



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 12 OF 2020

ELIUD WANJAU MUREITHI

T/A THE JOB AQUA DRILLERS.....APPELLANT

VERSUS

GEOFFREY KILOSA MULWA.....RESPONDENT

RULING

1. By a Motion on Notice filed on 28th August, 2020, the applicant seeks stay of execution against the decision delivered by the SPM's Court Machakos on 23rd January, 2020 and 5th August, 2020.

2. According to the Applicant, on 23rd January, 2020, a default judgement was delivered for the sum of Kshs 1,005,000/= plus costs and interests in favour of the Respondent. According to the Applicant, he was not represented at the hearing hence was unable to challenge the evidence against him. It was his case that he has triable issues and if the execution proceeds he shall be unheard. It was his case that he was let down by his lawyers. He averred that the amount awarded was substantial and if execution proceeds, he may likely to suffer significant loss.

3. In reply the Respondent averred that the Applicant applied for setting aside judgement which application was dismissed and no appeal was filed. Since the applicant has an advocate on record, it was contended that the applicant has no right of audience since no leave was sought and granted to permit the applicant to act in person. It was further contended that the Applicant is guilty of non-disclosure of material facts in that he had filed a notice of withdrawal of this appeal on 3rd March, 2020.

Determination

4. I have considered the application, the affidavit in support of the application, the grounds of opposition and the submissions filed as well as the authorities relied upon.

5. It is contended that the applicant was represented in the lower court by the firm of M/s Anne Thiongó & Company Advocates and that no leave has been sought and granted to the applicant to act in person.

6. Order 9 rule 5 of the *Civil Procedure Rules* provides that:

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

7. Order 9 rule 9 of *the Civil Procedure Rules* provides as follows:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the

proposed incoming advocate or party intending to act in

person as the case may be.

8. In John Langat vs. Kipkemoi Terere & 2 Others (2013) eKLR, Muchelulue, J expressed himself as hereunder:

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates

“without an order of the court.”

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

9. In Loise Wambui Karigu & another vs. Joel Gatungo Kiragu & Another [2016] eKLR, Limo, J expressed himself as hereunder:

It is important to note that the provisions of Order 9 rule 9 were put in place to cover some mischief by a party who after being represented by an advocate in the entire trial decides to abandon the same advocate after judgment without addressing the issue of legal fees earned to that date. It was also intended to ensure that the advocates or parties on the other side are kept informed about the change of address for service of any further court process. The intention of the drafters of this rule was noble and aimed at having some order in civil practice. In the case of LALJI BHIMJI SHANGANI BUILDERS & CONTRACTORS –VS- CITY COUNCIL OF NAIROBI [2012]eKLR the High Court in Nairobi presided over by Hon. Justice Odunga struck out an application by a defendant who did not comply with Order 9 rule 9 of the Civil Procedure Rules and made the following observation:-

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

The court went further to quote with approval the holding by Hon. Sitati Judge, in MONICA MORAA –VS- KENINDIA ASSURANCE CO. LTD. [2010] eKLR where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached...”

The applicant’s counsel submitted that the provisions of Order 9 rule 9 do not apply to miscellaneous applications but after judgment has been entered usually what remains is the execution or application for stay or such other application such as the present application. The firm of Rugaita & Co. Advocates deserved to be informed of intention of his client to engage the services of another firm of advocates. The other parties to the said suit also deserve to be notified of the new change of address hence the need to comply with the said rules. In the absence of such leave of court as provided by the law, the application dated 10th February, 2016 is incompetent and is struck out with costs.”

10. Similarly, in this case, the Applicants have not bothered to deal with this damning contention.

11. As was held in Chelashaw vs. Attorney General & Another [2005] 1 EA 33, without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

12. In Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651, the Court of Appeal held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38.

13. I associate myself with the decision of the Court of Appeal (Kiage, JA) in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR that:

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

14. In **Taracisio Githaiga Ruithibo vs. Mbuthia Nyingi Civil Appeal No. 21 of 1982; [1984] KLR 505**, it was held that no court, could wash away the Rules of Court so ignobly.

15. Accordingly, I agree with the Respondent that the application before me is incompetent for the failure by the Applicant to seek and obtain leave after the judgement was entered and is hereby struck out with costs to the Respondent.

16. It is so ordered.

Read, signed and delivered in open court at Machakos this 14th day of January, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of

The Applicant in person

Mr Muithya for Mr Ngolya for the Respondent

CA Geoffrey