



African Independent Pentecostal Church of Africa (AIPCA) v Gathuma (Environment & Land Case 31 of 2015) [2022] KEELC 15251 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15251 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 31 OF 2015**

**JO OLOLA, J
DECEMBER 8, 2022**

BETWEEN

**AFRICAN INDEPENDENT PENTECOSTAL CHURCH OF AFRICA
(A.I.P.C.A) PLAINTIFF**

AND

DUNCAN NDERITU GATHUMA DEFENDANT

RULING

1. By the notice of motion dated January 10, 2022, the African Independent Pentecostal Church of Africa (AIPCA) (the Plaintiff) prays for an order of stay of further proceedings herein pending the hearing and determination of Court of Appeal Civil Appeal No 56 of 2019 (Nyeri) now pending in the Court of Appeal.
2. The application which is supported by an Affidavit sworn by David Ndiangui Wambugu, a member of the Plaintiff Church is premised on the grounds that:
 - (a) The Applicant was dissatisfied with the ruling and orders of the Court dated December 7, 2018 substituting the deceased Monicah Wangui Gathuma with Duncan Nderitu Gathuma;
 - (b) This suit concerns acquisition of title by adverse possession to Tetu/Unjiru/1468 in the name of John Gathuma Waititu (deceased) and Duncan Nderitu Gathuma is not the legal representative of the said John Gathuma Waititu;
 - (c) Substantial loss would result if proceedings are not stayed and the Appeal would be rendered nugatory as Duncan Nderitu Gathuma has no capacity to represent the estate of John Gathuma Waititu;



(d) The Appeal has overwhelming chances of success.

3. Duncan Nderitu Gathuma (the Respondent) is opposed to the application. In his Replying Affidavit sworn and filed herein on 19th April 2022, the Respondent avers that the suit land belonged to his father John Gathuma Waititu who had inherited the same from his late father Gerishon Waititu. The late Gerishon had temporarily given the applicant a portion of the land to build a Church pending allocation of land by the Government and upon his death, the Respondent's father sub-divided the land into 8 equal portions.
4. The Respondent avers further that his father allowed the Applicant to stay on one of the 8 portions being Tetu/Unjiru/1468 where they built a school and dormitories.
5. The Respondent avers that the Applicant was later allocated land by the Government and they ought to have vacated the suit land and relocated to their parcel of land. The Respondent asserts that prior to his death, his father had given numerous oral and written demands asking the Applicant to remove his facilities from the land and his mother Monicah Wangui Gathuma continued with the said demands to the Applicant but to no avail.
6. The Respondent further avers that it was then that the Applicant filed a claim for adverse possession against his mother and that since his mother passed away it was only mete and just that she be substituted so that the matter proceeds for hearing and determination.
7. The Respondent avers that he has been issued with Letters of Administration, ad litem and asserts that he is the rightful party to proceed with this matter which ought to proceed to its logical conclusion as if the orders sought by the Plaintiff are granted, there shall be a delay of justice which is equivalent to justice being denied.
8. I have carefully perused and considered the Plaintiff's application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the parties.
9. The Plaintiff church has by this application urged the Court to order a stay of further proceedings herein pending the hearing and determination of an Appeal it has preferred to the Court of Appeal. It is the Plaintiff/Applicant's case that it stands to suffer substantial loss if the proceedings are not stayed and that its Appeal would be rendered nugatory as the present Respondent has no capacity to represent the original Defendant/Respondent in its claim for adverse possession.
10. The threshold for the grant of an order of stay of proceedings can be gleaned from the following passages of *Halsbury's Laws of England* 4th Edition Vol 37 at pages 330 and 332:

“The stay of proceedings is a serious grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power, which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the Plaintiff might not,



or probably would not succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

11. Considering similar circumstances in *Global Tours & Travels Limited*; Nairobi, HC Winding Up Cause No 43 of 2000, Ringera, J (as he then was) observed as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceeding on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

12. In the matter before me, the Plaintiff Applicant instituted this suit vide an Originating Summons dated April 8, 2015 seeking a declaration that it had acquired title by adverse possession of the whole of the parcel of land known as LR No Tetu/Unjiru/1468. The Plaintiff accordingly desires an order that title to be the said parcel of land be registered in its name.
13. It was apparent from Paragraph 2 of the First Supporting Affidavit to the Originating Summons sworn by Eliud Njia Njuma that the said Monicah Wangui Gathuma was sued as the widow and the administratrix of the estate of one John Gathuma Waititu in whose name the suit property is registered. As it turned out Monicah Wangui passed away on March 4, 2018 before the suit could be concluded.
14. Subsequently and by an application dated May 14, 2018, her son Duncan Nderitu Gathuma sought to be substituted in her stead as the Defendant in the suit. The Plaintiffs herein were opposed to the application on account that the Applicant therein was incapable of being substituted in place of the deceased as he was not an administrator of the estate of John Gathuma Waititu to which the subject matter of the dispute related.
15. By a Ruling delivered on December 17, 2018, the Honourable Lady Justice Lucy Waithaka overruled the Plaintiff's objection and allowed the said Duncan Nderitu Gathuma to be substituted as the Defendant herein. Aggrieved by that determination, the Plaintiff's moved to the Court of Appeal where they lodged a 9-point memorandum of Appeal on March 28, 2019 seeking to have the decision overturned.
16. By this present application, the Plaintiffs now pray for a stay of their own claim for adverse possession against the substituted Respondent on account that they stand to be prejudiced where the matter were to proceed.
17. As Ringera, J (as he then was) stated in the *Re Global Tours & Travels Limited (supra)* such an application ought to have been made to the Court expeditiously as the consequences of stay of proceedings are grave. In the matter herein, the Plaintiffs filed the present application more than three (3) years after the Ruling being appealed from was delivered.
18. While it was clear that they appealed the decision some three (3) years back, the Plaintiffs have not explained any steps taken to prosecute the Appeal ever since and what stage if at all the Appeal has reached. In my considered view, if it were to be determined that there was no



proper substitution of the Defendant herein, then it was incumbent upon the Plaintiffs to bring in the right person for substitution otherwise their own suit would be considered to have abated.

19. In the circumstances herein, I was not persuaded that this is a property matter where the Court should exercise its discretion to stay further proceedings herein. To do so would allow the Plaintiffs continuous and indefinite stay on the suit property without any determination being made on their right to retain the same by virtue of adverse possession.
20. In the premises, I disallow the application and hereby direct that this suit be fixed for hearing within 90 days from today.
21. The costs of this application shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 8TH DAY OF DECEMBER, 2022.**

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

