



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 5 OF 2018

PASTOR MARTIN MITHEU RIMUI.....APPELLANT

VERSUS

THE TRUSTEE GOSPEL ASSEMBLIES OF KENYA.....RESPONDENT

RULING

1. The application dated 28/9/2018 seeks the following orders:-

(1) That this honourable court do set aside the order made in the Chief Magistrate's Court at Kitale Civil Case No. 39 of 2011 dismissing the appellant's application for stay of execution.

(2) That this honourable court do order a stay of execution of the decree or judgment in the Chief Magistrate's Court at Kitale Civil Case No. 39 of 2011 pending the hearing and final determination of the appellant's appeal.

(3) That the costs of this application be provided for.

2. The grounds upon which the application is sought are that the applicant has an arguable appeal with a high probability of success; that if the respondent executes the decree/judgment in the *Kitale Chief Magistrate's Court Civil Case No. 39 of 2011* the appeal will be rendered nugatory and the applicant will suffer substantial irreparable loss/damage; that there has been no delay in bringing this application; that the defendant is will to abide by any conditions and terms as to security as the court may deem fit to impose; that the plaintiff is likely to execute the judgment/decree in *Kitale Chief Magistrate's Court Civil Case No. 39 of 2011* at any time and that the respondent will suffer no prejudice if the application is allowed.

3. The application is supported by the sworn affidavit of the appellant dated 28/9/2018.

4. The respondent filed its replying affidavit dated 9/10/2018 through **Bishop Samuel Waweru Kibe**. The gist of his response is that the application lacks merit and is calculated at denying the respondent the fruits of their judgment; that the appellant was a member of the Gospel Assemblies of Kenya; that he formed a splinter faction; that thereafter the appellant merely removed the name of Gospel Assemblies of Kenya and put the name of a Ministry that he had registered; that he violated the church constitution; that it is immoral unconscionable and unlawful for the appellant to remain in the premises that belong to the Gospel Assemblies of Kenya which had been surrendered for worship purposes; that the only way that the appellant will be affected if ordered to leave the premises is that he will have to seek alternative premises; and that the appellant has come to court with unclean hands.

5. The appellant filed further affidavit on 18/10/2018. And averred that the land on which the church stands belongs to him and that he has been in possession to the exclusion of the respondents who have their own place of worship and that the church is built on his land.

6. The appellant filed his submission on 18/10/2018 and the respondent on 26/10/2018.

7. The appellant relies on the decision in **Wensley Barasa Vs Immaculate Abongo 2016 Eklr** and **Waweru Mwaura Vs Mary Wanjiru Njenga 2016 Eklr**.

8. The respondent relies on the cases of **Ryce Motors Vs Ruto 2006 1 KLR 46**, **James Kiharu Muthundu Vs Leonard Ngonde & 100 Others 2005 eKLR** and **William Charles Fryda Vs Assumption Sisters 2018 eKLR**.

9. I have considered the submissions of the parties and those decisions that they cite.

10. In the respondent's submissions it is averred that **Civil Procedure Rules** regarding change of advocates have not been observed in that Ann Kibe & Co Advocates were previously on the record and the firm of Ingosi Advocate needed to have had a consent or sought leave of

court to come on record for the appellant.

11. For that argument the case of **Ryce Motors Vs Ruto 2006 1 KLR 46** and **James Kiharu Muthundu Vs Leonard Ngonde & 100 Others 2005 eKLR** are cited. That decision was issued before the enactment of the Constitution of Kenya 2010 were it not for what I will say herein below, on a cursory glance the issue amounts to a technicality of the kind that is frowned upon by the spirit of **Article 159(2) (d)** of the **Constitution of Kenya** that does not address the merits of the application before me and on the grounds of which the motion and the appeal may not be struck out.

12. I have however drawn from the observation of the court in the case of **Aphonse Mwangemi Munga & 10 others (suing on behalf and on behalf of 367 employees of African Safari Club Limited) v African Safari Club Limited & 2 others [2018] eKLR** concerning the mischief meant to be avoided by **Order 9 Rule 9**. The court therein stated as follows:

“The 1st Interested Party also relied on the decision of the High Court in Simon Barasa Obiero v Jackson Onyango Obiero [2016] eKLR in which the court stated that the reason this provision was there was to ensure that Advocates got paid for their services and to impose orderliness in civil proceedings.

The 1st Interested Party further relied on Peter Ludasia Makokha v Theresia Hudson, Busia H.C. Civil Appeal No. 18 of 2015, as quoted in Simon Barasa Obiero v Jackson Onyango Obiero [2016] eKLR (supra) where the Court concluded as follows:

“Similarly in this case the firm of Advocates on record for the Appellant in the lower Court proceedings were Ochweni Ngamate and Company Advocates. This Court deems that firm of Advocates to have been the one with the capacity to file the memorandum of appeal and any other motion or notice and to prosecute the appeal on behalf of the Appellant in terms of Order 9 of the Civil Procedure Rules. Any memorandum of Appeal, Application, Notices, Submissions filed by any other party or firm of Advocates, ostensibly on behalf of the Appellant without complying with Order 9 Rule 9 of the Civil Procedure Rules is null and void ab initio.”

The 1st Interested Party also relied on the High Court in Livingstone Simei Sane v Shadrack F. Ogata & Another [2015] eKLR, where it was held that where an application or pleadings are dismissed for failing to comply with Order 9 Rule 9, such application is fatally defective and such application cannot be reinstated or validated by compliance with Order 9 Rule 9.

The court observed that if the Advocates were paid for their services and in turn raised no objection to the coming on record of the Advocates who were to come on record after them, it would automatically reduce the number of Advocate-Client applications made in court. It is also an alternative dispute resolution mechanism as it encourages out of Court negotiations as opposed to claiming costs through the litigation process. Furthermore, it is substantive justice and equitable for the Courts to ensure that Advocates are duly paid for their legal services, otherwise, the party seeking justice from the Courts before paying their outgoing Advocates would be coming to Court with unclean hands, as they have themselves not done justice to their outgoing Advocates. This is in line with the Overriding Objectives of the Civil Procedure Act and cannot be dismissed as a mere technicality.”

13. The applicant never addressed the issue even in his further affidavit. I would uphold the said objection.

14. The respondent also submits that the conditions for granting stay have not been met and that it has not been shown that the respondent can not compensate the appellant for any loss he may suffer. However I note that there is an appeal already filed.

15. The filing of an appeal by the appellant is proof that there are issues that he is dissatisfied with and which he desires this court to determine. I find that the appellant is in possession of the suit premises. The purpose of a stay order in this matter is to preserve the status quo as the appeal is being heard.

16. Whereas the land is claimed to belong to the appellant the issue of eviction is a social and religious issue that is bound to affect persons other than the appellants.

17. One of the issues that this court has to determine is whether the conclusion by the learned magistrate that the gift of the suit premises was a gift that could not be revoked was the correct decision in law. Another issue is whether the church on the premises was constructed by the respondent or not.

18. The respondent has already acknowledged that some of the church members followed the appellant and worship in the church premises. There is therefore no doubt that the suit premises are still being used for the worship of God by a section of the congregation that is said to have remained with the appellant while the respondents are housed elsewhere. There is likelihood that eviction would disrupt worship while the appeal is still pending.

19. Regardless of what this court will rule on appeal, the followers will have been inconvenienced for no fault of their own while an appeal is still pending if the stay order does not issue. I find that there is likelihood of substantial loss that can not be compensated for by way of damages.

20. The application is expressed to be brought under **Order 42 Rule 6** of the **Civil Procedure Rules**. The application however does not seek an injunction as provided for under that rule but a stay of execution.

21. The court would overlook this as it has been stated in **Order 51 Rule 10 (1) and (2)** that the failure to cite the proper provisions of the law and any want of form that does not affect the merits shall not defeat an application.

22. I have found that though there is an appeal though challengeable, in place and that the appellant and his flock may suffer substantial loss the failure to observe **Order 9 Rule 9** of the **Civil Procedure Rules** renders this application fatally defective as demonstrated herein above.

23. In the circumstances I hereby strike out the application dated **28th September 2018**.

24. The costs of the application shall be borne by the applicant.

Dated, signed and delivered at Kitale on this **28th** day of **November, 2018**.

MWANGI NJOROGE

JUDGE

27/11/2018

Coram

Before - Hon. Mwangi Njoroge Judge

Court Assistant: Picoty

Mr. Wanyonyi for respondent

Mr. Ingosi for applicant absent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/11/2018