



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 383 OF 2008**

**JACK K. GITHAЕ.....APPLICANT/PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL**

**BANK LIMITED.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**WATTS ENTERPRISES.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**RULING**

The applicant instituted a suit against the Kenya Commercial Bank and Watts Enterprises, a firm of auctioneers praying that the latter be restrained by an order of permanent injunction from alienating, selling, transferring or dealing with the applicant's property known as L.R. No.NYANDARUA/KARATI/151. With the suit, the applicant also brought an application for temporary restraining orders pending the hearing and determination of that very application *interpartes*. The orders were duly granted on 17<sup>th</sup> December, 2008 and directions taken for *interpartes* hearing on 9<sup>th</sup> January, 2009.

From the record, no step was taken in the matter until 23<sup>rd</sup> April, 2010. In other words, after the interim orders were obtained, the application was never listed for *interpartes* hearing for nearly one year when the firm of Omwenyo and Company Advocates came on record for the applicant in place of Anthony Gikaria and Company Advocates. On the same day, the firm of Omwenyo and Company Advocates also filed a notice of withdrawal of the suit and a letter addressed to the Deputy Registrar, High Court, Nakuru to the effect that;

**“We appear for the plaintiff in this matter. We have instructions to withdraw this suit at this stage.**

**Kindly mark it as withdrawn.**

**Yours faithfully**

**Omwenyo and Company Advocates**

**(signed)**

**E. A. Omwenyo.”**

The letter was duly endorsed by the Deputy Registrar effectively signifying the withdrawal of the suit and is the subject of the dispute to which this ruling relates. The instant application seeks, among other things,

the striking out or setting aside of the notice of withdrawal and consequential orders. The only question the application raises is whether the firm of Omwenyo & Company Advocates had authority to withdraw the suit.

It is the applicant's contention that he had neither instructed the firm of Omwenyo and Company Advocates to take over the conduct of this matter nor to withdraw the suit. That he only requested them to explore ways of working with Mr. Anthony Gikaria Advocate to challenge any further dealings with the suit property. How else did the applicant expect the firm of Omwenyo and Company Advocates to do this without coming on record for him?

In my view, there were sufficient instructions to the firm of Omwenyo and Company Advocates, not to join Anthony Gikaria and Company Advocates but to replace them, hence the notice of change of advocates filed on 23<sup>rd</sup> April, 2010.

The next question is whether the firm of Omwenyo and Company Advocates had authority to withdraw the suit. First before I consider this question, it must be borne in mind that a plaintiff in civil litigation is at liberty at any time before the setting down of the suit for hearing, to discontinue his suit wholly against all or any of the defendants. See **Order 25(1)** of the **Civil Procedure Rules (Order 24 (1)** of the revoked rules).

Accordingly, M/s. Omwenyo and Company Advocates filed a notice of withdrawal of the suit and all applications. Elizabeth Omwenyo of M/s. Omwenyo and Company Advocates has given a graphic concatenation of events leading to the decision to withdraw the suit. She has deposed that the applicant visited her chambers on 20<sup>th</sup> April, 2010 and briefed her about this dispute indicating that the suit property had been sold. She went to the court and perused the file after which she formed a professional opinion that the interim orders of injunction having lapsed, the bank having gone ahead and sold the suit property; noting that summons were never served upon the respondent who consequently did not enter appearance or file defence; and in order to avoid costs, it was advisable to withdraw the suit altogether. She advised the applicant to sue the bank for damages arising from the sale of the suit property at a value below the market value and also to sue the firm of Anthony Gakaria and Company Advocates for professional negligence.

The advocate has further averred that upon receipt of her letter communicating the foregoing opinion, the applicant paid her another visit on 22<sup>nd</sup> April, 2010. It is on that day that the applicant instructed the advocate to take over the conduct of the matter from the firm of Anthony Gikaria and Company Advocates.

Upon taking over, she sent demand letters to M/s. Anthony Gikaria and Company Advocates and to the bank after which she prepared documents in order to file the suits against the two. Annexed to the advocate's affidavit, is a copy of an affidavit said to have been sworn and signed by the applicant in support of a proposed application against the bank.

A copy of a letter dated 4<sup>th</sup> July, 2010 annexed to the applicant's affidavit in support of the instant application marked JKG 2, confirms that the applicant indeed gave instructions to the advocate. The claims that the advocate made him to sign some blank papers to be used in filing a suit are incredible. The applicant is obviously an enlightened person, who certainly appreciates the implications of signing blank papers.

I come to the conclusion that the applicant instructed the firm of Omwenyo and Company Advocates to withdraw and indeed endorsed the withdrawal of the suit after the advocate gave him professional opinion. Whether or not that advice was sound is not relevant here.

Having voluntarily withdrawn the suit, the applicant cannot be heard to disown the instructions to M/s. Omwenyo and Company Advocates, simply because he has received another opinion. The granting of this application, namely to set aside the notice of withdrawal of the suit and to reinstate the suit would

serve no purpose, the suit property having been sold on 18<sup>th</sup> December, 2008, a day after the interim injunction was issued. It has been averred without being controverted that the respondents were not served with any restraining orders. If indeed the orders were served and the sale proceeded in violation, there is no record of any steps taken to bring an application for contempt. As a matter of fact between 17<sup>th</sup> December, 2008 when the injunction was granted and 23<sup>rd</sup> April, 2010 when the firm of Omwenyo and Company Advocates came on record, no steps were taken confirming my conclusion that the order was not served. The manner in which this matter was conducted cannot even be salvaged by the 02 rule.

The application fails and is dismissed with costs.

**Dated, Delivered and Signed at Nakuru this 9<sup>th</sup> day of February, 2011.**

**W. OUKO  
JUDGE**