



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**Civil Suit 43 of 2008**

**JULIUS MWIVITHI NZUKU.....PLAINTIFFS**

**VERSUS**

**FERNANDO VISCHI & 21 OTHERS.....DEFENDANTS**

**RULING**

There are two applications coming up for hearing today – application dated 4-7-08 and application dated 1-8-08. The hearing of these applications have in the past been confirmed served .....for hearing today. All allowing, Mr. Maosa was shown and did appear for 1<sup>st</sup> – 6<sup>th</sup> defendants up until 29<sup>th</sup> August when the firm of Oraro Rachier notified court of their take over in this matter. Now it emerges that Mr. Odera who is from the firm of Oraro and Rachier is not able to attend today's hearing as he was only instructed on 29<sup>th</sup> August. Of course parties have a right to choose which advocate should represent them, even at the eleventh hour, and they can certainly change advocates even in the middle of a hearing.

Now having done that, then should Mr. Odera be granted indulgence on the basis that he has not had chance to look at the papers filed and that he is on leave?

It is pointed out that Mr. Riitho is based in Nairobi and at the expense of his business trip – I think that is intended to evolve sympathy – by July 2008, he was already aware of hearing being set for 1-9-08 and if he chose to travel to London and then come back in the middle of his business trip – then that really has nothing to do with whether the orders seeking adjournment should be granted or not.

The other issue is that Mr. Odera has not had a chance to look at the documents – to which Mr. Wasunna stated that it means he has not been instructed and should therefore never have taken over this matter. That would be rather myopic way of looking at it – Mr. Odera has been instructed to take over the conduct of this matter – that is why he has filed a notice of change of advocate. However at this point his instructions seem limited in view of the fact that he has not seen the pleadings and other documents. There are two affidavits of service showing that the parties were served the first six having been served through their advocate Mr. Maosa- the affidavit by John Kilonzo informs this.

Mr. Gor says the other affidavit only refers to service of an order and a certificate of urgency – that is the content of paragraph 2 of that application – it does not state whether along with the certificate of urgency, there was a chamber summons served and this is where Mr. Odera seeks to find his life here that what was he to respond to since there was no application served. However the truth of the matter is simply this

– Mr. Odera agreed to take over this matter he has not been fully appraised of it, he is on leave and is not ready to proceed today.

If at all he made attempts to reach Mr. Ritho's office then this has not been demonstrated. It would also seem that Mr. Gor was instructed to attend court simply for purposes of applying for an adjournment. It is not stated where Mr. Odera is spending his leave, but my perception is not the leave which is an issue, it is simply a question of unpreparedness per se.

I had granted temporary orders against the defendant – deliberations to stem the multiple applications and counter applications which had already began in this matter. To wait until the last minute for this court to put aside a matter that was chequered a month ago to my mind is taking too much for granted. The court will not grant an adjournment on the basis that counsel took up instructions fully aware that he was on leave and would not attend today's hearing.

The orders of 22<sup>nd</sup> August and Certificate of Urgency referred to in Kamau Mwangi were in any event served – on the Commissioner of Lands and the anomaly has nothing adverse against the 1<sup>st</sup> – 6<sup>th</sup> defendant. Both Maosa and Mr. Odera became aware that the matter was for hearing today and ought to have been so prepared. I decline to adjourn the matter and it will proceed to hearing at 2.30pm.

Dated and delivered this 1<sup>st</sup> day of **September 2009** at Malindi.

**H. A. Omondi**

**JUDGE**

**1-9-08**

MR. GOR

I seek leave to appeal against the ruling.

**H. A. Omondi**

**JUDGE**

**1-9-08**

**Order**

Leave to appeal against the content of the ruling is granted but it will not operate as stay to the proceedings already conferred for 2.30pm because to do so will be a roundabout way of adjourning the matter.

**H. A. Omondi**

**JUDGE**

**1-9-08**