



Seka & 14 others v Church of God in East Africa (Kenya) (Civil Appeal E132 of 2022) [2024] KEHC 957 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E132 OF 2022
HM NYAGA, J
FEBRUARY 7, 2024**

BETWEEN

ELIJAH SEKA & 14 OTHERS APPELLANT

AND

CHURCH OF GOD IN EAST AFRICA (KENYA) RESPONDENT

RULING

1. The Applicant filed an application dated 24th July, 2023 brought pursuant to Sections 1A, 1B, and 3 A and Order 42 Rule 6 of the Civil Procedure Rules 2010.
2. The application seeks for stay execution of the order/ruling and delivered on 29th September, 2022 and all consequential orders thereto pending the hearing and determination of this Appeal. The Applicant also seeks costs of the Application to abide in the intended Appeal.
3. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Jotham Munala who is one of the Applicants herein on his behalf and on behalf of his Co-Appellants.
4. He deponed that the appeal herein arises from the judgment of the Chief Magistrate in Nakuru CMCC No. 868 of 2006 whereby the Respondent had sued them seeking injunction to restrain them from interfering with the running of the affairs of the church.
5. He averred that lower Court judgment was delivered on 14th May, 2020 in favour of the Plaintiff.
6. He asserted that the Plaintiff had not prayed for any relief in the nature of eviction.
7. That on 5th October, 2021 the Plaintiffs took out Notice to Show Cause why they should not pay costs of the suit as the process of execution of the decree and that apart from that award of costs the only other relief was an injunction.



8. He stated that moreover, the Respondents took out the decree on the 26th June, 2020 expressing the terms of the judgment clearly and on the 29th September, 2021 upon realizing that they had not sought any eviction orders in the suit but now needed the same to evict not just the Appellants herein but even their resident pastor who resides on the church precincts and who was not a party to the subject suit with her family.
9. He deponed that consequently the instant appeal was filed and he believes the same raises serious points of law and has high chances of success.
10. He contended that they are apprehensive the respondent will move to execute the ruling as their resident pastor has already been summoned by the OCS Njoro Police station for purposes of enforcement of the Court order.
11. He believes the appeal will be rendered nugatory if stay of execution is not granted pending appeal.
12. He averred that the involvement of other parties who were not parties to the suit or notified of the proceedings that now stand to adversely affect them in life-changing sense and who have intimated that they would apply to join this appeal as interested parties create a unique and compelling circumstances to warrant stay of execution.
13. He averred that they are ready and willing to furnish such security as this Honourable Court may deem just and fit as a condition for issuance of the said orders sought.
14. He asserted that no prejudice will be occasioned to the respondent as they have an undeniable right to Appeal.
15. In opposition to the Application, George Kirumba Mbiyu, advocate for the Respondents swore a replying affidavit on 26th September, 2023.
16. He averred that that granting of the orders sought when two Courts of competent jurisdiction have declined to stay the judgment and the decree issued on 14th May, 2020 will cause great prejudice to the respondent herein.
17. He deponed that the applicants have consistently continued to disobey the Decree dated 14th May, 2020 and believes that the order issued by this Honourable Court on 29th September, 2022 was necessary to ensure compliance with the Decree dated 14th May, 2020, and that issuance of the orders herein will in effect stay the said Decree of 14th May, 2020.
18. He believes that the requirements for stay provided for under Order 42 Rule 6 of the Civil Procedure Rules have not been satisfied and the intended appeal will not be rendered nugatory if the orders of stay are not granted.
19. He prayed that the Application be dismissed with costs.
20. Rev Julius Makanga Kweya, swore a replying affidavit in opposition to the application on 26th September, 2023. He averred that the Court having passed a decree dated 14th May, 2020 which decree has not been stayed then the Applicants have no right to run the affairs of the Njoro Church of God.
21. He averred that the deponent, Jotham Munala, did not testify in the suit and neither was an authority filed by the Applicants appointing any of the Applicants to testify on behalf of the other Applicants.
22. He stated that the orders of 29th September, 2022 would not render the church in operational as the bona fide members and leadership of Njoro Church of God appointed by the Plaintiff would move in and carry out the affairs of Njoro Church as per the constitution of the Plaintiff.



23. It was his deposition that the Decree dated 14th May,2020 did not bar the Applicants or any other congregant from attending church but rather restrained the applicants from interfering with the running of the Njoro Church of God.
24. He believes the Applicants have not demonstrated how the intended appeal will be rendered nugatory or how they stand to suffer substantial or irreparable loss as the Njoro Church Building and the land will still be there when the appeal is determined. In addition, he stated that the applicants did not counterclaim in the primary suit and therefore they are not claiming the property.
25. DR James Obunde an archbishop of the Respondent also opposed the application through his replying affidavit sworn on 26th September,2023. He averred that the decree of the Court having been passed on 14th May,2020, the respondent is ready to resume the running affairs of Njoro Church of God immediately.
26. He contended that the respondent will suffer prejudice as the Njoro Church of God bona fide members, pastor and local leadership have been worshipping at home and other worship places away from the rightful place of worship, to wit, Njoro Church of God since 2005 having been prevented by the Applicants from accessing the church.
27. He deponed that the respondent does not intend to close Njoro Church of God or sell the property and as such the Applicants will neither suffer prejudice or their appeal rendered nugatory as the church building and the land will still be intact when the appeal is determined.
28. He believes the Applicants are undeserving of the orders sought as they are in contempt of the orders passed against them on 14th May, 2020.
29. He prayed that the application be dismissed with costs.
30. The Applicants' deponent Jotham Munala swore a supplementary affidavit in response to the aforestated Replying Affidavits on 17th October, 2023.
31. He deponed that it is not indeed against the judgement itself but the attempt by the plaintiffs to change the nature of the claim they mounted and the terms of the judgment having realized the futility of the judgement they sought in the first place.
32. He asserted that filing of an application seeking eviction orders post judgement necessitated the filing of the instant appeal.
33. He stated that in the wider interest of justice and the protection of the integrity of the Court processes that this Application be allowed.
34. The Application was canvassed through written submissions. The Applicants filed their submissions on 2nd November, 2023 whereas the Respondent submissions were filed on 31st October,2023.

Appellant's Submissions

35. The Appellant/Applicant submitted that the grant of an order of stay of execution pending appeal is largely a matter of discretion to be exercised by the Courts and the provisions of Order 42 Rule 6 of the Civil Procedure Rules operate to guide the Court. In support of this proposition, the Applicants relied on the cases of Alhyder Trading Co. Ltd -vs- Lucy Jepnetich Mbei, Eldoret Civil Appeal No. 135 of 2014, Butt v Rent Restriction Tribunal [1979] eKLR, & Kenya Shell Ltd -vs- Benjamin Karuga Kibiru and Another, Court of Appeal Civil Application No. 97 of 1986 1 KAR 1018.



36. On what amounts to substantial loss, the applicant referred this Court to the case of Equity Bank Ltd vs ... Taiga Adams Company Ltd Civil Appeal 772 of 2005 & James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR and submitted that the initial stay of execution granted by the Court has expired and if the orders sought are not granted, the instant appeal will be rendered nugatory notwithstanding the fact that the appeal has high chances of success and in the process they will suffer substantial loss.
37. They urged this Court to balance the interest of both parties by securing the applicants' interest such that in the event the appeal succeeds, execution would not have prevailed. They urged this Court to be guided by the case of Butt v Rent Restriction Tribunal (supra) where it was held that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.
38. The Applicant also submitted that the application has been filed timeously. They argued that an application for stay of execution is required to be made without unreasonable delay. In support of their submissions reliance was placed on the case of M'ndaka Mbiuki v James Mbaabu Mugwiria [2016] eKLR.
39. On security, the Applicants submitted that an Applicant does not have to furnish security upfront before arguing the application for stay pending appeal. In support of this proposition reliance was placed on the case of Selestica Ltd -vs- Gold Rock Development Limited (2015) eKLR. Where it was held that The Court in its discretion, and upon considering the circumstances of the case, is empowered to direct and order the type of security sufficient to cushion due performance of the decree.
40. He prayed that the application be allowed as prayed.

Respondents' Submissions

41. The Respondent conceded that this application has been filed without unreasonable delay.
42. On substantial Loss, the Respondent submitted that Appellants have not advanced a shred of evidence of substantial loss and have not shown how the appeal will be rendered nugatory.
43. The Respondent argued that the Appellants will neither suffer irreparable damage nor appeal rendered nugatory as it does not intend to close Njoro Church of God or sell the property and therefore the church building and the land will still be intact when the appeal is determined.
44. The Respondent posited that even if the Applicants are evicted the intended appeal will not be rendered nugatory because if the appeal succeeds they will just get back to the church premises. In buttressing its submissions, the Respondent relied on the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR. & Peter Ndung'u Ngae & 2 others v John Mugane Karomo [2015] eKLR.
45. On the issue of security, the Respondents submitted that the Applicants have not offered any security. To bolster their submissions, they relied on the case of Stephen M'ikunyua M'imathiu V Elija Mwirigi & 2 Others [[2006] eKLR and John Mwangi Ndiritu v Joseph Ndiritu Wamathai [2016] eKLR.

Analysis & Determination

46. I have considered the application, the responses as well as rival submissions. In my considered view, the issues for determination are;
 - a. Whether there is a decree capable of execution by way of an eviction.



- b. Whether the Applicants have met the prerequisite for grant of stay of execution pending appeal.
47. The Applicants in this matter contend that execution of the lower Court ruling of 29th September, 2022 will adversely affect them and other parties who are not party to this suit as they will be required to vacate the church premises or be evicted. The Applicants took issue with the said ruling for reasons that the eviction orders were never sought in the primary suit but filed post judgment of the lower Court.
48. It is factual the Respondent instituted a suit against the Applicants vide a plaint dated 11th May, 2006 praying for a permanent injunction to restrain the Applicants by themselves, their agents and or servants from interfering with the running or operation of Njoro Church of God either by writing letters on its behalf, conducting church service, elections, functions or purporting to hold positions thereat, or making decisions on behalf of the church and/or in any other manner howsoever from interfering with the affairs of the Njoro Church of God or interfering with Church properties either by remaining or staying in the church house or compound and premises. The Respondents also prayed for costs and interest of the suit.
49. The judgment was entered in favour of the Respondent as prayed on 14th May, 2020. Subsequently, the Applicants filed an application dated 16th June, 2020 seeking stay of execution of the said Judgement. The lower Court in its ruling delivered on 28th January, 2021 disallowed the applications on grounds that the Applicants had not demonstrated that they will suffer substantial loss given they have been intermeddling with the affairs of the Respondent and since they were still members of the church, they failed to demonstrate any threats and intentions of the respondent to ex-communicate them.
50. Vide another Application dated 29th January, 2021 the Applicants approached this Court seeking stay of execution of the aforesaid judgement and my sister Hon. Rachael Ngetich vide a ruling dated 22nd July, 2021 disallowed the application for reasons that the Applicants had not established substantial loss as the church building and land will still be in existence at the conclusion of the Appeal.
51. Thereafter the Respondent by an application dated 29th September, 2021 sought for execution of the Decree issued on 14th May, 2020 by Ms Legacy Auctioneering Services and for security to be provided to the said Legacy Auctioneering services by OCS Njoro Police Station while undertaking the said exercise.
52. The trial Court upon considering the application allowed the same as prayed. The Court made reference to Order 22 Rule 29(1) and (3) of the Civil Procedure Rules 2010 and held as follows: -

“These provisions of the law clothes this Court with jurisdiction to grant the orders sought, which is to give effect to its decree by giving orders on how to implement the same. The plaintiff will not be able to enjoy the judgment without being put into possession of the church premises to facilitate running of the church. The upshot of the foregoing analysis is that I find merit in the Application dated 29.9.2021 and I allow the same. Accordingly, I do issue the orders as follows:

- a. The decree issued on 14th May,2020, that is to say, order for permanent injunction be executed by Ms Legacy Auctioneering Services
- b. The officer commanding station(OCS) Njoro Police Station do provide security to Legacy Auctioneering Services while undertaking the said exercise
- c. Costs to the Plaintiffs/Applicants.”



53. My understanding of the applicants' case is that the said ruling amounted to the grant of an eviction order when none was prayed for in the suit before the lower Court.
54. The respondents had in the suit sought a permanent injunction against the applicants. The same was granted.
55. The purpose of an order of injunction was described in the case of *New Kenya Co-operative Creameries Limited v Hassan Ali Mboga & 150 others; National Land Commission (Interested Party)* [2021] eKLR, cited by the Applicant. The Court held that;

“By granting a prohibitory injunction, the Court does no more than prevent for the future continuance or repetition of the conduct the applicant complains of. The applicant seeking a prohibition injunction must establish the requirements stipulated in the case of *Giella – Vesrus - Cassman Brown & Co Ltd & Co. Ltd* (1973) EA 358, the existence of a prima facie case with high chances of success, and that he will suffer irreparable damage which cannot be adequately compensated by an award of damages if the injunction is not granted and further, that the balance of convenience tilts in his favor.”

56. The learned magistrate in his ruling sought to give effect to the judgment by issuing the orders that the decree in question be executed by the auctioneer.
57. This is where the problem lies. The decree, being one for a prohibitory injunction, cannot be converted by any means to become an eviction order. An eviction order must be specifically prayed for in the suit, which was not the case herein.
58. It is also clear that no mandatory injunction was prayed for in the plaint or was granted by the trial Court.
59. Therefore, the orders directing the auctioneer to effect the decree were null and void ab initio. There is nothing in an order for a prohibitory injunction to be executed by an auctioneer by way of an eviction.
60. A party who obtains an order for injunction, and which injunction is not complied with has a remedy provided under Order 40 Rule 3 of the Civil Procedure Rules(CPR). It provides as follows;

“Consequence of breach [Order 40, rule 3.]

- (1) In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.
- (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.
- (3) An application under this rule shall be made by notice of motion in the same suit.”



61. From the wording of the said rule, an auctioneer, acting as a bailiff, may only come in if there is an order for a mandatory injunction, or in the case of a prohibitory injunction, there is an application for the attachment of the property of the party who has failed to comply with an order for injunction.
62. Flowing from the above, I find that the orders issued by the Court on 29th September 2022, were null and void and they are set aside.
63. That said, I find that in so far as the orders for injunction are concerned, and given the earlier ruling of this Court, the Respondents are entitled to proceed to enforce the decree for the injunction as provided for under Order 40 Rule 3 of the Civil Procedure Rules.
64. Having found that the manner of execution of the decree was irregular, I do not need to go to the grounds dealing with the stay of execution of the decree in the suit in question. That has already been dealt with by the Court in its earlier ruling.
65. As regards costs, I find that although the applicants have succeeded in having the ruling of the Court dated 29th September 2022 set aside, they are ostensibly in breach of the injunction orders. As such they cannot be rewarded by an award of costs.
66. I therefore order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAKURU 7TH DAY OF FEBRUARY, 2024.

H. M. NYAGA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

C/A Jeniffer

M/s. Mbiyu for Respondent

M/s. Murithi for Kisilah for Appellant

