



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA OF KISII**

**Civil Case 153 of 2003**

**JOSHUA NYAMACHE T. OMASIRE ..... PLAINTIFF**

**VERSUS**

**CHARLES KINANGA MAENA ..... DEFENDANT**

**RULING**

On 8<sup>th</sup> April, 2008 Mr. Bosire advocate argued an application dated 3<sup>rd</sup> March, 2008 which had been filed by M/S. Nyairo Orora & Co. Advocates. The said Advocates described themselves as advocates for the plaintiff/applicant. The application sought a review of orders made on 11<sup>th</sup> December 2007. Mr. Bosire is an advocate in Nyamweya, Osoro and Nyamweya Advocates, which firm was duly instructed by the plaintiff on 3<sup>rd</sup> March 2008 to act for him together with M/S. Nyairo Orora & Co. Advocates. The plaintiff's suit was filed on 14<sup>th</sup> October, 2003. On 21<sup>st</sup> March 2006 a notice of change of Advocates was filed by F. N. Orora & Co. Advocates who came on record in place of M/S. Nyairo Orora & Co. Advocates.

Mr. Oguttu for the defendant responded to Mr. Bosire's submissions by stating that the application was a non starter as it had been filed by a stranger who had no capacity to do so. He pointed out that the plaintiff's advocates were F. N. Orora & Company Advocates and thus Nyairo Orora & Company Advocates were strangers who could not file an application on behalf of the plaintiff.

Before Mr Oguttu could finish his submissions, Mr. Bosire shot up and conceded that the application was procedurally improper since it was drawn by a firm of advocates who were not on properly on record. He applied to withdraw the some with costs to the defendant.

Mr. Oguttu objected to the proposed withdrawal of the application, arguing that Mr. Bosire could not withdraw an application, which he had not filed. Furthermore, the application, having been listed for hearing could not be withdrawn without the defendant's consent. In his view, the withdrawal was intended to defeat the objection which he had raised.

Mr. Bosire responded by stating that the firm of Nyamweya Osoro & Nyamweya Advocates had been properly appointed by the plaintiff and they could therefore act for him by seeking to withdraw the application dated 3<sup>rd</sup> March 2008.

He added that the defendant's consent to withdraw the application was not necessary since what was sought to be withdrawn was not a suit.

The issues for determination are:

- (i) **Whether an advocate who is properly on record for a Party can withdraw an application filed by an advocate who is not duly appointed.**
- (ii) **whether an application that has been set down for hearing can be withdrawn by a party without consent of the other party in the matter.**

To answer the first issue, **Order III rule 1** of the **Civil Procedure Rules** permits advocates who are duly appointed by a party to file any application or take such action as by law authorized. **Under Order III rule 6**, a party is at liberty to change his advocate and when he so decides, an appropriate notice of change of advocates must be filed. An advocate who is not duly appointed to act for a party can not be allowed to purport to file applications or documents on behalf of a party. An application filed by an advocate who is not duly appointed is an affront to the court process and is a nullity. The court can strike it out **ex debito justitiae**.

When an advocate who is on record in a matter realizes that there is a strange application in the file, filed by an advocate who is not duly appointed by his client, the right thing to do is to ask the court to expunge the strange document out of the record. In this case M/S. Nyamweya Osoro & Nyamweya Advocates are properly on record together with F. N. Orora & Company Advocates. Mr. Bosire ought to have urged the court to strike out or expunge the application filed by M/S. Nyairo Orora & Co. Advocates who are not on record.

In the context of **Order of Order XXIV** of the **Civil Procedure Rules**, withdrawal or discontinuance of suits presupposes that it is done by the plaintiff's duly appointed advocate or the plaintiff himself in respect of a suit properly filed.

On the second issue, an application that has been set down for hearing can be withdrawn with leave of the court even if the other party refuses to consent to the withdrawal. That may be discerned from the provisions of **Order XXIV rule 2(2)** of the **Civil Procedure Rules** which applies to discontinuation of a suit or withdrawal of any part of a claim even after it has been set down for hearing upon such terms as to costs, the filing of any other suit and/or otherwise as may be just.

In this application, it is apparent that the application dated 3<sup>rd</sup> March, 2008 by Nyairo Orora & Co. Advocates is improperly before court as it was filed by a stranger. I strike it out with costs to the defendant.

**DATED, SIGNED and DELIVERED** at KISII this 21<sup>st</sup> day of April 2008.

**D. MUSINGA**

**JUDGE.**

Delivered in open court in the presence of:

Mr. Bosire for the plaintiff

Mr. Oguttu for the defendant.

**D. MUSINGA**

**JUDGE**