



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Civil Application 3958 of 1991

OCEANFREIGHT TRANSPORT COMPANY LTD.....PLAINTIFF

VERSUS

PURITY GATHONI GITHATE.....1ST DEFENDANT

SAMUEL KAMAU MACHARIA.....2ND DEFENDANT

RULING

1. Before the court is an application by way of Notice of Motion dated 1st March, 2010 premised under Order III Rule 9A and order L Rules, 1 and 3 of the Civil Procedure Rules.
2. It seeks two prayers, first being the leave to be granted to the firm of M/s Mwaniki Gachoka & Co. Advocates to come on record for the Defendants in place of firm of M/s Waruhiu K'owade & Ng'ang'a Advocates and secondly that the costs of this application be borne by the Defendants/Applicants.
3. The said application is supported by grounds set forth on the face of the application which are two: viz:

(1)The defendants has (sic) instructed the firm of M/s Mwaniki Gachoka & Co. Advocates, in place of Waruhiu K'owade and Ng'ang'a Advocates, and

(2)The rules of procedure require that an order has to be sought in order to effect the change in representation.

4. The application is further supported by the Supporting Affidavit sworn by Mwaniki Gachoka, an advocate on 1st March, 2010. It really reiterates the grounds as aforesaid and avers one more fact that the Summary Judgment was entered in the suit on 23rd October, 2001
5. He further avers that his firm has instructions to file the application relating to a decree obtained in this matter in terms of the annexed draft application.
6. In the annexed draft application, specifically, in the draft Certificate of Urgency, it is alleged that in the Ruling on Summary Judgment delivered on 23rd October, 2001 the court did not make any reference on the interest payable on the principal sum and the rate at which the said interest shall be calculated as what was ordered was – namely:-

“ I therefore allow the application and order that judgment be entered in favour of the plaintiff in the sum of Kshs.500,000/- against the Defendants jointly and severally as prayed in the plaint.”
7. It also mentions the application of 28th February 2002 filed by the Plaintiff seeking inter alia the interpretation of the Ruling and Plaint and interpreted the same to include an award of interest at 19% p.a. compounded monthly from the 6th day of December, 1986 until payment of the principal amount in full.
8. With the above interpretation, it is alleged that the decretal sum now stands at Kshs.40,000,000/=.

9. It is further stated that the plaintiff has since moved to execute the decree by way of seeking bankruptcy orders in the High Court Bankruptcy Petition Nos. 25 and 26 of 2009.
10. In short, in the said Certificate of Urgency, it is contended that the plaintiff may enforce the decree the contents whereof are being disputed.
11. The Draft Notice of Motion annexed to the application is premised under Sec. 1A, 1B, 3A, 26 and 80 of the Civil Procedure Act and Order XLIV, order XX Rule 6 and 7 and Order XXI Rule 22 of Civil Procedure Rules.
12. It seeks the review and setting aside of the decree issued on 29th November, 2001 and in the alternative, it prays for review by way of clarification of the Ruling in question.
13. The draft application is supported on numerous grounds set forth on its face as well as draft supporting affidavit of S. K. Macharia the 2nd Defendant.
14. It reiterates the grounds mentioned in the draft certificate of urgency and furthermore reiterates the three prayers made in the plaint. it is contented that the order made in the Ruling as specified hereinbefore did not include the interest of 19% per annum and after the Plaintiff withdrew its application of interpretation on 22nd March, 2002, his two advocates on record previously did not move this Hon. Court to clarify/interpret the said ruling to protect their legal rights and the court is urged not to vest the apparent mistakes and lapses of the previous advocate on the Defendants/Applicants.
15. The Plaintiff strenuously opposes the application and through the replying affidavit sworn by its Managing Director on 12th March, 2010, has mentioned many

applications filed by the Defendants which are dismissed by several courts and most of them are categorized as an abuse of court process and I am urged also to follow the suit.

16. He referred to recent ruling of **Kimaru J.** of 2nd July, 2009 who observed:-

“... in the light of their past concerted and determined efforts to completely avoid being held accountable to satisfy a valid decree of the court... the debtors are abusing the due process of this court to achieve the sole purpose of frustrating the execution of a valid decree that is not subject to any appeal.” (emphasis mine).

17. It is also stressed that the Defendants have repeatedly subverted and abused the machinery and the process of this court to delay, obstruct and prevent the early disposal and conclusion of these proceedings. It is averred that six different Rulings delivered in the last few years by the High Court, the Constitutional Court, the Bankruptcy Court and the Court of Appeal have given stern notice to stop them from misusing the process and machinery of our court.

18. The background of this case, in short, as averred in the replying affidavit is as under.

19. After the Judgment was entered in October, 2001 the defendants did not appeal against the Judgment or apply for its review and when the application to commit them to Civil Jail was filed, a constitutional reference was filed. The result whereof was the automatic stay of all proceedings vide Legal Notice of 133 of 2001 (known as Chunga Rules!!)

20. The reference was not prosecuted for almost six years upto June, 2008. The Plaintiff's application to withdraw the application to commit the defendants to civil

jail was opposed. Eventually the plaintiff had to file an application to lift the stay order which was granted allowing the plaintiff to execute its decree.

21. The court notes in the said Ruling which was delivered on 13th June, 2008 – in the first paragraph thereof – to wit:-

“... A decree was thereafter extracted and the same is not in dispute. The amount of judgment debt stood at Kshs.8,260,583/85 on 25th October, 2001 and by February, 2007, it has risen to Kshs.22,671,784/20” (emphasis mine)

22. The said Ruling obviously is not appealed against.

23. After that, the plaintiff applied for and court granted two bankruptcy Notices on 10th July, 2008 which was disputed and sought to be dismissed by the defendants. The Ruling after lengthy proceedings was delivered on 27th May, 2009. From that date, the defendants have filed four more applications for stay of proceedings in High Court as well as Court of Appeal. I have referred to Ruling made by **Hon. Kimaru J.** on 2nd July, 2009.

24. The Court of Appeal in its Ruling delivered on 16th October, 2009, observed:

“On whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that the same will not be rendered nugatory. We recognize the applicants’ argument that there is a threat of Receivership orders being made against them which would seal their fate. But we are conscious that the Judgment debt which stands at staggering sum in excess of Kshs.30million continuous to rise, and must indeed be paid. We also note, once again, that no appeal was ever preferred against that Judgment.”
(emphasis mine)

25. Similar was the fate of third application which was dismissed by *Hon. Koome J.* on 5th February, 2010 who observed:

“... A determination of those issues is a regurgitation of the same issues that were ruled upon by Kimaru J. and Court of Appeal. Asking this court to revisit the same issues is an abuse of the court process.”

26. The last attempt to stay the proceedings was also thwarted by Court of Appeal when the Court was presented with the similar intention of bringing an application in this court to review the issue of interest and set aside the decree on the grounds that the judgment of 23rd October, 2001 did not give any interest to Plaintiff, the court observed:

“Upon a careful and sympathetic consideration of the matter, I am not persuaded that the motion is urgent as to deserve a priority hearing. I decline to certify as urgent.”

The said application was filed by the firm of M/s Kinoti Kibe & Co. Advocates, a different firm than the one before this court.

SUBMISSIONS AND CONCLUSION

27. In the joint submissions from the two counsel for the Applicants, namely Mr. Gatonye and Mr. Gachoka, it was contended in short that the right of the litigant to choose to be represented by an advocate of his choice should not be trifled and that it is subject to the control of the court as stipulated in Order III Rule 9A of Civil Procedure Rules. The party could err in its choice but it is the choice of a litigant.
28. It was stressed that mentions and emphasis on earlier proceedings and Rulings are

not relevant for the purposes of this application and a lawyer who intends to come on record cannot be barred on the grounds of likelihood of the abuse of court and that what is intended to be done by the present lawyer, as stated in paragraph 6 of replying affidavit, is nothing but the speculation and cannot be the basis for the refusal of this application. I may place on record that the said paragraph 6 (d) of the replying affidavit mentions that the new lawyers could have advantage of pleading ignorance on questions of laxity and delay.

29. It is contended further that the application honestly discloses its purpose and has annexed the draft application for review and thus the matters raised can be heard and determined on its merits. Moreover, the two previous lawyers have shown that they do not have any objections to the new lawyers coming on record and the applicants has shown total exposure of their intention.
30. Mr. Gachoka submitted that the mischief which Order 3 Rule 9A intended to address was to protect the interest of previous Advocates on record after the Judgment is entered. Mr. Raiji on the other hand, submitted that the purpose of Order III Rule 9A of Civil Procedure is larger than contended. Before the enactment of Rule 9A of Order 3, the parties could change as many advocates as they chose but now it is under the discretion of the court which is unlimited although has to be exercised judiciously without caprice and after balancing the interest of both parties before the court. Each case poses its own peculiar circumstances and the court shall consider all the relevant factors including the background of the case, the prejudice which a party would suffer as a result of grant or non-grant of the orders sought and also the factor whether the application is brought in good faith. Now by advent of new sections of overriding objectives of the Act, the court can also look at the objectives enumerated in Sec. 1A

and 1B of Civil Procedure Act. The court now is obligated to facilitate just, expeditious, proportionate and affordable resolutions of the Civil dispute and interpret the provisions of law to give effect to those overriding objectives. The party and an advocate before the court is also under a duty to assist the court to further the above objectives.

31. With the above observations, I do tend to agree that the scope of Order III Rule 9A is not limited as has been submitted on behalf of the Applicants.
32. It was also brought to the attention of the Court that M/s Kamau Kuria & Advocates are, as at the date of hearing of the application, still on record for the plaintiff in the Bankruptcy case which is fixed for hearing on 25th March, 2010. It was in short contended very strenuously that the application is an abuse of the court process and the crowning factor is the inordinate delay in bringing in the intention of filing the application for review.
33. I have considered the rival arguments and the pleadings before the court and specifically the submissions that the issue whether the decree conform to the judgment has been raised for the first time and that issue is not been heard and determined in any of the Rulings made in the related proceedings of this matter. A question was posed that the issue of delay has been raised in doing what? The submission was that the application for change of Advocate can be made at any time.
34. I must admit the Applicants have presented very interesting points but armed with the provisions of Sec. 1A and 1B of the CPA, this court is able and should try to cut the veil of technicalities brought before it and could go behind the background of this matter and get support from the other off-shoots of this case.

35. The applicants intend to change the Advocates on the basis that their legal protections were not catered for by the previous firms of the Advocates and that they ought to have filed an application for review of the judgment delivered in October, 2001 and decree issued thereon. I have mentioned hereinbefore that the Court in Constitutional matter and High Court and Court of Appeal in Bankruptcy matter have indicated that the Decree is not disputed and that the decretal sum grows in amount by days. Moreover, the Respondent had immediately after the Judgment, filed an application to get clarification and/or interpretation of the decree which application was withdrawn on 22nd March, 2002. With these facts, was there not sufficient notice to the applicants also?

I have perused the draft application and certificate of urgency annexed to the present application. The element of delay in now intending to file the proposed application is not even attempted to be explained at all apart from putting the blame of lack of legal protection from the previous Advocates. The complaint of colossal decretal sum is nothing but a result of trying to avoid the execution of a decree made ten years before, or to get it properly assessed at the first available point if it was a mistake or an error apparent on the face of the record. I reiterate that the decree has been recognized as valid by several courts.

In my considered view, this application is once again a very innovative or clever move by the applicants to avoid the payments of the decretal sum. On the façade of an innocuous application lies the intention not to obey the decree of a court. After I have observed as above, I cannot deny the submissions by the Advocate of the Decree-holder that the application dated 1st March, 2010 is an abuse of the court process. The litigation must come to an end and definitely after ten years.

The application of 1st March, 2010 thus is dismissed with costs.

Dated, Signed and delivered at Nairobi this **19th** day of **April, 2010**.

K. H. RAWAL

JUDGE

19.04.2010