



**Trustees of Kwa Mutu Pentecostal Evangelistic Fellowship of Africa alias Pefa Church v Muthini  
(Environment & Land Case 242 of 2010) [2023] KEELC 19078 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19078 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 242 OF 2010**

**A NYUKURI, J  
JULY 24, 2023**

**BETWEEN**

**THE TRUSTEES OF KWA MUTU PENTECOSTAL EVANGELISTIC  
FELLOWSHIP OF AFRICA ALIAS PEFA CHURCH ..... PLAINTIFF**

**AND**

**PASTOR RAPHAEL MUTHINI ..... RESPONDENT**

**RULING**

1. Before court is an application dated January 28, 2021, filed by the Defendant seeking the following orders;
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That the Defendant/Applicant be supplied with a certified copy of the court proceedings of January 19, 2022.
  - e. That this honourable court be pleased to reopen the Defendant's case by granting the Applicant herein leave to file his statement of defence out of time, and any other document accompanying the Defence, the draft copy of the defence attached hereto be deemed as duly filed and served upon payment of requisite court fees
  - f. That costs of this Application be in the cause.
2. The Application was based on grounds on the face of it and supported by the Affidavit of Pastor Raphael Muthini the Defendant herein, sworn on January 28, 2021. The Applicant deponed that he had been represented by the firm of AM Mbindyo & Company Advocates but that the said firm



was not updating him on the progress and proceedings in this matter. That there was breakdown in communication between himself and the law firm, leading him to appoint other Advocates, being Calistus & Co Advocates on January 13, 2021 to take up the file and act for him. He deposed that the newly appointed Advocates had filed a Notice of Change of Advocates on January 17, 2022 and served the same upon all the advocates on record.

3. The Deponent further stated that at the point of filing the notice of change of Advocates, and upon perusal of the court file, the counsel had noted that the matter had been fixed for hearing on 19<sup>th</sup> of January 2022 with only one day to the said date. He deposed that the hearing Notice had been served upon their erstwhile Advocates but that the Advocates had not informed him.
4. The Applicant further deposed that his Advocates had expeditiously written to the erstwhile Advocates requesting for a copy of the file to prepare for the hearing but by 19<sup>th</sup> January, they had not obtained the file. He then stated that on the day set for hearing, his counsel had sought the court's indulgence for a last adjournment but the same was declined and he was accorded 2 hours to avail himself at Machakos law courts for a physical hearing, noting that he was virtually in court from Kangundo that morning. He averred that the hearing proceeded with three Plaintiff witnesses who testified, and there being no defence on record, the court declined to give any further time for the Applicant's counsel to file his documents despite their request to do so.
5. The Deponent stated that they were apprehensive that since the court only heard one side of the case, that land, being an emotive issue in Kenya, required an evaluation of evidence from both sides. He then stated that the failure to file a defence and any other documents was a mistake of his erstwhile Advocates which should not be visited upon an innocent litigant. He deposed that he was ready to comply with any conditions the court may issue and that he had an arguable defence which raises triable issues.
6. The Applicant concluded by stating that he will be greatly prejudiced if he is judged unheard and that the Respondents will not be prejudiced since they will still have an opportunity to cross-examine the Defendant.
7. The Application is opposed. The Respondent filed his replying Affidavit dated March 22, 2022 and sworn by one Bishop Joseph Mophat Kilioba, the Chairman to the Plaintiff. The Deponent stated that the Applicant had not challenged the orders issued on January 19, 2022 declining an adjournment and that the Applicant wants to defeat the said orders by his prayers. The Deponent further averred that the Application is full of falsehoods as the Applicant was personally served with the hearing notice on December 7, 2021 while his former advocates were served on November 29, 2021.
8. The Deponent went further and gave a chronology of events stating that the suit was filed on November 15, 2010 and summons served on the defendant on December 9, 2010. That thereafter on 1<sup>st</sup> February the Defendant's counsel entered appearance and filed a preliminary objection dated October 8, 2012 which was not prosecuted and was dismissed for want of prosecution on May 19, 2015.
9. He stated that the Applicant had manifested laxity in prosecuting his defence, from filing a Preliminary Objection in 2012 but failing to prosecute the same until the same was dismissed on May 19, 2017 for want of prosecution; and failing to comply with pre-trial directions and seeking two 'last adjournments'. He stated that the counsel on record for the Applicant had filed an application to cease acting on November 4, 2020, but that the Application was not prosecuted and that the same was dismissed for want of prosecution on November 22, 2021. It was his testimony that the court then directed that the hearing notice be served to the Applicant in person and his erstwhile advocates, which



was done on November 29, 2021. He further stated that despite the service, the Applicant had waited until January 17, 2022 to instruct his Advocates in an attempt to scuttle the hearing date.

10. The Respondent further deposed that neither the Applicant nor his Counsel had sought leave to file Defence out of time, even after being informed that there was no defence in place. The Deponent averred that the Applicant was barred by a court order from remaining, trespassing or in any way dealing with the suit property but that he had defied the orders, even further changing the name of the church. It was his testimony that the Applicant is not keen on defending the suit having not filed defence more than ten years after being served, and that he is illegally occupying the land hence benefiting from the pendency of the suit. He prayed that the Application be dismissed.
11. In response to the Replying Affidavit, the Applicant filed a further Affidavit dated April 1, 2022. He reiterated that his advocates who were on record, being AM Mbindyo & Co Advocates, had not been updating him of the progress in the suit and that he has been in the dark for all that time. Further, he emphasized that the court had not been sitting on several occasions hence the Applicant had no control of the same. As for the allegations of personal service, he denied ever being served with a hearing notice, and emphasized that as per the attached evidence of service, only his Advocates on record were served but they did not bother to inform him.
12. The Deponent further emphasized the fact that he had then changed to an Advocate that he could trust, being his current Advocate, and that the Advocate had done their best to get a copy of the file, travel to Machakos for the hearing and beseech the court for more time to make things right. He stated that it was for the interest of justice and rules of natural justice that the application be allowed.
13. The Application was canvassed by way of written submissions. The Applicant filed his submissions on May 9, 2022 while the Respondent filed their submissions on May 23, 2022.

### **Submissions by the Applicant**

14. Counsel for the Applicant argued that although their former advocates were served, they never informed the Applicant. Counsel also blamed the applicant's former advocate for failure to hand over the file to his current advocates. Counsel argued that this case is in regard to a land dispute and that land is an emotive issue whereof a court should make a decision only after hearing both sides. Counsel cited the cases of *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR, *MW v MWM & Another* [2015] eKLR, *Shah v Mbogo and Another* [1967] EA, *Mbaki & Others v Macharia & Another* (2005) 2 EA 206 for the proposition that the court ought to uphold principles of natural justice by affording both parties the right to be heard despite mistakes of counsel as the court's discretion is unfettered.
15. Further, Counsel placed reliance on provisions of Articles 50 and 159 of the *Constitution* of Kenya 2010, Section 3 A of the *Civil Procedure Act* and the principles of natural justice. They argued that on the hearing date of January 19, 2021, counsel was denied a prayer for adjournment on the basis that this is an old matter, but that he ought to have been given a chance. Relying on the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another* [2014] eKLR, counsel submitted that in determining whether there is inordinate delay, the court ought not take the dictionary meaning of inordinate, but should instead consider the circumstances of the case, the explanation given and the bigger picture of administering justice. Further reliance was placed on the cases of *Burbani Decorators & Contractors v Morning Foods Ltd & Another* [2014] eKLR and *Safaricom Limited v Josenga Company Limited & 4 Others* [2021] eKLR, which the court has considered.
16. As to who should bear the costs of the Application, Counsel relied on section 27 of the *Civil Procedure Act* and the case of *R v Rosemary Wairimu Munene, ex parte Applicant, Ibururu Dairy Farmers Co-*



*operative Society Ltd*, to contend that costs are awarded at the discretion of the court and that costs follow the event. Counsel therefore sought costs on behalf of the Applicant.

### Submissions by the Respondent

17. Counsel for the Respondent referred to the wording of Lord Denning MR in *Fitzpatrick v Batger & Co Ltd* (1967) 2 A11 ER 657 which were cited with approval by the Court of Appeal in the case of *Japheth Pasi Kilonga & 8 Others v Mombasa Autocare Limited* [2015] eKLR, wherein the Lord Denning warned that public policy demands that the business of the court ought to be conducted with expedition.
18. On whether the court should grant the application as sought, counsel argued that the Applicant has been extremely indolent and treated the court process with contempt as the defendant had never filed defence or witness statement, despite being given last adjournments severally. They referred the court to the case of *Board of Trustees Full Gospel Churches of Kenya v Commissioner of Lands, Attorney General & Good News Church of Africa* [2021] eKLR, wherein the court emphasized that a Defendant who had failed to file his Defence for over fifteen years could not argue that he is being condemned unheard, having been accorded many chances to comply. The court further opined that the Defendant could not blame his Advocates, stating that a matter belongs to a litigant and he ought to have perused the court file or appointed another Advocate.
19. Counsel further argued that the Applicant had not demonstrated any efforts in finding out the status of the matter himself. He cited the case of *Savings and Loans Limited v Susan Wanjiru Muritu*, Nairobi HCC No 397 of 2002 for the proposition that a litigant ought to constantly check with their Advocate for the progress of their case. To buttress the same, Counsel also placed reliance on the holding in *Equatorial Commercial Bank Limited v Pickwell and Deal Limited & 2 Others* [2019] eKLR and submitted that an Advocate is an Agent of the party who instructs him and that the litigant has a duty to ensure that the Agent carries out instructions as given.
20. Counsel concluded by submitting that the court made a finding that this was not a proper case for granting an adjournment and the Applicant ought to have appealed or filed an application for review. He argued that the court was functus officio and that granting the orders sought would amount to sitting in an appeal on its own orders, which is an illegality. They also stated that the other option would have been to file an Application for review under order 45 but the same was not done. They prayed that the Application be dismissed with costs.

### Analysis and determination

21. I have considered the Application, the response thereto and the submissions by the parties. The crux of the application is the prayer by the Applicant to be accorded a chance to file defence and other documents and be allowed to defend this suit.
22. From the record, I note that when this matter came up for hearing on January 19, 2022, Mr Odhiambo, counsel for the Defendant applicant sought for adjournment on ground that he had just come on record and he needed time to acquaint himself with the matter. He stated that the Defendant had had issues with his previous counsel but that he was now keen on proceeding. The application was opposed by the counsel for the Respondent on grounds that this matter had never proceeded since 2018 because the Defendant had not been attending court and that on March 3, 2020 the Defendant was given a very last adjournment. Counsel stated that now they were in 2022 yet the Applicant was not ready to proceed. He argued that the Defendant had had sufficient time to prepare but failed to do so.
23. Upon consideration of submissions made by both counsel, this court found as follows;



I have considered the sentiments and submissions of counsel on both sides. This is a 2010 matter. The defendant had sufficient time to prepare for hearing and also to instruct a new counsel. The record shows that the defendant was personally served for today's hearing on December 7, 2021. He therefore has no excuse for instructing his advocate a few days to the hearing date. Besides, on March 3, 2020, the defendant was given a very last adjournment I therefore decline to adjourn this matter. The same shall proceed today at noon.

24. Thereafter, when the matter came up the same day for hearing as scheduled, both counsel for the Plaintiff and defendant attended court and the matter proceeded to hearing. The Plaintiff presented three witnesses who were cross examined by Mr Odhiambo advocate for the Defendant and thereafter the Plaintiff's case was marked as closed. Thereafter Mr Odhiambo sought for leave to file defence and counter claim. He argued that the Defendant had documents showing that he owned the suit property and that not hearing the Defendant will prejudice him. Again, his prayer was opposed by the Plaintiff's counsel on grounds that the defence had been given opportunity to file defence and witness statement when they got the last adjournment on March 3, 2020 but failed to comply. He argued that the orders sought will prejudice the Plaintiff as the Plaintiff had already closed his case and that the Defendant's intention was to tailor-make their case in accordance to the evidence on record.

25. Upon hearing both parties, this court held as follows;

I note that this matter was filed in the year 2010 and the defendant entered appearance in 2011. In 2012 he filed a preliminary objection which was dealt with by the court. Subsequently this matter came up for hearing severally until the March 3, 2020 when a very last adjournment was granted to the defendant. No explanation has been offered by the defendant why for the last ten years he has not been able to file defence and witness statements. Justice should be done to both parties. I am not persuaded that the defendant deserves the orders sought and I dismiss the application. The defendant's case is marked as closed.

26. I have highlighted the proceedings of the court on January 19, 2022 to determine whether the court has jurisdiction to determine the instant application. The application before court seeks for leave to file defence and other documents accompanying the defence out of time. Does this court have jurisdiction to determine this application in view of the fact that the same application was orally made on 19<sup>th</sup> January 2022, argued on merit and determined by this court?

27. Section 7 of the *Civil Procedure Act* bars the court from determining the same issue twice and provides for the doctrine of res judicata as follows;

#### Res Judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

28. In this matter the issue as to whether there is sufficient cause to justify the exercise this court's discretion in granting leave to the defendant to file defence, witness statements and other attendant documents was raised on January 19, 2022, heard on merit and finally determined by this court. It matters not that the application was made orally. What is key is that the issue of leave to file defence and attendant documents was raised, argued on merit and a determination made. Failure to file a formal application does not render the court's determination inferior, to call for a formal application. Therefore, by dint



of Section 7 of the Civil Procedure Act, I find and hold that the application dated 28<sup>th</sup> January is *res judicata* and the same is hereby dismissed with costs to the Plaintiff.

29. It is ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Mr. Ochieng holding brief for Ms. Munyao for Plaintiff/Respondent

Mr. Odhiambo for Defendant/Applicant

Abdisalam – Court Assistant

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