REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.14 OF 2003

HEZRON TIRIMBA MICHIEKA ……PLAINTIFF/RESPONDENT

VERSUS

ALFAYO OMESA OMANGI …….. DEFENDANT/APPLICANT

RULING:

Defendant/Applicant seeks orders that there be stay of execution of court orders dismissing the suit.

The defendant when served with summons filed a memorandum of appearance through the firm of M/S KEROSI ONDIEK & CO. ADVOCATE. He however never filed a defence. On 23/9/2003 matter proceeded for formal proof and judgment entered on 25/9/2003. It is that judgment he now seeks to be set aside.

It was submitted by Mr. Ondika who argued the application that the mistake was made by the defendant's former advocate as he did not file a defence. He therefore submitted that mistake of a counsel should not be vested on an innocent litigant.

Application was opposed. It was submitted that M/s Nyamwange and Co. Advocates floated order 3 rule 9 CPR in that they did not make an application to court to be allowed to come in record instead of M/s Kerosi Ondieki & Co. Advocates and thus they are not properly on record. Counsel for applicant clearly avoided to reply to that point.

However it is clear that M/s Nyamwange & Co. Advocates failed to comply with order 3 rule 9(a) CPR. That rule is clear and is mandatory. Judgment had already been entered when they purported to come on record.

They needed to make an application serving the other counsel to be allowed to come on record. Failure to do so makes this application in incompetent, null and void and in that ground alone I would dismiss it.

Again issue was raised on the provisions of order 21 rule 22 & 25 CPR under which the application is made. I concur with counsel for the respondent that the two rules are irrelevant to this application. Order 21 rule 22 CPR talks of a situation where a decree is sent from one court to another for execution. Then a party can make an application before the court where the decree had been sent for a temporary stay for the affected party to get time to go back to the court which sent the decree. This was not the case in this case.

O.21 rule 25 CPR talks of a situation where there is a completely different suit pending before a court whose outcome perhaps would affect the case in where the decree is sought to be executed. There is no other case pending whose results are being awaited for.

As for s.34 & 35 of the Advocates Act there is clearly an indication of the party who drew the application. In any case s.35 only states whoever floats the two section shall be guilty of an offence. It does not say the documents drawn be rejected. That is left at the discretion of the court.

Indeed it is trite law that a party should not be made to suffer for mistakes of his counsel. Applicant however does not say if he instructed M/s Kerosi & Co. Advocates to file a defence or not. In his affidavit he only say he expected them to file a defence. However when M/s Kerosi Ondieki and Co. Advocates were served with a hearing notice for taxation they endorsed the notice and stated they were receiving it under protest as they had no instructions for the client.

I don't think the defendant was diligent in his matters to convince the court to exercise its discretion in his favour. If indeed he had instructed the counsel and they refused to act he can get recourse elsewhere.

All in all I find application has no merit. The same is dismissed with costs.

Dated and delivered this 23rd February 2004.

KABURU BAUNI

JUDGE

23/2/04

Mr. Ondika for the applicant

Mr. Oguttu for respondent

KABURU BAUNI

JUDGE