



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 31OF 2003

HENRY NJERU.....PLAINTIFF/APPLICANT

VERSUS

AGRICULTURAL FINANCE CO-OPERATIVE.....DEFENDANT/APPLICANT

RULING

1. The applicant in his application dated 5th November, 2014 seeks for the following orders:-

- i. That the prohibitory order registered against Land Parcel Number Gatari/Nembure/1934 be cancelled.*
- ii. That the instrument of charge registered against land Parcel Number Gatari/Nembure/1934 in favour of the Defendant, Agricultural Finance Co-operation be discharged and/or the Land Registrar be ordered/authorized to cancel the said charge entry.*
- iii. That the the Defendant, Agricultural Finance Co-operation be odered to return the original title deed number Gatari/Nembure/1934 to the applicant unconditionally and encumbered.*
- iv. That the Defendant be ordered to refund the amount of Kshs.40,000/= unduly and unlawfully obtained from the Applicant on 27/03/2013 and 16/04/2013.*

2. The grounds supporting the application are that the applicant obtained a decree nullifying the illegal sale of his property L.R. Gatari/Nembure/1934 in this case. There was evidence that the applicant did not owe the respondent any money. The respondent continues to illegally hold the applicant's security. The applicant has already paid the respondent Kshs.40,000/= demanded by the respondent for the discharge of charge. Despite the payment, the discharge was not effected.

3. The defendant through his advocate Rashid Ngaira filed grounds of opposition challenging the application as incompetent for offending mandatory provisions of the law and that it does not raise sufficient grounds for grant of orders sought.

4. Both parties filed written submissions to argue their application which this court has perused and considered as explained in the following paragraphs.

5. The issue for determination in this application are whether the application is incompetent and whether it has merit in the specific prayers sought.

6. The respondent allege that the counsel for the applicant Mr. Eddie Njiru failed to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

7. In this case, the counsel on record up to stage of the delivery of judgment was Njeru Nyaga & Co. advocates. The provisions of Order 9 Rule 9 require that the incoming advocate obtain a court order before coming on record or file a consent between him and the advocate on record. For this reason the respondent argues that the counsel Mr. Eddie Njiru is not properly on record. The application is incompetent for that reason.

8. Messrs Eddie Njiru & Co. Advocates did not submit or respond to the issue of incompetency of the application.

9. Before going to the merit of the application, it is important to deal with the issue of competency of the application.

10. Order 9 Rule 9 of the Civil Procedure Rules 2010 provides:-

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.

11. The respondent relied on the case of **LALJI BIMJJI SANGHAN & CONTRACTORS VS CITY COUNCIL OF NAIROBI [2010] eKLR** where Odunga, J. cited the case of Sirati, J. in **MONICA MORAA VS KENINDIA ASSUARANCE CO. LTD [2010] eKLR** where it was held:-

“....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 intend to come on record after delivery of judgment. There are specific provisions governing, such change of advocate. In my view the firm of Ms. Kibuchiy & Co. Advocates should have sought this court's leave to come on record as acting for the applicant...The firm of Ms. Kibichiy & Co Advocates has not complied with the rules and instead, have just gone ahead and and filed a Notice of Appointment without following the laid down procedure. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached.....The mischief Order 9 of the Civil Procedure Rules intended to address was to protect advocates pr for,s pf advocates being replaced without Notice and without their legal fees being settled. In as much as Ms. Kibuchiy & Co. Advocates were holding brief for Ms. Hamilton Harrison & Mathews Advocates, it was important that they come on record properly and should have filed a consent and/or made an application seeking leave as provided for under Order 9 |Rule10 of the Civil Procedure Rules.”

12. This issue also arose in the case of **JACKLINE WAKESHO VS AROMA Case [2014] eKLR** which had similar facts. It was held:-

*“Although the foregoing objection appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the Motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack **locus standi**. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the motion. The court will not however do that. The reason for the foregoing is two fold. Firstly, there are several judicial pronouncement cited by the claimant which show that the court's have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Rule 9”.*

“In view of the findings and reasons stated above, the Motion dated 15/5/2014 is struck out with

costs for being incompetent.”

13. It is not in dispute that judgment in this case was entered on 30th July, 2009 and that Njeru Nyaga & Co. were on record for the plaintiff/applicant. Neither is it in dispute that the firm of Eddie Njiru & Co. came on record without obtaining a court order as provided by Order 9 Rule 9. The only document filed by the firm was a notice of change of advocates.

14. It is a mandatory requirement that the incoming advocate obtain a court order or record a consent with the advocate on record before he takes over the case. It is also a requirement that the advocate on record be served with such an application or is involved in the consent before any order is made by the court.

15. I find that the firm of Eddie Njiru & Co. failed to comply with the mandatory provisions of the law. The firm therefore lacks the *locus standi* to represent the applicant and consequently renders this application filed by the same firm incompetent.

16. The application is hereby struck out with costs to the respondent.

17. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 22ND DAY OF MARCH, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Eddie Njiru for Applicant/Plaintiff

Mr. Mutuma for R. Ngaira for Respondent