



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.74 OF 2005 (CONSOLIDATED WITH

ELC CASE NO.222 OF 2008)

THE BOARD OF TRUSTEES FULL GOSPEL CHURCHES OF KENYA.....PLAINTIFF

-VERSUS-

THE COMMISSIONER OF LANDS.....1<sup>ST</sup> DEFENDANT

THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT

GOOD NEWS CHURCH OF AFRICA.....3<sup>RD</sup> DEFENDANT

**RULING**

1. In the Notice of motion dated 9<sup>th</sup> February, 2021, the 3<sup>rd</sup> Defendant is seeking for the following orders:

**a. That this application be certified urgent and service be dispensed with in the first instance.**

**b. That the firm of B.M Mung'ata & Company Advocates be granted leave to come on record in place of Manthi Masika & Company Advocates.**

**c. That this Honourable court do grant stay of execution of the final judgment delivered on 29/1/2021 pending the hearing and determination of this application.**

**d. That this Honourable court do set aside the exparte proceedings of 17/9/2020, the subsequent proceedings as well as well as the final judgment delivered on 29/1/2021.**

**e. That the matter does start de novo and the suit to proceed on merit.**

**f. That in the alternative the plaintiff/and his witnesses be recalled for purposes of cross-examination and the 3<sup>rd</sup> defendant granted leave to testify and call witnesses.**

**g. That the costs of this application be in the cause.**

2. The Application is supported by the Affidavit of the 3<sup>rd</sup> Defendant's Bishop who deponed that the Plaintiff has obtained *ex-parte* final Judgment in this matter declaring it the legal owner of the suit land and ordering the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to register the land in the name of the Plaintiff and that this suit was consolidated with HCCC No. 222 of 2008.

3. According to the 3<sup>rd</sup> Defendant's Bishop, the 3<sup>rd</sup> Defendant instructed the firm of **Manthi Masika & Co Advocates** to represent them; that they were surprised when they learnt that the suit had been decided in favour of the Plaintiff and that when they perused the court file, they discovered that the matter had proceeded for hearing on 27<sup>th</sup> September, 2020 in their absence and a Judgment rendered on 29<sup>th</sup> January, 2021.

4. It was the deposition of the 3<sup>rd</sup> Defendant's Bishop that none of the officials of the 3<sup>rd</sup> Defendant had been informed about the hearing of the suit; that the failure to attend court was due to the mistake of their advocate; that the mistake of their advocate should not be visited on

the 3<sup>rd</sup> Defendant and that it is the 3<sup>rd</sup> Defendant who was allocated the suit property first.

5. According to the 3<sup>rd</sup> Defendant's Bishop, the dispute as to ownership of **Plot Number Zone 47-Machakos Municipality** (the suit property) was heard by a Committee led by the District Commissioner Machakos in the year 1994; that a decision was reached whereby the 3<sup>rd</sup> Defendant was declared the lawful owner of the suit property and that it was recommended that the Plaintiff be given an alternative land.

6. The 3<sup>rd</sup> Defendant's Bishop finally deponed that the Defendant has a strong defence which raises serious triable issues; that the 3<sup>rd</sup> Defendant is ready to attend court if the court allows the Application; that unless the orders are granted, the 3<sup>rd</sup> Defendant will be evicted from the suit property leaving the worshippers embarrassed and that the land would have been taken away from them unjustly.

7. In response, the Plaintiff's Trustee deponed that for a period of more than one year, the Defendants were given an opportunity to comply with the provisions of **Order 11** of the **Civil Procedure Rules** which they failed to do and that the suit was finally certified as ready for hearing by the court.

8. The Plaintiff's Trustee deponed that to date, the 3<sup>rd</sup> Defendant has never filed any witness statement or documents as required by the law; that when the matter came up for hearing on 17<sup>th</sup> September, 2020, counsel for the 3<sup>rd</sup> Defendant informed the court that he did not have instructions and that indeed the 3<sup>rd</sup> Defendant had taken its file away from its advocate.

9. According to the Plaintiff, the 3<sup>rd</sup> Defendant has not demonstrated that it was entitled to the suit property; that the 3<sup>rd</sup> Defendant has never challenged the allocation of the suit property to the Plaintiff; that the Defendant has never filed documents in this matter and that there must be an end to litigation.

10. The 3<sup>rd</sup> Defendant's advocate submitted that under **sections 1A, 1B and 3A** of the **civil procedure Act**, the Court has inherent powers to grant the orders sought to meet the ends of justice; that under **Article 159 (2)(b)** of the **Constitution**, the Court should do justice to parties without undue regard to technicalities and that regardless of any short comings of the Defendant's counsel, the Court is obliged by the Rules of Natural Justice and in particular by **Article 50** of the **Constitution of Kenya, 2010** to hear and determine each case on its merit and that no litigant should be driven from the seat of justice without being heard.

11. The record shows that this suit was commenced by way of a Plaint on 9<sup>th</sup> August, 2005 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The suit was later on consolidated with Machakos HCCC No. 222 of 2008 in which the Plaintiff had sued Good News Church of Kenya (the 3<sup>rd</sup> Defendant) over the same land.

12. Through the firm of **Manthi Masika & Company Advocates**, the 3<sup>rd</sup> Defendant filed a Defence on 11<sup>th</sup> December, 2000. Although the Plaintiff filed and served a list of documents and a supplementary list of documents, together with its witness statements, the 3<sup>rd</sup> Defendant did file any of these documents.

13. Indeed, the matter come up for pre-trial directions to confirm the filing of witness statements and documents, on which occasions it was confirmed that the Defendants had not complied with **Order 11** of the **Civil Procedure Rules**.

14. The record shows that on 6<sup>th</sup> March, 2019, the 3<sup>rd</sup> Defendant's advocate informed the court that the 3<sup>rd</sup> Defendant had not filed its witness statements and documents as prescribed in law. The court nevertheless went ahead and certified the matter ready for hearing. The matter was then fixed for hearing in the registry for 16<sup>th</sup> October, 2019. On the said date, the court adjourned the matter to 19<sup>th</sup> February, 2020, before the same was adjourned once more to 17<sup>th</sup> September, 2020.

15. On 17<sup>th</sup> September, 2020, the 3<sup>rd</sup> Defendant informed the court that the 3<sup>rd</sup> Defendant had withdrawn instructions from their law firm and carted away his file. The court declined to allow the Application for adjournment and proceeded to hear the Plaintiff's case.

16. From the chronology of the events, it is obvious that since the 3<sup>rd</sup> Defendant filed its Defence in the year 2008, it never bothered to have its witness statements and documents filed as prescribed under **Order 11** of the **Civil Procedure Rules**. In a nutshell, even as at the time the court heard the matter, which was more than 15 years from the time the 3<sup>rd</sup> Defendant was sued, the 3<sup>rd</sup> Defendant was not ready to defend the suit.

17. The 3<sup>rd</sup> Defendant cannot be heard to blame its former advocate considering that it did not only give the said advocate instructions by supplying to him the requisite witness statements and documents, but also took away the file from the said advocate. Having done so, it was incumbent upon the 3<sup>rd</sup> Defendant to peruse the court and either act in person or instruct another advocate to come on record and prepare for hearing.

18. It has been held for the umpteenth time that a suit always belongs to litigants and not their advocates. Advocates are just but agents of the litigants, and where the advocate does not comply with the instructions of the litigant, it is the litigant to decide the next cause of action in regard to the matter.

19. A litigant cannot blame his advocate for the dismissal of a suit, or where a suit proceeds for hearing in his absence, in a situation where there is no evidence that he indeed took a deliberate step to acquaint himself with the position of his case.

20. The 3<sup>rd</sup> Defendant having not filed the witness statements and documents in this matter, and having taken away its file from his previous advocates, it cannot be heard that it has been condemned unheard. The 3<sup>rd</sup> Defendant was not ready to defend the Plaintiff's claim even after

being given numerous opportunities to do so. In the circumstances, this court cannot exercise its discretion in favour of the 3<sup>rd</sup> Defendant.

21. For those reasons, other than allowing the 3<sup>rd</sup> Defendant's current advocate to come on record in terms of prayer number one, the 3<sup>rd</sup> Defendant's Application dated 9<sup>th</sup> February, 2021 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 1<sup>ST</sup> DAY OF OCTOBER, 2021**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

.....for the 3<sup>rd</sup> Defendant

John Okumu – Court Assistant