



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISII  
CIVIL CASE NO. 40 OF 2001

M/S RAMJI MEGJI GUDKA ..... PLAINTIFF  
VERSUS

ALFRED MORFAT OMUNDI MICHIRA ..... 1<sup>ST</sup> DEFENDANT  
GETEMBE THRIFT CO. LTD. .... 2<sup>ND</sup> DEFENDANT  
THOMAS ORESI OMWOYO ..... 3<sup>RD</sup> DEFENDANT

**RULING**

There are two applications that came up for hearing on 22<sup>nd</sup> July 2010. The first one was by G.J.M. Masese Advocate dated 13<sup>th</sup> July 2010. The application sought the order that:

**“1. That G.J.M. Masese be regarded as the sole advocate for the 2<sup>nd</sup> defendant instead of M/s Anyona Mbunde & Company Advocates.**

**2. Costs of this application be provided.”**

The second application was filed by M/s Minda & Company Advocates for and on behalf of the 1<sup>st</sup> defendant. The application is dated 16<sup>th</sup> June 2010 and the same sought several orders of review in respect of proceedings of 8<sup>th</sup> June 2010. The orders sought to be reviewed were made in pages 2, 3 and 5 of the typed proceedings which were annexed to the said affidavit.

In respect of the first application, an affidavit sworn by **Vincent Tumbo Siro** stated that he is the personal representative of the late Siro Mogaka, who was a director of the 2<sup>nd</sup> defendant. On 15<sup>th</sup> June, 2001 the 2<sup>nd</sup> defendant appointed Mr. G.J.M. Masese as its Advocate. Thereafter Mr. Masese proceeded to file a notice of appointment of advocate under **Order III Rule 8** of the **Civil Procedure Rules**. On 27<sup>th</sup> July 2006, M/s Anyona & Company Advocates filed a notice of change of advocates for the 2<sup>nd</sup> defendant. The notice showed that the said advocates had come on record in place of Mr. G.J.M. Masese. But Vincent Tumbo Siro says that M/s Anyona Mbunde & Company had no authority of the 2<sup>nd</sup> defendant to do so. He said that Siro Mogaka was the Secretary of the 2<sup>nd</sup> defendant and is the one who had given instructions to Mr. Masese. The deponent further stated that M/s Anyona Mbunde & Company Advocates had not been given such instructions and prayed that Mr. Masese be recognized as the sole advocate for the 2<sup>nd</sup> defendant.

That application was opposed by the 2<sup>nd</sup> defendant vide a replying affidavit sworn by **John Mogaka**, one of the Directors/Shareholder of the 2<sup>nd</sup> defendant. He stated that although Mr. Masese was on record for the 2<sup>nd</sup> defendant since sometimes in 2001, in 2006 the Directors of the company appointed M/s Anyona Mbunde to act for it in place for Mr. Masese. A copy of the minutes of the Directors of the 2<sup>nd</sup> defendant dated 17<sup>th</sup> December, 2006 in respect of the above appointment were annexed to the affidavit of John Mogaka. Subsequently, Mr. Masese filed an application dated 26<sup>th</sup> July, 2007 seeking to be reinstated as the advocate for the 2<sup>nd</sup> defendant instead of M/s Anyona Mbunde & Company. The deponent further stated that the two advocates agreed in principal that both of them would be on record for the 2<sup>nd</sup> defendant and they had remained so until Mr. Masese filed his current application.

John Mogaka further deposed that Vincent Tumbo Siro was unknown to the 2<sup>nd</sup> defendant and

hence he is a stranger who cannot swear an affidavit for and on behalf of the 2<sup>nd</sup> defendant. He further stated that the company never held any meeting to appoint Mr. Masese as its advocate.

Having carefully perused the record, it is evident that as at 12<sup>th</sup> March, 2007, it is Mr. Anyona who was on record as the advocate for the 2<sup>nd</sup> defendant. On that date Mr. Masese did not feature anywhere. However, when the matter was first listed before me on 7<sup>th</sup> July 2008 both Mr. Masese and Mr. Anyona were recorded as appearing for the 2<sup>nd</sup> defendant. That has been the position until Mr. Masese filed the present application. All along Mr. Masese acted as the lead counsel. However, the legal position is that there is a notice of change of advocates by Mr. Anyona Mbunde in place of Mr. Masese. The application by Mr. Masese dated 26<sup>th</sup> July, 2007 was scheduled to be heard on 30<sup>th</sup> January 2008 but that was not to be. That being the case, Mr. Masese cannot purport to push out Mr. Mbunde. It is the latter who is officially on record for the 2<sup>nd</sup> defendant. But considering that the two advocates have remained together on record without Mr. Mbunde raising any issue about Mr. Masese's continued appearance inspite of the notice of change aforesaid, they are both estopped from challenging the obtaining position. If any of them were to be removed from record then it would be Mr. Masese.

In view of the foregoing, the application by Mr. Masese must be dismissed with costs to the opposing parties.

I now turn to the 1<sup>st</sup> defendant's application.

Upto to 8<sup>th</sup> June 2010, the advocates who was on record for the 1<sup>st</sup> defendant are M/s Nyatundo & Company Advocates.

On 16<sup>th</sup> June M/s Minda & Company Advocates filed a document headed:

**“NOTICE OF APPOINTMENT OF ADVOCATES (ADDITIONAL)**

**TAKE NOTICE that the 1<sup>st</sup> defendant herein (ALFRED MORFAT OMUNDI MICHIRA) has appointed the firm of M/S MINDA & COMPANY ADVOCATES, GOLF ARCADE, 1<sup>ST</sup> FLOOR, P.O. BOX 3572, KISII to act for him in this matter alongside the firm of ..... (blank).**

**TAKE FURTHER NOTICE that all future correspondences pertaining to this suit shall be addressed to them.”**

The aforesaid document is invalid in law. It does not conform to the requirements of **Order III** of the **Civil Procedure Rules**. It is neither a notice of change of advocates as envisaged under **order III rule 6** and neither is it a Notice of Appointment of Advocates in terms of **Order III rule 8. Rule 8** above states as follows:

**“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”**

M/s Nyatundo & Company Advocates are still on record for the 1<sup>st</sup> defendant and whereas the 1<sup>st</sup> defendant was at liberty to appoint any other advocate to act alongside M/s Nyatundo, it was improper for M/s Minda & Company Advocates to purport to have taken over conduct of the 1<sup>st</sup> defendant's case by stating that all future correspondence pertaining to this suit should be addressed to them.

Where a party, having appointed an advocate to represent him, subsequently decides to appoint another advocate or advocates to act for him together with the first advocate, it is the latter who remains on record and only that advocate (or through him) can any document be filed. If it were not so there would be chaos and confusion as it will mean that any of the advocates can file documents without consent and or awareness of the others. It is upto the advocates to agree who the lead counsel is.

As long as no notice of change of advocates was filed, M/s Nyatundo & Company are the recognized advocates for the 1<sup>st</sup> defendant. It follows therefore that the application that was filed on 16<sup>th</sup> June 2010 by M/s Minda & Company Advocates was filed by a stranger. That in itself renders the application defective in law.

That notwithstanding, I will consider the merits of the application as though it were properly on record.

On 8<sup>th</sup> June 2010, Mr. Nyatundo told the court that the Chief Land Registrar had been served with witness summons to attend court but she had failed to do so. He referred the court to an affidavit of service that had been filed on 12<sup>th</sup> May 2010. He asked the court to issue a warrant of arrest against the Chief Land Registrar for having failed to attend court as required. Upon perusal of the affidavit of service the court was not satisfied that the Chief Land Registrar had been served personally and therefore declined to issue a warrant of arrest as sought.

In the application for review, the 1<sup>st</sup> defendant now state that if the trial judge had properly considered paragraphs 4, 5 and 6 of the affidavit of service he would have realized that the Chief Land Registrar had been served personally. In his view therefore, there is an error apparent on the face of the record and prays that the court reviews the order it made in refusing to issue a warrant of arrest.

That application was opposed by the plaintiff and the 2<sup>nd</sup> defendant. I need not set out the grounds of opposition that were articulated by Mr. Oguttu for the plaintiff. Mr. Bosire, for the 3<sup>rd</sup> defendant, left the matter to the court's discretion.

This court considered the contents of the aforesaid affidavit of service. Prior to 8<sup>th</sup> June 2010, the court had made a very specific order requiring the Chief Land Registrar to be served in person. The court's appreciation of the affidavit of service was that although the process server purported to have been taken to the office of the Chief Land Registrar by a Legal Officer known as Mrs. Susan, the process server did not effect personal service upon the Chief Land Registrar and if at all he did, there was no sufficient evidence to that effect. In paragraphs 5, 6 & 7 of the affidavit of service the Process Server stated as follows:

**"5. That the Chief Land Registrar asked the Legal**

**Officer to receive summons and take the necessary action.**

**6. That the Legal Officer then received the witness summons by stamping with the official stamp at the reverse of my service copy and duly signed.**

**7. That what is deponed to herein is true to the best of my knowledge, information and belief."**

**Order XV rule 8 of the Civil Procedure Rules states:**

**"Every summons under this order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule."**

**Order V rule 13 states as follows:**

**"Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgement of service on the original summons:  
Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served."**

The Process Server did not ask the Chief Land Registrar to sign the witness summons in acknowledgement of service. That was necessary since the court had ordered that she be served in person. Secondly, although it was alleged that the Legal Officer stamped and signed at the reverse of the witness summons, there is no signature on the reverse of the witness summons. There is only a stamp. In such circumstances, a court cannot order arrest of a witness on the ground that he or she has refused to

attend court having been duly served with witness summons. There must be proper evidence that the witness acknowledged service by appending his signature on the witness summons or having been requested to do so refused to sign the original summons. That was not demonstrated.

Furthermore, the witness summons that was purportedly served upon the Chief Land Registrar did not comply with the mandatory requirements of **order XV Rule 2 (1)** of the **Civil Procedure Rules** which requires the party applying for a summons, before the summons is granted, to pay into court sufficient amount of money to defray the travelling and subsistence expenses of the persons summoned. It was the duty of the 1<sup>st</sup> defendant to comply with that requirement.

In my view therefore, I am not satisfied that there was any error apparent on the face of the record. In **NATIONAL BANK OF KENYA LTD. –VS- NDUNGU NJAU**, Civil appeal No. 211 of 1996, it was held that an error or omission must be self evident and should not require an elaborate argument to be established. It cannot be a ground for review where the applicant argues that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. **“Misconstruing a statute or other provision of law cannot be a ground for review”**. In such an instance a party is at liberty to exercise his constitutional right of appeal.

The other ground upon which the 1<sup>st</sup> defendant sought an order of review at page 3 of the typed proceedings is where it was alleged that the record shows that I had written that the plot in dispute now belongs to the plaintiff. It is apparent that the aforesaid statement was made by **John Mogaka, DW1** in his examination in chief. It is not a conclusion of the trial judge. That cannot be said to be an error on the face of the record.

Thirdly, all the parties had closed their respective cases and agreed by consent that they would file written submissions. There is therefore no basis of re-opening the case and compel the Chief Land Registrar to testify on behalf of the 1<sup>st</sup> defendant.

All in all, I find no merit in the 1<sup>st</sup> defendant’s application and dismiss the same with costs to the plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**DATED, SIGNED AND DELIVERED AT KISII THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2010.**

**D. MUSINGA  
JUDGE.**

**30/9/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the Plaintiff

Mr. Minda for the 1<sup>st</sup> Defendant

Mr. Sagwe HB for Mr. Masese for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

**COURT:** Ruling delivered in open court on 30<sup>th</sup> September 2010.

**D. MUSINGA  
JUDGE.**

**Mr. Minda:** I seek leave to appeal. I also seek an informal stay of proceedings for a period of 7 days to enable me file a formal application for stay.

**D. MUSINGA  
JUDGE.**

**Mr. Oguttu:** The order given by this court is an order in the negative. It cannot be the basis of any application for stay. No leave to appeal is necessary. The application that has been disposed of was filed when parties were about to file their submissions and get a date for judgment. The application is calculated to delay finalization of this matter.

**D. MUSINGA  
JUDGE.**

**Mr. Sagwe:** I have nothing to say.

**D. MUSINGA  
JUDGE.**

**Mr. Minda:** I sought stay of proceedings. Judgment has not been delivered so proceedings are still on.

**D. MUSINGA**

**JUDGE.**

**COURT:** As regards the application for leave to appeal, I believe the first defendant has an automatic right of appeal. On the second limb of the application, I grant temporary stay of proceedings to enable the first defendant file his intended formal application. This stay shall be for a period of 7 days.

**D. MUSINGA**

**JUDGE.**