



**Lords Promise Church v Njogu & 2 others (Suing as the legal representatives of the Estate of the Late Simon Muriuki Njogu) & another (Civil Appeal 141B of 2023) [2024] KEHC 8771 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8771 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 141B OF 2023  
M THANDE, J  
JULY 19, 2024  
(FORMERLY MOMBASA HCCA NO. E216 OF 2023)**

**BETWEEN**

**LORDS PROMISE CHURCH ..... APPELLANT**

**AND**

**EUNICE WAGITHI NJOGU, MCHAEEL MUNENE NJOGU & PETER ZAKAYO  
(SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
SIMON MURIUKI NJOGU) ..... 1<sup>ST</sup> RESPONDENT**

**FELIX KITHOME ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the ruling decision of Hon. Olivia Koranje, Resident Magistrate delivered on 27.7.23 in Mariakani SPMCC No. 165 of 2019)*

**JUDGMENT**

1. The 1<sup>st</sup> Respondent filed Mariakani SPMCC No. 165 of 2019 against the Appellant and the 2<sup>nd</sup> Respondent seeking to recover damages for fatal injuries allegedly sustained by Simon Muriuki Njogu (the deceased) in an accident on 6.6.18, involving a motor vehicle, KCH 050H an Isuzu lorry, KWT 840, which they said was owned by the 2<sup>nd</sup> Respondent. In the plaint dated 18.6.19 and amended on 2.8.22, they averred that the deceased was a lawful pedestrian along the Mombasa-Nairobi road at Mariakani Weigh Bridge when the said vehicle was so negligently, recklessly and carelessly driven by the Appellant's authorized driver, servant and/or agent that vehicle veered off the road and knocked down the deceased occasioning fatal injuries to the deceased. They claimed special and general damages, costs and interest.
2. The Appellant and 2<sup>nd</sup> Respondent failed to enter appearance or file defence. As a result, judgment was entered against them on 21.5.22 thereby settling the issue of liability. The matter then proceeded



to formal proof and in a judgment dated 30.9.23, the trial Magistrate awarded damages in the sum of Kshs. 2,990,246/=. Thereafter the Appellant filed an application dated 5.5.23 and amended on 17.5.23, seeking stay of execution of the decree arising from the said judgment and an order compelling Fantasy Auctioneers to release motor vehicle registration number KCJ 025R, pending the hearing and determination of the application. The Appellant also sought the setting aside of the said judgment and the consequential decree. By a ruling dated 27.7.23, the trial Magistrate found the application lacking in merit and dismissed the same. It is this ruling that is the subject of this Appeal before me.

3. The grounds of the Appeal are:

1. That the Learned Magistrate erred both in law and in fact and misapprehended herself by failing to appreciate that the service of summons to enter appearance and the Plaintiffs' pleadings upon Pastor Nicholas Misango as alleged by the Court Process Server, was done to a person who is not a party to this suit.
  2. That the Learned Magistrate erred both in law and in fact and misapprehended herself by failing to appreciate that the Appellant, Lords Promise Church, does not have Legal Capacity to sue or to be sued.
  3. That the Learned Magistrate erred both in law and in fact when she placed on over reliance in procedural technicalities contrary to Article 159(2)(d) of *the Constitution* of Kenya by insisting on the attachment of draft defence on the Application in order to ascertain whether there were triable issues yet the same were duly raised in the Appellant's Written Submissions. Further, she did not acknowledge the express content and spirit of the law in regards to the exercise of judicial discretion as laid out in Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
  4. That the Learned Magistrate erred both in law and in fact when she infringed the Appellant's constitutional right to fair hearing as envisaged in Article 50 of *the Constitution* of Kenya, 2010.
  5. That the Learned Magistrate erred both in law and in fact by failing to exercise her discretion in a judicial manner and in accordance with the law.
  6. That further and without prejudice to the foregoing grounds of appeal set out herein, the Learned Magistrate erred in law and in fact when she failed to appreciate the documentary evidence filed by the Appellant.
4. The Appellant prayed that the decision of the Learned Magistrate be quashed and the ruling delivered be set aside. The Appellant also prayed for costs.
5. In its submissions, the Appellant raised the following issues for determination which the Court adopts:
- i. Whether the Lord's Promise Church has legal personality to sue or be sued.
  - ii. Whether there was proper service of summons to enter appearance and other pleadings upon the Appellant.

#### **Whether the Lord's Promise Church has legal personality to sue or be sued**

6. It is the Appellant's case that the Appellant does not have capacity to sue or be sued. It was contended that the trial court proceedings were null and void from the beginning as the Church does not have the capacity to be sued. As such, there are no fruits of judgment to be enjoyed and the extracted decree is illegal. The Appellant submitted that the suit ought to have been struck out against it. The case of *Peter*



Taracha & another v International Pentecostal Holiness Church & another [2016] eKLR was cited to buttress this submission.

7. The 1<sup>st</sup> Respondent submitted that they were issued with a police abstract indicating the Lords Promise as the beneficial owner and/or insurance policyholder of the motor vehicle, at the time of the accident. It was argued that in light of this, the Appellant was a person in law capable of holding and owning property in its own name and therefore capable of suing and being sued. Reliance was placed on the definition of “person” under Article 260 of the Constitution which includes a company, association or other body of persons whether incorporated or unincorporated. Further that even though a society generally acts through its officers, there is nothing in the Act that says it cannot sue or be sued in its own name. The 1<sup>st</sup> Respondent urged the Court to find that the Appellant was rightfully sued.
8. I have looked at the record and note that the issue of the legal capacity of the Appellant was not raised in the application in question or at any other time prior.
9. It is trite law that an appellate court will not consider new issues that were not canvassed in trial court. This was considered in the case of Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] eKLR where Kairu, JA stated:
  11. Before this Court, the appellant unsuccessfully sought to introduce, through an amendment to its memorandum of appeal, the complaint that the transaction was void by reason of section 6 of the Land Control Act. That attempt was rejected in a ruling delivered by M’Inoti, J.A in this matter on 23<sup>rd</sup> February 2018 with which the full court in a reference concurred in a ruling delivered on 25<sup>th</sup> January 2019. In rejecting the proposed amendment, the learned Judge expressed that:

“if the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court.” [Emphasis added]

And later,

“Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first instance determinations without the benefit of the input of the court from which the appeal arises.”

12. The learned Judge concluded that the appellant’s intended new ground of appeal was not pleaded before the High Court, no evidence was led on it, the parties did not address the court on the matter and the trial Judge did not pronounce himself on the issue and dismissed the motion to introduce the new ground of appeal. There are past decisions on this point, including Openda v Abn [1982] KLR 165; Kenya Commercial Bank Limited v Osebe [1982] KLR 292; Nyang’au v Nyakwara [1986] KLR 712; Securicor (Kenya) Ltd v E.A. Drapers Ltd & another [1987] KLR 338.



13. Affirming those decisions, in this very matter in *Kenya Hotels Limited v Oriental Commercial Bank Ltd* [2019] eKLR, the full court in the reference from the decision of M’Inoti, J.A to which I have referred reiterated that:

“...the Court will not consider or deal with issues that were not canvassed, pleaded or raised at the lower court; and that for a matter to be a ground of appeal it has to have been sufficiently raised and succinctly made an issue at trial.”

10. The issue of the Appellant’s legal capacity having not been raised in the trial Court, there is nothing on record to enable this Court make any finding thereon. The Appellant has not told the Court how it is registered, if at all and there is no document of registration on record. It would seem that the Appellant believed in its own legal capacity to sue and be sued. This is the reason it filed the application dated 5.5.23 and amended on 17.5.23 in the trial court. If the Appellant lacked such capacity, it follows that it lacked the capacity to file the said application. Further, the Appellant ought to have raised the issue in the trial court to enable the 1<sup>st</sup> Respondent respond to the same and the Court to pronounce itself thereon. The issue cannot be dealt with for the first time by this Court at the appellate stage. Indeed, if this Court were to entertain this issue, it would in effect transform itself into a trial court and make first instance determinations without the benefit of the input of the court from which the appeal arises.
11. In light of the foregoing, and duly guided by the Court of Appeal in the cited decision, the Court declines to consider the issue of the legal capacity of the Appellant which was not pleaded, raised or canvassed in the court below.

#### **Whether there was proper service of summons to enter appearance and other pleadings upon the Appellant**

12. The Appellant submitted that the trial Magistrate erred in finding that it was properly served through service of the summons to enter appearance, upon Pastor Nicholas Misango Shitambanga, who was not a party to the suit. Further that not being a legal entity, the Appellant could not be served with summons or pleadings. It was submitted that there was thus gross miscarriage of justice to enter judgment against the Appellant.
13. For the 1<sup>st</sup> Respondent, it was submitted that service of summons to enter appearance and pleadings was done in accordance with Order 5 of the Civil Procedure Rules.
14. While addressing itself to this issue, the trial court stated thus in its ruling:

Upon perusal of the record, the sworn return of service by Bernard M. Ngungi filed on 31<sup>st</sup> May, 2022 confirms that the Plaint and summons were indeed served upon the 1<sup>st</sup> Defendant through Pastor Nicholas whose phone number is indicated in the return of service. The service was personally (sic) at the church premises at Diani Forst Ukunda.
15. A careful look at the record shows that the affidavit in support of the application was sworn by Nicholas Misango Shitambanga who described himself as the registered trustee of the Appellant. This implies that the Appellant is indeed a corporation.
16. The manner of service of summons on a corporation is set out in Order 5 Rule 3 of the *Civil Procedure Rules*. Rule 3(a) provides that where the suit is against a corporation the summons may be served on the secretary, director or other principal officer of the corporation. Nicholas Misango Shitambanga being the registered trustee of the Appellant was a person recognized in law, to accept service upon a corporation. To claim that service on Nicholas Misango Shitambanga was improper as he was not a



party to the suit is in my view, a feeble attempt at negating what he himself stated on oath. I accordingly find that service of process as contemplated in Order 5 Rule 3 of the Civil Procedure Rules was duly effected upon the Appellant. This ground thus fails.

17. It is clear from the foregoing that having failed in its bid to have the judgment in question set aside, the Appellant is simply clutching at straws. In the end, I find and hold the Appeal herein lacks merit and the same is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 19<sup>TH</sup> DAY OF JULY 2024**

**M. THANDE**

**JUDGE**

