



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL SUIT NO 227 OF 2012

FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

MARTIN GICHUNGE NGOLUA T/A

HOL MOLSEN FINNI.....DEFENDANT

RULING

1. The Applicant moved Court via an application which is undated and not received in Court. The same is also supported by an Affidavit which is neither dated nor sworn by a Commissioner of Oaths.
2. He argued via his advocate Ojijo prayers No.3 and 4 of the Notice of Motion seeking to set aside the decree and for his release from the prison.
3. His grounds in support of the application are that, the committal to Civil Jail by the Decree Holder is illegal in that he is not a party in the suit as he is **LINCOLN L. RUVAGA** not **MARTIN GICHUNGE N'GOLUA** and that he is not responsible for **MARTIN GICHUNGE N'GOLUA's** actions. His affidavit reiterates the same grounds in support of the application.
4. The Respondent opposes the application via an Affidavit of **STELLA MBULI** sworn on 14.12.2015 and Notice of Preliminary Objection dated the same date. The Respondent argues that the Applicant was represented by Wesley John Austin & Associates previously and thus representation by Asian, Ojijo Advocate offends the mandatory provision or Order 9 Rule 9 of the Civil Procedure Rules.
5. The Respondent avers that the Applicant is charged in Criminal Case No.1812/2010 for defrauding the Plaintiff using the name of **Martin Gichunge Ngolua**. The ID shown to court of same person has the photographs which is similar to one in the ID held by the Applicant. The Applicant is thus held to be **LINCOLN LIVENGA** alias **MARTIN GICHUNGE N'GOLUA**, in any event it is averred that the Applicant was served with summons and he instructed the firm of **WESLEY JOHN AUSTIN & ASSOCIATES** who entered appearance but never defended the suit. He was also served with NTSC application but failed to appear to Court to Show Cause.
6. In the submissions, the Applicant invokes the bill of rights element to impugn his imprisonment. He submits that he is unconstitutionally held as he is not the party who the bank sues in the case. He claims that he is not the Defendant named nor did he masquerade as the same in the fraud against the Plaintiff.
7. The Respondent submit that they have no doubt the person in court is the same as the one who defrauded the bank and in any case the ID's he has and the one with the bank contains his photograph.
8. The Respondent also contends that the application is totally defective as same issues were argued

- and overruled by the D/R and same ruling has not been challenged.
9. Further the application is not signed or dated and the alleged Affidavit in support is undated nor commissioned.
 10. I have perused the Court file and found that the issues or identity of the Applicant were raised before the D/R on 18.11.2015 and the D/R held that in deed there was no mistake in identity. The Applicant is the Defendant in the suit who used **MARTIN GICHUNGE NGOLUA's** name and that the photo on the ID is his.
 11. The same ruling has not been challenged under order 47 Rule 8 of the Civil Procedure Rules Cap 21. The advocate on record has been appointed in a concluded matter after another advocate had entered appearance. Thus the Respondent submits that the same is irregular. Order 9 Rule 9 talks of where there is a change of an advocate and a party engages another advocate to take over the matter; an order of court is required to effect the change.
 12. Further the Affidavit is not commissioned under Order 19 Civil Procedure Rules and the provisions of Statutory Declaration and Oaths Act Cap 15. All the above points go to the root of the application which calls for the striking out of the same application.
 13. However the applicant has invoked the Bill of Rights alleging that he is wrongly imprisoned and seeks the verification of his identity by the experts and mean while he be bonded.
 14. Obvious if it turns out that he was never the person who defrauded the bank, he will have suffered serious injustices. It is not denied that in the Criminal Case the Applicant was bonded and he is deemed to be doing the same case while at liberty.
 15. The court would indulge him as we search the truth as to the true person who defrauded the bank the decretal amount by releasing him on the set conditions.
 16. The same are;-
 1. He will deposit Ksh.1 million in court with 2 sureties.
 2. Alternatively sign a bond with sureties of Kshs.2 million with 2 sureties of equal amount.
 3. Mean while the Applicant will be subject to the expert Identification by Registrars of Persons and the Director of the Criminal Investigations Department to establish whether he is the same person who transacted with the bank in the defrauding the amount subject herein and a report be filed within 45 days.
 4. Parties at liberty to apply.
 5. Mention in a date after 2 months.

Dated, signed and delivered in court at Nairobi this 18th day of December, 2015.

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C. KARIUKI

JUDGE