REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 71 OF 2000

MBOGO ..... PLAINTIFF

VERSUS

ASIKOYO & 3 OTHERS..... DEFENDANTS

RULING

David James Mbogo, the respondent herein raised preliminary points of law contained in the notice dated 26th June 2004 and sought to have the applicant's chamber summons dated 15th June 2004 struck out. The first point he put forward for my consideration is that the firm of Wetangula & Co Advocates are not properly on record having failed to file a notice of change of advocates. Mr Makokha who appeared for the defendants in this matter did not address this Court as to whether a notice of change of advocates was filed and served or not. I have perused the entire court record and I am unable to trace a notice of change of advocates filed by the firm of Wetangula & Co Advocates to replace CJ Kittony Advocates.

This is necessary according to the provisions of order III rule 6 which provides:

"A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until a notice of change of advocate is filed in the Court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall subject to rules 11 and 12 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

It is therefore apparent that the firm of Wetangula & Co Advocates and its clients have not complied with the above mentioned provisions of the law when filing the chamber summons dated 15th June 2004.

The second preliminary issue argued by the plaintiff's advocate is that the firm of Wetangula and Co Advocates came on record without complying with the provisions of order III rule 9 A of the Civil Procedure rules. This Court was therefore urged to strike out the entire application.

Mr. Kiarie who appeared for the plaintiff/respondent further argued that the firm of Wetangula and Co Advocates should have filed a separate application seeking for leave to replace CJ Kittony & Co Advocate before commencing the filing of the chamber summons in which it sought for all the prayers in one application. He therefore challenged the *ex parte* leave stating that the same was issued contrary to law. The applicants' advocate opposed this ground by stating that they were granted leave before arguing the application hence they are competently on record. Mr Makokha cited the case of *Pithon Waweru Maina vs Thuku Mugiria* CA No 27 of 1982 in which urged this court to adopt the following statement at page 16 of the judgment.

"This discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

Mr Makokha saw nothing wrong with the omnibus application in which all the prayers including that of leave were made in the same chamber summons.

A fact which is not in dispute is that judgment was delivered on the 31st day of March 2004 against the defendant who was by then represented by the firm of CJ Kittony & Co Advocates. When judgment has been entered and a party who wishes to change advocates, that party must comply with the provisions of order III rule 9 A of the Civil Procedure Rules which says:

"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."

The summons dated 15th June 2004 seeks for *inter alia* at paragraph 5 that the firm of Wetangula & Co Advocates to be granted leave to come on record to represent the defendants in place of M/S CJ Kittony Advocates. The record reveals that the firm of Wetangula & Co Advocates were granted the order on 15.6.2004 pending the hearing *inter partes* of the summons. It is also stated that the application was to be served upon the firm of CJ Kittony & Co. Advocates and the firm of Kiarie & Co. Advocates.

When this matter came up for *inter partes* hearing it became apparently clear that the firm of CJ Kittony & Co Advocates was not served. Perhaps having obtained leave *ex parte*, Mr Makokha did not see the need. The question is can the *ex parte* leave be challenged? My answer is yes. I say so because the *ex parte* order which I granted was to last up to the *inter partes* stage. Secondly that the law requires that the firm of CJ Kittony & Co Advocates should be served before making a final order, on the matter. This court did not make a final order therefore Mr. Kiarie was perfectly right to challenge the *ex parte* order. The court of appeal in the case of *Mary Wambui Kabungua vs Kenya Bus Service Limited* CA No 195 of 1995 adopted the statement of Lord Denning MR relating to position of *ex parte* orders in the case of *R vs Morley (Valuation officer) EP Peachy Property Corporation Ltd*:

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"It must be remembered that, even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar."

In this instant case the relevant party to challenge the *ex parte* order is the firm of CJ Kittony & Co Advocates which the law requires that they must be served to see whether they have any objections to the matter being taken away from it. However the law does not bar the plaintiff's advocates from pointing out that the defendant has not complied with the Rules of Procedure. The plaintiff's counsel has actually pointed out that there is no competent application for this court to hear.

It is always presumed that the court knows the law. Even if Mr Kiarie had not pointed out that the defendant had not complied with the law this court was bound to consider whether the defendants' advocate was properly on record and whether the *ex parte* order was competently obtained. The law enjoins this Court to only make a final order to sanction a notice of change of advocates when the previous advocate has been served. There is no evidence that the application was served. In such a case I will normally exercise my discretion *ex-debito justitae* to set aside such an order as the same was issued unjustifiably.

The final matter which I should conclude is whether the applicants are justified to make an omnibus application which seeks for leave to file a notice of change of advocates at the same time. I have come to the conclusion that a party must first file a separate application seeking for leave to come on record before

seeking for other remedies. Such an advocate can only be competently on record after obtaining the order pursuant to order III rule 9 A of the Civil Procedure Rules and after first filing the notice of change of advocates failure to comply with the above mentioned conditions renders any pleadings filed incompetent for being improperly on record. This is what happened in this matter. The firm of Wetangula & Co advocates filed a single application seeking all the prayers in a swoop before first meeting the preliminary requirements of the law. I have come to the conclusion that the preliminary objection has merit, it is upheld.

Consequently the chamber summons dated 15th June 2004 is ordered struck out with costs to the plaintiff respondent.

Dated and Delivered at Bungoma this 2nd day of July 2004.

J.K.SERGON

JUDGE