

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Suit 24 of 2011

COSMAS K. NDAMBUKI

T/A UJUZI BIDII TAILORING.....PLAINTIFF

VERSUS

1. THE BOARD OF GOVERNORS

2. MBOONI BOYS SECONDARY SCHOOL.....DEFENDANTS

RULING

1. This is a ruling respecting an oral application (“Application”) by the law firm of A.K. Mutua & Co. Advocates to “withdraw” their Memorandum of Appearance dated 17th February, 2011 and filed in Court on 20th February, 2011 and the Statement of Defence dated 7th March, 2011 and filed in Court on the same day. These documents were filed by the law firm of A.K. Mutua & Co. Advocates in response to the Complaint dated 3rd February 2011. I have declined to grant the orders sought.

2. The defendant in this case is the Board of Governors for Mbooni Boys Secondary School (“School”). Once they were served with the Complaint, the Board apparently instructed the law firm of A.K. Mutua & Co. Advocates to enter appearance and file a defence. The law firm obliged and filed the documents described above. However, because the School is a public one, the Attorney General, on 19th April, 2011, filed yet another Memorandum of Appearance dated 4th April, 2011. This Memorandum of Appearance also purports to enter appearance for the Defendant in this suit.

3. Apparently, the parties were all unaware about the confusion regarding representation of the Defendant until 25th October, 2011 when the matter was coming up for hearing before Justice M.S.A. Makhandia. When the matter was called for hearing, Ms. Ngovi representing the law firm of Kingoo-Wanjau & Co. Advocates, for the Plaintiff, informed the Court that both the law firm of A.K. Mutua & Co. Advocates and the AG had entered appearance for the Defendant. Apparently, this revelation caught Mr. Mutua from the law firm of A.K. Mutua & Co. Advocate by surprise. He asked for time to seek more instructions from his clients. The Court granted a mention date of 23rd November, 2011.

4. On November 23, 2011, when the matter was called for mention, there was no one from the AG’s office in the courtroom but both Ms. Ngovi and Mr. Mutua were present in court. They asked me to set the matter aside because Mr. Mutua had instructions that somebody from the AG’s office was coming to attend to the matter. I did.

5. When I called the matter out again at 11:30 am, a Mr. Kuria from the AG’s office was present. He said that this was not “his matter” but if granted a further mention date the AG’s office would be able to sort out the issue of representation. Mrs. Nzau who was holding brief for Mr. Mutua then made a formal oral application to have the Memorandum of Appearance and the Defence filed by A.K. Mutua & Co. Advocates be “struck off the record so that the AG can continue to represent the Defendant.” Ms. Ngovi was concerned that all this confusion was causing a delay. Mrs. Nzau insisted that her instructions were that the Court should grant the oral application since Mr. Mutua was “withdrawing” the documents which he had filed.

6. The brief question is whether an advocate can make an oral application to withdraw his Memorandum of Appearance and Defence in this manner. I think not. Once the law firm of A.K. Mutua & Co. Advocates entered appearance for the Defendant, they became the official advocates for the Defendants. The statement of defence they filed is the official defence of the Defendant. They cannot simply recall the documents by orally “withdrawing” them. The proper procedure would be for the law firm to make a formal application to cease acting for the Defendant under Order 9, Rule 13. It is important to note that should this happen, the effect is simply that the law firm of A.K. Mutua & Co. Advocates would cease to act for the Defendant but the statement of defence would still be effective.

7. This rule is there for the protection of clients so that their advocates do not prejudice them by withdrawing without their knowledge. The party is, in fact, entitled to be served with such an application in person. Importantly, even where that happens all the documents filed and actions taken by the advocate when the advocate had instructions remain valid and effective. The advocate cannot seek to “withdraw” such documents as a way of ceasing to act for his client.

8. The logical conclusion is that I decline to grant the orders orally sought by Mrs. Nzau. If the law firm no longer has instructions to act in this matter, it should follow the proper procedure and file an appropriate motion to withdraw from acting. As far as I am concerned, there is really no “confusion” on representation at this point. The effective memorandum of appearance is the one filed by the law firm of A.K. Mutua & Co. Advocates on 17th February, 2011. By the time the AG purported to enter appearance on 19th April, 2011, there was already an effective advocate for the Defendant in the matter to wit A.K. Mutua & Co. Advocates. Unless and until the law firm of A.K. Mutua & Co. Advocates withdraws from acting for the Defendant in the manner prescribed by law, the Attorney General cannot be the recognized advocate for the Defendant.

DATED and DELIVERED at MACHAKOS this day 9TH day of DECEMBER 2011.

J.M. NGUGI
JUDGE