



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 217 OF 2004

THOMAS CARROLL..... PLAINTIFF/RESPONDENT

VERSUS

EDWARD GITAH KIHIA...DEFENDANT/APPLICANT

RULING

1. Judgment in this suit was delivered in favour of the plaintiff on the 31st January 2014. The plaintiff was represented by the firm of Orina and Company Advocates while the firm of Njoroge Regeru and Company Advocates represented the Defendant.

After the Judgment, the plaintiff purported to appoint the firm of Kanyi Ngure & Company Advocates to act alongside Njoroge Regeru and Company Advocates while Kimatta and Company Advocates came on record for the plaintiff in place of Orina & Company Advocates. By a ruling delivered on the 24th September 2014, the firm of Kanyi Ngure and Company and Kimatta and Company Advocates were held to have been irregularly on record. On the 24th October 2014, the firm of Kanyi Ngure and Company Advocates regularised its representation of the Defendant and proceeded to file its application by Notice of motion dated and filed on the 20th November 2014, seeking orders of stay of execution pending the hearing and determination of the intended appeal.

2. The Application dated 20th November 2014 was served upon Kimatta & Company Advocates purportedly representing the Respondent who had filed a Notice of Change of Advocates on the 6th June 2014 taking over from the firm of Orina and Company Advocates aforesated.

The court's ruling dated 24th September 2014 had found both advocates firms, Kanyi Ngure and Company and Kimatta and Company Advocates irregularly on record for their respective clients. Without regularising its representation, Kimatta and Company Advocates proceeded to prepare a Replying Affidavit that was sworn by the Respondent on the 27th January 2015, and filed on the 16th February 2015.

3. I have noted that a consent order dated 2nd April 2015 signed by Orina & Company Advocates allowing Kimatta & Company Advocates to come on record for the Respondent was filed on the 10th April 2015, Kimatta & Company Advocates prepared the Replying Affidavit and filed it on the 16th February 2015, when the said firm was not procedurally and properly on record.

Order 9 Rule 9 of the Civil Procedure Rules states:

“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) Upon an application with notice to all parties or upon, or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate and or party intended to act in person as the case may be.”

4. The above provisions are mandatory in nature.

In the case **John Langat -vs- Kiplemoi Terer & 2 Others Kericho HCCC No. 21 of 2013**, the court struck out a Replying Affidavit drawn by a firm of advocates who were irregularly on record. Similarly, same orders were applied in the case **Monica Moraa -vs- Kenindia Assurance Company Ltd Kisii High Court Case No 43 of 1999**.

5. On his part, Mr. Kimatta Advocate on that issue argued that the technical error had since been cured by filing the consent letter on the 10th April 2015. That is so. However, this court finds that the Replying affidavit that was prepared by his firm before it was properly on record to be unprocedurally on record.

Provisions of Order 9 rules 5, 9, 10 goes to the jurisdiction of the court. The Advocates lacked *locus standi* to address the court on the application on record and generally on the Replying Affidavit sworn on the 27th January 2015.

Although **Article 159(2)(a) of the Constitution** enjoins the court to administer justice without undue regard to procedural technicalities, rules of procedure, and more so by persons with legal minds ought to be adhered to. In view of the above I have no option but to strike out the Respondent's Replying affidavit sworn on the 27th January 2015 and filed on the 16th February 2015.

6. The Replying Affidavit having been struck out, the Application dated 20th November, 2014 stands unopposed.

The court notes that the Applicant's Advocates Kanyi Ngure and Company found themselves in a similar situation in their earlier application that was struck out on similar grounds.

In the Court of Appeal case **No. 46 of 1986 Haji Almed Sheikh t/a Hasa Hauliers -vs- Highway Carriers**, it was held that mistakes of counsel should not be visited upon their clients, and followed in **Nairobi Civil Appeal No. 215 of 2000 Trust Bank Ltd -vs- Amollo Co. Ltd**.

The court held that administration of justice should not necessarily deter a litigant from pursuit of his case by having the case decided on merit. A party should not be denied adjudication of his claim on merits because of procedural default unless it causes prejudice which cannot be compensated with costs. See **Sila Mutiso -vs- Rose Hellen Wangari C.A. No. Nairobi 255 of 1997** This is a court of substantial justice, and will determine the application at hand on merit. There will be no prejudice caused to the Applicant in this matter as shall be seen below.

7. Having struck out the Replying Affidavit, I will not make a ruling on the application as urged, exparte. I will give the Respondent a chance to prepare file and serve a fresh Replying Affidavit to the application dated 20th November 2014 within thirty(30) days of the date of this ruling.

8. In the meantime, and being mindful of the subject matter and issues raised in the application under consideration and in pursuit of substantive justice, I make a further order that *status quo* subsisting in respect of the suit property **Nakuru Municipality Block 18/78** as at the date of

judgment on the 23rd January 2014 be maintained pending the hearing and determination of the Application.

The case will be mentioned before this court for further directions on the 17th September 2015 – at 11.00a.m.

Dated, signed and delivered in open court this 30th day of July 2015

JANET MULWA

JUDGE

In the presence of:

Kimatta - for Respondent

Mbiyu holding brief for Kanyi - for Applicant

Court clerk - Linah.