



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 150 OF 2008

DANIEL MBURU GICHAMBA.....1ST PLAINTIFF

SAMWEL NJENGA GICHAMBA.....2ND PLAINTIFF

VERSUS

ELIUD MBUGUA KIMANI.....DEFENDANT/RESPONDENT

RULING

1. Judgment in the above suit was delivered by the Hon. W. Ouko, J (as he then was) on the 26th July 2012. Being dissatisfied with the entire Judgment, the applicants herein then the plaintiffs filed a Notice of Appeal being an intention to lodge an appeal to the Court of Appeal on the 6th August 2012 within the requisite period allowed under the Civil Procedure Rules.

2. On the 13th February 2013, the applicants filed a Notice of Motion application dated the 4th December 2012 premised under **Order 42(1),(4), (5) and (6)** seeking the following orders:

1. That this court be pleased to order a stay of execution of judgment delivered on 26th July 2012 pending hearing and determination of the Intended Appeal.
2. That costs be in the cause.

The application is supported by grounds on the face of the application and affidavit of joint the applicants. Before the application could be listed own for hearing, the Respondent filed his party and party Bill of costs for taxation and the same was taxed by the Deputy Registrar of the court, on the 6th March 2013 with participation of the plaintiffs/applicants. The Applicants were not satisfied with the award on costs and sought to file a notice of objection and Reference against the award to the Judge, out of time.

3. On the 30th October 2013, the Applicants filed an Amended Notice of Motion dated the 29th October 2013 where the Notice of Motion dated 4th December 2012 was amended to include the following prayers:

- i (a) That this application be certified urgent and be heard *ex parte* in the first instance.
- i (b) That this Honourable court be pleased to order a temporary stay of execution of Judgment delivered on 26th July 2012 pending of hearing and determination of this application and eventually pending the hearing and determination of the intended Appeal.

i (c) That this Honourable court be pleased to enlarge time to the Applicants to give notice to object to the decision of the Taxing officer.

i (d) That this Honourable court be pleased to issue orders of injunction to restrain the Defendants/his servants and agents from dealing in any adverse manner with **LR NO Naivasha/Mwichiringiri Block/1/709** until the determination of the intended appeal.

ii That costs be in the cause.

The application is based on grounds on the face of the application and affidavit of Regina Wambui Muhuhu, advocate for the Applicant.

4. Upon service of the application, the Respondent filed grounds of opposition and raised issues that the application is grossly incompetent and bad in law, that it was brought after inordinate delay, that there was no appeal pending in court and that the application was amended without leave of the court and therefore irregular and incompetent.

Parties to the application agreed to file written submissions.

5. Before going into the interrogation of the merits and demerits of the application, I shall address the issue raised by counsel for the Respondents, that the Amended Notice of Motion dated 29th October 2013 and filed on 30th October 2013 was so done without leave for court.

In her submissions, Advocate for the Applicants did not address this issue. I have perused the court record. I find no application filed by the Applicants seeking leave to amend the Notice of Motion dated 4th December 2012. Likewise there is no order of the court allowing the amendments to the said Notice of Motion and stated under the Amended Notice of Motion.

The **Civil Procedure Rules 2010**, provide for amendment of pleadings generally. **Order 8 Rule 1** provides that a party may without leave of the court amend any of his pleadings once at any time before the pleading are closed. **Order 8 Rule 5** gives parties and the court general power to amend pleadings, to either correct a defect or error in any proceedings by application of either party or on its own motion.

The applicants Amended Notice of Motion was clearly filed without leave of the court.

As stated in the case **Cenriva Traders Ltd -vs- County Government of Trans Nzoia(2014) KLR**, mandatory procedure should be followed and cannot be taken as procedural technicalities. The procedures are fundamental and cannot be overlooked.

Likewise in the **Court of Appeal Civil Application No. 1550 of 2012 Nathan Chesang Moson & Other -vs- Community Uplift Ministries(unreported)**, the three Judges of Appeal held that there is no freedom for any litigant to amend documents without leave of the court under the rules of the court.

I fully agree with the Honourable Judges of appeal in their holding above, and that without the sanction of the court to amend, the Amended Notice of Motion subject hereof is not properly on record. It is incompetent and ought to be expunged from the court Record.

This court is alive to the provisions of **Article 159(d) of the Constitution** that justice shall be administered without undue regard to procedural technicalities. As much as I agree to the above, where other enacted statutes provide for procedure that ought to guide the courts procedural administration of justice, such provisions ought not be sacrificed under the guise of the Constitutional provision above, otherwise it would make nonsense of all the statutes that govern the fair administration of justice in courts and tribunals. See **Nicholas Kiptoo Arap Korir Salat -vs- IEBC and 6 Others (2013) KLR** where the Court of Appeal held that rules of procedure must be respected and courts cannot aid in circumventing justice and shifting goals as this would harm the party who strives to abide by the rules.

I need not go into the merits of the amended Notice of Motion. The Respondent urged this court to strike out the Amended Notice of motion filed dated 29th October 2013.

Accordingly, the Amended Notice of Motion, Amended on the 29th October 2013 is hereby struck out with costs to the Respondent.

Dated, signed and delivered in open court this 9th Day of November 2015

JANET MULWA

JUDGE