



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 774 OF 2001

**GITHONGO ELECTRICAL
ENGINEERING LIMITED.....PLAINTIFF**

• **VERSUS -**

ARNIE CAMPBELL & CO. LIMITED.....DEFENDANT

RULING

1. The application before me has been brought by the defendant. It is a multi-pronged application.
2. As a first step, the defendant seeks leave to have the firm of Rachuonyo & Rachuonyo Advocates come onto the record, to represent them.
3. The need for such leave stems from the fact that on 18th of May 2006 the learned Deputy Registrar granted judgment in favour of the plaintiff, following the defendant's default in filing a Defence. As at the date when judgment was granted, the advocates who were on record as acting for the Defendant were Messrs **NYAENCHA WAICHARI & COMPANY ADVOCATES**.
4. The defendant has made it clear that it never ever instructed that Law Firm to represent it. Therefore, the defendant holds the view that Messrs Nyaencha Waichari & Company Advocates had acted without any authority from the defendant.
5. For that reason, the defendant wished to be completely dissociated from that Law Firm. Indeed, the defendant asked the court to strike out the Memorandum of Appearance together with all pleadings and documents which Messrs Nyaencha Waichari & Company Advocates had filed in this case.
6. According to the defendant, they had never been served with the plaint or any pleadings in this matter. Therefore, they did not and could not have instructed lawyers to act for them in a matter that they knew nothing about.
7. The defendant said that they were completely shocked to be required to Show Cause why the decree in this case should not be executed against the company. In order to forestall the threatened execution, the defendant has sought a stay of execution.
8. It is the hope of the defendant that the company will be afforded an opportunity to file its own Defence, unconditionally.
9. But the plaintiff is convinced that the Defendant was properly served with the plaint. Therefore, as far as the plaintiff was concerned, the defendant was simply stating lies and half-truths in this application, in an effort to frustrate the plaintiff from enjoying the fruits of the successful litigation.
10. The plaintiff pointed out that the defendant, through their advocates, engaged the plaintiff in negotiations.
11. Thereafter, when judgment had been granted in favour of the plaintiff, the defendant's advocate

- participated in the process of taxation of the Bill of Costs. Therefore, as far as the plaintiff was concerned, there cannot be any truth in the defendant's assertions, that it was unaware of the case.
12. In any event, the defendant was not pointing any accusing finger at the plaintiff. Instead, the defendant appeared to be heaping blame upon a third party, the Automobile Association of Kenya.
 13. Another factor which the plaintiff drew attention to was the fact that defendant's officer did swear an affidavit to support an application for the case to be referred to arbitration. The person who swore the affidavit was cited by name, as being **STANLEY KARANJA**.
 14. Although a person by that name used to work with the defendant, he has sworn an affidavit, categorically denying having signed the alleged affidavit.
 15. Stanley Karanja also stated, on oath, that whilst he worked with the defendant, he never had authority to either accept service on behalf of the defendant or to swear any affidavit on behalf of the defendant.
 16. Finally, Stanley Karanja deponed that the Law Firm of Nyaenda Waichari & Company Advocates never acted for the defendant. If anything, that Law Firm was said to have been acting for the defendant's adversary.
 17. **GOPAL K. VAGJANI** is a director of **ERNIE CAMPBELL & COMPANY LIMITED**. He swore an affidavit indicating that the Law Firm of Nyaencha Waichari & Company Advocates was duly served with the application. It was therefore curious that the Law Firm did not deem it prudent to respond to the depositions made by the applicant's witnesses.
 18. To my mind, there is a lot of weight in the assertions put forth by the defendant. Basically, the defendant accused Messrs Nyaencha Waichari & Company Advocates of acting dishonestly and fraudulently. The said Law Firm was said to have deliberately and deceitfully concealed the case from the defendant.
 19. Those are matters about which if a person was accused of, he would be expected to come out fighting hard to clear his name. Therefore, when the Law Firm has chosen to keep mumb in the light of the serious allegations, the loud silence appears to lend credence to the defendant's complaints.
 20. Furthermore, even the official stamp which was used by the person who was served with the plaint herein, was disowned by the defendant.
 21. The stamp bore the defendant's name; "**ERNIE CAMPBELL & CO. LTD**", in capital letters, which are along a line.
 22. However, the defendant pointed out that it always used a stamp which was oval in shape. The said oval shape of the defendant's stamp was clearly evidenced in the documents received by the plaintiff, even prior to the institution of the suit herein.
 23. Having given due consideration to the application, I have come to the conclusion that the defendant never instructed the Law Firm of Nyaencha Waichari & Company Advocates to represent the defendant in this case.
 24. Therefore, the said Law Firm had absolutely no authority to enter appearance or to file any pleadings for or on behalf of the defendant. The Law Firm also lacked authority to represent the defendant at any negotiations with the plaintiff.
 25. As the Memo of Appearance was filed without the defendant's authority, I do hereby order that it be struck out forthwith.
 26. Similarly, all the other pleadings and documents filed by the Law Firm of Nyaencha Waichari & Company Advocates, are struck out forthwith, for want of authority.
 27. Had the Law Firm been duly instructed, that would have rendered the judgment regular. But because the defendant was not served with the plaint, and also because the Law Firm of Nyaencha Waichari & Company Advocates purported to act for the defendant when the defendant had not instructed that firm, the judgment which was entered against the defendant was irregular.
 28. I order that the said judgment be set aside forthwith. I further grant to the defendant unconditional leave to file its defence. The said defence should be filed within the next **TEN (10) DAYS** from today.
 29. On the issue of costs, I find that it would be unfair to order the plaintiff to pay the costs of the application; I so find because the plaintiff did not play any active role in doing the things which have been undone today. The whole problem can only be traced to the doorstep of the Law Firm of Nyaencha Waichari & Company Advocates.
 30. But then again, the said Law Firm is not a party to these proceedings.

31. Before I make the final orders on the issue of costs, I would like to have the parties address me further. I deem this to be the prudent route to take because the costs of this application are likely to go well beyond the application itself.
32. The setting aside of the judgment gives rise to questions relating to the proceedings and pleadings filed by the plaintiff and Nyaencha Waichari & Company Advocates. It is for that reason that I direct that the parties should address me further on the issue of costs, before I make my decision in that regard.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of April 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kiunga for the Plaintiff

Onyango for the Defendant.

Collins Odhiambo – Court clerk