



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GITHINJI & KANTAI, J.J.A.)

CIVIL APPEAL NO. 65 OF 2017

BETWEEN

THE EVANGELICAL LUTHERAN CHURCH OF KENYA.....1ST APPELLANT

THE ARCH BISHOP OF THE EVANGELICAL

LUTHERAN CHURCH OF KENYA.....2ND APPELLANT

THE GENERAL SECRETARY

EVANGELICAL LUTHERAN CHURCH OF KENYA.....3RD APPELLANT

THE TREASURER EVANGELICAL

LUTHERAN CHURCH OF KENYA.....4TH APPELLANT

THE TRUSTEES OF THE EVANGELICAL

LUTHERAN CHURCH OF KENYA.....5TH APPELLANT

AND

SKAIR ASSOCIATES ARCHITECTS.....RESPONDENT

(Appeal from the decision, ruling and order of the High Court of Kenya

at Nairobi (Olga Sewe, J.) delivered on 7th October, 2016

in

H.C.C.C. No. 342 of 2014)

JUDGMENT OF THE COURT

The suit at the High Court of Kenya at Nairobi was filed by the respondent, Skair Associates Architects against the appellants. The appellants filed motion to strike out the suit which was heard by Kamau, J. In a ruling delivered on 18th June, 2015 the judge found that although the Motion was merited striking out the defendants from the suit would leave the plaintiff bare and non-existent and for that reason the judge refused to strike out the suit. The judge found that misjoinder or non joinder of parties did not defeat the suit and in the event made an order directing the respondent who is the plaintiff in High Court to make an application to enjoin defendants to the suit within 30 days failing which the suit would stand dismissed without further reference to court.

In a Notice of Motion filed before that court under various provisions of law the respondent prayed for a review or setting aside of a decree that had been issued by the High Court, that the suit be reinstated and that the court stay taxation of a bill of costs which had been filed. It was stated in the motion that the court file had been missing at the registry thus the respondent was unable to file an application as ordered by Kamau, J.; that the decree obtained by the appellants was irregular; that dismissing the suit when the court file was missing was wrong; and

that the respondent was entitled to be heard in the suit.

That was repeated in an affidavit of **Mr. Robert Muriuki** an advocate on record instructed by the firm of **Wambugu and Muriuki advocates** for the respondent.

The motion was opposed through grounds of opposition and a replying affidavit of the advocate for the appellants **Mr. Otieno Ochich**. The application was heard by Olga Sewe, J. who in a ruling delivered on 7th October, 2016 allowed the motion thereby setting aside the decree that had been issued and reinstating the suit for hearing. The judge ordered that the application for amendment of the plaint be set down for hearing.

Those are the orders that have provoked this appeal which is premised in the memorandum of appeal drawn by the advocates for the appellants M/S Otieno Ochich and Associates advocates where 28 grounds of appeal are set out. In sum, the appellants complain that the judge erred in allowing the application; that the judge erred in setting aside the decree that had been issued; that the judge erred in ordering reinstatement of the suit; that the judge erred in what is said to be sitting on appeal on an earlier decision by Kamau, J.; that conditions for review had not been met; that there was unreasonable delay in filing the application; that the judge erred in not finding that the application was filed outside the orders of Kamau, J.; that the judge should have found that the Court receipt exhibited to the court had been tampered with; that costs should have been awarded to the appellants; and that the ruling was not based on law and fact. It is therefore prayed that the ruling be set aside; that the motion that was heard by Olga Sewe, J. be dismissed and that we determine that the suit at the High Court had been decreed.

The appeal came up for hearing before us on 6th May, 2019 when learned counsel **Mr. Otieno Ochich** appeared for the appellants while learned counsel **Mr. E. Eregi** appeared for the respondent. Both parties had filed written submissions and relied on the same at the hearing. Mr. Ochich submitted that the decree issued by the High Court had been properly obtained and that the judge exercised her discretion wrongly in setting it aside. According to counsel there was an order by Kamau, J. that the application for amendment be filed within 30 days and that that order was not complied with. Counsel further submitted that the application before the judge was filed after unreasonable delay without any explanation. For all that we should allow the appeal.

Mr. Eregi for the respondent urged us not to apply procedural technicalities in the appeal submitting that the overriding objectives of the court should prevail. Counsel submitted that the application was filed within 30 days as ordered by Kamau, J. Counsel pointed out correspondence with the High Court where issues of missing court file were raised. In conclusion counsel submitted that there was an explanation for delay because there was communication between the respondent and the High Court on the issue of the missing court file.

Mr. Ochich in a rejoinder submitted that there were no technicalities in the matter. According to counsel there was no confirmation that the court file had been missing.

We have considered the record of appeal and the submissions made. Olga Sewe, J. was required to exercise her discretion in the application for review. The judge considered **section 80** of the **Civil Procedure Act** and **order 45** of the **Civil Procedure Rules** on the scope and parameters for review and found that the respondent had satisfied the court that it was entitled to review. The judge used her discretion in favour of the respondent.

In the ruling by Kamau, J. delivered on 18th June 2015 the respondent was ordered to file an application within 30 days of that day. We have noted from the record correspondence from the advocates for the respondent. In a letter dated 16th June, 2015 received by the Registry of the High Court on the same date the lawyers complained that the court file could not be traced. We have noted that there is a Court receipt dated 16th July, 2015 and a Credit Advise of the said date issued by Kenya Commercial Bank being confirmation of receipt of court fees payment of an application by the respondent. The application was paid for without the court file which was missing. It was paid for within the 30 day period ordered by Kamau, J. Olga Sewe, J. considered the facts placed before the court and found that the respondent had acted within the period ordered by Kamau, J. in the earlier ruling. The judge exercised her discretion properly and there is no merit in this appeal which we dismiss with costs to the respondent.

Dated and delivered at Nairobi this 19th day of July, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR