



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 544 OF 2000

KENYA PETROLEUM REFINERIES.....PLAINTIFF

VERSUS

HASSAN NGOA & 53 OTHERS.....DEFENDANTS

RULING

By this Notice of Motion dated 3rd April, 2013 brought under certificate of urgency the Applicant **KENYA PETROLEUM REFINERIES LIMITED** sought *inter alia*, the following orders:

“2. **THAT** this Honourable court be pleased to strike out the defendants notice of motion dated 25th March, 2013 and all papers/documents filed pursuant to and or together therewith and or supplemental thereto.

3. **THAT** consequent to prayer (1) here above this Honorable court be pleased to vacate and set aside the orders given pursuant to the defendants said application on the 26th day of March, 2013 and any decree made thereon.

4. **THAT** the costs of this application be provided for.”

This application arises from the hearing of the main suit in which judgment was entered in favour of the plaintiffs on 12th March, 2013. The defendants being aggrieved decided to launch an appeal. The defendants through the law firm of **Osoro Omwoyo & Company Advocates** filed an application dated 25th March, 2013 seeking to stay the court’s judgment of 12th March, 2013. It is pertinent to note that the defendants had all along during the hearing been represented by the firm of **M/S Chidzipha & Company Advocates**. It is not disputed that at the time the firm of Osoro & Company purported to act for the defendants and at the time they filed the application for stay dated 25th March, 2013, the said firm was **NOT** on record for the defendants. In ignorance of this fact the court did non 26th March, 2013 grant interim orders of stay for **7 days** on 26th March, 2013. The matter next came up before me on 3rd April, 2013 when Mr. Lumatete, counsel for the applicant raised the concern that Messrs Osoro Omwoyo & Company were not properly on record. He was instructed to file a substantive application which he did and filed this Notice of Motion dated 3rd April, 2013.

It was agreed that the application be disposed of by way of written submissions and both parties did duly file their submissions before the court.

It is not disputed that at the time Messrs **Osoro Omwoyo & Company** filed the Notice of Motion dated 25th March, 2013 they were **not** officially on record for the defendants. The firm of Chidzipha & Company were still on record. No notice of change of advocate had been filed and the firm of Osoro Omwoyo & Company had not sought the leave of the court to come on record. Thus their action directly breaches Order 9 rule 9 of the Civil Procedure Rules which provides:

“Where there is a change of advocate or when a party decides to act in person having previously engaged and 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 parties; or**
- b. **Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

Although a consent in line with order 9 rule 9 (b) has been filed that consent is dated 20th March, 2013 and was filed in court on 4th April, 2013 well after the firm of Osoro Omwoyo had filed the application on behalf of the defendants. I harbour grave doubts as to whether that consent was actually executed on 20th March, 2013 as indicated because it is curious why it took the law firm of Osoro Omwoyo over ten (10) days to file the consent in court. Nothing would have been easier than to file the said consent immediately or contemporaneously with the application dated 25th March, 2013. It is more likely that by 25th March, 2013 no such consent existed and that is why it was not filed until 4th April, 2013.

Counsel for the defendants submit that due to the urgency of the matter, execution of the judgment was likely, they made attempts to contact Mr. Chidzipha the previous lawyer in order to sign the consent but were unable to do so on time. However, under Order 9 rule 9, counsel was at liberty to seek leave of the court to come on record but did not bother to pursue this avenue. They just decided to ignore the legal provisions and act for the defendants knowing full well that they had no legal mandate to do so. By failing to mention this to the court on 26th March, 2013 when the certificate was argued I detect a clear intention to deceive the court and to obtain orders in a less than honest manner. Counsel for the defendants seeks to rely on Article 159 of the Constitution of Kenya to allow their application to stand. I am mindful of the provisions of Article 159 which urge courts not to pay undue regard to technicalities but to my mind, Article 159 would only apply where there has been a genuine mistake or an inadvertent lapse in procedure. This is **not** the case here. As I have stated before the defendants’ advocate appeared in court, argued their certificate and obtained stay orders in their favour knowing fully well that they were not properly on record and failing to disclose this material fact to the court. Article 159 cannot be used to sanitize such deceptive actions by counsel.

I find that Messrs Osoro Omwoyo & Company Advocates deliberately breached the law and procedure by their actions. The Notice of Motion dated 25th March, 2013 is hereby struck out. All orders consequential thereto are also set aside. I do allow the present application in terms of prayers (2) and (3). Costs will be met personally by the firm of Messrs Osoro Omwoyo & Company Advocates.

Dated and delivered in Mombasa this 22nd day of October, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Lumatete for the Plaintiff/Applicant

No Appearance for Defendants/Respondents

Court Clerk Mutisya