



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 21 of 2004 (OS)

AGNES A. KWAMBOKA.....APPLICANT

VERSUS

ERADION OCHENGE MOKUA.....RESPONDENT

R U L I N G

This Ruling relates to notice of motion application dated 18.07.07 and filed on 02.08.07 by Eradion Ochengé Mokua who appears in the title above as respondent but who in the actual notice was described as defendant. The application is stated to be brought under Order XXI rule 22 and Order XLIV of the Civil Procedure Rules, *inter alia*, seeking the following orders:-

- ‘2. THAT there be a stay of execution of the orders made on 8<sup>th</sup> November 2005 and 2<sup>nd</sup> May 2007 pending the hearing and determination of the instant application.**
- 3. THAT this Honourable Court do review its order made on 8<sup>th</sup> day of November 2005 and 2<sup>nd</sup> May 2007 and at (sic) the same be set aside.**
- 4. THAT cost of this application be provided for.’**

Only the first page of the notice of motion is available in the court file. The page containing the grounds on which the notice of motion application is based and/or the signature page is/are missing. What appears next after the first page is an affidavit by Mokua Ochengé a.k.a. Ochengé Mokua sworn on 18.07.07. The affidavit indicates that it was drawn and filed by Mokua Ochengé and that it was to be served upon Agnes Ochengé.

When the matter came up for initial hearing before me on 22.11.07, learned counsel, Miss L.A. Machio said she appeared for applicant Agnes A. Kwamboka in Amended Originating Summons dated 10.01.06 while respondent Eradion Ochengé Mokua in the same Amended Originating Summons appeared in person.

This court drew the attention of the parties to the fact that the notice of motion supposed to be for hearing that day was incomplete. Miss Machio for Agnes A. Kwamboka told this court that as far as applicant Agnes Kwamboka was concerned, the respondent was being represented by P.W. Wena & Co. Advocates since the applicant’s advocates had not been served with notice for the respondent to act in person as required by Order III rule 9(1) of the Civil Procedure Rules.

Agnes’ counsel complained that the incomplete notice of motion indicated it was to be served upon her

client (Agnes) while the applicant in the said notice of motion (Mokua) well knew that Agnes was represented by the firm of Judy Thongori & Co. Advocates who should have been served on Agnes' behalf. Agnes' counsel also complained of having received in her office only the top page of the notice of motion without any other page or attachment but that the said counsel perused the court file and managed to file a replying affidavit by Agnes A. Kwamboka sworn on 16.11.07, filed and served the replying affidavit on P.W. Wena & Co. Advocates, who were on record for the respondent (Mokua), on 21.11.07. At this juncture, Eradion Ochenge Mokua told this court that he had never at any time engaged P.W. Wena & Co. Advocates or any other advocates to act for him in this matter and that he had always acted in person. Mokua added that he was aware that Agnes A. Kwamboka was being represented by Judy Thongori & Co. Advocates in this case and that he had served the notice of motion in question on Agnes in ignorance of the requirement that service should have been upon Agnes' Advocates.

This court drew Eradion Ochenge Mokua's attention to a Notice of Appointment of Advocates dated 07.12.05 and filed on 16.01.06 whereby the firm of P.W. Wena & Co. Advocates stated that Eradion had appointed them to act for him. The court showed Eradion Ochenge Mokua the said notice and after seeing it he said:

***'I talked to Mr. Wena sometime in December, 2005. I asked him to represent me in this case. He agreed and told me to go and see him and talk further on the matter. I never went to see him neither did I talk to him again on this case.'***

Arising from the foregoing, this court directed that Mr. P.W. Wena should appear before court to give his side of the story. He appeared on 29.11.07 and told this court that Eradion Ochenge Mokua instructed the firm of P.W. Wena & Co. Advocates to act on his behalf in this case and paid an initial fee of Kshs.3,000/=. Mr. Wena said that he had a receipt for that payment; that Eradion Ochenge Mokua instructed Mr. Wena's firm to prepare and file notice of motion dated 01.03.06 which Wena's firm prepared and filed on 07.03.06 seeking a stay of execution of this court orders issued on 08.11.05 plus review of those orders; and that Eradion Ochenge Mokua himself swore the requisite supporting affidavit to that notice of motion on 01.03.06. Mr. Wena said it is not true as stated by Eradion that he never instructed P.W. Wena & Co. Advocates to act for him in this matter. Mr. Wena added, however, that Eradion Ochenge Mokua is free to appoint another counsel to act for him but that he should follow the correct procedure and that he had not informed P.W. Wena & Co. Advocates of his intention to act in person.

In reply, Miss Machio for Agnes A. Kwamboka submitted that Eradion Ochenge Mokua had advocates acting for him in this matter and that if the court so finds, the court should dismiss the notice of motion dated 18.07.07 filed by Eradion Ochenge Mokua in person on the basis that the said Eradion had no capacity to file the said notice of motion since there was a firm of advocates on record for him.

I have given due consideration to Eradion Ochenge Mokua's notice of motion dated 18.07.07 and the opposition thereto.

Order III rule 9(1) of the Civil Procedure Rules provides as follows:-

***'9, (1) Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of intention to act in person, with the necessary modification.'*** (underlining added).

There is indeed a notice of motion in the court file dated 01.03.06 and filed on 07.03.06. It states that it was drawn and filed by P.W. Wena & Co. Advocates. The said notice of motion is accompanied by an affidavit in support thereof sworn by Eradion Ochenge Mokua on 01.03.06 and filed on 07.03.06 like the notice of motion. Therefore, what Mr. P.W. Wena stated to this court from the Bar is well supported by documentary evidence in the court file. I accept that the firm of P.W. Wena & Co. Advocates was still on record for Eradion Ochenge Mokua when the latter purported to file his incomplete notice of motion

dated 18.07.07. No evidence was furnished to this court that Eradion Ochenge Mokuia filed and served the requisite notice of his intention to act in person. Therefore, its incompleteness aside, the notice of motion dated 18.07.07 and filed on 02.08.07 by Eradion Ochenge Mokuia in person contravenes the mandatory requirements of Order III rule 9(1) and is for that reason invalid. This is enough to dispose of the said notice of motion. Additionally, the notice of motion is incomplete in that it does not have the page containing the grounds on which it is based and it also does not have a signature page. It is accompanied by what appears to be a supporting affidavit sworn on 18.07.07 by Mokuia Ochenge a.k.a. Ochenge Mokuia but the affidavit is hanging in the air as the motion it is supposed to support contains no grounds and has no signature page. The purported notice of motion is for this reason independently invalid.

In view of the foregoing, Eradion Ochenge Mokuia's purported notice of motion application dated 18.07.07 is hereby declared incompetent and struck out.

Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 3<sup>rd</sup> day of September 2008.**

**B.P. KUBO**

**J U D G E**