



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISCELLANEOUS APPLICATION 214 OF 2003
REPUBLIC APPLICANT
VS
BUSIA SENIOR RESIDENT
MAGISTRATE’S COURT RESPONDENT
EX – PARTE
DAVID HENRY MUCHELULE 1ST APPLICANT
HENRY SHISIA MATALANGA 2ND APPLICANT
AND
COAST BROADWAY CO. LTD INTERESTED PARTY

RULING

Coast Broadways Co. Ltd, being the interested party herein filed a notice of motion dated 28th October 2003 pursuant to Order L rules 1 and 17 of the Civil Procedure rules and under Section 3 A of the Civil Procedure Act and prayed for the following orders:

- (i) To set aside ex – parte orders made on 22 nd October 2003.
- (ii) To have motor vehicles registration numbers KAM 437 M and KAM 435 M kept in the custody of this court until the intended Judicial review is heard and determined.
- (iii) That the O.C.P.D . Bungoma to enforce compliance of the order.

The motion was accompanied by a supporting affidavit of Zarah Anwar Cocker sworn on 27th day of October 2003. The motion was opposed by the ex- parte applicants who filed grounds of opposition under order L rule 16 of the Civil Procedure rules. When the motion came up for inter partes hearing Mr. Makokha for the applicants raised a preliminary objection stated as the first ground on the grounds of opposition dated 4th November 2003 which reads: “That the application is defective, incompetent and bad in law as the same was prepared and filed by a person with no Locus standi.”

It was submitted that the Notice of Motion and the accompanying supporting affidavit were filed on 28th October 2003. The motion clearly shows that the same was prepared and filed by the firm of Nguire Mbugua and Company Advocates. It is pointed out that the motion was filed before the aforesaid firm of

advocates filed a notice of appointment of Advocates hence they had no authority to do so pursuant to the provisions of Order III rules 1 and 8 of the civil procedure rules. The Notice of appointment of advocates was filed on 29.10.2003 a day after the filing of the motion. When Mr. Ngure Mbugua was confronted with this preliminary objection, he conceded and justified the delay in filing the Notice of Appointment of Advocates on the fact that the court file had to be moved to Kisumu and in the Process confusion ensued. He was of the view that mistake of counsel should not be visited upon the litigant.

Mr. Gatundu who appeared alongside Mr. Ngwe Mbugua for the interested party addressed this court at length on the competency of the proceedings before this court. He chose not to address himself to the preliminary objection raised by the applicants' counsel. He was of the view that whether the firm of Ngwe Mbugua & Co. Advocates were properly on record or not did not matter. To him the proceedings before me were mere nullities which ought to be struck out ex-debito justitiae. I will start with the submissions of Mr. Gatundu. I think Mr. Gatundu dwelt on a subject which needed to be substantively addressed. It is not even raised in the motion which was due for hearing inter partes. I can only state that he placed the cart before the horse. His submissions though impressive and well researched were irrelevant to the matter at hand. Consequently, the same are noted though they are of no useful purpose at the moment.

It is not denied that the motion dated 28.10.2003 with the supporting affidavit were filed before the Notice of Appointment of Advocates was lodged. It is important to examine the provisions of Order III rule 1 of the Civil Procedure rules which provides: "Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by a party in person or by his recognized agent, or by an advocate duly appointed to act on his behalf:....." The import of the above legal position is that a party may appoint an advocate to do what is authorized by law in court on his behalf. He is one of those recognised agents.

Order III rule 8 reads: "Where a party, having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of appointment," It is apparent that the above provisions of the law makes it mandatory for an advocate to file a notice of appointment as evidence of authority to appear or act on behalf of a party.

I have come to the conclusion therefore that the failure on the part of the firm of Ngure Mbugua & Co advocates to file a Notice of appointment renders whatever had been filed before the notice of appointment was lodged to be incompetent. The preliminary objection is therefore upheld. Consequently the Notice of Motion dated 28th October 2003 is ordered struck out for being incompetently on record with costs to the applicants.

DATED AND DELIVERED THIS 10th DAY OF March 2004

J.K. SERGON

JUDGE