



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2974 OF 1992

PETER MUASYA MUSYIMI

T/A MEDINEX KENYA ----- PLAINTIFF

VERSUS

THE ATTORNEY GENERAL ----- DEFENDANT

R U L I N G

The application before me is the one dated 12th July. The Plaintiff having all along been represented by Harit Sheth Advocate now wants to be represented by Macharia Njeru Advocate and seeks the Court's sanction concerning such change. The application is expressed to be brought under OIII Rule 9A, and has only become necessary following the amendments to the Civil Procedure Rules under Legal Notice No. 36 of 2000 which now makes it mandatory under the new Rule 9A for the Courts leave to be sought before such change is effected in circumstances where judgment and decree have been passed.

The Plaintiff has been cross-examined at length on his affidavit in support of the application, in which affidavit he has alleged all manner of misdeeds against his former Advocates. He accuses him of inability to expedite the recovery of moneys due on the decree dispute. The Applicants continued pleas on the Advocate; that his Advocate has kept him in the dark concerning the progress of the case; that a complete breakdown in communication has resulted between the two and that the Applicant has, therefore, been unable to furnish instructions to his lawyer.

The Applicant then intimates to having certain reasons he has for wanting to withdraw the services of his now Advocate on record, reserves the right to disclose them, but has misgivings about stating them too readily lest they embarrass this Respondent. It has transpired in cross-examination that the Plaintiff had before engaging the services of Harit Sheth, Advocate had 3 other firms of Advocates representing him, namely Mugo Mukunya, Maranga Maosa and Gilbert Mungu Advocates. He lamented that although it is to Harit Sheth Advocate that he gave instructions, he has, every time been represented by lawyers other than his Advocate of choice. Those Advocates include Mr. Ngunjiri, Mr. Theruri and Mr. Murage.

He does not know how the lead Advocate, Mr. Ngunjiri came into the case and under what terms; He complains that Mr. Sheth abdicated his responsibilities to the Applicant and pushed the matter to Mr. Ngunjiri. He states that he signed a blank paper on which was later typed the contents of the Affidavit in support of the mandamus application; he says he only knew the case was coming up before Aganyanya J., for the hearing of the mandamus application when he saw it on the notice board the day before.

He admitted to having received various amounts of money in the form of financial assistance from Mr. Sheth, but denied ever having borrowed money from a company called Alluta Holdings Ltd through Mr. Sheth.

Shown a damning irrevocable power of Attorney allegedly signed by him, he denied its authenticity and changed it must be a forgery, and that there is a possibility that he signed the blank and this could have been superimposed on the documents now relied upon.

I carefully observed the Applicant as he was cross-examined in Court. My impression was that he was not being truthful. He is an intelligent man no doubt. The pleading and the judgment demonstrate that the transaction the Plaintiff was involved in was complex. It is a credit to the Plaintiff's shrewdness that he transacted such a deal. Such a shrewd and intelligent businessman cannot, in my judgment, go about signing blank papers for other people to fill details. His allegations that he didn't know about the mandamus application coming before Aganyanya J., that he did not sign the affidavit in support; that he did not sign the Power of Attorney exhibited in Court; all these must be taken with some doubt as to their truth.

The foregoing however is not relevant to the application at hand. The Respondent maintains the Power of Attorney is a genuine and valid document. The Applicant takes the stand that it is a forgery. The controversy between the parties in this regard, cannot be the subject of an application such as the present one and must be resolved elsewhere. The Respondent, as I see it, has the option of filing a separate suit seeking declaratory orders that the Power of Attorney is genuine and binding on the parties to it; He could even go further and seek orders to attach this judgment.

I however do not see that a client should be forced, by an order of the Court, to continue being represented by an Advocate that he does not want to representing to do so would result in a crisis of confidence; it would go against the inalienable and sacred right of a party to be represented by an Advocate of his choice. It would not unlike an order forcing two people to live together as man and wife, or an employer-employee relationship to subsist even where one party would clearly want to sever it. This, plainly, could not have been the intendment of Rule 9A of Order III. The intention, as I see it, was to put the Advocate coming out of record on notice and to enable him pursue any rights over any professional fees that may have accrued to him.

Mr. Sheth has that notice. He has an undertaking from Mr. Macharia that he will be paid taxed costs and proven disbursements once the decree is executed. If the decree is not executed, Mr. Sheth still has the Applicant to chase for his fees, disbursements and any money he may have procured from third parties, on behalf of the Applicant.

I am persuaded that I should allow this application, the better to enable the Advocate coming on record to prosecute the two applications now pending in Court.

Orders accordingly.

C.K. NJAI

PRINCIPAL DEPUTY REGISTRAR

9.10.00.