



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 689 OF 2001**

**AZIM SAMEJA Trading as**

**BUSSINES 2000.....PLAINTIFF/APPLICANT**

**VERSUS**

**LAKHAMSHI VIRPAL SHAL**

**KAMLABEN LAKHAMSHI SHAH**

**ASHOKKURMAR LAMKAHAMSHI SHAH**

**HARSHA LAKHAMSHI SHAH**

**PRITMALAKHA SHAH**

**Trading as HIGH PARK INVESTMENTS.....DEFENDANTS/RESPONDENTS**

**RULING**

This is an application by way of Notice of Motion dated 12<sup>th</sup> March and filed on 13<sup>th</sup> March, 2020 seeking an order that the firm of Oyatta and Associates Advocates come on record for the 3<sup>rd</sup> defendant/judgment debtor after delivery of the judgment. The application is said to be under Order 9 rule 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is supported by grounds set out on the face of the application and an affidavit sworn by Filah Martins, an advocate of the High Court in the firm seeking to come onto to record for the 3<sup>rd</sup> defendant.

The application is opposed by the plaintiff /judgment creditor who has sworn an affidavit to that effect, but the advocate for the objector and the defendants have no objection. I have read the submissions by the plaintiff in opposing the application which shows that the defendants all along were represented by one firm of advocates at any given time but which representation changed severally.

The 3<sup>rd</sup> defendant is listed amongst the partners of High Park Investments which all along has been the defendant in the suit. There is a judgment in favour of the plaintiff against all the defendants/partners jointly and severally.

Order 9 rule 9 of the Civil Procedure Rules cited by the 3<sup>rd</sup> defendant requires an order of the court to effect change of representation after judgment. I bear in mind the opposition raised by the plaintiff to the application.

In the process of preparing this ruling, I came across communication made by Oyatta and Associates Advocates, who are now seeking to come on record for the 3<sup>rd</sup> defendant, addressed to Christine Oraro and Company Advocates who are the advocates for the plaintiff. In a letter dated 16<sup>th</sup> December, 2019 M/s Oyatta and Associates Advocates addressed a letter in the following terms,

**“RE: CIVIL CASE 689 OF 2001 PROPOSED SETTLEMENT**

**The above at our meeting of 21<sup>st</sup> November, 2019 reffers. First and foremost we apologize for our delay in forwarding this letter. We experienced some difficulties that were beyond our immediate control. Nonetheless we herein write to present our clients offer for your consideration. Upon consultation we propose that the judgment be compromised as follows;-**

- 1. That the defendant to make a lump sum payment of Khs. 25,000,000/= being full and final settlement of the decretal sum.**

**2. That the said amount be paid on or before 19<sup>th</sup> December, 2019.**

**3. That the prohibition registered against property title LR No. 209/5802 IR 16373 be lifted with immediate effect.**

**4. That the suit herein be marked as settled.**

**We hope to hear from you at the earliest time possible to enable us work on processing the release of the said settlement amount. Your kind but urgent attention therefore will be highly appreciable.**

.....

**Yours faithfully**

**D. OYATTA**

**OYATTA & ASSOCIATES.”**

Counsel for the plaintiff replied on 17<sup>th</sup> December, 2019 acknowledging receipt of the said letter, and stating they had forwarded the proposal to their client for consideration. However, they stated it was impossible to get a feedback by 19<sup>th</sup> December, 2019 but would revert upon receipt of instructions.

It is curious that the advocates now seeking to represent the 3<sup>rd</sup> defendant addressed a letter to counsel for the plaintiff before coming onto record in this matter. It is noted also that, the letter was addressed to the plaintiff's advocates on behalf of the defendant which was a partnership including the 3<sup>rd</sup> named defendant. It is not difficult to identify the concern raised by the plaintiff in the present application.

Further to the foregoing, the affidavit in support of the application has been sworn by the advocate who may not be in a position to confirm some facts relating to the applicant. There is no reason given why the applicant did not swear the affidavit. If it is true he was out of the country, the easiest way to prove this would be to produce a copy of his passport to show when he left and when he returned.

For the applicant to allege he did not know there were proceedings going on in his absence, yet all along there was counsel on record for the defendant which included the applicant, flies to the face of the entire process. This is preparation for a move to vitiate the trial which has been concluded.

This court shares the concern raised and questions the motive of the 3<sup>rd</sup> defendant appointing the firm of Oyatta & Associates Advocates to act for him to the exclusion of the other defendants.

Whereas a party has all the rights to be represented by an advocate of his choice, there is a conflict drawn from the letter cited above and the present application. Clearly, prejudice shall be occasioned to the plaintiff if this application were to be allowed. I therefore decline to allow the application which is hereby dismissed with costs to the plaintiff.

**Dated, signed and delivered at Nairobi this 23<sup>rd</sup> Day of March, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**