



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 546 OF 2010**

**MALEZI PREPARATORY**

**SCHOOL.....PLAINTIFF**

**VERSUS**

**DANIEL AMOYO**

**LUMUMBA.....DEFENDANT**

**Coram: Mwera J**

**Omino for plaintiff**

**Omolo for defendant**

**Njoroge court clerk**

**RULING**

In the notice of motion dated 22.11.10 brought under sections 1A, 3, 3A, 63 (a) 79G, 95 of the Civil Procedure Act and the old Order XL1 rule 4 of Civil Procedure Rules the defendant/applicant prayed:

- i) that the firm of M/s Abuodha & Omino Advocates do assume the conduct of this matter in place of M/s Onindo & Associates;
- ii) that there be a stay of execution of the decree from the lower court at Milimani Commercial Court pending an intended appeal ; and
- iii) that leave be granted to the applicant to file an appeal out of time.

In a whopping 15 grounds it was stated that judgment at Milimani was pronounced on 3/6/10 in favour of the respondent. A decree was extracted, given to M/s Keysian Auctioneers who proceeded to proclaim the applicant's property on 7.9.10. The applicant filed Civil Appeal No. 265/10 on 9.7.10 but a stay order sought therein was disallowed because that appeal had been filed out of time and without leave of the court. That exposed the applicant to a resumed execution of decree – hence this application. If a stay is not granted, execution may paralyse the operations of the applicant. The amount claimed was deposited in court on 28/4/97, adding a further sh. 213,842/= on 15/9/10. That constitutes sufficient security for performance of decree. In the grounds, it may be observed, nothing is said of the change of advocates after judgement, neither was the then order III rule 9A Civil Procedure Rules alluded to in the heading of the motion.

In the supporting affidavit by James Abok Odera, the proprietor of the applicant school stated *inter alia* that when C. A No. 265/10 was filed it was in an honest belief that all was within time. But that was not so and it was struck out before its merits were gone into. Then it was deponed that when the *ex parte* judgement entered in the case was set aside, the applicant deposited sh. 84 110/= in court on 28.04.97 and added sh. 213,842/= on 15.9.10 – both sums being sufficient security for due performance. A stay ought to issue or seizure and sale of the applicant's tools of trade may ground its operations. Again nothing of compliance with Order III rule 9A Civil Procedure Rules.

The respondent told the court that the judgement sum since judgement on 12.9.96 plus interest and costs had risen to sh. 283 277/= as at 3.6.10. For over 13 years the respondent had not enjoyed the fruits of his litigation. But if the total sum of money deposited in court was released to the respondent he could not oppose the desired stay. And that no reason has been laid before the court as to why an appeal was not filed in time.

Both sides submitted essentially on the lines of the affidavits. However, the court was unable to satisfy itself that the applicant's lawyers were properly on record as per Order III rule 9A Civil Procedure Rules. There was no evidence of notification to the outgoing firm of lawyers (see prayer 1 above) that the present firm had been instructed to replace it after judgement had been entered. On closer perusal of the affidavits and submissions, the court was left with the impression that:

**“7. Regarding the amounts of Kshs. 84,110/= deposited in the subordinate court and Kshs. 213,842/= deposited in the High Court, I wish to state as follows:**

**a) The sum of sh. 84,110/= was deposited in the trial court in March 1997 as condition for the setting aside of a regular default judgement and**

**b) The sum of Ksh. 213,842/= was deposited in the High court as a condition for the issuance of an interim order of stay of execution pending the inter partes hearing of the application filed in Civil Appeal No. 265 of 2010”**

(underlining supplied)

The foregoing is extracted from the respondent's replying affidavit sworn on 29.11.10. But then there was another judgement of 3.6.10. With that the applicant ought to have complied with Order III rule 9A Of Civil Procedure Rules (now repealed):

**“9A. When there is a change of advocate, or when a party decides to act in person having previously engaged an, advocate, after judgement has been passed, such change or intention to act in person shall not be effected without the order of the court upon an application with notice to the advocate on record.”**

(underlining added).

Even without stating so in the application the applicant sought an order to change lawyers. But there has been no evidence that the outgoing M/s Onindo & Associates firm of lawyers was notified of the intended replacement or that that firm had written stating that it had no objection to being replaced. In sum, the firm of M/s Abuodha & Omino Advocates has irregularly moved to take part in the proceedings of the application, with judgement already on record, without notifying the outgoing firm. That cannot be and this application must be dismissed.

In the event M/s Abuodha & Omino Advocates had shown evidence or do show evidence that as at the time of filing this application on 22.11.10 they had notified the outgoing firm of the intended replacement and/or that firm had not objected to be replaced, this court could have been minded to grant the prayers, adding that C. A. No. 265/10 was filed in an honest belief, but one that was mistaken, that it had been filed within time. Leave could have been granted to appeal out of time but with a condition that part of the sum so far deposited in court be paid out to the respondent while the balance held as security for due performance of the decree in the event the intended appeal fails.

In sum this application is dismissed on the grounds that M/s Abuodha & Omino Advocates are not regularly on record in this matter to conduct any proceedings on behalf of the applicant until and unless that firm has notified the outgoing firm of the intention to replace it or that firm has not objected to be replaced.

Application is dismissed with costs.

Delivered on 9.3.11.

**J. W. MWERA**

**JUDGE**