REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU Civil
Case 96 of 2005

FREDRICK MUGAMBI ….………… PLAINTIFF/APPLICANT

VERSUS

AFRICAN BANKING CORPORATION..................1ST DEFENDANT/RESPONDENT
NGURU E.S.Q. T/A NGURU ENTERPRISES AUCTIONEERS…...........2ND RESPONDENT/RESPONDENT
ABDUL RAHIM DAWOOD..3RD DEFENDANT/RESPONDENT

RULING

The plaintiff filed this suit in his capacity as the heir of the estate of Nicholas Riungu Mugambi, deceased. He sought a declaration that the first, 2nd and 3rd defendants fraudulently sold plot number *MERU MUNICIPALITY/BLOCK 1/215*. This property belonged to the estate of the Mugambi, deceased. When the suit came for hearing before court on 6th December 2005 the court on its own motion informed the plaintiff that the suit was incompetent *abinitio* because the court had perused Misc. Succession Number 25 of 2005 and had found that the plaintiff had only been authorized to file a suit on behalf of the estate of Mugambi, deceased, as against the consolidated bank. The consolidated bank is not a party in this case. On hearing the sentiments of the judge the plaintiff withdrew this case. He was condemned to pay costs to the defendants. The first defendant has moved to execute for costs by seeking a warrant of attachment and sale of the plaintiff's goods. The plaintiff by Notice of Motion dated 23rd November 2009 seeks that the costs be ordered to be paid out of the estate of Mugambi deceased. In the alternative he seeks that he be allowed to pay the costs by monthly instalments of Kshs. 5,000/=. As laid out at the beginning of this ruling there was no basis in law for the plaintiff to file this suit since he has no grant authorizing him to sue. Section 82 of the Law of Succession Act so states. The section in part states as follows:-

"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

(a) to enforce by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

b.…………………...……
c.…………………………..
d.…………………………..

The plaintiff had no power to enforce this suit. By provisions of that section, I find that the plaintiff was a busy body in bringing the present action. He was unauthorized by law and he cannot at this stage seek that the costs be paid by the deceased estate. On the plaintiff's prayer to be allowed to pay costs by instalments, order XX rule 11(2) of the Civil Procedure Rules provides that a party who seeks to pay a decretal amount by instalment after judgment has been entered can only be granted if the decree holder consents. In the alternative an applicant

should show sufficient cause why payment should be ordered to be made by instalments. That order provides as follows:-

"11 (2) After passing of any such decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown order that the payment of the amount decreed by postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise, as it thinks fit."

For our case, the plaintiff should have sought to pay by instalments when the order for costs was made or when taxation was carried out. Taxation was on 23rd June 2009. The plaintiff needed to show sufficient cause why he should be ordered to pay by instalment. The plaintiff stated that he is a retired civil servant and is now over 70 years old. He stated in his affidavit that he has no regular income and is therefore unable to raise the amount demanded by the first defendant. That in my view does not show sufficient cause required under Order XX Rule 11(2). The plaintiff needed to be candid on how much money he has because after all he is able to exist. He therefore must be in receipt of some income. He failed to satisfy order XX Rule 11(2) and court cannot grant the order he seeks, that is, to pay the first defendant's costs by instalments. The affidavit on behalf of the first defendant in reply to the plaintiff's application was filed by the advocate for the first defendant. The plaintiff objected to the first defendant relying on that replying affidavit on the basis that it was filed by the advocate. To support that opposition, counsel relied on the case Sireret Farmers Co. Ltd Vs. Ododa [2000] KLR. In that case, the court held as follows:-

"An advocate acting for a party should not make a sworn affidavit on disputed matters."

In that case, the court referred to the case of Kuya/Investments Ltd and Another Vs. Kenya Finance Corporation and others Nairobi No. 3504 of 1993 by Justice Ringera, as he then was, and quoted the following passage:-

"The first objection is well founded. The applicant's counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge and information and belief. It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box."

He also relied on the case Oduor Vs. Afro Freight forwarders [2002] KLR. The court in that case held:-

"The replying affidavit was sworn by the plaintiff's advocate and it is not stated that he had the plaintiff's authority to do so. That affidavit was therefore sworn by a stranger as the deponent fails to reveal his source authority to swear it."

Learned counsel for the first defendant Mr. Mwirigi in response argued that what was deponed in the replying affidavit was what was constituted in the record of the court file. I have looked at that affidavit and I find that it simply sets out what has taken place in this case. That deposition cannot be said to be controversial. It certainly cannot be termed as one where an advocate has deponed to matters of evidence. The opposition raised by the plaintiff is therefore rejected. The Advocates (Practice) Rules Rule 9 provides as follows:-

"9. No Advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear."

From that rule, it is clear that there is no blanket refusal for an advocate to give evidence in a case he is handling. An advocate by that Rule should not appear where he is likely to give evidence or is likely to be called as a witness. This cannot be said to be so in this case. As stated before, the replying affidavit contains matters reflected in the proceedings of this case. Even if the advocate had not brought to light those matters, this court would still have referred to them from the proceedings. In the end, I find that the Notice of Motion dated 23rd November

2009 is without merit and is dismissed with costs to the first defendant. The order of stay granted to the plaintiff in this matter is hereby vacated.

Dated and delivered at Meru this 12th day of March 2010.

MARY KASANGO
JUDGE