



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 178 of 2007

BENJAMIN K. KIPKULEIAPPELLANT

VERSUS

MUSK DEER LIMITED.....1ST RESPONDENT

**MUNICIPAL COUNCIL OF MOMBASA2ND
RESPONDENT**

RULING

The Municipal Council of Mombasa, being the 2nd Respondent herein, took out a motion pursuant to the provisions of Order III rules 1 and 5(2) and order L rule 1 of the Civil Procedure Rules and under Section 3A of the Civil Procedure Act in which it prayed for an order seeking to have the pleading filed by the firm of Meenye & Kirima Advocates be struck out. The motion is supported by the supporting and further affidavits of Wisdom K. Mwamburi. When served with the summons, the firm of Meenye & Kirima Advocates filed a replying and further affidavits sworn by G.K. Meenye, Advocate to oppose the application. Musk Deer Ltd., the 1st Respondent herein, filed grounds of opposition to also oppose the application.

The facts leading to filing of the above motion can easily be traced from the material placed before this court. It would appear that Benjamin K. Kipkulei the appellant herein, had fallen into land rate arrears due to the Municipal Council of Mombasa (2nd Respondent) in respect of his property known as L.R. No. I/MN/5194. The outstanding rates allegedly stood at Kshs,752,507/- as of 31st March 2006. The 2nd Respondent, sought to recover the aforesaid sum pursuant to the provisions of Section 17(10) of the Rating Act (Chapter 267, Laws of Kenya) by filing a suit against the rate payer (Benjamin Kipkulei) before the Chief Magistrate's Court, Mombasa, vide CM.C.C.C.No. 2094 of 2006. The suit is expressed by the plaint dated 23rd June 2006. The same is drawn and filed by Meenye & Kirima Advocates as advocates for the Municipal Council of Mombasa. The record shows that judgment was entered in default of appearance against the appellant on 18th August 2006 in the sum of Kshs.869,302/70. The firm of Meenye & Kirima Advocates instructed the firm of Kinyua & Co. Auctioneers to issue a notification of sale of L.R. No. IMN/5194. It would appear the firm of Kinyua & Co. Auctioneers sold the property by public auction on 16th March 2007, when the appellant failed to liquidate the decretal sum. Musk-Deer Ltd., the 1st Respondent herein is said to have been declared the highest bidder whereupon it bought the aforesaid property for Kshs.15,000,000/-. The appellant filed a notice of motion dated 22nd June 2007 before the Chief Magistrate's court in which he sought for interalia an order to set aside the exparte judgment of 18th June 2006. Musk-Deer Ltd, the 1st Respondent herein, raised a preliminary objection

against the aforesaid motion. The preliminary objection contained in the notice dated 20th August 2007 was argued before Mr. M.K. Mwangi, the learned Resident Magistrate. In the end the learned Resident Magistrate upheld the Preliminary Objection by dismissing the appellant's notice of motion dated 22nd June 2007. Being aggrieved, the appellant filed this appeal in which he now seeks for the following orders:

- (i) *The dismissal order to be set aside and substituted with an order dismissing the preliminary objection.*
- (ii) *Reinstatement of the notice of motion dated 22nd June 2007 and that the same be reheard by another Magistrate of competent jurisdiction other than Mr. M.K. Mwangi.*

The Memorandum of Appeal was served upon Meenye & Kirima Advocates being advocates for the Municipal Council of Mombasa, the 2nd Respondent and upon the firm of Mogaka Omwenga & Mabeya Advocates for Musk Deer Ltd, the 1st Respondent. The firm of Meenye & Kirima Advocates filed a notice of appointment of Advocates as appearing for the 2nd Respondent. The firm of Swaleh & Co. Advocates also filed a notice of appointment of Advocates which indicated that the aforesaid firm had been instructed by the 2nd Respondent to appear as its advocates. Upon filing the notice of appointment, the firm of Swaleh and Co. filed the notice of motion dated 22nd April 2008, the subject matter of this ruling.

The main ground raised and argued by the 2nd Respondent is that the firm of Meenye & Kirima Advocates was never instructed by it to file any suit against the appellant. It is stated that the aforesaid firm of advocates mischievously and fraudulently used and abused the 2nd Respondent's name in this appeal and in the suit before the subordinate court. It is the submission of the 2nd Respondent that Mombasa C.M.C.C.C. No. 2094 of 2006 and this appeal amount to an abuse of the process of court. The 2nd Respondent also denied ever instructing the aforesaid firm of advocates to recover any outstanding rates as against the appellant. The 2nd Respondent attached a list of the panel of advocates it had appointed to appear for it in various matters to the affidavit of Wisdom K. Mwamburi. That list does not contain the name of the firm of Meenye & Kirima, Advocates. It is also argued that since the 2nd Respondent is a public body hence it is prohibited by the provisions of the Public Procurement Act from outsourcing for legal services without following the rules and regulations therein. It is the argument of the 2nd Respondent that Lenny Kivuti trading as GEOMAPS had instructed the firm of Meenye & Kirima, Advocates to collect rates yet that was not part of the terms of the agreement entered between the 2nd Respondent and GEOMAPS. It is said that the agreement between GEOMAPS and the 2nd Respondent was strictly for the establishment of geographical information system for city and revenue management.

On its part, the firm of Meenye & Kirima Advocates, opposed the motion by relying on a replying and a further affidavit sworn by G.K. Meenye. It is the submission of the aforesaid firm that the 2nd Respondent's application is malicious, mischievous and it is intended to dent the name of Meenye & Kariuki Advocates. The firm claimed that it acted with the full authority of the council to file many suits to recover outstanding rates from rate payers which included the appellant. It is alluded by Mr. Meenye that his firm was retained by GEOMAPS, the 2nd Respondent's lead revenue collection mobilization to recover rates. Mr. G.K. Meenye states that his firm was even allocated office space by the 2nd Respondent within its premises in order to undertake the work it assigned. It is averred that the firm of Meenye & Kirima, Advocates issued cheques in settlement of its legal fees as stated in the memos forwarded to it. It is pointed out that the affidavit verifying the plaint filed against the appellant was deposed by the clerk to the 2nd respondent hence signifying his instructions and authority to file the suit. The 2nd Respondent even forwarded the banker's cheque payable to the court as court fees. Mr. G.K. Meenye pointed out that he even led one Jacob Kirari, the 2nd Respondent's Revenue officer in testifying before the subordinate when the suit proceeded for formal proof. The learned advocate stated that he

even paid the outstanding debt of Kshs.930,600/- upon which the 2nd Respondent issued receipt no. 000024578 acknowledging receipt thereof.

On its part, Musk Deer Ltd, opposed the motion by filing grounds of opposition. Mr. Mogaka, learned advocate for the 1st Respondent, adopted the submissions of Mr. G.K. Meenye in resisting the motion. It is said that the application is made too late in the day. In view of the fact that a vesting order has been made and a provisional certificate issued. It is said that the application by the firm of Swaleh and Co. amounts to an abuse of the process of court.

I have considered the above submissions made by learned counsels. I have also considered the material placed before this court. The main issue which was put forward for consideration by this court is whether or not the firm of Meenye & Kirima Advocates had authority from the Municipal Council of Mombasa to file the suit against the appellant for the recovery of the outstanding rates. The 2nd Respondent's town clerk, Mr. Wisdom Mwamburi categorically denies on oath that the 2nd Respondent ever instructed nor authorized the firm of Meenye & Kirima Advocates to appear, file suit or act on its behalf in this appeal. It is not in dispute that the Municipal Council of Mombasa (2nd Respondent) entered into a contract for the establishment of a geographical information system for city and revenue management with one Lenny Kivuti trading as GEOMAPS. The agreement is dated 5th January 2005. It is also not in dispute that the firm of Meenye & Kirima, Advocates and Geomaps entered into a written retainer agreement dated 23rd January 2006. Paragraphs (f) and (g) of the aforesaid retainer agreement provides as follows:

“(f) It will be your responsibility to liaise with the court personnel on all matters pertaining to filing of the court cases, hearings, disposal and execution through auctioneers and bailiff to be approved by the client through us.

(g) In the event of recovery through court

process you will also be required to recover the party and party costs of the action.”

It is also not denied that the firm of Meenye & Kirima Advocate was instructed to commence proceedings for recovery of outstanding land rates against the appellant by Lenny Kivuti trading as Geomaps. The 2nd Respondent claims that it had not authorized Geomaps to file suit on its behalf or in its name or even delegate or subcontract the provision of legal services for recovery of rates on behalf of the 2nd Respondent. It is the submission of the firm of Meenye & Kirima Advocates that the 2nd Respondent is estopped from denying that it authorized it to commence proceedings for recovery of land rates. I agree that the firm of Meenye & Kirima, Advocates is not in the list of advocates retained by the 2nd Respondent. But nevertheless the 2nd Respondent did not protest. In fact it encouraged the aforesaid firm of advocates to hold itself out as the advocate for the Municipal Council of Mombasa. The 2nd Respondent made the firm of Meenye & Kirima, Advocates believe that it had authorized Lenny Kivuti trading as Geomaps to procure its legal services. Let me set out in brief the conduct of the 2nd Respondent.

First, Shedd Simotwo, the 2nd Respondent's Town Clerk executed the affidavit he swore on 23rd June 2006 to verify the plaint of the same date. The plaint and the verifying affidavit were drawn and filed by the firm of Meenye & Kirima Advocates.

Secondly, the 2nd Respondent made payments to Meenye &

Kirima Advocates in respect of legal collection fees and charges. Thirdly, the 2nd Respondent paid court fees through the firm of Meenye & Kirima, Advocates.

Fourthly,, when the suit came up for formal proof, the 2nd Respondent's Chief Revenue Officer, Jacob

Kirari was led in his evidence in Chief by Mr. G.K. Meenye as he testified before the subordinate court.

Fifthly, the 2nd Respondent acknowledged receipt of payments of land rates received and paid through the firm of Meenye & Kirima Advocates. In view of the above, can it be said that the firm of Meenye & Kirima Advocates had no instructions from the 2nd Respondent? I am convinced that the 2nd Respondent is estopped from denying that it had given authority to the aforesaid firm to act the way it acted. The authority can be implied from the conduct of the 2nd Respondent. The firm of Meenye & Kirima Advocate is and was the advocate of the 2nd Respondent as an agent by estoppel.

Even if I was convinced that the firm of Meenye & Kirima Advocates had no authority from the 2nd Respondent, I am of the view that the issue cannot be determined without involving in these proceedings Mr. Lenny Kivuti trading as Geomaps. It is indirectly argued by the 2nd Respondent that Lenny Kivuti trading as Geomaps exceeded his mandate spelt out in the agreement he entered with the 2nd Respondent when he instructed Meenye & Kirima Advocates to file suits to recover outstanding rates. That agreement has to be interpreted. The interpretation can only be done in proceedings where Lenny Kivuti t/a Geomaps is a party being the principal of the firm of Meenye & Kirima Advocates. I have perused the copy of the aforesaid agreement annexed to the affidavit of Wisdom Mwamburi and it is clear that the agreement has a clause for dispute resolution. Some of the Mechanism set out include mediation and arbitration. It would be absurd if the firm of Meenye & Kirima Advocates is condemned for acting on the instructions of its principal who in fact had a valid contract with the 2nd Respondent. The dispute in my view cannot be resolved through these proceedings.

The 2nd Respondent has urged this court to strike out the pleadings filed by the firm of Meenye & Kirima Advocates. The application is made on an appeal file where the aforesaid firm had filed a notice of appointment. That cannot be a pleading within the definition given under section 2 of the Civil Procedure Act. If I understood well the submissions of Mr. Mutubia, learned advocate for the 2nd Respondent, it would appear the learned advocate wanted this court to strike out every document filed by the aforesaid firm including the plaint filed before the Chief Magistrate's court. In my humble view, that cannot happen through the current motion. It can only be dealt with on appeal. There is a judgment which is said to have been executed to convey proprietary rights to the 1st Respondent. I agree with the submission of Mr. Mogaka, learned advocate for the 1st Respondent that the motion was filed too late in the day hence the orders sought can only be issued on appeal but not through such a application. I cannot for sure at this stage rule that the application was filed with malicious intent. I am of the view that the same is misconceived.

The record shows that the firm of Meenye & Kirima Advocates filed a notice of appointment of advocate on 18th October 2007. The firm of Swaleh & Co. Advocates filed a notice of appointment on 8th April 2008. That cannot happen. Even if the firm of Meenye & Kirima Advocate had not been instructed by the 2nd Respondent, the notice of appointment must be impeached first before another notice of appointment can be filed. The only way the firm of Swaleh and Co. Advocates can validly come on record is by filing a notice of change of advocates pursuant to the provisions of Order III rule 6 of the civil Procedure Rules. Of course the firm of Meenye & Kirima Advocates was on record from the beginning up to the stage of judgment. That firm can only be removed or replaced with leave of court under order III rules 9 A and or rule 11 of Civil Procedure rules. In short, the firm of Swaleh & Co. Advocates is improperly on record hence all documents filed by that firm must be struck out and expunged from record.

In the final analysis and for the above reasons I strike out and dismiss the motion dated 22nd April 2008 with costs to the firm of Meenye & Kirima Advocates being paid by the 2nd Respondent.

I also strike out the notice of appointment filed by the firm of Swaleh & Co. Advocates hence the aforesaid firm is effectively removed from record as appearing for the 2nd Respondent.

Dated and delivered at Mombasa this 28th day of August 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Khagram for the appellant

Mr. Mogaka for the 1st Respondent,

Mr. Norani h/b brief Mr. Mutubia for Swaleh and Co. for 2nd Respondent.

N/A for Meenye & co.