



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1230 of 1997

LALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS.....PLAINTIFF/RESPONDENT

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT/RESPONDENT

RULING

By a Notice of Motion dated 19th March, 2012 and filed in Court on 29th May 2012, brought under Certificate of Urgency, the Defendant/Applicant seeks the following orders:

- 1.The matter be certified urgent and prayer 2 be granted in the interim pending inter party(sic) hearing of this application;**
- 2.That the Honourable Court is pleased to stay any intended execution of the decree arising out of the decree issued by this Court on 21st April 1998 pending hearing and determination of the Application.**
- 3.The Honourable Court does appoint an independent Certified Public Account (sic) to compute and advise the Court on the simple interest and total accruing sum due from the decree of this court issued on 21st April 1998;**
- 4.Upon determination of the interest due under prayer (3) the outstanding sum if any be paid by way of instalments;**
- 5.The costs of this application and the fees of the CPA do abide the outcome of this application.**

The application is supported by an affidavit and is on the grounds that;

- a) Out of the judgment sum of Kshs. 48,398,487.30, the court issued a decree requiring the Defendant to pay the Plaintiff a total sum of Kshs. 59,221,185.34 with interest at the rate of 26.5% p.a from 5th March 1998;**
- b) The Defendant has since paid Kshs. 46,671,230.40 towards liquidation of the decretal sum;**
- c) The Plaintiff has continued to demand sums from the Defendant said to be the decretal sum plus interest which the Defendant holds the view is exorbitant, exaggerated, erroneous and not lawfully due;**

d) As at 26th July 2010 the Plaintiff was demanding a sum of Kshs. 634,410,523.00 interest alone being Kshs. 586,012,035.70;

e) The parties have been unable to amicably resolve the issue of the interest lawfully due;

f) The Defendant is apprehensive that unless this application is heard and decided urgently, the Plaintiff shall proceed to levy execution based on the unlawful and erroneous interest and thereby defeat the outcome of this application.

Before going into the merits of the matter, I intend to deal with the competency of the application before the Court. On 24th June 1997 the firm of **Ogetto & Company** entered appearance in this suit for the defendant and filed a defence for the same party on 2nd July 1997. By a ruling dated 4th March 1998, **Mboghli Msagha, J** struck out the said defence and entered judgement for the plaintiff against the defendant as prayed in the plaint.

The present application is, however, filed by **Prof Tom Ojienda, Advocate** on 29th May 2012. Order 9 rule 5 of the Civil Procedure Rules provides:

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

Rule 9 of the said Order, however provides:

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—

(a) upon an application with notice to all the 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.

I have perused the record and I have neither seen an application seeking the Court's leave to permit the new advocate to come on record nor an order granting such leave. To make matters worse I have neither seen a notice of change of advocates nor notice of appointment. The applicant however contends that a notice of appointment dated 9th November 2012 was filed on 16th November 2012. Even if that were so, it would not, in my respectful view, validate an application which was filed 29th May 2012 before the advocate came on record. The applicant has, however, sought to rely on the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act and the cases of **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi [2010] eKLR** and **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 3 Others [2010] eKLR**. In the former, the Court of Appeal held inter alia that:

“In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives”.

In my view, the Court may when properly moved validate the coming on record by an advocate who was

on record depending on the circumstances of the case. However, the Court is not entitled to simply ignore a procedural misstep. That in my view is the alternative that the Court of Appeal had in mind in the latter case. The alternative is not to ignobly disregard the rules of procedure since the said rules are meant to regulate administration of justice and not to assist the indolent. As was held by the Court of Appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010:**

“...the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...If improperly invoked, the “O2 principle” could easily become an unruly horse and therefore while the enactment of the “double O” principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”.

The said objective it has been held is a case management tool and therefore before the Court invokes the same the foundation for its application must be properly laid and the benefits thereof judicially ascertained. A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate.

In **Monica Moraa vs. Kenindia Assurance Co. Ltd [2012]Eklr, Sitati, J** delved into the provisions of Order 9 rule 9 and expressed herself as follows:

".....there is no doubt in my mind that the issue of representation is critical especially in cases such as this one where the applicant’s advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/s Kibichiy & Co. Advocates should have sought this court’s leave to come on record as acting for the applicant...The firm of M/s Kibichiy & Co. Advocates has not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedure. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached...The mischief order 9 of the Civil Procedure Rules intended to address was to protect advocates or firms of advocates being replaced without Notice and without their legal fees being settled. In as much as M/s Kibichiy & Co. Advocates were holding brief for M/s Hamilton Harrison & Mathews Advocates it was important that they come on record properly and should have filed a consent and/or made an application seeking leave as provided for under Order 9 Rule 10 of the Civil Procedure Rules."

On my part I, with respect, associate myself with the views expressed by learned Judge’s in the said case.

Accordingly, the application dated 19th March 2012 is incompetent and is struck out with costs to the respondent.

Dated at Nairobi this 18th day of December 2012

**G V ODUNGA
JUDGE**

Delivered in the presence of:

for the Applicant

for the Respondent