



STANLEY GATITHI NGWERIINI.....PLAINTIFF/RESPONDENT

(suing as the legal representative of the Estate of Paul Kinyua Gitithi deceased)

Versus

PAUL KARANJA GITAU.....DEFENDANT/APPLICANT

RULING

This is Chamber Summons dated 28th September 2009 filed by the Defendant/Applicant under Order 1XB Rule 8 and Order XXI Rule 22 of the Civil Procedure Rules and Sections 3 A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law praying for orders:-

1. spent

2. spent

“3 THAT this Honourable Court be pleased to set aside the judgment herein entered on 19th December 2008 and all the consequential orders arising therein

4. THAT the suit be heard de novo on a date to be fixed

5. THAT this Honourable Court do issue such other or further orders as it may deem fit and just to grant.”

Prayer 6 is for costs of the Chamber Summons.

Grounds on the basis of which the Chamber Summons is filed are found on the face of the Chamber Summons which is supported by the Affidavit of the Applicant deponed on 28th September 2009 and filed together with the Chamber Summons on 29th September 2009.

The Chamber Summons is opposed by the Plaintiff/Respondent relying on his Replying Affidavit dated 12th October 2009.

Having heard oral submissions thereon from Mr. Mbigi Njuguna, Counsel for the Applicant and Mr. Onyango of J.K.Kibicho & Company Advocates, for the Respondent; the brief position is as follows:

The Applicant’s motor vehicle was involved in a fatal traffic accident as a result of which the Respondent filed this Civil Suit against the Applicant whose accident motor vehicle had been insured by Blue Shield Insurance Company Limited. Having been served with the Complaint and Summons to enter appearance, the Applicant, without involving Blue Shield Insurance Company Limited, instructed Aboki Begi & Co. Advocates to defend him. As a result Aboki Begi & Co. Advocates entered appearance for the Applicant and filed and served a defence and unfortunately ended their service to the Applicant there. They were not responding to subsequent communications from the Respondent’s Counsel while at the same time kept the Applicant in darkness as to what was going on in the suit.

In the end, although duly served with hearing notice, hearing of the suit proceeded in the absence of the Defendant's Advocates as well as the absence of the Defendant and on 19th December 2008, judgment was entered against the Defendant.

The Defendant did not wake up until he realized the Plaintiff was taking steps to execute the judgment, the Plaintiff having filed a declaratory suit HCCC No. 205 of 2009 against the Insurance Company and having served the Defendant personally with Warrant of Attachment on 18th March 2009 through Keystan Auctioneers.

The Insurance Company sent the Defendant to the Company's Advocates, M/s Mbigi Njuguna who as a result are now the Defendant's Advocates in this Chamber Summons before me.

They are these Advocates, Mbigi Njuguna, who discovered, when acting for the Defendant, that Aboki Begi & Co., Advocates conducted themselves the way they did in this suit because they were unqualified to act as Advocates having held no practicing certificates for the years 2005, 2006, 2007 and 2008. That Aboki Begi & Co. Advocates did not disclose their unqualified status to the Plaintiff's Advocates and to the Defendant who therefore kept on dealing with Aboki Begi & Co. Advocates as if they were qualified to practice as advocates when they were not.

That explains why the Plaintiff's Counsel did not challenge what Aboki Begi did in the suit on the grounds that they had been done by a person unqualified to practice as an Advocate. That also explains lack of alarm on similar basis on the side of the Defendant. Aboki Begi kept the Plaintiff's Counsel and the Defendant ignorant of Aboki Begi's lack of capacity to practise as an advocate.

The Defendant is now saying through this Chamber Summons that since that is what happened leading to the existence of the judgment dated 19th December 2008 against him in this suit, it is fair that the judgment be set aside to enable him have his case handled by an advocate qualified to practice in law. The Plaintiff's Counsel opposes the prayers being made by the Defendant on the ground that it was the Defendant's duty to engage a qualified advocate and since the Defendant failed to do so resulting in misleading the Plaintiff and Counsel that Aboki Begi was qualified to practice as an advocate; the Defendant's Chamber Summons should be dismissed.

I am persuaded to agree with the Defendant's reply that as between the Defendant and the Plaintiff's Counsel, the Plaintiff's Counsel was in a better position than the Defendant, to find out whether Aboki Begi was qualified to practise as an advocate and advise the court accordingly to avoid serving of processes upon an unqualified person which amounted to having served no processes at all, including hearing notice, to the Defendant. Had the Plaintiff's Counsel done that, the Court would have made the Defendant be aware of the position and may be there could have been no ex parte judgment in this suit.

To me the time when the Defendant came to know of the existence of the judgment does not matter as this is a Defendant who believed he had an advocate qualified to practise and left everything in the advocate's hands and Defendant should not be punished therefore for a mistake of the advocate.

Further, merits of the Defendant's defence should be reckoned from contents of the defence and not from the point of view of whether or not that defence is liable to be struck out because it was filed by an incompetent advocate or person.

From the foregoing, therefore Chamber Summons dated 28th September 2009 is hereby granted in terms of prayers number 3, number 4 and number 5 the Defendant/Applicant being ordered to pay costs of the Chamber Summons to the Plaintiff/Respondent.

Dated this 30th day of October 2009.

J.M. KHAMONI

JUDGE

Present

Mbigi Njuguna & Co. Advocates for the Applicant

J.K. Kibicho & Co. Advocates for the Respondent

Court Clerk: Kabiru