Block 104/202, and have filed a Notice of Appeal against the Judgment which they annexed. The Applicants states that the intended appeal is arguable and has overwhelming chances of success, and that if the orders sought are not granted the 1<sup>st</sup> Respondent therein is likely to exercise his rights as the registered owner of the suit property and sell, mortgage, transfer lease or part with possession of the suit property which will render the intended appeal nugatory,

The Applicants further state that they have been in occupation of the suit property since 1985, and have developed the same as a house of worship and erected offices, nursery school, and other structures thereon. Further, that they are now facing an imminent eviction from the 1<sup>st</sup> Respondent which shall involve the demolition of the said structures, and lead to immense irreparable and substantial losses worth over Kshs.9 million unless the stay is granted. The Applicant averred that they are prepared to abide by a reasonable order for the furnishing of security as may be made by this Court.

The Applicants' counsel argued in submissions dated 16<sup>th</sup> November 2013 that the nature of the land and its user is important in determining whether substantial loss would be occasioned, and relied on the decisions in Sammy Some Kosgei vs Grace Jejel Boit Eldoret ELC No 411B of 2012, Mukuma vs Abuoga, (1988) KLR 645 and Halai & Another vs Thornton & Turpin (1963) Ltd, (1990) KLR 365 in this respect.

The 1<sup>st</sup> Respondent opposed the Applicants' Notice of Motion in a replying affidavit he swore on 7<sup>th</sup> November 2013, wherein he stated that this court dismissed the Applicants' suit and allowed them to vacate his premises at the end of December 2013. Further, that the Applicants have not set out grounds for the grant of an order for stay of execution, nor have they stated the security they intend to furnish since the value of the property they are occupying is worth more than Kshs.50 million.

The 1<sup>st</sup> Respondent averred that there are no substantial developments on the suit property as the said developments are temporary, and if demolished, the Applicants can be compensated by way of damages if successful in their intended appeal. He also averred that he has not utilized the suit property for over thirteen years, and that the Applicants have not undertaken to compensate him by way of mesne profits.

The 1<sup>st</sup> Respondent's counsel filed submissions dated 28<sup>th</sup> November 2013, and argued that the Applicant's Notice of Motion was defective for reasons that from the court record the firm of Kibatia & Company Advocates only represents the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in HCCC Civil Case No 201 of 2001, and that the 1<sup>st</sup> Defendant in the suit is represented by the firm of Rachier & Amollo Advocates. Therefore, that the firm of Kibatia & Company Advocates cannot come on record after judgment without leave of the court under the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

Further, that the affidavit of Rev Peterson Kithaka does not comply with Order 3 Rule 13 and Order 19 Rule 3(1) of the Civil Procedure Rules, as it contains legal issues which the deponent is not knowledgeable about, and should be struck out. The counsel relied on the decision in Kenya Horticultural Exporters (1977) Ltd vs Transami Kenya Limited Nairobi H.C.C.C No. 1405 of 99 in this respect. For all intents and purposes the 1<sup>st</sup> Respondent's counsel's submission was that the Applicants' Notice of Motion had no leg to stand on.

I have read and carefully considered the pleadings and submissions made by the Applicants and 1<sup>st</sup> Respondent. I will first address the two preliminary issues raised by the 1<sup>st</sup> Respondent. The first is whether the Applicants' Advocate is properly on record. Order 9 Rule 9 of the Civil Procedure Rules provides as follows in this regard:

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

It is clear that the rule envisages a situation where a party was previously represented by an Advocate and either wants to change that Advocate or to represent himself or herself in person after judgment is passed.

I have perused the court record in HCCC No. 201 of 2000 and note that the firm of of Rachier & Amollo Advocates filed a Notice of Change of Advocates dated 2<sup>nd</sup> February 2005 to appear for Juja Development Company who are the 2<sup>nd</sup> Defendants in HCCC No. 44 of 2010 (O.S) . Kibatia & Company Advocates have always been on record as the Advocates for all the Original Defendants in HCCC No. 201 of 2000. Order 9 Rule 9 is therefore not applicable in the circumstances of this application as there has been no change of Advocate for the Original Defendants in HCCC No. 201 of 2000 who are the applicants herein.

The second preliminary issue raised by the 1<sup>st</sup> Respondent was that the affidavit sworn by Rev. Peterson Kithaka offends the provisions of Order 1 Rule 13 of the Civil Procedure Rules which provides that in cases with more than one defendant, , any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and that such authorization should be in writing and filed in the case. I have perused the court record and find that such authorization was indeed not given . However, I find that this procedural lapse is not fatal as it can be remedied by the said authorization being filed, and the Applicants are directed to regularize this position within 15 days of the date of this ruling.

The 1<sup>st</sup> Respondent also argued that the said affidavit also offended the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules which provides as follows:

**“ (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:**

**Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”**

I have perused the paragraphs that are said to contain legal issues, which are paragraphs 11 and 12 of the supporting affidavit sworn by Rev. Peterson Kithaka, on 30<sup>th</sup> October 2013 in which he states as follows:

11. **“That I am advised by the advocates on record for the applicants which advise I verily believe to be true that substantial loss is the cornerstone to the jurisdiction to grant stay pending appeal as was held by the Court of Appeal in Mukoma v. Abuoga (1988) KLR. “... substantial loss.... that is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo”**
12. **That I am advised by the advocates on record for the applicants that stay of execution of decree is an appropriate relief at this stage as was held in Sammy Some Kosgei versus Grace Jellei Boit (2013 eKLR) where the High Court held “in matters related to land, the nature of the land, and its user is therefore important in determining whether substantial loss would be occasioned. There would be an inclination to grant stay, with conditions, where the subject matter is....or the suit land is so utilized in a way that would cause hardship to the appellant, or to members of the public if stay is not granted, subject of course to the issuance of security.”**

The present Notice of Motion by the Applicants is in the nature of an interlocutory application, as it is seeking interlocutory relief pending the hearing and determination of the Applicants’ Appeal. The proviso to Order 19 (3) of the Civil Procedure Rules therefore applies, and the deponent has in this regard stated the source of his legal information to be his Advocates on record.

In addition the judicial authority relied upon by the 1<sup>st</sup> Respondent namely **Kenya Horticultural Exporters (1977) Ltd vs Transami Kenya Limited Nairobi H.C.C.C No. 1405 of 99** is distinguished as the issue therein was on an advocate swearing an affidavit on contentious matters. But even on this issue, Kasanga Mulwa J stated in his ruling as follows:

**“In general the advocate can swear such affidavit where it is purely matters which will not raise opposition from the other side. Even where it is matters of law the client would better swear that he had been advised so by his advocate”**

A deponent is thus not forbidden from swearing on legal issues in interlocutory applications, so long as he states his source of information.

I therefore find the 1<sup>st</sup> Respondent's arguments to have no merit, and I will proceed to determine the substantive issues raised by the Applicants' Notice of Motion. The main issue is whether orders of stay of execution pending appeal can be granted. The applicable provisions of the law in this regard are Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provide as follows:

**“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.”**

The Applicants herein argue that substantial loss may result to them if stay of execution is not granted as they made substantial developments on the suit property which they value at Kshs 9 million, and which will be demolished. They attached photographs of the said developments to their application. The 1<sup>st</sup> Respondent on the other hand values the suit property at Kshs 50,000,000/= and asked the court to take judicial notice of the value of land in Pangani Nairobi, where the suit property is located. He also said he has been deprived of the suit property for thirteen years.

It is my view that while the Applicants may suffer substantial loss if their structures on the suit property are demolished, the suit property is also valued much more than Kshs 9 million. This is for the reason that even if as argued by the Applicants the 1<sup>st</sup> Respondent did not bring evidence of any valuation of the suit property, the Applicants also failed to take into account the unimproved site value of the suit property in their valuation of their developments thereon. I will therefore only grant a stay of execution upon provision of adequate security by the Applicants, which they have stated they are willing to provide for the due performance of the decree of this court.

I accordingly order that the execution of the judgment delivered herein on 10<sup>th</sup> July 2013 and any consequential decree arising therefrom be stayed pending the lodging, hearing and determination of the Applicant's appeal in the Court of Appeal, only on condition that the Applicants shall within thirty days of the date of this ruling deposit as security the amount of Kenya Shillings Thirty Million (Kshs 30,000,000/=) in a joint interest earning account they shall open in the joint names of the Applicants and the 1<sup>st</sup> Respondent. In the event of default by the Applicants, the 1<sup>st</sup> Respondent shall be at liberty to execute the judgment delivered herein on and any consequent decree.

The Applicants shall meet the costs of the Notice of Motion dated 30<sup>th</sup> October 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_23<sup>rd</sup>\_\_\_\_ day of

\_\_\_\_January\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**