



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL SUIT NO.37 OF 2010

PATRICK WAMUKOTA.....PLAINTIFF

VERSUS

JOHN TULULA.....1ST DEFENDANT

DISMAS MULONGO.....2ND DEFENDANT

AGGREY WABOMBA.....3RD DEFENDANT

GRACE N. WAMALWA.....4TH DEFENDANT

RULING

The applicant herein filed the application dated 29th May 2015 under Order 12 rule 7 and Order 51 rule 1 and Section 3 of Civil Procedure Rules praying that this Court be pleased to set aside its orders dated 11/5/2015 and that the Court be pleased to reinstate the suit herein for hearing and final determination.

The applicant's application is grounded on the fact that the applicant was sick and hospitalized and that the applicant's advocate lacked instructions from the applicant to proceed with the matter. It was argued that the applicant shall suffer prejudice if the orders are not granted. That the subject matter is Land and that the same is a matrimonial property. The applicant relied on the supporting affidavit dated 29/5/2015 and a further affidavit dated 10/8/2015. He said that when the suit was dismissed he was in the hospital.

The application was opposed by the respondent who relied on the Replying Affidavit by the 4th defendant dated 8th October 2015. He said that the suit had earlier been adjourned at the instance of the plaintiff on 30/6/2014 and the applicant herein was ordered to pay Court adjournment fees and costs to the defendant. The respondent argued that the applicant did not obey the Court order in paying the Court adjournment fees and costs to the defendant. That the respondent paid the court adjournment fees and fixed the case down for hearing on 11/5/2015. On that date the applicant through his lawyer applied for adjournment on the ground that his client was sick, he produced no medical evidence, the Court rejected the application for adjournment. The applicant's advocates then filed an application to withdraw for lack of instructions, the application was rejected on the ground that the applicant was not served with the application and that this was a further attempt to delay the case. The suit was then dismissed.

When Mr. Areba learned Counsel addressed this Court on 27/10/2015, he argued that he filed the application dated 11/5/2015 because he did not have instructions. He admits that this application is still pending. What is interesting, is that on 27/10/2015, he chose to argue the current application which is a later application filed on 29/5/2015. In this application there is no averment that he has since 11/5/2015, obtained further instructions.

What is more, he did not withdraw the earlier application of 11/5/2015 seeking to withdraw for lack of further instructions.

The applicant should have dealt with the application dealing with his instructions in this matter. Counsel cannot breath hot and cold on the issue of instructions. He either has instructions or does not have the same. Instructions are what creates the agency relationship between an advocate and his client. It is that agency that enables an advocate to conduct the suit on behalf of his client and even compromise the suit on behalf of his/her client. That is why it is imperative for an advocate to file a notice of appointment when instructed and when the advocate has no instruction in a continuing suit, before judgement, that is why he should file an application for leave to cease acting on the case. The application must always be served on the client so that the client is aware that the advocate no longer acts for him. The application to cease acting is always supported by an affidavit sworn on oath to affirm the veracity of the truth of the motion to cease acting.

In the application dated 11/5/2015, to cease acting, Mr. Areba in his affidavit sworn before a Commission for Oaths stated;

1. ...
2. *That I was approached to take up this matter for and on behalf of the plaintiff which I duly consented to*
3. *That upon having instructed I duly filed the case*
4. *That the plaintiff has failed to avail full instructions and facts regarding this case*
5. *That the plaintiff is sickly and cannot be consulted and therefore it is just, fair and expedient that I be allowed to cease acting in the matter herein so that the parties can proceed with the matter to its conclusion.*
6. ...
7. *That I swear this affidavit in support of the application herein and that I have deponed to herein above is true to the best of my knowledge, information and belief.*

There is no other affidavit on record to say that Mr. Areba ever obtained further instructions hereon. The application of 29th May 2015 (this application) is supported by the affidavit of the applicant which does not at all say that Mr. Areba advocate has fresh instructions. As far as I am aware, Mr. Areba has no instructions. That is indeed, why Mr. Areba says that the application of 11/5/2015 is still pending. If that application is still pending, where could Mr. Areba get further instructions to conduct this application?

Mr. Areba clearly acts in this application without instructions.

There is another thing; the Court Order of 30/6/2014, made the adjournment of that date, the last adjournment. The adjournment was conditional on the applicant paying costs to the plaintiff assessed at Kshs.800/- and Court Adjournment fees before the next hearing date.

The applicant did not comply with that Court Order. The respondent had to pay that amount six months later on 8/12/2014 vide receipt No.6386398 to enable the respondent to fix the suit down for hearing. The respondents costs todate remains unpaid. Those facts were admitted by Mr. Areba learned Counsel for the applicant.

A party who flouts Court Orders with impunity deserves no indulgence from the Court. Court orders must not only be respected, they must be obeyed. The applicant has disobeyed this Court's orders. He should not be indulged by the same Court whose orders he flowns upon.

This application must be dismissed for two reasons firstly, Mr. Areba has no instructions to file this application. This application is drawn by a Counsel without instructions. The application must be struck out. I do strike it out from the record.

Secondly, the applicant has disobeyed Orders of this Court. Even if Mr. Areba had instructions, he cannot be granted the order he seeks because the applicant herein is in contempt of Court.

The application is dismissed with costs to the respondents.

DATED at BUNGOMA this 28th day of October, 2015

S. MUKUNYA

JUDGE