



**Sikalieh (Suing as Chairman, Karen Langata District Association (K LDA) on
Behalf of Miotoni Residents Association) v Nzomo & 6 others (Civil Appeal
(Application) E506 of 2024) [2024] KECA 1413 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1413 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E506 OF 2024
LA ACHODE, K M'INOTI & WK KORIR, JJA
OCTOBER 11, 2024**

BETWEEN

**SAMORA SIKALIEH APPLICANT
SUING AS CHAIRMAN, KAREN LANGATA DISTRICT ASSOCIATION
(K LDA) ON BEHALF OF MIOTONI RESIDENTS ASSOCIATION**

AND

**CALORS MUSEMBI NZOMO 1ST RESPONDENT
JOSHUA NZOLA MUTETI 2ND RESPONDENT
ALFRED KIMANTHI MUUO (SUED ON BEHALF OF WORLD AWAKENING
CHURCH) 3RD RESPONDENT
JAMES KANGORO KIMITI 4TH RESPONDENT
KARURUI KAMITI KIHINGO 5TH RESPONDENT
MARGARET WAMBUI KANGORO 6TH RESPONDENT
GEORGE MATHU KAMITI 7TH RESPONDENT**

*(Application for injunction pending appeal from the ruling and order of the Environment
and Land Court at Nairobi (Omollo, J.) dated 29th April 2024 in ELC EP No. E003 of 2024)*

RULING

1. Before the Court is a motion on notice dated 28th June 2024.



The motion is taken out by the applicant, Samora Sikalieh, in his capacity as chairperson of the Karen and Langata District Association (KLDA) and on behalf of Miotoni Residents Association, a member of KLDA.

2. The applicant prays for an order of injunction to restrain the respondents from constructing or operating a church on the parcels of land known as Dagoretti/Mutuini/1314 and Dagoretti/Mutuini/1316 (the suit properties) which are adjacent to Miotoni Estate, a residential area, pending the hearing and determination of his appeal.
3. The application was provoked by the ruling of the Environment and Land Court at Nairobi (Omollo, J.) dated 29th April 2019 by which the learned judge struck off the applicant's application for injunction for want of merit. On 8th May 2024, the applicant lodged a notice of appeal against the said ruling.
4. The undisputed facts in the application are briefly as follows.

The suit properties are registered under the Land Restoration Act in the names of the 4th, 5th, 6th and 7th respondents. The said respondents have leased the suit properties to the 1st, 2nd and 3rd respondents, who have constructed what they describe as a "temporary structure" and are running or operating thereon a house of worship under the name and style of World Awakening Church.
5. It is common ground that the respondents did not obtain from the Nairobi City County Government change of user of the suit properties so as to enable them use the same for a purpose other than residential use. Similarly, the respondents did not obtain approval of building plans before erecting the structure on the suit properties or any approval to operate a church thereon. It is also common ground that on 13th February 2024, the Nairobi City County Government issued an enforcement order directing the respondents to cease and desist from operating the church on the suit properties, which order the respondents did not comply with.
6. By a plaint dated 29th February 2024, the applicant instituted proceedings against the respondents for a permanent injunction to stop them from constructing or running a church on the suit property. Simultaneously with the plaint, the applicant filed a notice of motion seeking an interim injunction to stop the construction and operation of the church pending the hearing and determination of the suit.
7. The respondents opposed the suit and the application vide a statement of defence, replying affidavit, grounds of objection and preliminary objection. The substance of their case was that KLDA was not recognised in law; that the applicant had no locus standi to institute the proceedings; that the construction of the structure was complete and the court could not issue orders in vain; that the owners of the suit properties were exercising their constitutional right to property; that the suit was defective for lack of a verifying affidavit; that the applicant had not given undertaking as to damages; that erection of a temporary structure on the suit properties did not require any change of user or approval; and that the suit did not disclose a cause of action and was frivolous and an abuse of the process of the court.
8. By the impugned ruling, Omollo, J. found that the suit and the application were not defective; that the applicant had the requisite locus standi; that the respondents had not obtained change of user of the suit properties or an Environmental Impact Assessment Report; and that the applicant had not demonstrated how the respondents' structure was out of character with the surrounding area. Ultimately, the learned judge dismissed the respondents' preliminary objection, but struck out the applicant's application with costs for lack of merit.
9. In support of the application for injunction under rule 5(2)(b) of the *Court of Appeal Rules*, Mr. Wandabwa and Ms. Wachira, learned counsel, relied on their written submissions dated 19th July 2024 and submitted that the intended appeal is arguable because the learned judge erred by allowing



the church to continue operating on the suit properties without approval or change of user. They contended that the respondents have admitted that they do not have any of the necessary licenses or approvals to operate the church on the suit property and further faulted the learned judge for failing to properly appreciate and apply the test on grant of injunctions.

10. On whether the intended appeal risked being rendered nugatory, counsel submitted that the continued operation of the church on the suit properties without approval was a violation of the constitutional right of the residents of Miotoni Estate to a clean, healthy, quiet and peaceful environment. Counsel relied on the Environmental Noise Investigation Report annexed to a further affidavit sworn on 17th July by Washika Wachira. The report, prepared on 16th July 2024 by Mr. Philip Abuor, a registered environmental impact assessment expert, found that the noise levels emitted from the suit properties exceeded the 50 dB limit allowed in residential zones by the [Environmental Management and Coordination \(Noise and Excessive Vibration Pollution \(Control\) Regulations, 2009](#).
11. The respondents opposed the application relying on a replying affidavit sworn by the 2nd respondent on 13th September 2024 and submissions dated 10th September 2024. The substance of the response is that intended appeal is not arguable because the legal status of KLDA is unknown and that the construction of the structure is complete and an order of injunction cannot issue in vain. The respondents further submits that the applicant has not demonstrated that if successful, the intended appeal will be rendered nugatory because the applicant can be adequately compensated by award of damages.
12. Lastly the respondents contended that the applicant was not entitled to an order of injunction because he had not given an undertaking as to damages.
13. We have carefully considered this application. We propose to first dispose of some of the objections that the respondent has raised against the application before us.
14. First, we are not persuaded by the respondents' argument that the applicant or KLDA have no standing in this matter. There's on record a certificate of exemption from registration issued to KLDA under the [Societies Act](#), cap 108 Laws of Kenya. By virtue of section 10(2) of the [Societies Act](#), a society that is exempt from registration is deemed to be a registered society. These proceedings have been brought by the applicant, a natural person, in his capacity as chairman of a registered society.
15. Second, by dint of Article 70 of the [Constitution](#) on enforcement of environmental rights, any person who alleges that the right to a clean and healthy environment has been, is being or is likely to be violated has a constitutional right to approach the courts for redress. The applicant is therefore entitled to approach the Court as he did.
16. Third, we do not agree with the respondents that this Court will be acting in vain if it grants an order of injunction. The respondent's contention in this regard is based on the claim that the construction of the temporary structure is complete. Both before the trial court and in this Court, the applicant applied, in addition to an injunction to stop construction, for an order stopping the respondents from conducting the business of a church on the suit properties. By their own replying affidavit, the respondents confirm that they are still carrying on such business on the suit properties. Therefore, the question of the order of this Court being in vain does not arise.
17. Lastly, as regards security as to damages, rule (5)(2) (b) does not make an undertaking as to damages a condition for grant of the reliefs stipulated therein. The Court is empowered to grant any of the reliefs on such terms as it deems just. In short, a party cannot be denied a remedy under rule 5(2)(b) on the ground of failure to give an undertaking on damages.



18. Turning to the merits of the application, the principles on which this Court grants a remedy under rule 5(2)(b) are well settled and comprehensively summarised in the ruling of this Court in *Stanley Kangethe Kinyanjui v. Tony Ketter & Others* [2013] eKLR. The applicant must satisfy the Court that the intended appeal is arguable or that it is not frivolous, and that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds.
19. We have no doubt in our minds that the intended appeal raises several arguable points. Among these is whether the trial court properly applied the test for grant of an order of injunction; whether the court erred by failing to hold that the applicant had established a prima facie case to warrant an order of injunction in light of the admission that the respondents had no change of user or approvals to operate a church on the suit property; whether the court erred by failing to find that the respondents' structure was out of character with the surrounding residential area; and the interface between the respondents' constitutional right to property and worship, and the residents of Miotoni Estate's constitutional right to a clean and healthy environment.
20. As for the second test of whether the intended appeal risks being rendered nugatory, we bear in mind that what will render an appeal nugatory depends on the circumstances of each individual case (See. *Reliance Bank Ltd v. Norlake Investments Ltd* [2002] 1 EA 227). In the present case, the residents of Miotoni Estate will be required, until the appeal is heard and determined, to bear with noise pollution from the respondents who expressly admit not having obtained any change of user of the suit properties or any approval to operate a church business thereon. The report by Mr. Abuor is categorical that the noise emitted from the suit properties is beyond what is allowed in residential areas by the *Environmental Management and Coordination (Noise and Excessive Vibration Pollution (Control) Regulations, 2009*.
21. We think it is totally remiss to subject citizens to prima facie violation of their constitutional rights on the basis that they will be compensated by award of damages. Award of damages is the exception not the rule. Our Constitution allows courts to stop threatened violations of rights. It does not require citizens to first suffer violations before they can obtain a remedy.
22. For the foregoing reasons, we find that the applicant has satisfied both tests under rule 5(2) (b) of the *Court of Appeal Rules*. We accordingly allow the notice of motion dated 28th June 2024 and issue an order of injunction prohibiting the respondents from continuing to operate the business of a church on the suit properties until the hearing and determination of the applicant's intended appeal. The applicant will have costs of this application. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

K. M'INOTI

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JUDGE OF APPEAL

K. A. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

