



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO. 47 OF 2020

GRACE WATERE MURUIKIAPPELLANT

VS

EUNICE MUTHONI NDERITU1ST RESPONDENT

DAVID NDERI KAMAU T/A

LUKAKA SERVICES 2ND RESPONDENT

RULING

The Notice of Motion dated the 21/12/2020

1. It is the Appellant's Notice of Motion dated the 21/12/2020 seeking the following orders-

a. SPENT.

b. SPENT

c. THAT the Judgment and consequential orders delivered on 19th October 2020 by the Hon. J. A. Agonda at Ruiru in Senior Principal Magistrate's Court in ELC Case No. 59 of 2019 be stayed and/or set aside/vacated pending the determination of this appeal.

d. THAT the Applicant be granted leave to lodge their Memorandum of Appeal and Record of Appeal out of time against the Judgment entered on 19th October 2020, and delivered by the Hon. J. A. Agonda at Ruiru in Senior Principal Magistrate's Court ELC Case No. 59 of 2019.

e. THAT the Memorandum of Appeal annexed at paragraph 10 in the supporting affidavit filed herein be admitted in this Honourable Court in this cause.

f. THAT the costs of this application be in cause.

2. The application is supported by the grounds set out as follows;

a. THAT on the 19th October 2020 the Hon. J. A. Agonda, SRM in Ruiru, delivered a Judgment in ELC Case No. 59 of 2019.

b. THAT the Applicant felt aggrieved with the said decision at the time the Applicant had instructed the counsels herein to lodge an appeal.

c. THAT Counsel immediately made a request to be supplied with the proceedings but there was a delay on the Court's end and hence the Applicant's counsel was unable to lodge the appeal on time.

d. THAT the inadvertent delay was occasioned by Court and not by the Applicant herein.

e. THAT the Applicant resides in the suit land and will be rendered destitute within 90 days from the date of delivery of Judgment.

f. THAT the Applicant's intended appeal raises triable issues and has high chances of success.

g. THAT this application is in the interest of justice and shall not prejudice the Respondents in any way.

3. In her Supporting Affidavit, the Applicant explained the delay experienced in filing the appeal on time. That the judgement was delivered on the 19/10/2020 whereupon she instructed the firm of Mbiyu Kamau & Co Advocates to file an appeal against the said judgment instead of her erstwhile Advocates Messrs. Waweru Nyambura & Co Advocates who represented her in the lower Court.

4. That there was a delay of 30 days in obtaining proceedings from the lower Court as shown by the certificate of delay dated the 23/11/2020. Further that she resides on the suit land with her children and she stands to be rendered destitute if the judgement is executed and yet her appeal stands a good chance of success.

5. The application is opposed by the 1st Respondent vide her Replying Affidavit dated the 15/2/2021 where she stated that the application is irregular and an abuse of the process of the Court. That the Applicants counsel is improperly on record having failed to comply with provisions of Order 9 rule 9 of the CPR. That the orders issued by the Court in favour of the Applicant on the 24/12/2020 ought to be discharged on that ground.

6. The 2nd Respondent did not oppose the application.

7. The parties have filed written submissions which I have read and carefully considered.

8. Before I delve into considering the merits or otherwise of the application dated the 21/7/2020, there is an objection that requires determination raised by the 1st Respondent.

9. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

“A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

10. Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

11. Order 9, rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

2. Order 9, rule 10 provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

12. According to the record the Applicant was represented by the firm of Waweru Nyambura & Co Advocates. After the delivery of judgement, the Applicant is now represented by the firm of Mbiyu Kamau & Co Advocates. There is no evidence that this law firm has complied with the provisions of Order 9 rule 9 of the Civil Procedure Rules. The correct action was for the new firm of advocates to seek leave under Order 9 rule 9 of the Civil Procedure Rules or file a consent to come on record. None of these steps were done hence I agree with the objector that the advocate is improperly on record.

13. The application before me therefore is incurably incompetent. It is struck out with costs.

The Notice of Motion dated the 22/12/2020

14. I have anxiously looked for this application in the file without success. I have deemed it to have been filed by the 2nd Respondent who has already filed a record of appeal against the judgement of the trial Court. From the face of the certificate of urgency filed on the 14/1/2021, I can glean that the Applicant sought orders for stay of execution of the judgement. Save for this page, I have not sighted the notice of motion dated the 22/12/2020. I note that the 1st Respondent duly opposed this application vide her Replying Affidavit sworn on the 8/2/2021 as well as in her written submissions dated the 24/5/2021.

15. The Applicant filed written submissions on the 16/6/2021 with respect to the two applications.

16. In the circumstances of this anomaly, the Court has no pleading in form of an application by the 2nd Respondent to address its mind to. The responses to the non-existent application are therefore struck out with no orders as to costs.

17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Appellant – Ms Gichio

Respondent 1 – Mrs. Githaiga

Respondent 2 – Tumu

Court Assistant - Phyllis