



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL SUIT NO. 5 OF 2009**

**PALS WAGENAAR .....PLAINTIFF**

**VERSUS**

**JOEL E. D. NYASEME.....1<sup>ST</sup> DEFENDANT**

**WALTER EDWIN OMINDE .....2<sup>ND</sup> DEFENDANT**

**RULING**

The application dated 3<sup>rd</sup> June 2011 coming up for hearing on 19<sup>th</sup> October 2011 prays for several orders namely:-

- (1) Pending the hearing and determination of the instant application the Honourable court be pleased to grant an interim order of stay of execution of the default judgment and/ or decree issued against the 2<sup>nd</sup> defendant / applicant on the basis non appearance and or default of pleadings.**
- (2) The Honourable Court be pleased to review, rescind and or vary the consent order vide consent letter dated 7<sup>th</sup> March 2011 and filed in court on even date.**
- (3) Consequent to prayer (3) hereinabove being granted the Honourable court be pleased to strike out and expunge the amended plaint request for judgment and all consequently documents and/or pleadings filed by and or at the instance of the plaintiff / respondent.**
- (4) The Honourable court be pleased to set aside and/or vary the default judgment entered against the 2<sup>nd</sup> defendant / applicant herein.**

They further prayed for costs.

I have read the application in contention together with the replying affidavit by **Patrick J. O. Otieno Advocate**. I have also heard the counsels' oral submissions. The question before me is whether or not the consent entered on 7<sup>th</sup> March 2011 between the firm of **Otieno, Yogo & Co Advocates** acting for the applicants in the application dated 27<sup>th</sup> January 2011 and **Oguttu Mboya & Company** acting for the respondent was valid.

I have perused through the courts records and I am not able to see where the firm of Oguttu Mboya has filed its paupers of appointment so as to act for the respondent a **Mr. Walter Edwin Ominde**. The firm of **K'opot & Co Advocates** came on record on 22<sup>nd</sup> September 2009, styling themselves as acting for an intended co-plaintiff.

On 20<sup>th</sup> July 2010 the said Edwin Walter Ominde filed his application to be enjoined as a co-plaintiff. The same was allowed on 6<sup>th</sup> October 2010. Apparently Mr. Yogo was present and consented to the said application. Interestingly, on 27<sup>th</sup> January 2011 the firm of Otieno Yogo filed an application to

bring in Walter Edwin Ominde as a co-defendant. I believe this is still the same Walter Edwin Ominde who had been made a co-plaintiff earlier on 6<sup>th</sup> October 2010. The said application was served upon K'opot & Co Advocates.

The firm of K'opot did file grounds of opposition on 27<sup>th</sup> February 2011. That application was compromised by the consent dated 7<sup>th</sup> March 2011 which is the subject matter in contention. As I have indicated above the firm of Oguttu Mboya never filed any documents. All along the firm of Otieno Yogo Advocates acted and served the firm of Kopot & Co Advocates. In any case already the 2<sup>nd</sup> defendant had already come on record. Whatever the application dated 27<sup>th</sup> January 2011 was to serve is unclear.

Neither the parties who caused the confusion Mr. Oguttu Mboya nor Walter Edwin Ominde filed any affidavits to rebut or otherwise. Mr. Mboya if indeed he spoke with Mr. Otieno Advocate should have shed some light by filing the necessary affidavits.

Consequently, it's my considered opinion that the firm of Kopot & Co Advocates all along acted for the 2<sup>nd</sup> defendant as long as there was no such change of Advocates. In the premises I do allow the application 3<sup>rd</sup> June 2011 and order that:-

- (a) There is an error apparent on the face of the record and the consent order dated 7<sup>th</sup> March 2011 and filed on the same date is set aside.**
- (b) The amended plaint dated 18<sup>th</sup> March 2011 is struck out together with the request for judgment entered against the 2<sup>nd</sup> defendant.**
- (c) Cost to the applicant.**

Orders accordingly.

**Dated, signed and delivered this 2<sup>nd</sup> day of November 2011.**

**H. K. CHEMITEI  
JUDGE**

*HKC/aao*