



**ALFRED MAKANGO
LUKE WAMALWA
WANYAMA**

**HENRY KIRINGOTI (Suing as the Chairman, Secretary and Treasurer,
respectively of AFRICAN RURAL MISSION.....
.....APPLICANTS**

VERSUS

PROF. BISHOP ZABLON NTHAMBURI

DR. REV. STEPHEN KANYARU M'IMPWII

(Being Registered Trustees under the Land Perpetual

Succession Act, Cap 286 Laws of Kenya)

**METHODISTCHURCH.....
.....DEFENDANTS**

RULING

1. When the parties in this suit appeared before me on the 27/1/2012, I directed that the Notice of Motion dated 12/10/2011 filed by the Applicant and the Preliminary Objection dated 13/10/2011 filed by the Respondent be heard together. In the Notice of Motion dated 12/10/2011, the Applicant is seeking;

(i) Stay of Execution of orders of 25/8/2011 pending hearing of this application *inter-partes*.

(ii) Following grant of stay, *status quo ante* prevailing on Plot No. 3/463/MATHARE NORTH/NAIROBI prior to the issuance of this Court's Order of 25/8/2011 be restored with the assistance and supervision of the Provisional Police Officer (PPO) Nairobi Area pending the hearing and determination of the application *inter-partes*.

(iii) Honorable Court be pleased to review and set aside its orders issued on 25/8/2011

(iv) Costs.

In the Preliminary Objection, the Defendant raised the following objections;

i) The application dated 12/10/2011 is incurably defective as it is made in contravention of the mandatory provisions of Civil Procedure Code.

ii) The application is barred by the *res judicatum* rule, the suit having been struck out on 13/3/2009 and the applicant having filed a notice of appeal on 25/3/2009 – hence the court is *functus officio*.

iii) The application is based on the Plaintiff's disobedience of the court order of 13/3/2009.

iv) The application offends the principle that no one shall found an action on his own wrong.

2. In order to understand the application and the preliminary objection, I have carefully perused the entire court file to know the genesis of the application and preliminary objection before, and this is what I have found.

3. The Plaintiff filed a plaint and a chamber summons application simultaneously in court on the 8/2/2005. On the 7/3/2005 the Defendants filed a statement of defence. The application dated 8/2/2005 was heard *inter-partes* and a ruling delivered by Kubo J. (as he then was) on 18/7/2005. In the said ruling, Justice Kubo stated that, he is persuaded that Plot No. 3/463/Mathare North/Nairobi plus Bethany Christian College standing on it and the motor vehicles and the bank account listed in prayer 2 of the application ought to be preserved pending the outcome of the main suit. He proceeded to grant prayer 2 of the application. Subsequently, the Defendants filed an application dated 20/11/2007 seeking to discharge the injunction granted on the 18/7/2005 and to strike out the suit. The said application was heard and a ruling delivered by Waweru, J. on the 13/3/2009. In the said ruling, the Plaintiff's suit was dismissed with costs to the Defendants, and the temporary injunction granted on 18/7/2005 discharged.

4. On the 25/8/2011 the Defendants filed an application seeking orders that the PPO Nairobi Area do assist the defendants to enforce the Court Order issued on 13/3/2009. This application was heard by Mugo, J. on the 25/8/2011, *ex-parte*, Justice Mugo certified the application as urgent, and admitted it for hearing and she gave a further order stating that, "*Considering the facts, I grant orders in terms of prayer 3 in order to value and give effect to the Court orders of 13/3/2009.*" Prayer 3 of the application was that, "*The PPO Nairobi Area do assist the defendants to enforce the order of 13/3/2009.*"

5. From this background, I pose the question whether I can grant a stay of execution of the orders dated 25/8/2011, issue an order of *status quo ante* prevailing on the suit premises prior to the issuance of the order of 25/8/2011 and restore the status before the said order was granted, and also review and set aside the said orders. I further pose the question of whether as a Court of concurrent Jurisdiction can I grant the orders as prayed. In my view, the applicant is seeking a review of the orders that were granted. Under Order 45 Rule an aggrieved party is entitled to review order if he demonstrates that: "***There is 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 when the decree was passed or the order made; whether on account mistake or error apparent on the face of the record; or any other sufficient reason.***"

6. From the grounds of the application, the applicant has clearly narrated the sequence of events that led to the order that the defendants obtained, which the plaintiff now seeks to be reviewed and set aside. The Applicant's main reason is that the order is an abuse of the court's process, and was obtained irregularly obtained as there was a non-existent suit. I note that the orders obtained on 25/8/2011 were obtained after this same court dismissed the plaintiff's suit and discharged the orders of 18/7/2005 and the Court became *functus officio*. In my view, if I delve into the issues raised by the applicant, I will be sitting on appeal of orders granted by a court of concurrent jurisdiction. The Plaintiffs' relief lies elsewhere and not before this court. I therefore decline to grant any of the orders sought by the Plaintiff and having done so, I find that I need not belabor myself with the objections raised in the Preliminary Objection as the Court is *functus officio*.

Orders accordingly.

Dated, Signed and Delivered on 31st day of August, 2012

R. OUGO

JUDGE

In the Presence of:-

.....For the Applicant

.....For the Respondent

Kabiru Court Clerk