



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
Civil Suit 1150 of 2001

CONNECTION JOINTPLAINTIFF

VERSUS

APOLLO INSURANCEDEFENDANT

RULING

On 24th October 2005 the plaintiff filed an application seeking to expunge from the court records two documents, namely the Notice of Intention to act in person dated 27th March 2002, and also the Notice of Withdrawal of the suit dated 27th March 2002.

When the said application came up for hearing, the 1st defendant raised two preliminary issues.

(a) Leave not obtained by counsel.

It was submitted by the 1st defendant that the application was a nullity as it had been brought by an advocate who had not obtained leave of the court to come on record. Why should the advocate have had to first obtain leave to come on record, one might ask.

According to the 1st defendant the answer is to be found in Order 3 rule 9A of the Civil Procedure Rules, which stipulates as follows;

"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record."

In the light of the above-cited provisions, the plaintiff submitted that the circumstances of this case did not obligate its advocates to first obtain leave of the court before coming on record. The circumstances about which the plaintiff makes reference are said to be the scenario in which the plaintiff has hitherto been acting in person, prior to its current advocates coming on record.

I do accept as correct, the plaintiff's contention that if a party who was acting for himself, subsequently appointed an advocate, the said advocate did not have to first seek leave to come on record, even if he did come on record after judgement had been passed. I say that, because of the plain meaning of the wording of Order 3 rule 9 A of the Civil Procedure Rules. Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.

By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate.

To my mind, apart from the plain meaning of Order 3 rule 9A, the decision, by a party who was acting in person, to appoint an advocate, did not need a nod from the court, as it did not fit within the mischief in respect to which the rule was formulated.

In this case, the plaintiff asserts that it was previously acting in person, and that therefore it did not need leave of the court to appoint its current advocates.

But, in the same breathe, the plaintiff went on to state that it was challenging its director's authority to bind the company. Surely, that assertion, which is at the core of the plaintiff's application, negates the foundation of its own contention that it had been acting for itself, through its director. In other words, either the plaintiff recognises that its director was acting for it, thus enabling it to now appoint an advocate without first seeking leave of the court, or alternatively, the plaintiff itself does not recognise the authority of its director to bind it, in which case the plaintiff would have had its new advocates first obtain leave of the court before coming on record.

As if to further complicate the issue, the 2nd defendant pointed out that the plaintiff's new advocates had filed both a "Notice of Change of Advocates" as well as a "Notice of Appointment of Advocates." A perusal of the court records reveals that both notices were dated 24th October 2004, and were also filed on that date. The reason for filing the two notices is not immediately clear to me, but nonetheless does not impact on this ruling. However, the contents of the "Notice of Change of Advocates" are noteworthy, as they indicate that messrs Githinji Kimamo & Company Advocates were appointed by the plaintiff, **"to act for them in the above matter in place of Mwangangi & Co. Advocates"**

In effect, by their own document, the plaintiff's new advocates was saying that they were replacing the advocates who were previously on record. Therefore, the plaintiff cannot now be heard to say that it had been acting for itself before appointing its current lawyers.

But the intrigue does not end there. A further perusal of the court records reveals that M/s Mwangangi & Company Advocates were replaced by M/s Ocharo & Company Advocates on 9th August 2002. That fact would imply that the plaintiff's current advocates are not yet properly on record, as they purport to replace persons who have not been on record since August 2002.

However, I must now remind myself that the issue at hand is the preliminary objection. That being the case, I must not loose sight of the words by the Hon. Law J. A. in **MUKISA BISCUITS MANUFACTURING LIMITED –VS- WEST END DISTRIBUTORS LIMITED [1969] E A 696, at page 700;**

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit."

In my understanding, a matter only qualifies to be a preliminary objection if the facts upon which it is founded are undisputed. It is only then that the issues arising out of such agreed facts would be limited to the points of law. In other words, if there is no agreement on the facts which are the foundation of the preliminary objection, the matter cannot properly be dealt with as such. Sir Charles Newbold put the matter as follows, in the **MUKISA BISCUITS case** (supra) at page 701;

"A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In this case, the plaintiff says that it had been acting in person. That must be the starting point, and, if that were assumed to be the correct factual position, there would be no need for the plaintiff's new advocates to first obtain leave to come on record. But as I have already illustrated, the factual foundation does not appear to be supported by the evidence on record. Consequently, I do hold that, even though the issues raised by the defendants do appear to have a lot of weight, the same cannot be properly dealt with by way of a preliminary objection.

(b) **No suit currently exists.**

The defendant submitted that as the plaintiff had not sought the reinstatement of the suit, the court was being asked to act in a vacuum. For a better understanding of that contention, it is important to recall that on 28th March 2002, the plaintiff's director, Mr. Richard K. Kariuki filed a Notice of intention to Act in person, as well as a Notice of Withdrawal of the suit.

Thereafter, on 2nd and 6th May 2002, respectively, the court granted judgement in favour of the 1st and 2nd defendants; awarding to each of them the costs of the suit.

As the suit was withdrawn, at the instance of the plaintiff, the defendants assert that there is now a vacuum.

However, the plaintiff's application is actually founded on the premise that the actions of its director, Mr. Richard K. Kariuki, were a nullity, for lack of legal authority. If the court were to accept the plaintiff's arguments, it is conceivable that the steps which led to the withdrawal of the suit might be declared a nullity. That would imply, although I cannot at the moment visualise exactly how, that the suit was still subsisting.

In other words, it appears that the two sides do not agree on the facts. Therefore, much as it appears that the plaintiff may have an uphill task, I believe that it is only fair to give them an opportunity to be heard on merits. Accordingly, the preliminary objection is overuled. But the costs shall abide the outcome of this application.

Dated and Delivered at Nairobi this 8th day of February 2006.

FRED A. OCHIENG

JUDGE