



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 138 OF 2013

**REGISTERED TRUSTEES OF THE CATHOLIC DIOCESE OF MURANG'A &
 ANOTHER.....APPELLANT**

-VERSUS-

JAMES MWANGI.....1ST
RESPONDENT

PETER MURIGI.....2ND
RESPONDENT

JOHN MWANGI.....3RD
RESPONDENT

RULING

The appellant moved this court by way of a notice of motion dated 18th August, 2010 filed under a certificate of urgency on the same date, seeking stay of execution of a decree following a judgment delivered by the **Murang'a Senior Principal Magistrate's court at Murang'a in Civil suit No. 141 of 2010** on the 14th July, 2010.

In the judgment and decree by which the appellant is aggrieved, the court decreed the eviction of the appellant from the subject matter of the suit filed by the respondents being a parcel of land known as **Murang'a Town/Block 1/112**; the appellant was also directed to demolish at its own expense a residential house which it had erected on the property.

The appellant appealed against the decision and in its motion for stay of execution the appellant has argued, *inter alia*, that its appeal has overwhelming chances of success and if its application is not allowed, its appeal may be rendered nugatory. In any event, the appellant is ready and willing to make an undertaking as to damages or loss that the respondents may incur should its appeal fail.

In the plaint amended on 15th June, 2005 and filed in the magistrates' court on 16th June, 2005, the plaintiffs sued the catholic diocese of Murang'a which they described in paragraph 2 of that plaint as "*a Christian church carrying on pastoral duties in Murang'a and Kirinyanga district (sic)*"

I have not been able to locate the appellant's defence but in its submissions filed at the close of the hearing, the appellant took issue with the description attributed to it by the respondents. According to the appellant, "the catholic diocese of Murang'a" as an entity capable of suing or being sued does not exist; in other words "the catholic diocese of Murang'a" is a non-entity for purposes of suing and being sued.

In support of its argument the appellant produced a certificate of incorporation under the **Trustees (Perpetual Succession) Act, Chapter 164 of the Laws of Kenya** showing the registration of a corporate body called “Diocese of Murang’a Registered Trustees”. The trustees themselves were named in the certificate as Peter Kairo, Daniel Muriithi, Martin Muraya and Bartholomew Giorgis. In the appellant’s view, it is this corporate body and the trustees who should have been sued and to the extent that they were not the respondent’s suit was non-suited.

Counsel relied on the High Court decision in **Nairobi Civil Suit No. 2824 of 1997(OS) Jane Nyambura Joshua versus Apostolic Faith Church** in which the High Court (Nyamu J, as he then was) held that the Church could only be sued through its registered trustees. The court also referred to **Halsburys Laws of England 3rd Edition Vol 18 at paragraph 239** on legal proceedings where it was stated:

“The trustees of a registered society or branch or officers authorised by its rules, may bring or defend actual or legal proceedings with respect to any property, right or claim of the society or the branch and may sue and be sued in their proper names without other description than the title of their office. The liability of trustees to be sued in proceedings with respect to a right or claim of the society or branch is restricted to cases in which the right or claim concerns the property of a society or branch...”

Neither the respondents nor the learned magistrate in her judgment addressed this issue and therefore it is the appellant’s main argument, amongst its grounds of appeal, that had the learned magistrate addressed her mind on this question the respondent’s suit would not have been sustained. It follows therefore, in the appellant’s view, that its appeal is arguable and is likely to succeed and if indeed it does succeed, it will be rendered nugatory should the magistrate’s decree be executed before its determination.

The respondents filed a replying affidavit to the appellant’s motion but did not file any submissions where the issue of the appellant’s capacity would have been addressed. Apart from the replying affidavit by the respondents, no other representations were made to counter the appellant’s motion and its submissions.

This court’s task at this stage is not to determine the merits of the appeal; all it needs to consider in exercise of its discretion is whether the appellant’s appeal is arguable and whether it will be rendered nugatory if a stay of execution is not granted.

There is no doubt in my mind that the capacity in which the appellant was sued is an arguable legal issue whose resolution may very well influence the outcome of the appellant’s appeal. If it will be determined in the appellant’s favour, the appeal will be rendered nugatory if the decree from the magistrate’s court is executed. This is because it will not be possible to undo the demolition of the appellant’s property on the suit land. In this court’s opinion, the applicant has established that its appeal is not only arguable but that it will suffer substantial loss if a stay order is not granted.

The application for stay was made in August 2012 while the judgment was delivered in July, 2010. There is no evidence of, and the respondents did not argue that there was unreasonable delay in making of the application for stay of execution. As far as security is concerned the applicant has offered an undertaking for damages or loss that the respondents may suffer should the appeal fail. It is therefore apparent that, apart from establishing that it has an arguable appeal capable of succeeding and which would be rendered nugatory should the application for stay of execution be declined, the appellant has satisfied the conditions spelt out in **Order 42 Rule 6(2) of the Civil Procedure Rules**.

Despite the discretion of the court to grant or decline to issue an order for stay under **Order 42 Rule 6(1), Order 42 Rule 6(2)** of the same Rules stipulates when that discretion will not be exercised in favour of the Applicant. That order provides as follows:-

"No order for stay of execution shall be made under sub rule (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 the decree or order as may ultimately be binding on him has been given by the applicant."

This court is persuaded to exercise its discretion in favour of the applicant in this application because, the appellant has satisfied the court that it will suffer substantial loss if the order for stay is not made; the applicant has also demonstrated that its application has been made without unreasonable delay and finally, it has offered to provide security for satisfaction or performance of the decree in the event its appeal fails.

In the premises I allow the applicant's motion dated 18th August, 2010 in terms of prayer 2 of the motion and order grant stay of execution of the decree from the magistrate's court pending the hearing and determination of the of the appeal herein. The appellant will also deposit in court cash or a bank guarantee of the sum of Kshs. 1 Million as security for the performance of the decree. The costs of the application will abide the outcome of the appeal.

Signed dated and delivered in open court this 3rd day of March, 2014.

Ngaah Jairus

JUDGEa