



**IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: TUNOI, SHAH & O'KUBASU J.J.A  
CIVIL APPLICATION NO. NAI 345 OF 2000**

**BETWEEN**

**BISHOP JOSHUA GAWO & OTHERS ..... APPLICANTS**

**AND**

**NAIROBI CITY COUNCIL & OTHERS ..... RESPONDENTS**

Intended Appeal from the Ruling and Order of the  
Honourable Lady Justice Rawal at Nairobi Central Law  
Courts on 5th October, 2000

in

H.C.C.C NO. 1166 OF 2000)  
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**RULING OF THE COURT**

Before us is a notice of motion brought under Rule 5(2) (b) of the Rules of this Court in which the applicants are seeking the following orders:-

*"1. That the Respondents by themselves their servants or agents or otherwise howsoever be restrained from evicting the Applicants from unsurveyed parcels of land occupied by them for use of their Applicant Churches at Kariobangi within Nairobi City Area or from preventing the Applicants their visitors licensees associates free entry to or exit from the said premises developed and used as Holy Trinity Church in Africa, and Nabii Christian Church of Kenya situated at Kariobangi within Nairobi City Area or from preventing the Applicants from conducting prayer services teaching or other social services at the said premises or from howsoever interfering with the Applicants peaceable possession use and enjoyment of the said premises or from destroying Applicants buildings and developments standing and being thereat pending hearing and determination of the Applicants' intended Appeal.*

*2. Costs of this application be costs in the intended Appeal".*

Mr. Wamalwa for the applicants submitted that the learned judge of the superior court ought not to have struck out the suit since paragraph 13 of the plaint clearly stated that there were no previous proceedings in any court between the parties. He went on to argue that damages would not be appropriate remedy for his clients as these were churches established for the purpose of religious worship. Mrs. Kamande for the 1st respondent, stated that it was a mandatory requirement that the plaint should be accompanied by a verifying affidavit. She went on to point out that there was another case (HCCC NO. 2930 of 1997) in which the defendants are the same as in the present dispute, and that the suit land is the

same.

On his part, Mr. Ngaah for 2nd 3rd and 4th respondents supported the submissions of Mrs. Kamande and went on to say that the intended appeal was frivolous as it raised no substantive issues that were arguable. He asked us to dismiss this application with costs.

This dispute started in the superior court by way of a plaint dated 24th July, 2000 and filed in court on 25th July, 2000. We found it rather difficult to paraphrase the reliefs sought in that plaint and so we can do no better than reproduce what was stated therein which was as follows:-

*"REASONS WHEREFORE the plaintiffs prays for a declaration that the plaintiffs are entitled to possession occupation and use of their respective holdings by licence from the Government of the Republic of Kenya the owner thereof a judgment in terms of the said declaration and an order restraining the Defendants their servants or agents from evicting the plaintiff churches or destroying the Church School and Community Service Buildings or any other or from preventing worship, teaching, learning at the said premises or preventing or blocking entry to or exit from the said premises by preachers worshippers visitors licensees teachers children and others for purposes of plaintiff operations at the said premises.*

b. The Honourable Court be pleased to make any other orders deemed fitting within the inherent jurisdiction of court.

c. Costs hereof be provided for".

There was then an application brought by a chamber summons under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act in which the plaintiff/applicants sought more or less the same orders that were sought in the plaint. When that application came up for hearing before the superior court, Mr. Ngaah for the respondents, raised an objection based on Order VII Rule 3(2) of the Civil Procedure Rules. It was Mr. Ngaah's contention both in superior court and in this Court that since the plaint had not been accompanied by an affidavit the suit ought to be struck out. In upholding that submission the learned judge (Rawal J) of the superior court in her ruling stated inter alia:-

"Sub- Rule (2) which has been enacted recently by legal Notice No. 36 of 2000 is very clearly worded and I reiterate.

"(2)The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint"

In my view, the wording of the sub-rule specifically refers to the accompaniment of the affidavit with the plaint. The plaint herein is not accompanied by the affidavit. Paragraph 12 of the affidavit filed in support of the chamber summons does not cure the defect. -----

In the premises, I order that the plaint be struck out. However as the plaint is struck out on technical ground I shall not order costs".

In this dispute the issue of verifying affidavit as per order VII r, 1(2) of the Civil Procedure Rules is very important. The rule clearly states that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint. Mr. Wamalwa for the applicants sought to show that the affidavit in support of the application served the same purpose to be served by the affidavit which should have accompanied the plaint. In our view, the rule is so clear as to leave no room for such interpretation. Having so said, we find that the intended appeal does not raise an arguable point that would warrant an order of this Court under Rule 5(2) (b) of this Court's Rules.

In view of the foregoing, we do not think it would be necessary to go into other issues except to point out that as of now, there is no suit pending before the superior court. We wish to add that we found

it difficult to follow Mr. Wamalwa's submission and what his clients wanted from the superior court. In our view, the submissions by Mrs. Kamande and Mr. Ngaah cannot be resisted.

The upshot of the foregoing is that this application is found to be unmeritorious and the same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 9th day of March, 2001.

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**