



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
ENVIRONMENT AND LAND CASE NO. 319 OF 2008

**AHMED NOORANI ..... PLAINTIFF**

**VERSUS**

**JOYCE AKINYI OCHIENG ..... DEFENDANT**

**RULING**

In the interest of saving judicial time and for effective case management, I directed that the two pending applications, that is, the notice of motion dated 28<sup>th</sup> September, 2011 and the one dated 9<sup>th</sup> October, 2010, be argued together. I will therefore determine the two applications in this ruling seriatim.

The notice of motion dated 28<sup>th</sup> September, 2011, seeks for orders that the firm of Mutuli & Apopo Advocates be discontinued from acting in this matter. Secondly, the pleadings and proceedings filed and conducted by the firm of Mutuli & Apopo be struck off.

This application is supported by the grounds that the firm of Mutuli & Apopo acted in **HCCC No: 350 of 2008** on behalf of the Defendant; **Joyce Akinyi Ochieng**. That case was in respect of the applicant and her husband, one **Antony Chinedu** over the same subject matter. Mr Apopo, a partner in the firm of Mutuli & Apopo, proceeded to act for Ahmed Noorani who is now the plaintiff. It is contended that confidential information regarding the suit premises was passed to the advocate.

The firm of Mutuli & Apopo was faulted for representing the plaintiff when they had information which was deliberately used against the applicant. On the issue of whether the firm of Mutuli & Apopo should be barred from appearing and also the expulsion from the records all their pleadings and submission, the court was invited to consider that the firm of Mwangi Kigotho had filed a notice of change of advocates in May 2011, so as to defeat this application.

This application was opposed firstly it was submitted that the original application was amended without the leave of the court. Under the provisions of **Order 8 rule 11 of the Civil Procedure Rules**, the only pleading that can be amended is a plaint and defence. According to Mr. Kigotho learned counsel for the respondent, a notice of motion is not a pleading.

Secondly, regarding the proceedings that came to the knowledge of Mr Apopo, it was pointed out that the firm of Mutuli & Apopo came on record after the pleadings had been filed by the law firm of Akongo Omogeni Advocates. In the submissions that were filed in the previous case, it is obvious that the firm of Mutuli & Apopo had knowledge the purchase price was used to construct a property which is now embroiled in a matrimonial dispute.

Even if the court considered the submissions made by Mr Apopo, they were all based on the matters deposed to in the affidavit of the applicant sworn on 7<sup>th</sup> October, 2008. Under paragraph 6 of the

supporting affidavit, the applicant admitted having received KShs.4.4 million. Further, in paragraph 9, the same applicant disclosed that there was construction that was going on at the suit property. Regarding the original pleadings, the pleadings were filed by the firm of Akongo Omogeni and the firm of Mutuli & Apopo came on record just at the submissions stage where Mr Mutuli was leading another counsel by the name of Mr Onchiso.

When the firm of Mutuli & Apopo came on record, no objection was raised and the applicant consented to the amount being deposited in the names of the joint firms of Mutuli & Kabiro & Company Advocates.

Thereafter, instead of paying the money as ordered the applicant filed an appeal and the issue of representation which is being raised now was not even raised. Thus, this application is an afterthought as the court cannot expunge even the records before the court of appeal.

As regards the notice of motion seeking the removal of Mutuli & Apopo advocates from record, that firm is no longer acting for the parties herein. There was a change of advocates as at 17<sup>th</sup> May, 2011. This is a court of law, and orders are not issued in vain, what purpose would be served by this order when the firm is no longer on record. As regards the expulsion of the pleadings and submissions, I am persuaded that this prayer was not contained in the original application. It is contained in a subsequent amended notice of motion which is not properly before me because no leave of the court was sought to effect that amendment.

Although I agree there are no specific precedents under the Civil Procedure Rules that permit for amendments of interlocutory applications, I believe the courts have powers under the overriding objectives in the interest of substantive justice to allow amendments even of an interlocutory application. However this is dependent on the circumstances of every pleading especially for the ends of justice, leave can be granted. In this case, no leave was sought or granted.

Even if I was wrong on those two holdings, the applicant has not explained the prejudice she has suffered as a result of the firm of Mutuli & Apopo acting for the respondent for reasons that she admitted the claim and even gave a proposal of settlement.

Finally even if there was any breach of the Advocate's Code of Conduct, as alleged by the plaintiff, that is a matter for the disciplinary Committee of the Law Society of Kenya.

For the aforesaid reasons, I see no merit in this application and it is hereby dismissed with costs to the respondent.

This now takes me to the notice of motion dated 9<sup>th</sup> October, 2010, in which Ahmed Noorani, the applicant, is seeking for an order that the respondent, Joyce Akinyi Ochieng be committed to civil jail for contempt of the order made on 28<sup>th</sup> July, 2010. This application is predicated on the grounds that on 28<sup>th</sup> July, 2010, the respondent was ordered to deposit a sum of KShs.4.4 million.

The respondent failed to obey the order. On 13<sup>th</sup> September, 2010, the respondent's advocates wrote to the applicant's advocates proposing to pay the sum of KShs.4.4million in monthly instalments of KShs.250,000/-. However, the respondent as continued to defy the court orders and according to the applicant, she is deliberately disobeying a valid order by the court, thus undermining the dignity of this court.

Leave was granted on 12<sup>th</sup> October, 2010, to the plaintiff to commence contempt proceedings against the defendant. Instead to paying the sum ordered the Defendant preferred an appeal and an application seeking for stay of execution in the Court of Appeal. By a ruling of **Waki JA**, the defendant's application for stay of execution was disallowed. Even the proposal that the Defendant made to pay KShs.250,000/- per month has never been honoured, thus counsel urged the court to find the Defendant/respondent in contempt of a court order.

The application was opposed. Mr Kabiru, learned counsel for the respondent submitted that the application for contempt was bad in law. The court order was not served upon the respondent together with a penal notice. The respondent has been unable to refund the sum of KShs.4.4 million because she cannot dispose of the property due to other court cases

This application seeks the enforcement of a court order by way of committal of the Defendant/Respondent to civil jail. There is no doubt this is a drastic measure sought by the applicant. However, the facts of the case confirm that the respondent has willfully and deliberately disobeyed the court order made on 28<sup>th</sup> July, 2010. The record shows that counsel for the respondent was aware of the court order, because there is a letter where the respondent made a proposal to pay the sum of KShs. 4.4 million in installments.

The applicant has, however, not annexed any evidence to show that the respondent was served with the order as well as the penal notice as required by the procedural law from England that governs matters of contempt of Court.

In matters of contempt, the rules of procedure are strictly adhered to, so as to protect even the contemnor because a committal order to civil jail is a serious matter.

I see no other defect in this application other than lack of personal service of the order and the penal notice. For that reason, this application is defective and thus incompetent. Due to the nature of this matter, costs shall be in the suit.

**Ruling read and signed this 17<sup>th</sup> day of February, 2012.**

**MARTHA KOOME**  
**JUDGE OF APPEAL**

**Note:**

*This application was heard and concluded on 8<sup>th</sup> December, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity*