



**Mungai (Suing on behalf of the Parishioners of St John Orthodox Church Parish Kibiria Kenya) v JM Njenga & Co Advocates & another (Civil Appeal E522 of 2022) [2023] KEHC 3078 (KLR) (Civ) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3078 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E522 OF 2022**

**AN ONGERI, J**

**APRIL 14, 2023**

**BETWEEN**

**CHRISTOPHER NDUNGU MUNGAI ..... APPELLANT  
SUING ON BEHALF OF THE PARISHIONERS OF ST JOHN ORTHODOX  
CHURCH PARISH KIBIRIA KENYA**

**AND**

**JM NJENGA & CO ADVOCATES ..... 1<sup>ST</sup> RESPONDENT  
THE AFRICAN ORTHODOX CHURCH OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two applications coming for consideration in this ruling as follows:
  - i. The application dated 22/7/2022.
  - ii. The application dated 9/9/2022.
2. The application dated 22/7/2022 is seeking the following orders:
  - i. That this application be certified as extremely urgent, be heard ex parte and service thereof be dispensed with at the first instance due to the urgent nature of the relief sought herein;
  - ii. That a temporary injunction and/or stay of attachment and execution of the decree dated 17<sup>th</sup> February 2020, only in regard to further proceeding of the disposal and advertisement of the suit property (land reference no. Dagoretti/Riruta/S.955) do issue restraining the 1<sup>st</sup> respondent either by himself, his agents or servants from advertising for sale, selling, charging, mortgaging, leasing, entering, taking possession or in any other way whatsoever



interfering with land reference no. Dagoretti/Riruta/S.955 pending inter-partes hearing of this application.

- iii. That a temporary injunction and/or stay of attachment and execution of the decree dated 17<sup>th</sup> February 2020, only in regard to further proceeding of the disposal and advertisement of the suit property (Land reference no. Dagoretti/Riruta/S.955 do issue, restraining the 1<sup>st</sup> respondent either by himself, his agents or servants from advertising for sale, selling charging, mortgaging, leasing, entering, taking possession or in any other way whatsoever interfering with land reference no. Dagoretti/Riruta/S.955 pending inter-partes hearing and determination of the appeal.
  - iv. That costs of this application be in the appeal.
3. The application dated 22/7/2022 is supported by the affidavit of Christopher Ndungu Mungai dated 22/7/2022 in which he deponed that there is already a decree issued in favour of the 1<sup>st</sup> respondent which he seeks to satisfy through the wrongful sale of the appellants property, land reference No. Dagoretti/Riruta/S. 955. He indicated that there is a prohibitory order, warrants of attachment and notification of the sale issued against the suit property by the trial court on 13<sup>th</sup> April 2021 and 28<sup>th</sup> April 2021 respectively.
  4. It was deposed further that the appellants objection application was dismissed vide a ruling on the 16<sup>th</sup> June 2022 and the stay of execution of the said decree granted by the trial court on the same date, lapsed and exposed the suit property for disposal by the 1<sup>st</sup> respondent.
  5. The appellant lodged an appeal against the trial court's ruling and if an order of temporary injunction is not granted the 1<sup>st</sup> respondent will execute the decree by disposing off the suit property and render the appeal nugatory. He added that there is a real fear that the intended sale of the suit property shall lead to the desecration of the tomb and interred remains of the appellants founding father the late, Fr. John Kariuki as the remains may have to be exhumed. The suit property has been serving the public interests of the larger Riruta Community in Dagoretti South for over 28 years and is a hub for a myriad of socio-economic initiatives.
  6. The 2<sup>nd</sup> application dated 9/9/2022 is seeking the following orders:
    - i. That the appeal herein vide the Memorandum of Appeal dated 14<sup>th</sup> July 2022 be struck off as it was filed without leave and therefore incompetent and bad in law.
    - ii. That consequent to the said striking off, the interim orders in force be vacated.
    - iii. That the costs of this application be provided for.
  7. The application dated 9/9/2022 is supported by the affidavit of Jeremy Njenga. In it he deposes that there is on record a memorandum of appeal dated 14<sup>th</sup> July 2022 that seeks to appeal against the orders issued in the lower court on 15<sup>th</sup> June 2022. The proceedings filed by the appellant in the lower court were objector proceedings under provisions of Order 22 Rule 51 of the Civil Procedure Rules which was dismissed on 15<sup>th</sup> June 2022. No leave was sought or obtained and therefore the purported appeal is a non-starter and ought to be struck off. He argued that in the absence of a competent appeal, stay of execution orders in force ought to be vacated.
  8. The parties filed affidavit as follows; the 1<sup>st</sup> respondent opposed the application dated 22<sup>nd</sup> July 2022 and 31<sup>st</sup> August 2022 vide an affidavit dated 12<sup>th</sup> September 2022 by Jeremy Njenga. In it he averred that appellant did not prove his locus standi or that of the alleged parishioners nor did he avail evidence



of his alleged authority given to him in these proceedings and as such the appeal and the application is bad in law.

9. It was added that the execution in the lower court is procedural, lawful and legal as regards the suit property which is wholly owned by the 2<sup>nd</sup> respondent and not the appellant. he added that it is trite law that the appellant has the burden of proof to prove that the suit land belongs to it and not to the 2<sup>nd</sup> respondent.
10. That the applicant/parishioners constitute the 2<sup>nd</sup> respondent church which is a body corporate and the applicants cannot claim to be owners of what is clearly registered in the 2<sup>nd</sup> respondent's favour. That it is disturbing that instead of the applicant and the 2<sup>nd</sup> respondent addressing the issue of the indebtedness and making appropriate proposals on settlement they choose instead to collude on how to forestall execution and rob the 1st respondent what is legitimately theirs for services rendered.
11. The parties filed written submissions in both applications as follows; the appellants/applicants in its submission argued that all other parishioners were notified by way of advertisement of their intention to file the present suit in accordance with the provisions of order 1 Rule 8. The objectors being the said parishioners of the St. John Orthodox Church Parish Kabiria aver that the intended sale of their Church Property shall infringe and violate their sacrosanct fundamental rights and freedoms.
12. The applicant submitted that this court should be guided by article 159 (2) (d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice to ensure the right to access to justice guaranteed to every person under article 48 of *the Constitution*.
13. The applicants submitted that they have filed an arguable appeal and is apprehensive that if the orders of status quo are not granted the 1<sup>st</sup> respondent will execute the decree. It was argued that the application has been made without unreasonable delay, demonstrated a prima facie case with a probability of success and that irreparable injury that would not be adequately compensated by an award of damages.
14. The 1<sup>st</sup> respondents submitted that if there was any basis to grant a stay which does not exist in this case, an order for stay can only be granted on the basis of an appeal lodged in the high court as the order under appeal was issued by the lower court.
15. That guided by the provisions of order 43 of the *Civil Procedure Rules*, the applicant did not have an automatic right of appeal and if the applicant wanted to appeal, leave ought to have been sought and obtained. When the application dated July 22, 2022 was filed and directions given on July 25, 2022 the court gave a conditional 14 day stay provided that the applicant furnish a copy of the lower court's order granting them leave to appeal the decision of the subordinate court arising from objection proceedings.
16. That in the absence of such leave the memorandum of appeal on the record is premature, unprocedural, bad in law and is incompetent. That with no appeal on record the stay orders would have no legs to stand on.
17. The issues for determination in the two applications are as follows:
  - i. Whether this court should grant a temporary injunction and stay of attachment and execution of the decree dated 17/2/2020 with regard to disposal of LR Dagoretti/Riruta/S.955.
  - ii. Whether this appeal is competent.
18. On the issue as to whether the appellant is entitled to a temporary stay of execution of the decree dated 17/2/2020, the appellant has attached a ruling delivered on 18/6/2022 dismissing his application dated 28/4/2022.



- 19. The appellant filed the application on behalf of the parishioners of St. John Orthodox Church Parish Kabiria – Kenya.
- 20. The trial court relied on the High Court case of *Andrew Inyolo Abwenza vs Board of Trustees of Pentecostal Assemblies of Kenya & 3 others* (2009) eKLR where the court said the plaintiff as a member of the church did not have property rights over the church owned property and all the plaintiff would do was to raise complaints to the relevant church institutions.
- 21. I find that the court was right in saying that the appellant’s membership of the congregation did not confer on him or any other member the rights in ownership of the property the subject of the execution.
- 22. I therefore find that the application dated 22/7/2022 has no merit.
- 23. On the issue as to whether this appeal is competent, the respondent in the application dated 9/9/2022 is seeking to strike out this appeal for reasons that no leave was sought to file it and that the decree is not attached.
- 24. I find that this appeal is not competent for those two reasons and the same is accordingly struck out.
- 25. Each party to bear their own costs of the two applications.
- 26. In the opinion of this court this matter should be sorted out amicably.
- 27. The parties are directed to seek the assistance of the Trial court to be referred to court annexed mediation.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**A. ONGERI**

**JUDGE**

**In the presence of:**

- ..... for the Appellant
- .....for the 1<sup>st</sup> Respondent
- ..... for the 2<sup>nd</sup> Respondent

