



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCC NO.217 OF 2004

THOMAS CARROLI.....PLAINTIFF/RESPONDENT

VERSUS

EDWARD GITAHI.....DEFENDANT/APPLICANT

RULING

Aggrieved by the judgment of Ouko J., (as he then was) which was delivered by Anyara Emukule J., on 31st January, 2014, the applicant, Edward Gitahi Kihia, filed the notice of motion dated 30th April, 2014 seeking, inter alia, a stay of execution of the said judgment and the decree pending the hearing and determination of the application and further pending the lodging, hearing and determination of his intended Appeal.

The application was brought under Sections 3A and 63(e) of the Civil Procedure Act and Orders 42 Rule (6)(1) (2) and 51 Rule 1 of the Civil Procedure Rules and is premised on the grounds that the plaintiff (Respondent) filed the suit herein against the defendant (Applicant) on 21st July, 2004 seeking a permanent injunction and an order for transfer of the suit property, NAKURU MUNICIPALITY BLOCK 18/78 to himself; that after the suit was heard and determined, judgment was entered in favour of the respondent. Aggrieved by the said judgment, the applicant filed and served the notice of appeal dated 6th February, 2014 which he intends to prosecute.

It is the applicant's case that he has an inalienable right of appeal and that the intended appeal has high chances of success (is arguable). The applicant is apprehensive that unless the orders sought are granted, the object of the application and the intended appeal will be rendered nugatory. Further, that the respondent will suffer no prejudice if the orders sought are granted because he is in possession of the original title document for the suit property. He undertakes not to interfere with the suit property pending the hearing and determination of the intended appeal.

The application is supported by the affidavit of the applicant, sworn on 30th April, 2014, in which the grounds thereon are reiterated.

In opposition to the application, the respondent (Thomas Carroll) filed the replying affidavit sworn on 23rd May, 2014 in which he has, inter alia, deposed that the applicant has not established sufficient grounds for grant of the orders sought, that having waited for ten years before the suit could be heard and determined, he is entitled to enjoy the fruits of his judgment. Further, that he will suffer greater injustice if the orders sought are granted as he will be further curtailed in the use of the suit property which he bought in good faith.

Before I consider the merits of the application. It is necessary to consider that objection raised by Mr. Kanyi, counsel for the appellant. Mr. Kanyi submitted that the respondent's counsel is irregularly on record and did not comply with **Order 9 Rule 9** of the **Civil Procedure Rules**.

Referring to the decisions **John Langat v. Kipkemoi Terer & 2 others** Kericho HCC No.21 of 2013 and **Monica Moraa v. Kenindia Assurance Company Ltd** Kisii HCC No. 43 of 1999, Mr. Kanyi submitted that the replying affidavit sworn by the respondent ought to be struck out as it was filed by a firm of advocates that was not authorized to represent the respondent under Order 9 Rule 9 of the Civil Procedure Rules.

In **John Langat v. Kipkemoi Terer & 2 others** (*supra*), A.O Muchelule J. observed:-

“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 the parties; or

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

“No such orders was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant and therefore the appeal and the application are incompetent.”

Similarly, R.N Sitati J., in **Monica Moraa** (*supra*) stated:-

“From the above order 9 at rule 9 it is mandatory after judgment has been entered for a new firm of advocates to seek leave to act for a party or file a consent to that effect after delivery of judgment.”

Having perused the court record, I find that none of the advocates acting for the parties herein is properly on record. I say this because in the suit that is the subject matter of the application herein and the intended appeal, the plaintiff/respondent was represented by the firm of Orina & Company Advocates. After the application herein was filed, the respondent instructed the firm of Aminga, Opiyo Masese & Company Advocates who filed the replying affidavit dated 23/5/2014 and notice of change of advocate on same date and later on, the firm of Kimatta & Company Advocates by notice of change dated 6/6/2014. In effecting those changes the respondent did not comply with the provisions of Order 9 rule 9 of the Civil Procedure Rules which requires such a change to be effected by an order of court or consent of the parties. No order of the court or consent of parties was filed to effect the said changes.

On the other hand, during the proceedings before the trial court, the appellant was represented by Njoroge Regeru & Company Advocates. After judgment that firm filed the appeal herein through the notice of appeal dated 6th February, 2014. On the same day, (6/2/2014) Njoroge Regeru & Company Advocates wrote to the Deputy Registrar of this court requesting for a certified, typed copy of the judgment appealed from and the typed proceedings relating thereto. Thereafter, the appellant, through the notice of appointment dated 19/2/2014 and filed on the same day, purported to appoint the firm of Kanyi Ngure & Company Advocates to act alongside Njoroge Regeru & Co. Advocates. By that notice of appointment, the appellant changed his address of service for the purpose of the suit (read the appeal) to the new firm, Kanyi Ngure & Co. Advocates. Although on the face of the notice of appointment it is indicated that the notice of appointment was to be served on the appellant's former advocates, Njoroge Regeru & Company Advocates, there is no evidence that the said notice was ever served on them. There is no consent of the change of advocate. There being no evidence that the change of advocates herein was conducted in accordance with Order 9 rule 9 of the Civil Procedure Rules which required an order of court or a consent between the outgoing advocate and the proposed incoming advocate, I hold the view that the change of advocate effected by the both the appellant and the respondent are unlawful. In the above cited cases,

John Langat and **Monica Moraa** where the courts were faced with a similar situation the judges declared the pleadings that had been drawn and filed in contravention of the said provisions of the law incompetent and accordingly struck them out. In the circumstances of this case, I see no reason why the application herein should be allowed to stand having been filed by an advocate who has been found to be not properly on record for the appellant. Consequently, I hereby strike out the application dated 30/4/2014 with costs.

DATED and DELIVERED this 24th day of September, 2014.

R.P.V. WENDOHO

JUDGE

PRESENT:

Mr. Kanyi for the defendant/applicant

Mr. Mongeri holding brief for Mr. Kimatta for the plaintiff/respondent

Kennedy – Court Assistant