Mukobwa v Kenya Pentecostal Holliness Church Wiru Branch Through Registered Trustees (Environment & Land Case 22 of 2017) [2023] KEELC 447 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 447 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT & LAND CASE 22 OF 2017

CK YANO, J

FEBRUARY 1, 2023

BETWEEN

ANESTLY MUTHONI MUKOBWA SUBSTITUTED FOR JOEL MUKOBWA MWONGERA .... PLAINTIFF

AND

KENYA PENTECOSTAL HOLLINESS CHURCH WIRU BRANCH THROUGH REGISTERED TRUSTEES .... DEFENDANT

RULING

1. This ruling is in respect to a Notice of Motion dated June 28, 2022 brought under Sections 3A, 63(4) CPA, and Order 51 Rule 1 of the *Civil Procedure Rules* by the Plaintiff/Applicant. The application seeks the following orders:

   i. That the court be pleased to issue an eviction order against the respondent evicting the respondent from LR Mwimbi/Murugi/1788.

   ii. Cost of this application be provided for.

2. The application is supported by the affidavit of Anestly Muthoni Mukobwa sworn on June 28, 2022 and is based on the following grounds:

   a) That on June 20, 2018 judgement in this suit was delivered by the honourable court.

   b) That on September 4, 2018 a decree pursuant to the court judgement was issued by the honourable court.

   c) That the respondent has never applied for stay of execution of decree aforesaid, despite that the judgement was against them.

d) That the respondent remains in occupation and use of the suit land LR Mwimbi/Murugi/1788 to the detriment and disadvantage of the plaintiff applicant.

e) That it is only fair and just that the respondent should be ordered to give vacant possession of LR Mwimbi/Murugi/1788 and in default their be possibly evicted.

f) That substantive justice of this case demand that orders of eviction be issued against the respondent ordering them to give vacant possession of LR Mwimbi/Murugi/1788 and in default they be forcibly evicted therefrom.

g) That the orders sought are the best and most apt in the circumstance and substantive justice of this case require that the orders be granted if substantive justice is to be served and seen to be served.

3. The above grounds are repeated in the supporting affidavit of Anestly Muthoni Mukobwa. Copies of the judgment and decree have been annexed and marked 'AMM1' and 'AMM2' respectively.

4. The application is opposed by the Respondents vide grounds of opposition dated on August 26, 2022, on grounds that the application is incurably defective and bad in law, that the plaintiff has an advocate on record and he has not sought the leave of the court to act in person, that there is an appeal against the decision of the honourable court at Nyeri Civil Appeal No 187 of 2018 whose submissions have been filed and it is pending for judgement and that the application is premature as the appeal is waiting for judgment.

5. The application was canvassed by way of written submissions.

6. The plaintiff identified four issues for determination, firstly, whether an eviction order should issue in the circumstance, secondly whether an appeal or second appeal can operate as stay of execution, thirdly whether the application is incurably defective and lastly who should pay the cost.

7. The Applicant submitted that it is fair and just that an eviction order be issued against the respondent because Judgment in the case was rendered on June 20, 2018 and a decree pursuant to that judgment was issued on September 4, 2018 and that naturally the applicant is entitled to enjoy the fruits of her successful litigation and without execution a judgment remains an empty gong. The applicant argues that he should now be seen to enjoy the fruits of what she has fought for. That granted the status of the case, eviction orders should issue against the Respondent as a matter of cause.

8. Regarding the issue whether an appeal or second appeal will of necessity operate as stay of execution, the applicant submitted that the judgment in the case was rendered on June 20, 2018 and a decree to that effect issued on September 4, 2018.

9. The applicant admitted that that there is a pending appeal in the court of appeal, CIVIL APPEAL NO 187 of 2018 which is at an advanced stage according to the respondent but the applicant submitted that the pending appeal should not be treated as stay in this case.

10. The applicant cited Order 42 rule 6 (1) Civil procedure Rules which provides that:

> ' 6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such order, and whether the application for such stay of execution of such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty , on application being made , to consider such application and to make such order

thereon as may to it seem just , and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.'

11. The applicant submitted that the respondent saw no wisdom or prudence in applying for stay of execution after judgment was rendered against them in the high court and equally upon appealing to the court of appeal. That the judgment of the high court and the decree remain unchallenged and as such there is nothing to stop the honorable court from issuing eviction orders against the respondent.

12. Regarding the issue whether the application is incurably defective, the applicant admitted that she had an advocate upto the time judgment was rendered by the honorable court on June 20, 2018, and the decree issued by the court and argued that the applicant had moved on her own due to lack of funds to continue with the advocate on record.

13. The applicant submitted further that the advocate on record is not opposed to the applicant acting in person and that the applicant being a lay person did not understand the necessity of having a consent with the advocate on record or making an appropriate application to act in person and implored the court to excuse her ignorance on procedure.

14. The applicant submitted that this is a court of law and is enjoined under article 159 of the *Constitution* to serve substantive justice rather than dwell on technicalities. The applicant further submitted that failure to comply with a certain rule in Civil Procedure Rules should not strictly defeat a claimant's suit.

15. The applicant argued that she is a poor lady who has stopped having the services of an advocate because she cannot afford any more to pay the services of her counsel and has moved the best way she thought was right.

16. The applicant submitted that the court can give her a moratorium and have a consent between her and her former advocate to enable her proceed in person such that justice will not only be done but be seen to be done.

17. The applicant submitted that the respondent should be condemned to pay costs of the application herein since costs follows the event and cited section 27 of the *Civil Procedure Act* which is clear on the issue.

18. The Respondent pointed out that the application is drawn by the applicant in person despite the firm of Ayub K Anampiu & Co Advocates being on record for her. The Respondent cited Order 9 Rule 9 of the Civil Procedure Rules which provides for change of Advocate to be effected by an order of court or by consent of parties, and states:

> ' 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'

19. The respondent relied on the case of *James Ndonyu Njogu v Muriuki Macharia [2020] eKLR* in which the court observed that the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then

there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.

20. The respondent submitted that the reasoning behind the said provision was well articulated in the case of *SK Tarwadi v Veronica Muehlmann [2019] eKLR* where the court observed as follows:

> ' In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him.'

21. The respondent also relied on the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi [2012] eKLR* where the Court held as follows:

> ' A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.'

22. The Respondent also cited the case of *Monica Moraa v Kenindia Assurance Co Ltd [2010] eKLR* which was quoted with approval in the above case in which the court held as follows:

> ' There is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.'

23. The Respondent submitted that in this case the applicant has disregarded the express provision of the law as the firm of Ayub K Anampiu & Co Advocates is on record for the applicant and submitted that the rules of procedure are maiden to enable consistence and certainty both in law and practice.

24. The Respondent's counsel also submitted that there is an appeal in NYERI CIVIL APPEAL NO 187 OF 2018 that is pending judgment and argued that it would be prudent to wait the outcome of the appeal.

25. It is the Respondent's submission that the application lacked merit and prayed for it to be struck of the record with costs.

26. The court has considered the application, the grounds of opposition and the submissions thereto and finds that the issues for determination are:

    i. Whether the application is defective by virtue of Order 9 Rule 9 (a) of the Civil Procedure Rules.

    ii. Whether an appeal can operate as stay.

    iii. Whether the applicant is entitled to eviction orders.

    iv. Who pays the costs of the application.

Analysis &determination

Whether the application is defective by virtue of Order 9 Rule 9 (a) of the Civil Procedure Rules.

27. The Respondent submitted that the application is incurably defective and bad in law since it is drawn by the applicant in person despite having an Advocate on record. On her part the applicant submitted that the advocate on record is not opposed to the applicant acting in person and that the applicant being a lay person did not understand the necessity of having a consent with the advocate on record or making an appropriate application to act in person and implored the court to excuse her ignorance on procedure.

28. The court has looked at the provisions of Order 9 rule 9 of the Civil Procedure Rules which provides for change of Advocates to be effected by order of court or by consent of parties. My understanding is that the rule envisages two scenarios where there is change of advocate and where a party decides to act in person. The commonality in the two scenarios is that there is a previous advocate and the change is happening after judgment.

29. In the first scenario, the new advocate or the party in person makes a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. In the second scenario, the new advocate or party in person need to secure the written consent of the previous advocate on record, file that consent in court and then seek leave to come on record.

30. In this case, the record indicates that the Plaintiff/Applicant was represented by the firm of Ayub K Anampiu & Co Advocates. The suit proceeded for hearing and judgment was entered on June 20, 2018 for the Plaintiff against the Defendant and a decree issued on September 4, 2018. The application herein has been filed by the Plaintiff in person. In my view, it was necessary for the Plaintiff/applicant to comply with the provisions of Order 9 Rule 9 because she is acting in person after judgment had been passed.

31. Looking at the wording of Order 9 Rule 9, it is clear that any change of advocate or notice to act in person after judgment has been entered is mandatory for that change to be effected and there must be an order of the court upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person.

32. The Plaintiff/applicant has submitted that the court is enjoined under Article 159 of the *Constitution* to serve substantive justice rather than dwell on technicalities and that failure to comply with a certain rule in Civil Procedure Rules should not strictly defeat a claimant's suit.

33. In the case of Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi [2012] eKLR it was held as follows:

> ' A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.'

34. The Respondent raised an objection to the effect that the Application herein was fatally defective as it contravened the provisions of Order 9 Rule 9 (a) of the Civil Procedure Rules. The court notes that the correct procedure was not followed and as such the applicant cannot shield herself with Article 159 or the ground of ignorance of the law since ignorance of the law is no defence.

35. In the circumstances, I find that the application dated June 28, 2022 is incurably defective and bad in law having been filed by a party who is not properly on record and without leave of court contrary to the mandatory provisions of Order 9 Rule 9. Having found that the application is defective, I need not consider the other issues.

36. The upshot of the foregoing is that notice of motion dated June 28, 2022 is hereby struck out with costs to the Respondent.

37. It is so ordered.

DATED, SIGNED AND DELIVERED at Chuka this 1st day of February, 2023 in the presence of:

C/A: Martha

Mugo for Plaintiff/Applicant

No appearance for Defendant/Respondent

C. K. YANO,

JUDGE.