REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 23 of 2007

Barrack Otieno Owuor.....1st APPELLANT

STANDARD CHARTERED BANK LTD.....2nd APPELLANT

VERSUS

MARY ASEWE OLUOCH ….....RESPONDENT

JUDGMENT

This is appeal is based on the following grounds:-

1. The learned Magistrate erred in law in misconstruing the content and import of the Provisions of Order 111 Rule 9A and thereby finding that counsels for the 1st Appellant were not properly on record.

2. The learned Magistrate miscomprehended and misinterpreted the Provisions of Order XXII of the Civil Procedure Rules and misapplied the Provisions of Order L Rule 16 of the proceedings under the said Order XX11.

3. **The learned Magistrate erred in disregarding a duly filed and relevant affidavit lodged by the 2nd Appellant and in directing that the said affidavit be expunged from the court.**

4. The learned magistrate failed to consider the fact that her order would result in a party being denied a chance to be heard.

The appellants vide a consent between the firm of **H. M. Wasilwa & Co Advocates** and **Otieno Ragot & Co Advocates** dated 8th June 2005 and filed on 9th June 2005 changed their advocates to M/s Otieno Ragot & Co Advocates.

The said advocates filed the Notice of change of advocates on 9th June 2005. The said firm equally filed a replying affidavit by the garnishee sworn on 9th June 2005.

Apparently on 22nd June 2005 the firm of Otieno Ragot & Co Advocates filed an application to come on record on behalf of the 1st defendant. The said application was compromised by a consent dated 22nd June 2005 and filed on 23rd June 2005.

When this matter came up for before the learned Senior Resident Magistrate the plaintiff argued that the firm of Otieno Ragot was not properly on record and further that the said firm could not act for both the defendant and the garnishee.

The trial court upheld this argument stating that the parties ought to comply with Order 3 Rule 9 A of the Civil Procedure Rules.

I have perused the said Ruling and heard the submissions by the parties herein. Order 3 Rule 9 A states:-

"When 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 upon an application with notice to the advocate on record(*Underlining mine*)".

My understanding of the said portion of the law is that the intention of the drafters was to protect the interest of the advocate who has been labouring for and on behalf of a party.

In the instant case M/s H. M. Wasilwa had been acting for the defendant. The defendant then instructed M/s Otieno Ragot Advocates. Both advocates filed the relevant consents to imply that H. M. Wasilwa Advocate had been notified that his client had given instruction to Otieno Ragot Advocates.

By signing the consent therefore M/s H. M. Wasilwa were well notified of the said changes. As indicated above the purposes of ropping in the counsel on record is to take care of his interest. The interest of M/s H. M. Wasilwa seemed to have been taken care of by the time he signed the consent.

Should a party make a formal application as suggested by the trial court? I do not think this is necessary where parties have filed such consents. I however agree that ordinarily one has to file a formal application and serve the outgoing advocate. In the instant case the outgoing counsel showed explicitly that he was in the picture when he signed the consent.

The other argument raised by the appellant was that the trial court wrongly expunged the garnishee replying affidavit. I think this was erroneous. The garnishee strictly speaking is not a party to the suit and by extension ought to be treated as a neutral party. I have read the said affidavit of one **Moses Tangara** and the same simply confirms the account which is held by both appellants. The next issue to follow after that was for the court to determine whether there was sufficient reasons or otherwise to authorize the satisfaction of the decree by the garnishee.

Once the parties have filed any pleadings in court the court cannot simply wish them away. The court is enjoined to look at them and put into consideration their relevance, while taking into consideration of course the usual time limit. However the question of time frame is not the only sufficient reason to expunge a document.

It is incumbent upon a trial court to take the total overall facts and in particular to ensure that parties are granted justice and not turn away at the altar of technicalities.

The above position was put succinctly in the case of **Central Bank of Kenya =vs= Uhuru Highway Development Ltd & others C. A. 75 of 1998** where Bosire J. A. said:-

" I am therefore unable to subscribe to the view expressed by Mr. Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind a court is obliged to consider them unless for a reason other than mere lateness it considers it undesirable to do so. Besides, the learned Judge in the court below fell into error when he said that a failure to file grounds of opposition automatically entitles the applicant to orders exparte".

The learned Magistrate ought to have considered the garnishees replying affidavit even if the same seemed to have been filed out of time. The same in any even did not prejudice the application but went only to state the position of the account.

The last issue to determine is whether the firm of Otieno Ragot could act for both the garnishee and

the 1st defendant. I have perused the proceedings as well as the civil Procedure Act and I have not found anything barring the said firm from acting for both. However, if there was to be any serious issue of conflict then perhaps the said firm ought to choose whom to act. In the day to day litigation however counsels have practically been known to act for separate parties. This cannot however be a ground to have dismissed the application.

In the final analysis this appeal ought to succeed. The reasons for dismissal were purely technical which did not go into the root of the issue at hand. Section 159 of our constitution in particular abhors technicalities and therefore as much as possible matters ought to be allowed to proceed to their logical conclusion.

The appeal is allowed with costs.

Dated, signed and delivered at Kisumu this 25th day of March 2013

H.K. CHEMITEI

JUDGE

In the presence of:

….....for appellants

….....for the respondent

HKC/aao