



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 714 OF 02

JANET MUTANU NDETO.....PLAINTIFF

VERSUS

1. THUKU GACHIRI)

2. IBRAHIM WACHIRA MATHU)

3. FIDELIS MUEKE NGULI).....DEFENDANTS

RULING

This application by Chamber Summons, filed under Order III Rule 12 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, came up for mention on 11th November, 2003. On that occasion, the hearing date was fixed for 18th November, 2003. Mr. Korongo represented the Plaintiff/Respondent, while Mr. F.N. Wamalwa represented the Third Defendant.

The prayer in the application is firstly, that M/s F.N. Wamalwa & Company Advocates be granted leave to withdraw and cease to act for the Third Defendant; secondly that the Court do make any such orders as it may deem fit; thirdly, that the costs of this application be provided for.

In support of his application, counsel for the Third Defendant, on 31st October, 2003 swore an affidavit carrying the following assertions: -

(i) That his firm, F. N. Wamalwa & Company Advocates had been instructed by an insurance firm, United Insurance Company Ltd., in respect of insurance claims made by the Third Defendant in the suit;

(ii) That on 21st July, 2003, the Court allowed the Applicants' application for adjournment, to enable the Applicant to set aside an interlocutory judgement;

(iii) that the summons to appear delivered to United Insurance Company Ltd. by the Third Defendant on 24th June, 2003 was a different one featuring in the return of service accompanying the Plaintiff's application for interlocutory judgement;

(iv) that in the premises, the Applicant firm of Advocates has repeatedly requested the Third Defendant to make an affidavit deponing to matters that would explain the discrepancies in documents served, but the requests have been in vain;

(v) that consequently, it is not in the interests of the Applicants' instructing clients that the Applicants continue to conduct the defence of the Third Defendant.

Mr. Wamalwa observed that the Third Defendant appeared as if he had an interest in the interlocutory judgement which the Applicants considered it advisable to have vacated, even as the instructing insurance company was in agreement that the said judgement should be set aside. In the circumstances, it seemed that there was a conflict of interest between the instructing client and their insured. Counsel submitted that, as no instructions from the insured had been received to enable the prosecution of the application to set aside the interlocutory judgement, it had become important that the Applicants have their name taken off the record as counsel for the insurance company.

Mr. Korongo for the Plaintiff had no objection to the Applicants' withdrawal from the case, but prayed for costs, in view of the fact that he had been duly served with the application.

In this ruling, I grant the Applicants' application and order the removal of their names from the record as counsel in respect of the Third Defendant.

As the Plaintiffs were duly served with the application and necessarily incurred costs at the hearing thereof, they would be entitled to costs, but these costs shall be in the cause.

The Applicants, too, made a prayer for costs. From the facts of this application, the costs of the applicant have clearly been occasioned by the Third Defendant who has rendered it, by his personal, uncommunicated interests and preferences, impossible for the Applicants to continue to act as counsel in this matter. It is ordered, that the costs of the Applicants shall be borne by the Third Defendant.

DATED and DELIVERED at Nairobi this 28th day of November, 2003.

J. B. OJWANG

Ag. JUDGE