



**No. 341**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CASE NO. 112 OF 2010**

JAMES MOSOTA ONCHAGWA ..... PLAINTIFF

VERSUS

FRANCIS BORURA ONCHAGWA ..... 1<sup>ST</sup> DEFENDANT

JEMIMAH BORURA ..... 2<sup>ND</sup> DEFENDANT

JOSEPH SONYE ONDARI ..... 3<sup>RD</sup> DEFENDANT

**RULING**

1. In a ruling that I delivered on 28<sup>th</sup> June 2013 in this matter, I held that the hearing date for this case was taken irregularly and as such the hearing that took place on 12<sup>th</sup> March, 2013 was similarly irregular. In the circumstances, I decided that in the interest of justice and fairness, I should exercise the inherent powers conferred upon the court under section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and set aside all the proceedings and consequential orders made on 12<sup>th</sup> and 20<sup>th</sup> March, 2013 so that this suit may be listed for hearing afresh. Before making this order however, I thought it prudent to give the parties a hearing. In this regard, I directed the defendant's advocates to take a date for that purpose and serve a notice upon the firms of Momanyi Gichuki & Co. Advocates and C. A. Okenye & Co. Advocates.
2. In the ruling of 28<sup>th</sup> June 2013, I held that when the hearing date herein was taken, it was the firm of C. A. Okenye & Co. Advocates and not Momanyi Gichuki & Co. Advocates that was on record for the plaintiff. It is on account of this fact that I reached the conclusion that the consent hearing date that was taken by the firm of Nyatundo & Co. Advocates and Momanyi Gichuki & Co. Advocates was irregular. When this matter came up for mention before me pursuant to the directions that I gave on 28<sup>th</sup> June 2013 in the ruling aforesaid, Mr. Nyatundo of Nyatundo & Co. Advocates appeared for the defendants while Mr. Okenye of C. A. Okenye & Co. Advocates appeared for the plaintiff. The firm of Momanyi Gichuki & Co. Advocates was not represented. Mr. Nyatundo advocate submitted that as far as the defendants are concerned, the firm on record for the plaintiff is Momanyi Gichuki & Co. Advocates. Mr. Nyatundo submitted that the defendants are not aware that the firm of C. A. Okenye & Co. Advocates had come on record for the plaintiff because the said firm of Advocates did not serve them with a Notice of Change of Advocates.
3. Mr. Nyatundo submitted further that in any event, the document that the said firm of advocates filed in court was a notice of appointment of advocates and not a notice of change of advocates. Counsel submitted that the said notice did not remove the firm of Momanyi Gichuki & Co. Advocates from the record but only added the firm of C. A. Okenye & Co. Advocates as additional

firm of advocates acting for the plaintiff. Mr. Nyatundo submitted that in the circumstances, the firm of Momanyi Gichuki & Co. Advocates was on record when the consent hearing date was taken and this matter proceeded to hearing on 12<sup>th</sup> March 2013. Due to the foregoing, Mr. Nyatundo argued that there is no good reason why the proceedings that took place herein on 12<sup>th</sup> March 2013 and 20<sup>th</sup> March 2013 should be set aside. He urged the court to proceed and deliver judgment in the matter on the basis of the evidence on record.

4. On his part, Mr. Okenye advocate submitted that the firm of C. A. Okenye & Co. Advocates had taken over the conduct of this case from the firm of Momanyi Gichuki & Co. Advocates and as such should have been served with a hearing notice for the hearing which took place herein on 12<sup>th</sup> March 2013. Mr. Okenye submitted that contrary to the contention by the defendants' advocates, his firm did serve a notice of appointment of advocates upon them. Mr. Okenye submitted that since the firm of C. A. Okenye & Co. Advocates that was on record for the plaintiff was not served with a hearing notice, the hearing which took place on 12<sup>th</sup> March 2013 was irregular and such should be set aside. After hearing, the submission from Mr. Nyatundo and Mr. Okenye, I adjourned the matter to 26<sup>th</sup> June 2014 to hear the firm of Momanyi Gichuki & Co. Advocates. On 26<sup>th</sup> June 2014, the firm of Momanyi Gichuki & Co. Advocates did not appear in court although they were served with a hearing notice and an affidavit of service filed in court.
5. I have considered the submissions by the advocates for the defendants and the advocates for the plaintiff. As I observed in the ruling delivered herein on 28<sup>th</sup> June 2013, there is a notice of appointment of advocates on record that was filed by the firm of C. A. Okenye & Co. advocates on 9<sup>th</sup> August 2011 to the effect that the plaintiff had appointed the firm of C. A. Okenye & Co. Advocates to act for him. It is indicated on the face of the said notice of advocates that it was to be served upon the firm of Momanyi Gichuki & Co. Advocates that was then on record for the plaintiff and the firm of Nyatundo & Co. Advocates that was on record for the defendants. The firm of Nyatundo & Co. Advocates has denied service of this notice of appointment of advocates although the firm of C.A. Okenye & Co. Advocates has insisted that the same was duly served. There are a number of issues which arise for determination from the arguments advanced by the advocates for the parties herein.
6. The first issue is the effect of the notice of appointment of advocates dated 9<sup>th</sup> August 2011. The second issue is, whether the said notice was served upon the firm of Nyatundo & Co. Advocates for the defendants and, lastly, if the said notice was not served upon the firm of Nyatundo & Co. Advocates for the defendants, whether the court can ignore the same. Under order 9 rule 7 of the Civil Procedure Rules, 2010 a notice of appointment of advocate is only given where a party who had hitherto acted in person appoints an advocate to act on his behalf in the matter. Where a party who intends to appoint an advocate had an advocate acting for him in the matter, he should file a notice of change of advocates under order 9 rule 5 of the Civil Procedure Rules, 2010. A notice of appointment of advocates and a notice of change of advocates serve different purposes and the same cannot be used interchangeably. It is not in dispute that the firm of Momanyi Gichuki & Co. Advocates was acting for the plaintiff in this matter at all material times before the firm of C. A. Okenye & Co. Advocates filed notice of appointment of advocates on 9<sup>th</sup> August 2011. In the circumstances, the filing of notice of appointment of advocates was improper. What the plaintiff should have filed is a notice of change of advocates if he wanted the firm of C. A. Okenye & Co. Advocates to take over the conduct of this case on his behalf from the firm of Momanyi Gichuki & Co. Advocates.
7. There is an existing practice whereby in the event that a party wishes to be represented by several advocates or firms of advocates in a matter each advocate or firm of advocates that is appointed subsequently, files a notice of appointment of advocates as an indication that it has also been appointed to represent the particular party. This practice has no basis in the Civil procedure Act and the rules made thereunder. In my experience, this practice normally causes a lot of confusion and should be stopped. A litigant has a constitutional right to be represented by as many advocates as he can afford. All these advocates or firms of advocates need not be all on record. I am of the opinion that there should at all times be only one advocate or firm of advocates on record in whose name the pleadings and other proceedings may be filed and on whom the other parties can serve their pleadings and process. All these additional advocates or firms of advocates must appear in the matter under the umbrella of the original firm of advocates if the party does not

- wish to change advocates. To have more than one firm of advocates on record as representing a party or parties in a case is a recipe for chaos as proceedings would be difficult to control or manage. The opposite party or parties would not know which of the firms on record to be served. The said firms may also take the liberty to move the court for reliefs independent of each other.
8. In the present case of Mr. Okenye did not argue that his firm was appointed as additional advocates for the plaintiff. He was categorical that he was instructed to take over the conduct of the plaintiff's case from the firm of Momanyi Gichuki & Co. advocates. Mr. Okenye did not explain however why he filed a notice of appointment of advocates instead of a notice of change of advocates. As I have stated above, the plaintiff ought to have filed a notice of change of advocates if his intention was to change advocates from Momanyi Gichuki & Co. Advocates to C. A. Okenye & Co. Advocates. The notice of appointment of advocates dated 9<sup>th</sup> August 2011 is therefore irregular and defective. The defect however is only on the form of the notice. On substance, the plaintiff expressly expressed his wish to appoint the firm of C. A. Okenye & Co. Advocates to represent him in this suit. This is a case where a party intending to change advocates has filed in court a notice of appointment of advocates instead of a notice of change of advocates. In the interest of justice, I am minded to uphold the plaintiff's intention rather than to defeat it on account of the defective form in which it has been expressed. This court is enjoined under Article 159 (2) (d) to administer justice without undue regard to procedural technicalities. In the circumstances of this case, I would deem the notice of appointment dated 9<sup>th</sup> August 2011 filed herein by the firm of C. A. Okenye & Co. Advocates as a Notice of Change of advocates subject to the order that I will make herein below. The effect of the said notice was therefore to replace the firm of Momanyi Gichuki & Co. Advocates with the firm of C. A. Okenye & Co. Advocates as the advocates on record in this matter on behalf of the plaintiff.
  9. Order 9 rule 5 and 7 provides that neither a notice of change of advocates nor a notice of appointment of advocates shall take effect unless she same is served. As stated earlier in this ruling, the defendants' advocates have denied that they were served with the plaintiff's notice of appointment advocates. The plaintiff's advocates have insisted that they effected service. They have however not placed any evidence before the court in the form of an affidavit of service or the duplicate copy of the said notice on which service of the said notice was acknowledged. I therefore have no evidence that the plaintiff's notice of appointment of advocates dated 9<sup>th</sup> August 2011 was served upon the defendant's advocates. I am therefore in agreement with the defendant's advocates that they were not aware that the firm of C. A. Okenye & Co. Advocates were on record in this matter as advocates for the plaintiff.
  10. What arises from the foregoing is that the plaintiff changed advocates but failed to notify the defendant's advocates. The defendant's advocates proceeded to take a hearing date by consent with the plaintiff's previous advocates and proceeded with the hearing of the case ex parte when the plaintiff's said previous advocates failed to appear in court for the hearing. It is undisputed that the plaintiff had appointed the firm of C. A. Okenye & Co. Advocates to act for him. It is also not in dispute that the firm of Momanyi Gichuki & Co. Advocates which, had purportedly taken a hearing date herein by consent with the firm of Nyatundo & Co. Advocates was no longer acting for the plaintiff. The question that I need to answer is whether this court can proceed to pronounce judgment on the basis of the ex parte proceedings that took place herein in light of these facts? I do not think so. A right of a person to be heard before a decision is made against him is a constitutional right. The defendant has in his counter-claim sought an order for the eviction of the plaintiff from the property in dispute in this suit. The relief if granted would have serious impact on the life of the plaintiff. Justice would demand that such order be made only after hearing the plaintiff. The plaintiff has not given any reason why the notice of change of advocates was not served upon the defendants advocates. I am of the view however that the inconvenience caused to the defendant can be remedied in costs. I am therefore unable to ignore the fact that the plaintiff had changed advocates and that the plaintiff and his said advocates were not aware of the hearing of this case. I am inclined therefore to give the plaintiff a chance to be heard in this matter.
  11. In conclusion therefore, I hereby set aside the proceedings and consequential orders made herein on 12<sup>th</sup> March 2013 and 20<sup>th</sup> March 2013 and direct that this case be listed for the hearing of the defendant's counter-claim afresh. The firm of C. A. Okenye & Co. Advocates shall file a proper notice of change of advocates within 7 days from the date hereof. The defendant shall have thrown away costs assessed at Kenya Shillings Twenty Five Thousand only (kshs. 25,000/=)

which amount shall be paid by the firm of Momanyi Gichuki & Co. Advocates within thirty (30) days from the date hereof failure to which the defendants shall be at liberty to execute for the recovery thereof.

**Delivered, signed and dated at KISII this 31<sup>ST</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Sagwe h/b for Nyatundo for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**