



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1260 of 2002**

GEORGE GIKUBU MBUTHIA.....PLAINTIFF

VERSUS

PETER NJERU MUGO1ST DEFENDANT

GEOFFREY KARIUKI MWENDA2ND DEFENDANT

HON. THE ATTORNEY GENERAL3RD DEFENDANT

CONSOLIDATED BANK OF KENYA LTD4TH DEFENDANT

RULING

On 26th April, 2006, the court was scheduled to hear the 2nd defendant's Notice of Motion dated 23rd May, 2005. By the said application, the 2nd defendant sought an order to have the court release to him the original logbook of a motor vehicle registration number KVE 001. It was said that the logbook was supposed to be transmitted, by the 2nd defendant, to the new owner of the vehicle.

Before the hearing of the application could commence, the applicant drew the court's attention to a development which he believed should be addressed first. The said development was in relation to the representation of the objector in this case.

The advocates who had been acting for the objector were Messrs Mbuthia Mwagiru and Co. Advocates. But then, the plaintiff is now said to be the one representing the objector. The change in the representation occurred through a "Notice of Intention To Act In Person", dated 25th November 2005, and which was filed in court on 30th November, 2005. That notice was made pursuant to the provisions of Order 3 rules 2C and 9(1) of the Civil Procedure Rules.

Notwithstanding that notice, the 2nd defendant submitted that the plaintiff had no authority or power to represent the objector. It is the contention of the two defendants that the only proper way for there to be change in the representation of a party, after judgment had been granted in a case, was through an application for leave to have the representation changed. In this case, no such leave had been sought.

Secondly, the two defendants submitted that even if the court were to grant leave for a change in the representation of the objector, the plaintiff would still have no authority, under Order 3 rule 2(c) of the Civil Procedure Rules, to take action as a recognized agent.

In that regard, the 2nd and 4th defendants contended that the Notice of intention to act in person, did not confer any authority on the plaintiff, as it had no corporate seal.

In any event, the defendants hold the view that the only course of action available to the objector, if it wished to change its advocates, would have been through an application made pursuant to Order 3 rule 9(a) of the Civil Procedure Rules.

Finally, even though there was annexed to the notice of intention to act in person, a resolution appointing the plaintiff as an agent of the objector, the defendants feel that the said resolution could not clothe the plaintiff with the requisite authority. That resolution could not make the plaintiff a recognized agent, as he was not a principal officer, as is envisaged by the provisions of Order 3 rule 2 (c) of the Civil Procedure Rules, submitted the defendants. Accordingly, they expressed the view that the plaintiff had no ability or capacity to defend or prosecute cases on behalf of the company who was an objector in these proceedings.

Faced with those submissions, the plaintiff first submitted that the 2nd defendant had failed to comply with the provisions of Order 50 rule 2. He submitted that the 2nd defendant, who originated the preliminary objection herein, ought to have first served him with a notice, before he could be permitted to canvass the said preliminary objection.

As no such notice and been served on him, in advance, the plaintiff said that the authority which he was supposed to have brought to court, had not been brought.

He then submitted that the court was threatening him, so that he felt unable to continue with his submissions. He emphasized that justice requires the court to give a hearing to each party. Yet, in his view, the plaintiff felt that the court was threatening him with the decision in the “Theuri case.”

He concluded that this court did not wish to hear him, and therefore he sought an adjournment.

On his part, Mr. McCourt, advocate for the 4th defendant concurred with the submissions already made by Mr. Mugambi, the advocate for the 2nd defendant.

Did the 2nd defendant give notice of his preliminary objection, to the objector? Is such a notice a prerequisite to the presentation of a preliminary objection? Those are issues that need to be resolved by the court.

Meanwhile, the court delivered a ruling on objector’s application for an adjournment, (as presented through the plaintiff), and directed that the matter would proceed. In other words, the court rejected the objector’s application for an adjournment.

The main reason why the court rejected the application, (as set out in the ruling in relation thereto), was that a request to the plaintiff, to desist from pointing fingers at Mr. Mugambi advocate, could not be deemed to constitute a threat, emanating from the court.

I reiterate my honest, but firm, belief that any judicial officer who was presiding over proceedings is obliged to ensure that decorum is maintained in his court. For that reason, the pointing of fingers at counsel or other persons involved in the proceedings is considered, by me, to be wholly inappropriate. And, when the said conduct is also coupled with references which tend to personalize proceedings, that could easily become a recipe for disaster, unless it is nipped in the bud.

After the court rejected the objector’s application for adjournment, the objector’s “agent” said that he had nothing further to say, save that the 2nd defendant had failed to comply with Order 50 rule 2.

The said rule reads as follows:-

“2. No motion shall be made without notice to the parties affected thereby;

Provided, however, that the court, if satisfied that the delay caused by proceeding in the ordinary

way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court seems just, and any party affected by such order may move to set it aside.”

In my understanding, rule 2, above, only relates to Notices of Motion. It has no application to preliminary objections, such as the one which the 2nd defendant was raising in this case.

However, it has become an accepted practice, before our courts, that any party wishing to raise a preliminary objection in any application, suit, cause or other proceedings, would give prior notice of such intention, to the other parties. By so doing, the said other parties would not be taken by any surprise, and would indeed be afforded an opportunity to adequately prepare for the intended preliminary objection.

The 2nd defendant herein says that he made an endorsement on the plaintiff’s letter dated 16th November, 2005, by which the plaintiff invited them to attend at the registry, for purposes of fixing a date for the hearing of the application dated 22nd November, 2005. The said endorsement was in the following terms:

“RECEIVED UNDER PROTEST

As the inviting party is not a recognized agent under Order III and a firm of advocates is on record on its behalf.”

That endorsement did not state that the 2nd defendant would be raising a preliminary objection. However, it did serve to give the objector notice of the objection which the 2nd defendant had in mind. Therefore, I do not think that the objector can complain about an absolute lack of notice, for it did receive some form of notice.

As regards the defendant’s contention that the objector could only change its representation by making an application under Order 3 rule 9 of the Civil Procedure Rules, I find that the relevant provision is rule 9A, which provides as follows:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment 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 this case, there is already a judgment on record. It would therefore appear that, as the firm of Mbutia Mwagiru & company Advocates was already on record for the objector, whether the said objector wished to change advocates, or act for itself, it should have obtained an order of the court, permitting it to so do. As no such leave has been obtained, I hold that the person who has been nominated by the objector, as its agent, in place of Mbutia Mwagiru & company Advocates, lacks the requisite legal authority to represent the objector. The objector’s resolution to appoint the agent could not clothe him with the requisite legal authority until and unless the court also gave an order permitting such an agent to represent the objector.

At the moment, the 2nd defendant has already submitted that the plaintiff could not be an agent for the objector, even if the court were to give an order to that effect. To my mind, as the objector may yet decide to make a formal application to either change advocates or to act for itself, in the objection proceedings, I find that it would be premature for the court to pre-judge the issue. I therefore decline to make any comments in that regard. But, as the objector now already has a distinct impression as to the viewpoint of the 2nd defendant, I am sure that if it still wishes to appoint the plaintiff as its agent, it will fortify its legal arguments in that regard, as may be appropriate. But even as the objector continues to ponder on its next move, I believe that the first issue to receive due consideration is as relates to the person who would be moving the court, to seek orders which would enable there to be either a change of advocates, or alternatively a change from the advocates to the objector in person.

For now, I hold that the objection is successful. And the costs thereof are awarded to the 2nd and 4th

defendants.

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

FRED OCHIENG

JUDGE