



**M'Mukira & International Gospel Centre (Suing through its Executive Officials, namely, Chairperson, Secretary, Treasurer, and Pastor) v Magiri & another (Environment and Land Miscellaneous Application E024 of 2023) [2024] KEELC 1230 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1230 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E024 OF 2023**

**CK NZILI, J**

**MARCH 6, 2024**

**BETWEEN**

**JOSEPH KOOME M'MUKIRA AND INTERNATIONAL GOSPEL CENTRE  
(SUING THROUGH ITS EXECUTIVE OFFICIALS, NAMELY, CHAIRPERSON,  
SECRETARY, TREASURER, AND PASTOR) ..... APPLICANT**

**AND**

**CHARLES MAGIRI ..... 1<sup>ST</sup> RESPONDENT**

**Alice Naitore Magiri ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The court, by an application dated 22.11.2023, is asked to stay the execution and or issue a temporary injunction barring and restraining the respondents from executing the decree or judgment dated 13.7.2023; selling, leasing charging, or in any way interfering with the appellant's quiet peaceful actual occupations user development and enjoyment of L.R Kiirua/Naari-Maitei/472, pending hearing and determination of this application and the intended appeal. Further, the court is asked to grant leave to the applicant to file an appeal out of time and lastly to inhibit title to L.R No. Kiirua/Naari-Maitei/472, pending hearing and determination of the intended appeal.
2. The reasons are contained on the face of the application and in the supporting affidavit of Joseph Koome M'Mukira, sworn on 22.11.2023. Briefly, the applicants aver that after a judgment was issued against them on 13.7.2023 the court stayed the eviction orders for 60 days. Unfortunately, their appeal was filed at the High Court instead of the Environment and Land Court as per the annexed memorandum of appeal, and an application marked JKM 02 and JKM 03.
3. The applicants aver that when the application dated 17.11.2023 came up for hearing interparties on 14.11.2023, they were told to move to the correct court by which time the 30 days to file an appeal had



- lapsed. The applicants aver that due to this confusion, the respondent moved swiftly to demolish the church erected on the suit land with the aim of evicting them as per photographs attached as JKM – 04.
4. It was averred that there was imminent danger of total eviction and disposal of the land for the respondents have been visiting the land with potential buyers. The applicants aver that if execution occurs, they stand to suffer irreparable loss and damage. They therefore urge the court to grant the orders sought in order to preserve the substratum of the appeal, which, if it dissipates, will render their appeal nugatory, academic and inconsequential.
  5. The respondents have opposed the application through a replying affidavit sworn by Charles Magiri on 13.12.2023. It is averred that the application is sub-judice since there was a similar application in the H.C Civil Appeal No. E128 of 2023, which is yet to be determined as per the annexed copy marked CM "2". The respondents aver that the memorandum of appeal in the High Court was yet to be withdrawn, and so is the application alluded to above. They annexed a copy as CM "3" and said the two appeals and applications are running concurrently.
  6. It was averred that the applicants stand lawfully evicted from the suit land now under cultivation and therefore, an injunction cannot issue while the applicants are already out of the land, which eviction was supervised by the OCS Meru Police station through a valid court order attached as annexure marked CM 4 (a) & (b).
  7. With leave of court, the applicants filed written submissions dated 8.12.2023. It was submitted that the applicants had satisfied the tests for a grant of temporary injunction going by the caselaw of *Giella v Cassman Brown* (1973) E. A 358 and Section 40 of the Civil Procedure Rules, Section 68(1) & (2) of the Land Registration Act, Mrao Ltd v First American Bank of (K) Ltd & others CBK & another v. Uhuru Highway Development Ltd and others, Tritex Industries Ltd and National Housing Corporation & another (2014) eKLR, Thomas Mungiria & 9 others v Joseph Mutuma & 4 others Meru HCC No.12 of 2010 and Naibor Ajjik Group Ranch v Agriculture Development Corporation & others (2016) eKLR.
  8. On whether the applicants are entitled to stay of execution, the applicants submitted that they had an undoubted right of appeal and have met the conditions set in Butt v Rent Restriction Tribunal (1982) KLR 417.
  9. The applicants submitted that they filed the appeal within time, but in the wrong forum, which was unfortunate, yet it raises arguable points and that if a stay was not granted, the intended appeal would be rendered nugatory.
  10. Regarding leave to appeal out of time, the applicants relied on Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. Nai 255 of 1997. The applicants emphasized that they inadvertently filed the appeal and the application in the wrong forum, a genuine mistake on the part of their advocates on record, which should not be visited upon innocent litigants. Reliance was placed on Dilpack (K) Ltd v William Muthama Kitonyi (2018) eKLR.
  11. The applicants are seeking leave to appeal out of time. The reason given is that their appeal was wrongly filed at the High Court on 10.8.2023 and that the mistake was only realized when they appeared before the High Court in a stay of execution application dated 7.11.2023 hearing on 14.11.2023.
  12. The court, under Section 79 G of the Civil Procedure Act, has the power to admit the filing of an appeal out of time, if the applicant has good and sufficient cause for not filing on time. In this application, the reason given is attributed to the law firm that filed the appeal in the wrong court. The law firm has not owned up to the mistake at all. The applicants nevertheless aver that mistakes of counsel should not be visited upon innocent litigants. Article 162 (2) (b) of the Constitution has delineated the jurisdiction of this court from that of the High Court and the Employment and Labour Relations Court. The three



- courts, while co-equal, have distinct mandates. See [Henry Kigen & others v Baringo County Governor & others](#) (2020) eKLR.
13. How the confusion arose has not been explained at all. Mistakes are bound to occur. They are not lesser mistakes since they have been committed by a junior or a senior member of the bar. They can be excusable if genuinely, mistakenly or inadvertently made. In this application, the applicants were misled by their law firm on record. The mistake cannot be attributable to them. They should also not suffer the consequences of being denied an opportunity to exercise a right of appeal simply because their law firm committed a jurisdictional error.
  14. In [Belinda Murai & others v Amos Wainaina](#) (1978) eKLR, the court said the doors of justice should not be closed because a mistake has been made by a lawyer of experience who ought to know better and that the court should if it can rectify it in the interest of justice.
  15. The respondents take the view that there can be no parallel appeals, an appeal filed in a court without jurisdiction is a nullity in law and cannot be transferred by the High Court to this court. In [Equity Bank Ltd v Bruce Mutie Mutaka t/a Diani Tour & Travel](#) (2016) eKLR, the Court of Appeal said it would be illegal for the High Court under Section 18 of the [Civil Procedure Act](#) to transfer a suit filed in a court lacking jurisdiction and therefore sanctify an incompetent suit. Parties may not even consent to the transfer under Article 159 of the [Constitution](#).
  16. This court is, however, aware of the holding in [Albert Chaurembo Mumba and 7 others v Maurice Munyao & 148 others](#) (2019) eKLR. In the circumstances, I find the prayers sought meritorious.
  17. On stay of execution and temporary injunction pending appeal, the effect of the lower court decree was that an eviction was to be issued against the appellants; their counterclaim to the suit was also dismissed. The appellants' claim was based on adverse possession. The respondents aver that the execution process has taken place and, therefore, there was nothing for the court to stop. Further, the respondents have attached a copy of an order issued on 1.11.2023 for the OCS to provide security in the execution of the decree dated 21.7.2023. It is trite law that the eviction process must comply with Sections 152 A, B, C, D, E, and F of the [Land Act](#). There is no evidence that in undertaking the eviction process, the respondents adhered to the law and gave the applicants the requisite notices. The OCS has not given any report to this court through the respondents, that the applicants were given adequate or statutory notice of 3 months before the eviction could occur. It was not enough for the respondents to merely rely on the notice given by the trial court. That did not absolve the respondents from adhering to the law. Therefore, I cannot entirely agree with the respondent's averment that there was nothing to stay.
  18. In any event, the respondents knew of the pending proceedings, albeit filed in the wrong court. The wanton destruction of the applicants' properties, as shown in the photographs, is what the law on eviction sought to cure. I find that the applicants have demonstrated a right to be protected from abuse of the law in the course of the eviction. There is substantial loss demonstrated to warrant the preservation of the suit land.
  19. The intended appeal is not idle or frivolous, given that the applicants had a counterclaim at the lower court. The intended appeal raises arguable points that this court should hear. See [Madhu Paper International Limited v Kerr](#) (1985) KLR 840 [Stanley Kagetbe v Tony Keter & 5 others](#) (2013) eKLR. The upshot is that the intended appeal shall be filed and served within seven days from the date hereof. A temporary injunction and an order of inhibition are hereby granted barring and restraining the respondents, their agents, servants, or employees from selling, transferring, leasing, letting, evicting or interfering with the applicant's use, occupation, possession, developments or access to the suit premises, pending hearing and determination of the intended appeal.



20. The orders shall lapse after one year from the date hereof. The applicants are ordered to provide and file a written undertaking as to costs for Kshs.500,000/=, within three days from the date hereof; otherwise, the temporary orders shall lapse.

21. Costs in the course.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON  
THIS 6 DAY OF MARCH, 2024**

In presence of

C.A Kananu

Kerubo for respondent

**HON. CK NZILI**

**JUDGE**

