



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 85 OF 2009

ASWA DEVELOPERS & CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

COMPACT FREIGHT SYTEMS LIMITED.....DEFENDANT

RULING

1. On 23rd October, 2020 the defendant filed an application dated 22nd October, 2020 premised on the provisions of Sections 1A, 1B, 3A, and 44 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law and the inherent jurisdiction of the court. The defendant seeks the following orders -

(i) Spent;

(ii) Spent;

(iii) That pending the hearing of the appeal relating to the ruling delivered herein on 7th October, 2020, court do issue (sic) an order for stay of execution of the Judgment delivered by this court on 7th December, 2018;

(iv) That the plaintiff be directed to release to the defendant all the goods belonging to the defendant that have been attached by the plaintiff in execution of the decree issued in this suit; and

(v) Costs be in the cause.

2. The application is supported by the grounds on the face of it and the supporting affidavit sworn on 22nd October, 2020 and supplementary affidavit sworn on 14th January, 2021 by Peter Ngang'a, the General Manager of the defendant.

3. On 27th November, 2020 the plaintiff filed a replying affidavit sworn on 25th November, 2020 by Stephen Kinuthia Wang'ombe, a director of the plaintiff company.

4. Written submissions were thereafter filed by the defendant's Counsel on 14th January, 2021. The plaintiff's Counsel filed his written submissions on 18th January, 2021.

5. In highlighting the said submissions, Mr. Gikandi, Counsel for the defendant, stated that the consent to take over the case from M/s Ndegwa Muthama Katsiya & Associates was filed after the application in issue had been filed in court. He indicated that the consent was signed on 21st October, 2020. He further indicated that due to an inadvertent mistake, the consent was not filed on time. He was of the view that since Mr. Ndegwa (of M/s Ndegwa Muthama Katsiya & Associates) had not complained, the plaintiff should not complain. Mr. Gikandi relied on the case of **Ngitimbe Hudson Nyanumba v Thomas Ongondo** [2018] eKLR, in making the above submissions.

6. He stated that the purpose of getting a consent was to protect the former Advocate so as to benefit from the work which he had done previously, in acting for the defendant. He submitted that the provisions of Section 159(2)(d) of the Constitution, Sections 1 and 3A of the Civil Procedure Act were applicable and that failure to file the consent in good time was a procedural technicality. He indicated that the plaintiff had not stated that it had been prejudiced at all.

7. On the issue raised in the plaintiff's submissions that it did not seek leave of the court in order to appeal to the Court of Appeal, Mr. Gikandi submitted that under the provisions of Article 164(3) of the Constitution of Kenya, the doors to the Court of Appeal were thrown wide open and that one does not require leave in order to file an appeal. He cited the case of **Peter Wahome Kimotho v Josephine**

Mwiyeria Mwanu [2014] eKLR, where the Court of Appeal stated that under the Constitution of Kenya, 2010, all matters from the High Court are appealable to the Court of Appeal.

8. He submitted that after Judgment was entered, an application was filed for stay of execution but it was dismissed by the court. That the said dismissal entitled the aggrieved party to file an appeal. He contended that the dismissal constituted new facts, which gave the party who lost, a new cause of action, which is separate from the original appeal.

9. Mr. Gikandi submitted that the defendant operates a Container Freight Station (CFS) as per Gazette Notice No. 2460 of 4th April, 2008 attached to its supplementary affidavit. He stated that the plaintiff was in the process of attaching the loader but the same is not allowed under Section 44 of the Civil Procedure Act.

10. He was of the view that there was need for the plaintiff to move the court for a Judicial Review process so that it can remove machinery which is being used by the Government. He indicated that the plaintiff was asking for Kshs. 9 Million and for the deposit of the balance of the decretal sum in a joint bank account.

11. Mr. Gikandi urged this court to allow the application and not to give onerous terms which the defendant will be unable to meet. He was of the view that Kshs. 2 Million would be adequate security.

12. Mr. P. Wafula Advocate for the Plaintiff, opposed the application and stated that what was being demanded was the decretal sum and interest accrued calculated from the year 2008 and that it came to Kshs. 17,852,664.30, inclusive of Auctioneers fees. He submitted that Order 42 rule 6 of the Civil Procedure Rules provides that security should be furnished so that orders for stay of execution can be granted.

13. He prayed for the sum of Kshs. 8,926,332.15 to be paid to the decree holder and for the balance of a similar amount to be deposited in court or in the alternative, for the full decretal amount to be deposited in court.

14. On the issue of failure to file the consent for change of Advocates before filing the application in issue, Mr. P. Wafula indicated that on 30th October, 2020 the law firm of Gikandi & Co. Advocates was not on record for the defendant. He submitted that this court had not been moved to adopt the consent. Counsel for the plaintiff relied on the case of **Stephen Mwangi Kimote v Murata Sacco Society** [2018] eKLR, where the court found that Order 9 Rule 9 of the Civil Procedure Rules has to be followed where there is a Judgment on record. He further submitted that the Judge therein dismissed the application which had been filed, for want of compliance.

15. Counsel for the plaintiff contended that the Notice of Appeal dated 21st October, 2020 was defective for want of leave to appeal. He made reference to Section 75 of the Civil Procedure Act which gives instances where one can appeal as of right. He indicated that Order 43 Rule 1 of the Civil Procedure Rules lists orders for which leave to appeal must be sought.

16. In regard to the Gazette Notice relied on by the defendant, Mr. P. Wafula pointed out that it only designates the defendant as a CFS and it was not shown that it has immunity from prosecution. He was of the opinion that the Judgment debtor's goods can be attached to satisfy a debt. He relied on the case of **Zakhem International Construction Limited v Quality Inspectors Limited & Another** [2020] eKLR, where the Court held that Section 44 of the Civil Procedure Act is not intended to protect corporate citizens but artisans whose livelihood depend on their workmanship. Mr. P. Wafula submitted that Section 44 of the Civil Procedure Act was not applicable in the present circumstances.

17. On the issue raised by Mr. Gikandi of the dismissal of the application for stay of execution dated 20th March, 2019, the plaintiff's Counsel submitted that Order 42 rule 6 of the Civil Procedure Rules envisages a situation where, when the court appealed from declines to grant stay of execution, an applicant should move to the court appealed to.

18. He contended that the application herein is *res judicata* as a similar one was dismissed by Judge P.J. Otieno. This court was urged not to sit on appeal of the said Judge's ruling. Counsel for the plaintiff prayed for the application to be dismissed for being *res judicata*.

19. In response to Mr. P. Wafula's submissions, Mr. Gikandi stated that Section 44 of the Civil Procedure Act is applicable to artificial beings and not necessarily to human beings. He asserted that dismissal of the application for stay of execution constitutes a new cause of action and that is the reason why the defendant was seeking fresh orders for stay of execution.

ANALYSIS AND DETERMINATION

20. At the outset, this court must determine the preliminary issue of whether the law firm of Gikandi & Company Advocates is properly on record. Prior to the filing of the application dated 22nd October, 2020 the defendant was represented by the law firm of Ndegwa Muthama Katisya & Associates. The issue of whether the law firm of Gikandi & Co. Advocates is properly on record was first brought up by Mr. Maondo who represented the plaintiff in court on 30th November, 2020. Ms Murage represented the defendant in court on that day. Mr. Maondo informed this court that the Counsel for the defendant was a stranger to this suit since he did not seek leave to join the suit.

21. Ms Murage responded by stating that the law firm of Gikandi & Co. Advocates was properly on record as a consent was filed in court on the same morning of 30th November, 2020 but by then the file had been taken to court.

22. Mr. Maondo's rejoinder was that the Counsel for the defendant had filed the application dated 22nd October, 2020 without having formalized its position of being properly on record for the defendant, as its Counsel had informed this court that the consent was filed on 30th November, 2020. This court resolved to give directions as to the filing of written submissions. Leave was also granted to the defendant to file a supplementary affidavit, with the aim of proceeding to deal with the application on merit in the event that the law firm of Gikandi & Co.

Advocates was found to be properly on record.

23. Determination of the preliminary issue will either pave away for this court to deal with the application for stay of execution or shut the door to this court proceeding to consider the said application.

24. In this matter, Judgment was entered by the High Court in favour of the plaintiff as against the defendant when the law firm of M/s Ndegwa Muthama Katsiya & Associates was on record. The Judgment was delivered on 7th December, 2018.

25. Order 9 Rule 9 of the Civil Procedure Rules addresses the issue of change of Advocates in the following terms-

“Where 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) an application with notice to all 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.”

26. To elaborate further on the issue of the sequence of events when an Advocate or a litigant intends to take over conduct of a case after Judgment has been entered, Order 9 Rule 10 of the Civil Procedure Rules provides as follows-

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

27. Further, Order 9 Rule 11 of the Civil Procedure Rules states as follows-

“The party who gives notice under rule 8 or obtains an order under rule 9 may perform the duties prescribed under this order in person or through his new advocate.”

28. Under Order 9 Rule 9 of the Civil Procedure Rules, it is a prerequisite for an Advocate who has been instructed to take over a case from another, who had conduct of a case up to the stage of delivery of the Judgment, to either file an application and notify the parties of his intention to take over conduct of the case or he can file a consent signed by him and the outgoing Advocate.

29. The wording of the provisions of Order 9 Rule 11 of the Civil Procedure Rules makes it even clearer that it is only after giving of a notice under Rule 8 or after obtaining an order of the court under Order 9 Rule 9 of the Civil Procedure Rules that an incoming Advocate can be deemed as being properly on record.

30. Mr. P. Wafula correctly submitted that in this matter, the application was filed on 23rd October, 2020 whereas the consent was filed on 30th November, 2020. It is thus apparent that the law firm of Gikandi & Co. Advocates put the cart before the horse by filing an application before they were properly on record.

31. Counsel for the plaintiff urged this court to invoke the provisions of Article 159(2)(d) of the Constitution to cure the defect. He considered the anomaly of failure to file the consent for change of Advocates as a procedural technicality which does not go to the substance of the application.

32. In the case relied on by the defendant’s Advocate of **Ngitimbe Hudson Nyarumba v Thomas Ongondo** (supra), the court succinctly expressed the consequences of failing to comply with Order 9 Rule 9 of the Civil Procedure Rules. In the said ruling, Judge Mutungi however went on to state as follows:-

“The appellant suffered no prejudice at all by such change of Advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Act and with Article 159(2)(d) of the administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice.”

33. The above part of the decision is distinguishable from the circumstances in this matter. As result of the application made by the law firm of Gikandi & Co. Advocates on 22nd October, 2020 the defendant was granted an *ex parte* stay of execution but by then, the said law firm was not properly on record as no consent of change of Advocates had been filed or notice of change of Advocates had been filed. This court notes that the said orders were prejudicial to the plaintiff as it had a Judgment in its favour which it sought to execute. Since the matter at that time was at an *ex parte* stage, Judge P.J Otieno could not have established that the matter of the defendant’s representation was not properly settled.

34. In the case of **John Langat v Kipkemoi Terer & 2 Others** [2013] eKLR, when faced with an application which is similar to the present one, Judge Muchelule stated thus-

“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. 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.” (emphasis added).

35. In the case of **Nginyanga Kavole v Mailu Gideon** [2019] eKLR, Odunga Judge stated as follows regarding the operation of the provisions of Order 9 Rule 9 of the Civil Procedure Rules –

“It follows that in this case since judgment had been delivered dismissing the applicant’s suit, for the change of applicant’s advocates to have been effected leave of the court was required which could be obtained either on an application or by consent of the incoming and outgoing advocates.

In this case, the motion was filed on 4th December, 2018 while the consent was filed on 21st January, 2019. It is therefore in my view that without an order of the court regularizing the already filed motion, the Notice of change of Advocates and the consent that were filed after the motion could not cure the incompetency of the application (emphasis added).

36. In this court’s view, the act of filing an application for stay of execution before the filing of the consent for the incoming Advocates to be on record, incapacitates this court to look at the said application dated 22nd October, 2020. The failure to comply goes to the root of the application.

37. In the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 6 Others** [2013] eKLR, the Court of Appeal (Kiage JA) stated as follows about the provisions of Article 159(2)(d) of the Constitution of Kenya:-

“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 succor and cover to parties who exhibit scant respect of the rules and timeliness. Those rules and timelines serve to make the process of judicial adjudication fair, just, certain and even-handed. Courts cannot aid in bedding 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.”

38. In this matter, nothing stopped the law firm of Gikandi & Co. Advocates from filing the present application contemporaneously with the consent to the effect that it had taken over conduct of the case for the defendant with effect from 22nd October, 2020. The defendant’s Counsel would then have sought to have the consent filed on 30th November, 2020 adopted as orders of the court thereby attaining a launchpad upon which to prosecute the application dated 22nd October, 2020. The upshot of the objection raised by the plaintiff’s Counsel with regard to the law firm of Gikandi & Co. Advocates not being properly on record has merit and is sustained.

39. The application dated 22nd October, 2020 is hereby struck out for having been filed by an Advocate who had neither applied to come on record nor filed a consent for change of Advocates either before the date of filing the application or on the date he filed the application.

40. The effect of the striking out of the application dated 22nd October, 2020 means that the *ex parte* orders issued on the same day by Judge P.J. Otieno are hereby vacated. Costs are awarded to the plaintiff/decree holder.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 16th day of April, 2021. Ruling delivered through Microsoft Teams Online Platform due to the outbreak of the Covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Peter Wafula for the plaintiff/decree holder

Mr. Gikandi for the defendant/Judgment debtor

Mr. Oliver Musundi – Court Assistant.