



Community Uplift Ministries v Chelagat (Sued as the Legal Representative of the Estate of Nathan Chesang Moson-Deceased) & 2 others (Civil Case 8 of 2013) [2023] KEHC 23092 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 8 OF 2013
JRA WANANDA, J
OCTOBER 6, 2023**

BETWEEN

COMMUNITY UPLIFT MINISTRIES APPLICANT

AND

JOSEPHINE CHELAGAT (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NATHAN CHESANG MOSON-DECEASED) 1ST DEFENDANT

JOSEPHINE CHELAGAT 2ND DEFENDANT

SERVANTHOOD & LIGHT DEVELOPMENT FOUNDATION 3RD DEFENDANT

RULING

1. The background of this matter is the Plaintiff filed on 7/04/2011 by which the Plaintiff instituted Kitale High Court Civil Case No. 34 of 2011. In the suit, the Plaintiff, which described itself as a Christian non-profit making organization registered in the United States of America, accused the Defendants of misappropriating and/or converting to their own use, funds and assets entrusted upon the Defendants by the Plaintiff for the purposes of providing community development services, particularly cooking and lighting systems, to needy people in rural Africa. The Plaintiff then sought various reliefs in the nature of recovery of and compensation for the funds and assets allegedly advanced to the Defendants.
2. The suit was defended and was subsequently on 19/02/2013, due to what was described as the “controversial nature of the matter”, transferred to this Court and assigned the current case number.
3. What is now before the Court for determination is the Plaintiff’s Notice of Motion dated 26/10/2022 and filed in Court on 9/11/2022 through Messrs Lilan & Koech Associates LLP. The orders sought are as follows:



- a. That the Ruling delivered on 8th April, 2020 by the Court herein staying proceedings including writing of Judgment and any other antecedent actions pending hearing of appeal be set aside and vacated.
 - b. That this Court be pleased to give directions on the delivery of judgment and any other antecedent actions.
 - c. That the costs of this application be borne by the Defendants/Respondents.
4. The Application is stated to be brought under the provisions of “Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rule 7, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Articles 47(1), 48, 159(b) & (d) of the Constitution of Kenya 2010 and all other enabling provisions of the law”.
 5. The Application is then premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the one John Coors, who has described himself as a Director of the Plaintiff. In the Affidavit, he has deponed that by the Ruling delivered on 8/4/2020, this Court stayed the writing and delivery of Judgment in this matter pending the hearing and determination of intended appeal at the instance of the Defendants, the Defendants filed a Notice of Appeal dated 7/3/2019 against the decision of this Court delivered by Hon. Lady Justice H.A. Omondi on 5/3/2019 and a Notice of Appeal dated 12/3/2020 against the Ruling delivered by the same Judge on 25/9/2019, the case was fixed for hearing on 5/3/2019 and 6/03/2019 for the first time, during the hearing on 5/03/2019 the Defendant objected to production by the Plaintiff of a bundle of documents arguing that they had not been served with the documents, the Judge upon confirming that that the Defendants had indeed been served, rendered her decision admitting the documents, aggrieved by the decision, the Defendants sought leave to appeal and for stay of proceedings and the hearing proceeded on 6/03/2019, thereafter the Defendants filed the Notice of Appeal dated 7/03/2019, to date the Defendants have not yet filed the intended Appeal at the Court of Appeal.
 6. The deponent added that the Defendants then filed an Application seeking disqualification/recusal of the Judge and setting aside of the proceedings of 5/03/2019 and 6/03/2019, the Ruling was delivered on 25/09/2019 wherein the Judge declined to recuse herself, on 8/10/2019 the Defendants filed an Application seeking leave to appeal against the said decision and for stay of proceedings, including stay of writing of the Judgment pending hearing and determination of the intended Appeal awaiting grant of leave and that the Ruling was delivered on 8/04/2020 allowing the said prayers.
 7. It was deponed further that upon perusal of the Court file, the Plaintiff’s Counsel noted that a Notice of Appeal dated 12/05/2020 was filed by the Defendants, the same and a Record of Appeal has not been served upon the Plaintiff and neither has the Appeal been instituted, there has been a significant, inordinate and unreasonable delay that inhibits the determination of this old case, the Notices of Appeal filed were only a ploy to waste time and deliberate attempt to circumvent justice, the strict timelines prescribed for institution of appeal under Rule 82(1) of the Court of Appeal Rules, 2010 lapsed a long time ago and as such the delay of over 2 and 1 year each is inordinate and inexcusable, the impugned Notices of Appeal “died in the eyes of the law” upon expiry of the statutory 60 days from the date of the lodging of the Notices of Appeal, the Defendants have not sought leave of any Court to extend time for lodging of the appeals, from their inordinate inaction, the Notices were lodged in jest with no serious intention to institute the appeals, the delay in filing the intended appeals is prejudicial to the Plaintiff and the Court should vacate the Ruling delivered on 8/04/2020.



Defendants' Response

8. The Application was opposed vide the Replying Affidavit filed on 9/01/2023 and sworn by Anne Halwenge Odwa, an Advocate in the firm of Nyairo & Co. Advocates which firm represents the Defendant. The Advocate recounted the events already narrated by the Plaintiff and justified why it opted to apply for recusal of the Judge and to appeal and seek for stay of proceedings.
9. Regarding the Ruling delivered on 6/3/2019 allowing admission of the impugned bundle of documents, the Advocate deponed that the Defendants filed and served a Notice of Appeal and the letter bespeaking proceedings, all dated 7/3/2019, that following the Ruling delivered on 8/4/2020 whereof the Court declined to recuse itself, the Defendants filed and served a Notice of Appeal and the letter bespeaking the proceedings, all dated 7/5/2020 against the Ruling delivered on 25/09/2019, the Defendants requested and duly paid for the typed proceedings, the Plaintiff is trying to mislead the Court by implying that the Defendants filed a Notice of Appeal dated 12/05/2020 and failed to serve the same, the said Notice was filed by the Plaintiff and not the Defendant, both Notices filed by the Defendant were duly served upon the Plaintiff, the Appeal before the Court of the Appeal cannot be terminated for want of jurisdiction, the typing and supply of typed proceedings for purposes of preparing the Record of Appeal is a preserve of the Court and not the Defendant, the Defendants have written several letters requesting supply of the same resting with the one dated 28/09/2022, the letters have gone unanswered meaning that the typing is yet to be finalized.
10. Counsel deponed further that in any event whether or not a Notice of Appeal filed against the Court's decision is "dead before the eyes of the law" is not for this Court since the determination of the same would amount to the Court sitting on its own Appeal, a Notice of Appeal is the property of the Court of Appeal and any determination on the same is to be done by the Court of Appeal and not this Court.
11. Finally, Counsel deponed that it is clear from the foregoing that that the Defendants have not delayed in taking any action, the Plaintiff has undertaken numerous activities in this matter ever since the Appeals were filed and that is why the Court has delayed in supplying the typed proceedings, the right to appeal is constitutionally provided for and such right is protected, the Plaintiff cannot take away the right.

Hearing of the Application

12. It was then agreed and directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Defendant filed its Submissions on 26/04/2023 and the Plaintiff filed on 26/04/2023.

Plaintiff's Submissions

13. The Plaintiff basically reiterated the matters already deponed in its Supporting Affidavit and added that passage of time has given the Defendants sufficient time to peruse the impugned documents and it would serve interest of justice that the matter proceeds, regarding the Ruling of Omondi J (as she then was) delivered on 25/09/2019 declining to recuse herself, again the passage of time has cured the intended Appeal since the Judge is no longer at the Eldoret High Court, the Appeal is therefore an academic exercise.

Defendants' Submissions

14. The Defendants' Counsel too reiterated the contents of her Replying Affidavit and added that on 21/03/2023, the Plaintiff was granted leave to file a Supplementary Affidavit and Submissions within 14 days of being served with the Defendants' Replying Affidavit, the Plaintiff was so served with the Replying Affidavit on 22/03/2023 and was therefore expected to file the Supplementary Affidavit,



if any, and Submissions within 14 days (by 5/04/2023), however as at the date of the Defendant's Submissions, no Supplementary Affidavit or Submissions had been served, the Court should thus disregard the Plaintiff's Submissions and Supplementary Affidavit, if filed.

15. Counsel added that no legal provision has been cited invoking the Court's jurisdiction to entertain the orders, the provision cited is Order 40 Rule 7 of the Civil Procedure Rules which is not applicable to the circumstances herein since the Order deals with issues of Injunction, what is before the Court is the order of stay of proceedings granted pursuant to Order 42 Rule 6, since this Court cannot grant orders in a vacuum, on this ground alone this Application must fail. Counsel cited the case of case of Noel George Khaaba v Wanandege Housing Co-op Society Ltd [2014] eKLR.
16. Counsel submitted further that in any event, following delivery of the Ruling of 8/04/2020, aggrieved by the same, the Plaintiff lodged the Notice of Appeal dated 13/05/2020 against the Ruling, as such this Court cannot entertain an Application to vary, review or set aside the very orders which are now the subject of the Appeal in the Court of Appeal and that the Plaintiff is playing poker with the Court.
17. Regarding the delay by the Court to supply the typed proceedings, Counsel submitted that under Rule 84 of the Court of Appeal Rules, time stops running between the time the request for proceedings is made and when the Court delivers the typed proceedings, in view thereof, it is thus only the Court of Appeal that is properly seized of jurisdiction to determine the issue of propriety of the Appeal. She cited the case of Siokwet Tarita Limited V Kisii University & 2 others [2020] eKLR.
18. Finally, Counsel urged that the Defendants will be greatly prejudiced should the Court grant the Orders sought given that this matter was conducted partly without the Defendants' participation and all that is remaining is a Judgment date, the Appeals will be rendered nugatory if the orders are granted since the issues to be ventilated on the Appeal have a great bearing on how the matter proceeds and that this is what prompted the Court to grant the orders of stay of proceedings in the first place.

Analysis and Determination

19. I have considered the Application, the Affidavits filed in respect thereto, the Submissions presented and the entire record in general. In my view, the following are the issues that arise for determination:
 - a. Whether this Court has jurisdiction to vary, review or set aside its earlier orders staying these proceedings pending Appeal.
 - b. Whether the Application is fatally defective for allegedly invoking wrong provisions of the law.
 - c. Whether the Court should vacate the stay of proceedings order issued on 8/4/2020.
20. I now proceed to answer the said Issues.

a. Whether this Court has jurisdiction to vary, review or set aside its earlier orders staying these proceedings pending Appeal

21. The Defendant's Counsel has submitted that this Court lacks the jurisdiction to terminate the "Appeals" that have been filed by the Plaintiff at the Court of the Appeal. I find this submission to be misplaced because first, nowhere has the Plaintiff sought any order for termination of any Appeal. Such a prayer, if made would needless to state, be an outrageous one since clearly the High Court cannot terminate an Appeal pending before the Court of Appeal, a higher Court. Fortunately, there is no such prayer.
22. Secondly, although the Defendant's Counsel continuously refers to the "Appeals filed at the Court of Appeal", the reality is that there are no Appeals filed as yet at the Court of Appeal to warrant a prayer



for termination thereof. What were filed are merely Notices of Appeal whose only role is to signify an intention to appeal. These cannot be equated to filing an Appeal. I say so because an Appeal at the Court of Appeal is only deemed filed when a Record of Appeal is lodged at the Court of Appeal, Court fees paid for and the same assigned an Appeal number. None of these has been done as yet.

23. I however agree with the Defendant's Counsel that, although under Rule 82(1) of the Court of Appeal Rules, an Appeal is required to be filed within 60 days from the date of lodging of the Notices of Appeal, whether or not a Notice of Appeal is "dead before the eyes of the law" under Rule 82(1) aforesaid, is not for this Court to pronounce. That determination is a preserve of the Court of Appeal. This is apparent from Rule 80 of the Court of Appeal Rules which provides as follows:

"A person affected by an appeal may, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

24. The above provision is clear and there is no provision known to me donating to the High Court similar powers. Fortunately, again, and although alluded to in the Plaintiff's Submissions, no prayer for a pronouncement that the Notice of Appeal "is dead" has been made or included in the Application.

25. I also reject the Submission by the Defendants' Counsel alluding that the option of Review is no longer available to the Plaintiff merely because the Plaintiff, on its part, also already filed a Notice of Appeal against the same Ruling delivered on 8/4/2020, the same one now sought herein to be vacated. For this position and also for the earlier position that a Notice of Appeal is by itself not equitable to filing a substantive Appeal, I refer to the Court of Appeal decision in in *Yani Haryanto vs. E. D. & F. Man. (Sugar)* Limited Civil Appeal No. 122 of 1992 where the following was stated:

"The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filedWhat rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore, despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".

26. In light of the foregoing, it is clear that the Court of Appeal is not yet seized of any Appeal arising from the Notices of Appeal filed. I do not therefore find any merit in the submission by the Defendants' Counsel that allegedly this Court lacks jurisdiction to entertain the present Application and/or vary, review or set aside its orders of 8/04/2019.

b. Whether the Application is fatally defective for allegedly invoking wrong provisions of the law

27. The Defendant's Counsel has also argued that no legal provision has been cited invoking the Court's jurisdiction to entertain the orders, that the provision cited is Order 40 Rule 7 of the Civil Procedure



Rules which is not applicable to the circumstances at play since the Order deals with issues of Injunction, that what is before the Court is the order of stay of proceedings granted pursuant to Order 42 Rule 6 and that since this Court cannot grant orders in vacuum, on this ground alone this Application must fail.

28. I note that the Application has cited Order 42 Rule 7. To me, this appears to be a mere typographical error. I will therefore give the Plaintiff the benefit of doubt and presume that what was intended to be cited was Order 42 Rule 6, the one referred by the Defendants' Counsel. I do not think that the Defendant has in any way been misled or prejudiced by this minimal error or omission. At least, none has been disclosed or alleged.
29. In any event, it is now more or less settled that a party who invokes the wrong provisions of the law does not necessarily render his action fatally defective. This principle has been upheld in many decisions including in the case of *Nancy Nyamira & Another Vs Archer Dramond Morgan Ltd (2012) e KLR* where Ngugi J (as he then was) stated as follows:

“Next the defendant argues that the plaintiff’s application must fail because it cites the wrong provisions of the law. The enforcement application cites Order XLIV, Rule 17. The defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma’s remarks in *Salume Namukasa Vs Yosefu Bukya (1966) E.A 433*, invoking the wrong provisions of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in *Gitari Vs Muriuki (1986) K.L.R 211* which I now follow to hold that in as long as a party’s invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise cause injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded”.

30. In light of the foregoing, coupled with the provisions of Article 159(2)(d) of *the Constitution* of Kenya which enjoins the Courts to ensure that “justice shall be administered without undue regard to procedural technicalities.”, I decline the Defendant’s invitation to declare the Application as being fatally defective for allegedly invoking the wrong provisions of the law. As aforesaid, it has not been alleged or demonstrated that, in citing the wrong provisions, the Plaintiff was actuated by bad faith or intention to mislead or to cause injury or prejudice to the Defendants.

c. Whether the Court should vacate or set aside the stay of proceedings order issued on 8/4/2020

31. It is not disputed that on 5/3/ 2019, the Defendants sought leave to appeal and for stay the proceedings and that the Court granted them leave to appeal but declined to stay the proceedings. Having been granted the leave to appeal, the Defendants consequently filed the Notice of Appeal dated 7/3/2019 against the Ruling that had been rendered on 5/3/2019. Subsequently, the Defendant again vide the Application dated 7/10/2019 sought leave to file an appeal against the Court’s Ruling delivered on 25/9/2019 and for stay of any further action in this matter including the writing of the Judgment. The Court having heard the parties delivered its Ruling on 8/4/2020, allowing the Application and thus granting, inter alia, stay the proceedings pending Appeal.
32. The Plaintiff has now moved the Court to vacate the said orders granting stay of proceedings for reason that there has been a failure or inordinate delay on the part of the Defendants to file the intended appeals in respect to which the order of stay of proceedings was granted. Indeed, there is no doubt that there has been delay in filing the intended appeals which delay the Defendants have however attributed to the failure by the Court to supply typed Court proceedings for purposes of preparing and lodging



the Record of Appeal at the Court of Appeal. The Defendants have exhibited several copies of letters addressed to the Court in which they have sought to be furnished with the proceedings.

33. While appreciating that there has been delay in filing the intended appeals, I am of the view that in this case it would be unfair to punish the Defendants who have demonstrated that they applied, within the timelines prescribed under Rules 75 and 77 of the Court of Appeal Rules, for the typed proceedings and have even sent several reminds to that effect. It cannot be disputed that, apart from merely making constant follow-up, a party who has applied for typed proceedings from the Court has no powers over how the Court Registry runs its affairs and thus, apart from merely agitating the Court to act expeditiously, such party has no choice but to accept that the Court has its own system of work which litigants have no control over.
34. Indeed, without the copies of proceedings, the Defendants cannot mount a competent appeal. Should they attempt to do so, the appeal is unlikely to see the light of the day, it will most likely be struck out in limine. It has not been demonstrated that the Defendants have remained idle or have been complicit or contributed to or participated in the Court's delay to supply the typed proceedings. The material before me only reveals that the Defendants have been waiting, all for too long, for the proceedings to be supplied as documented in their Advocates' letters dated 7/3/2019, 5/5/2019, 8/2/2021, 8/9/2022, 9/3/2022 and 28/9/2022. Since the Defendants have no control over the Court Registry and cannot determine when the proceedings shall be supplied, it would also not be fair to order the Defendants to file the Record of Appeal at the Court of Appeal within a specific period of time. Although I note that in the intervening period, an Application filed by the Plaintiff seeking to substitute the 1st Defendant, who has since died, with his spouse and that the Application could have marginally interfered with the process of typing proceedings, still the 4 years delay to supply the typed proceedings is a damning indictment of the unacceptably slow speed by which the Court Registries operate.
35. In the end, in as much as I am greatly disturbed by the delay to file the Appeal, I find that the Defendants have sufficiently explained the delay in filing the Appeals and convincingly demonstrated their innocence.
36. Before concluding, I may mention that I agree with the Plaintiff's submission that regarding the intended appeal against the Ruling of Omondi J (as she then was) delivered on 25/09/2019 declining to recuse herself, unless the Defendants still wish to pursue the same for purely academic purposes, that grievance appears to be now overtaken by events since Omondi JJA has since been elevated to the Court of Appeal and is no longer at the Eldoret High Court. The Defendants may therefore reconsider whether pursuing that line of appeal is still worthwhile.

Final Orders

37. Consequently, I issue the following orders:
 - i. The Application dated 26/10/2022 is hereby dismissed with no order on costs.
 - ii. The Deputy Registrar, High Court of Kenya-Eldoret is hereby directed to supply the parties, **within 45 days**, with the typed proceedings and all other relevant documents requested for by the parties to enable them prepare their Records of Appeal for filing at the Court of Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF OCTOBER 2023

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WANANDA J.R. ANURO

JUDGE

