



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 236 OF 2012**

**GULF FABRICATORS .....APPLICANT**

**VERSUS**

**THE MUNICIPAL COUNCIL OF KISUMU.....RESPONDENT**

**R U L I N G**

There are two sets of application herein namely, that dated 1.4.2016 filed by the judgment/debtor, the County Government which seeks the following orders:

- (a) Interim stay of execution;**
- (b) that the execution and the proceedings to enforce the judgment and decree in Kisumu HCCC No.139/2004 be declared a nullity.**
- (c) that this court be pleased to set aside, recall, and lift the warrants of attachment and sale for cancellation for having been issued irregularly;**
- (d) the defendant/applicant bears the auctioneer's costs.**

The 2nd application by the decree holder dated 5/4/2016 prays for the following reliefs:

- (a) That the court be pleased to struck out/dismiss the application dated 1.4.2015 by the judgment/debtor for being an abuse of the courts process having been filed by a busy body;**
- (b) That the court do make a declaration that the firm of Otieno, Yogo, Ojuro & Company is improperly on record for the judgment/debtor leave thereby not having been sought/granted;**
- (c) There be issued a declaration that the same firm having been retained by and represented the Decree/holder herein M/S Gulf Fabricators Limited in Kisumu HCCC No.139/2004 is unprofessional, unethical and malicious for them again to purport to represent the judgment/debtor even with the confidential information given them when they so acted.**

Both parties prayed for the costs.

The first application by the judgment/debtor is supported by the sworn affidavit of **KILINDA KILEI** the legal counsel whereas the judgment/creditor has sworn his affidavit in support of its application afore stated.

Having perused both applications together with their relevant submissions and authorities by the

parties, what I consider as a preliminary issue is whether the firm of Otieno, Yogo, Ojuro & Company Advocates are properly on record as raised by the judgment/creditor. This issue is fundamental in determining the veracity of both applications.

From the record the firm of Otieno, Yogo, Ojuro did file a notice of change of advocates on 1.4.2016 taking over from the firm of Otieno, Ragot & Company Advocates as well as Rodi Orege & Company advocates I suppose.

The argument by Mr. KIMANGA is that the said firm ought to have complied with Order 9 rule 9 of the Civil Procedure Rules. The judgment/debtor on the other hand has argued that it is properly on record by virtue of the provisions of Order 9 rule 5 of the Civil Procedure Rules.

From the pleadings on record, the firm of M/S Otieno, Ragot & Company Advocates were replaced by the firm of Rodi Orege & Company Advocates vide an order of the Deputy Registrar dated 11/11/2015.

For now there is no evidence that the Deputy Registrar's order was complied with, namely whether the judgment/debtor paid the legal fees to M/s Otieno, Ragot & Company Advocates. However that is not for this court to decide for now. The other issue raised by the judgment/debtor is that there being no judgment on record, there was therefore no need to comply with the provisions of Order 9 Rule 10 of the Civil Procedure Rules and that what comes into play is the provisions of Order 9 Rule 5 which states 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 if 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.”**

This rule presupposes a continuing suit. The current suit was however determined by the judgment of Honourable Justice Maina on 30.10.14 which ordered the decree in Kisumu HCCC 139/2004 be satisfied. The heading of that decision was **“Judgment”** Blacks Law Dictionary 8th edition has defined judgment as:

**“A court's final determination of the rights and obligations of the parties in a case.**

**The term judgment includes an equitable decree and any order from which an appeal lies.”**

It is not true therefore as submitted by the judgment/debtor that what the court decided on 20.10.2014 was not a judgment. The Judicial Review proceedings are *sui generis* and the final decision is consequently a judgment and a decree arises therefrom.

In light of the above observations was the judgment/debtor in appointing the firm of Otieno, Yogo Ojuro & Company to act for them instead of Mr. Rodi, Rege & Company Advocates in breach of Order 9 Rule 9 of the Civil Procedure Rules?

The said Rule provides as hereunder:

**“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 maybe.”**

Rule 10 provides that a party can combine such an application as part of its prayers.

A look at the application dated 1.4.2016 does not ask for such an order or prayer. The same goes straight to ask for orders earlier enumerated. The assumption I suppose was that the notice of hearing filed on the same date covered such a request.

I find that the judgment/debtor did not comply with Order 9 rule 9 of the Civil Procedure Rules. There is on record a valid court judgment. All that the applicant did was to file a notice of change ostensibly in compliance with Order 9 rule 5. This suit was determined by the court and what is taking place is merely execution proceedings.

In light of the above finding I do not find the application by the judgment/debtor dated 1.4.2016 meritorious for want of compliance with Order 9 Rule 9 of the Civil Procedure Rules. The same is dismissed with costs to the judgment/creditor.

That leaves the issues of whether the said firm ought to act for the judgment/debtor. I think that it would be unfair for the court to delve into that arena for now. Should the said firm of Otieno, Yogo, Ojuro & Company Advocates be interested in representing the judgment/debtor then those arguments can be dealt with. Infact it would be unfair for me to distinguish the legal authorities submitted by the counsel herein for now.

The other observation which its worth mentioning and which the parties have been dealing with in error and I think it would be prejudicial not to mention is the question of the decree in HCCC 139/2004. The judgment of my sister, **Maina J** in part states that:

**“Accordingly an order of mandamus is hereby issued compelling the respondent to pay to the ex-parte applicants whatever amount remains unpaid of the decree issued in HCCC 139/2004.”**

The decree was to be settled in that civil suit and not this cause. The purpose of the cause was to merely get an order to compel a statutory body comply with the decree. That order having been obtained the execution proceeding ought and must be done within the HCCC 139/2004. The only execution that ought to be dealt with in this file are those that are specifically related to this cause. It would therefore be unfair to enforce proceedings of HCCC 139/2004 as I suppose that decree is still active and capable of being enforced. Infact I do not see any prejudice to be suffered by the parties. But for proper administration it is safe to execute in the proper files.

In light of the above observation I do order that the execution proceedings herein in so far as they relate to HCCC 139/2004 (Kisumu) the same ought to proceed in the said file. All the earlier proceedings in this cause are set aside. The judgment/creditor shall have the costs of the applications dated 1.4.2016 and 5.4.2016.

Orders accordingly.

**Dated, signed and delivered this 18th day of May 2016**

**H. K. CHEMITEI**

**J U D G E**