REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Case 142 of 2008

V. N. M. WOHORO, T/A WOHORO & CO. ADVOCATES.....APPLICANT

VERSUS

JUDY NJENGA.....RESPONDENT

RULING

Before me is a notice of motion made by the applicant purportedly under the provisions of Section 3A of the Civil Procedure Act seeking to set aside the consent order recorded between the applicant and the respondent on 19th April 2006 substituting Judith W. Njenga with Andrew Washington Ng'ang'a. The applicant contends that the said consent was a nullity. The applicant further prayed that all the proceedings subsequent to the date of the consent be declared a nullity and the same be set aside. The applicant prayed that the advocate-client bill of costs be taxed afresh on a date to be fixed. The grounds in support of the application are stated on the face of the application. The application is opposed. The respondent, Judith Njenga swore a replying affidavit in opposition to the application. She deponed that the application was *res judicata* as the issues raised therein had already been considered by a court of competent jurisdiction and therefore the same cannot be re-litigated. She further deponed that the applicant could not purport to tax its bill of costs against the respondent since at the material time there existed no advocate-client relationship between the parties herein. Though conceding that she was the administrator of the estate of Andrew Washington Njenga- deceased, she deponed that since the bill of costs was filed after the deceased's death, she could not be held liable for the same. She urged the court to dismiss the application with costs.

At the hearing of the application, I heard rival arguments made by Mrs. Karanu for the applicant and by Mr. Mutiso for the respondent. I have carefully considered the said submissions. I have also considered the pleadings filed by parties herein. I have read the ruling of Warsame J in regard to a previous application which had been filed by the applicant. The issues for determination by this court are twofold; whether the prayers sought by the applicant in this application have previously been considered by a court of competent jurisdiction and a decision thereof rendered. The second issue for determination is whether the applicant placed before the court sufficient grounds for the setting aside of the impugned consent order of 19th April 2006. As regards the first issue, it was evident as was submitted by the respondent that Warsame J did indeed consider and render a decision in regard to whether the respondent ought to have been substituted in the place of Andrew Washington Njenga – deceased in these proceedings. In part of his ruling, the learned judge stated thus:

"In my view, the attempt to substitute her name (the respondent) for that of her deceased's husband was an attempt or misplaced aggression against her. The taxation was irregular, unlawful and contrary to the provisions of the law. It was done against a deceased person … the whole thing is … meant to unnecessarily harass the respondent. The application is an abuse of judicial process and is dismissed with costs to the respondent."

It was clear from the above ruling that the learned judge rendered a decision in regard to whether the respondent can be substituted as a party in these proceedings in the place of her deceased husband. The

issue of substitution is therefore *res judicata*. It cannot be re-litigated under the guise that the applicant is seeking to set aside a consent order. If the applicant was dissatisfied with the decision of the court, it was at liberty to seek redress from a higher court. The issue of *res judicata* would alone determine this application.

However, for completion of record, it is important that the court addresses the second issue as to whether or not the applicant laid sufficient basis for the grant of the application to set aside the consent order. It is not in dispute, and it has indeed been conceded by the respondent that the deceased, Andrew Washington Njenga instructed the applicant firm to act on his behalf in a suit which the deceased had filed against the Cooperative Bank of Kenya Limited. The deceased died on 28th July 2005. The applicant sought leave from the court to cease to act on behalf of the deceased soon thereafter. The applicant filed its advocate-client bill of costs against the respondent herein on 27th February 2006 purportedly in her capacity as the administrator of the deceased's estate.

For some inexplicable reason, the applicant and the respondent recorded a consent on 19th April 2006 substituting the name of the respondent with that of the deceased. The applicant is an advocate of the High Court of Kenya. It cannot therefore be said that the applicant was not aware of the implication of what they were consenting to. The applicant did not plead any of the grounds such as mistake, undue influence and or duress that may persuade this court to favourably consider their application to set aside the consent order. The applicant cannot plead nullity with a view to impugning the consent. In the circumstances therefore, I hold that the applicant did not lay any or sufficient basis in law which would enable the court favourably consider their application.

The upshot of the above grounds is that the applicant's application dated 30th June 2009 lacks merit and is hereby dismissed with costs to the respondent.

DATED AT NAIROBI THIS 20TH DAY OF JANUARY 2010.

L. KIMARU

JUDGE