



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
ENVIRONMENT AND LAND COURT
HCCC NO. 61 OF 2012

GIUSEPPE BOZZOLASCO.....PLAINTIFF

=VERSUS=

- 1. ANNELIESE SUSAN FELLER**
- 2. RUGA VILLAS WATAM LTD**
- 3. CORRORDO PILOTTI**
- 4. JAMES GEKONGE MOUKO.....DEFENDANTS**

R U L I N G

1. Before me is the Plaintiff's Application dated 27th March 2013 seeking for the following orders;
 - a. **THAT this Honourable court be pleased to strike out the 2nd and 3rd Defendants Statement of Defence with costs payable by the law firm of Muli & Ole Kina Advocates.**
 - b. **THAT, the costs of this application be provided for.**
 - c. **This Honourable court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this application.**
2. The Application is premised on the affidavit of the Plaintiff's Advocate whose main depositions are that the 2nd Defendant is a Limited liability company; that the firm of Muli & Ole Kina Advocates entered appearance and filed a defence for the 2nd Defendant without a valid resolution by the company or by that of its Board of Directors appointing it to do so; that the 3rd Defendant vide his letter dated 13th March, 2013 addressed to the law firm of Muli & Ole Kina Advocates expressly confirms that he never instructed the aforesaid law firm to enter appearance and act for him in this matter and that the 2nd and 3rd Defendants' defence ought to be struck out and the law firm of Muli & Ole Kina Advocates condemned to bear the costs of the suit.

Background:

3. The Plaintiff instituted this suit against one Defendant and two Interested Parties by way of a

- Plaint on 13th December 2013.
4. It is not clear as to why the Plaintiff sued one Defendant and two Interested Parties, because pursuant to the provisions of Order 4 of the Civil Procedure Rules, 2010, the party sued by way of a Plaintiff can only be a Defendant.
 5. The firm of Mouko & Company Advocates filed its Notice of Appointment for the Defendant on 14th December 2012 and the firm of Muli & Ole Kina Advocates filed its Notice of Appointment for the 2nd Interested Party on the same day.
 6. In between, the Plaintiff filed an amended Notice of Motion dated 7th January 2013 and an amended Plaintiff of the same date. The amended Plaintiff referred to all the parties sued as Defendants and introduced James Gekonge Mouko as the 4th Defendant in the suit.
 7. The firm of Ogero Ogeto and Company Advocates filed a Defence on behalf of the 4th Defendant on 15th January 2013 while the firm of Muli & Ole Kina Advocates filed its Memorandum of Appearance and Defence on behalf of the 1st 2nd and 3rd Defendants on 15th January, 2013.
 8. On 22nd January, 2013, the advocates for the Plaintiff filed a Notice of Discontinuance of suit pursuant to Order 25 Rule 1 of the Civil Procedure Rules, 2010 in the following words;

“TAKE NOTICE that the Plaintiff hereby wholly discontinues his suit against all the four (4) Defendants.”

9. On 20th January, 2013, the advocates for the 1st 2nd and 3rd Defendants requested for Judgment pursuant to the provisions of Order 25 Rule 3 of the Civil Procedure Rules. When the request for judgment was placed before the Deputy Registrar, she fixed the matter for mention because *“an issue of costs has arisen.”* The matter was mentioned before the Deputy Registrar on 6th February, 2013 where all the parties were represented by their respective counsels and an order was made by the Deputy Registrar in the following terms:

“The Defendants are present in court. The matter is marked as discontinued with costs to the Defendants.”

10. The matter was mentioned again before the Deputy Registrar on 27th February 2013. The record shows that it is only the Plaintiff's counsel who appeared before the Deputy Registrar.
11. The record does not show the Plaintiff's advocate's arguments or submissions for that day. However, the Deputy Registrar made the following order;

“Matter is finalised save for costs.”

12. The Defendants, through their respective advocates filed their Party and Party Bills of Costs on 25th February 2013 which were placed before the Deputy Registrar on 14th March 2013.
13. On the said date, the Plaintiff's advocate brought to the attention of the Deputy Registrar his Notice of Preliminary Objection filed on 13th March 2013 attacking the qualifications of the 4th Defendant's counsel as provided for in sections 9, 24, 31 and 34 of the Advocates Act, Cap 16.
14. The Plaintiff's counsel submitted before the Deputy Registrar that no costs in respect of anything done by the counsel for the 4th Defendant are payable.
15. After the submission of the Preliminary Objection in respect to the qualifications of the 4th Defendant's counsel, the Deputy Registrar made the following directions:

“In my view those are issues that need to be confirmed before the matter proceeds further. I therefore order that Mr. Binyenya files and serves substantive application so that the affected parties can respond within 14 days from the date hereof”

16. The present application has been filed in light of the said directions by the Deputy Registrar.
17. Other than the Notice of Preliminary Objection in respect to the qualification of the 4th Defendant's advocate, the Plaintiff's advocate had also filed another Notice of Preliminary

Objection seeking for an order that “the 2nd Defendants' Defence is hopelessly misconceived, frivolous, totally devoid of merit and *mala fides* for the reasons *inter alia*, that;

- (a) The Defence was filed without any due authority from the 2nd Defendant’s company.
 - (b) There is no resolution or a valid resolution of the 2nd Defendant’s company approving the filing of the defence.
 - (c) There is no resolution or no valid resolution of the 2nd Defendant’s company appointing Muli & Ole Kina Advocates to defend this or any suit for or on behalf of the 2nd Defendant’s company.
 - (d) The filing of the Defence for the 2nd Defendant was unlawful for want of authority from the 2nd Defendant’s company.
18. It would appear that the Plaintiff’s Advocate’s understanding of the order of the Deputy Registrar was that he should file formal applications to address the issues raised in his two preliminary objections, that is, in respect to the qualification of the 4th Defendant’s advocate and the authority of the firm of Muli and Ole Kina to represent the 2nd and 3rd Defendants.

Submissions:-

19. Mr. Binyenya, counsel for the Plaintiff submitted that the Application dated 27th March, 2013 should be heard and determined by the taxing officer and not by this court.
20. Counsel submitted that this court became *functus officio* after Judgment was entered by the Deputy Registrar and that it can only have jurisdiction as provided for under Rule 11 of the Advocates Remuneration Order.
21. According to the Plaintiff’s counsel, it is the duty of the Taxing Officer to determine whether the advocate had a relationship with his client. Counsel urged this court to refer the matter to the taxing officer for taxation.

2nd and 3rd Defendant’s submissions

22. Mr. Ole Kina, counsel for the 1st, 2nd and 3rd Defendants submitted that the question as to whether a defence can be struck out after the entry of Judgment can only be answered by this court and not the taxing officer.
23. According to the 1st, 2nd and 3rd Defendants’ counsel, discontinuance of a suit renders the court *factus officio* except on the issue of costs and the Deputy Registrar cannot delve into substantive issues.

Analysis:

24. I have reproduced above the background of this matter. I have also reproduced the directions that were given by the taxing officer on the issue of the Plaintiff’s Preliminary Objection.
25. It is true, as argued by the Plaintiff’s Advocate, that the taxation of the Bill of Costs is outside the jurisdiction of this court. Indeed, the taxing officer was clear in his mind that before he could make a determination on the qualification of the 4th Defendant’s advocate in respect to the Bill of Costs before him, a formal application was to be filed.
26. The present Application has been brought under Order 51 of the Civil Procedure Rules, 2010 and sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Section 2 of the Advocates Act. The Plaintiff has not filed the Application pursuant to the Advocates Remuneration Order.
27. All Applications filed under the quoted sections of the law can only be heard by this court. Indeed the Application before me has nothing to do with the taxation of the two Party and Party

- Bills of Costs or the relationship between the advocate and his client.
28. The only substantive order that is being sought in the Application is for the court to strike out the 2nd and 3rd Defendant's statement of Defence with costs.
 29. It is true that a pleading which has been filed by an unqualified advocate or by an advocate who did not have his client's instructions can be struck out at any stage of the proceedings.
 30. However, the striking out of pleadings, for whatever reason, is in the province of this court and not the taxing officer. I therefore find and hold that this court, and not the taxing officer has the jurisdiction to deal with the Plaintiff's application dated 28th March 2013 in so far as it is seeking to strike out the 2nd and 3rd Defendants' Defences.
 31. This suit was discontinued by the Plaintiff against all the four Defendants and the Deputy Registrar entered Judgment on costs against the Plaintiff. The said Judgment by the Deputy Registrar has not been set aside by Plaintiff.
 32. Having discontinued the suit against all the Defendants, the Plaintiff cannot now be heard to say that he wants the 2nd and 3rd Defendants' statements of defences struck out with costs. There are no defences to be struck out because the suit was discontinued together with all the pleadings in the file.
 33. Even if the Judgment of the Deputy Registrar on Costs was to be set aside, the only option available to the Plaintiff is to file a fresh suit against the Defendants pursuant to the provisions of Order 25 Rule 4 of the Civil Procedure Rules and wait for them to file fresh Defences for him to make an Application like the present one. However, such a fresh suit may be stayed by the court until the costs in the discontinued suit are paid. Either way, the plaintiff must pay the Defendants in this suit their costs. The costs are payable to the Defendants and not to the Defendants' Advocates.
 34. I will not express my views as to whether there was a client-advocate relationship between the 2nd and 3rd Defendants and the advocates on record or whether this court has jurisdiction to make such a determination. That is not what is before me.
 35. Having found and held that there are no defences to be struck out in this suit, and having found and held that the Defendants are entitled to costs pursuant to the Judgment that was entered into by the Deputy Registrar, I shall, as I hereby do, dismiss the Plaintiff's Application dated 27th March 2013 with costs.
 36. It is so ordered.

DATED AND DELIVERED IN MALINDI THIS 18TH DAY OF JUNE, 2013

O. A. ANGOTE

JUDGE