



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 188 OF 2020

KAZUNGU KITSAO KIVUMA.....PLAINTIFF/RESPONDENT

-VERSUS-

GEORGE KURIA MUTHONI.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect to the Preliminary Objection raised by the Plaintiff/Respondent and filed on 16/10/2020 on the following grounds:

a. That the entire application is incurably and fatally defective for having been filed by non-agent contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

b. That given that the Mombasa SRMCC No. 942 of 2017; Kazungu Kitsao Kivuma –vs- George Kuria Muthoni was not a declaratory but a primary suit, one Isabella Nyambura, the Legal Officer at Messrs. Directline Assurance Company Limited lacks the *Locus Standi* to answer the affidavit in support of the said application.

c. That the entire application ought to therefore be dismissed with costs.

2. The Preliminary Objection is in respect to the Notice of Motion Application dated 9/9/2020 and filed by the Counsel for the Defendant/Applicant seeking *inter alia* orders for extension of time and leave for the Defendant/Applicant to lodge the Memorandum of Appeal out of time against the Judgment delivered on 15/7/2020 in Mombasa SPMC No. 942 of 2017, and further that stay be granted against the execution of the said Judgment pending the hearing and determination of the intended appeal.

3. It is averred that in the primary suit, the Defendant/Applicant was represented by the firm of M/S Kairu & McCourt and Company Advocates, but on appeal he seems to have changed advocates and instructed the firm of Kimondo Gachoka and Company Advocates to act for him. The application by the Defendant/Applicant still remains outstanding.

4. The court directed that the Preliminary Objection be prosecuted first and further that the same be canvassed by way of written submissions.

5. I have considered the submissions by the Plaintiff/Respondent filed on 23/11/2020 and I will outline a brief summary of the same as below. The Defendant/Applicant opted not to file any submissions.

6. Mr. Shariff, counsel for the Plaintiff/Respondent submitted that the Defendant's application has contravened the provisions of Order 9 Rule 9 of the Civil Procedure Rules which require that a consent to be filed between the outgoing advocate and the proposed incoming advocate. In his view, the firm of M/S Kimondo Gachoka and Company Advocates is a stranger to this suit and lacks locus standi to represent the Defendant for failing to comply with the mandatory procedural requirement.

7. Mr. Shariff further submitted that the firm of M/S Kimondo Gachoka and Company Advocates together with its associate Lilian Ndinda has committed perjury and contempt of court by swearing on matters which they are not privy to. He therefore sought M/s Ndinda to be cited as contemnor and be committed in Civil Jail for a period of 60 days.

8. The learned counsel further submitted that the affidavit in support of the substantive application is sworn by one M/S Isabella Nyambura who has no locus standi in the matter. The reason being that, M/s Isabella Nyambura is a legal officer of the Defendant's Insurers Messrs. Directline Insurance Company which was not a Party to the primary suit. In essence the counsel asserts that that this is not a subrogation suit wherein the insurer can purport to exert any right.

Analysis and Determination

9. I have considered the Preliminary Objection dated 15/10/2020 and filed on 16/10/2020 and the issues arising for consideration are as follows: -

a. Whether the application dated 9/9/2020 violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2020?

b. Whether M/s Isabella Nyambura of Directline Insurance Company had the locus standi to swear the affidavit in support of the Application.

Whether the application dated 9/9/2020 violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules

10. The Plaintiff/Respondent's contention is that the application dated 9/9/2020 violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 as it was lodged by non-agents and a firm which had not been legally appointed in accordance with the law. On that basis the Plaintiff/Respondent urges that the pleading the application to be dismissed with costs.

11. The Plaintiff/Respondent's Preliminary Objection is primarily hinged on the provisions of Order 9 Rule 9 of the Civil Procedure Rules which provides: -

“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—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

12. It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be. I will also borrow from the case of **Kazungu Ngari Yaa v Mistry v Naran Mulji & Co. [2014] eKLR**, where the court in considering Order 9 Rule 9 held as below:

“The provision envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.”

13. In this particular case, the Judgment sought to be appealed against was delivered way back on 15/7/2020. The Defendant/Applicant has not disputed that he had procured representation from the firm of M/S Kairu and McCourt & Company Advocates, during trial of the case. There is however no prove that the firm of M/S Kimondo Gachoka and Company Advocates, actually sought consent from the outgoing firm of M/S Kairu & McCourt and Company Advocates to bring the application seeking leave to appeal out of time.

14. In my view, the essence of Order 9 Rule 9 of the Civil Procedure Rules is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away.

15. For the foregoing reasons, even without considering the other points of law, this court find the Preliminary Objection merited on the point that the Notice of motion application dated 9/9/2020 is lodged by advocates who were not part of the trial suit without the leave of the court and ought to be struck out.

16. I will however proceed to address the second issue for determination so as to ensure that all issues pending in this case are determined.

Whether M/s Isabella Nyambura of directline Insurance Company had the locus to swear in the affidavit in support of the Application

17. Before I deal with this issue, I will address the concerns by the Plaintiff that M/s Lilian Ndinda should be cited as a contemnor and to be committed in civil jail for 60 days for having deponed on issues not in her knowledge. In my view, whether or not the said advocate was in contempt of court can only be ascertained based on additional evidence. Furthermore, the contemnor before being cited as such has a right to reply on her actions which allegedly mounted to contempt of court.

18. We must therefore be mindful of the principle in law which is abundantly clear that a preliminary objection is always raised on a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. A preliminary objection therefore must not derive its foundation from factual information which stands to be tested by rules of evidence.

19. In the end, it is my humble view that the question as to whether M/s Lilian Ndinda has been in contempt of court cannot be taken out as a pure point of law. And, if the Plaintiff/Applicant wishes to pursue that issue further then he is at liberty to institute the proper contempt of court proceedings against M/s Lilian Ndinda.

20. I will now turn to the core issue under consideration, which is whether the affidavit sworn by M/S Isabella Nyambura in support of the application is defective for want of capacity by the deponent.

21. The argument by the Plaintiff/Respondent is that, the deponent M/S Isabella Nyambura is a legal officer of the Defendant's insurers and has no locus standi in this case. It is argued that the case was brought against the Defendant in person but a subrogation suit for the Insurance company to claim a bite in cherry.

22. The attack on the competence of the supporting affidavit was not challenged by the Defendant/Applicant given that no response was filed to the Notice of Preliminary Objection. Be that as it may, it is the court's duty to interrogate the issues raised to establish whether or not they are factual and whether the said affidavit is incurably defective.

23. In the said affidavit, M/s Isabella Nyambura describes herself as follows:-

"That I am the Legal Counsel at Directline Assurance Company Ltd who are the insurers of Motor Vehicle Registration Number KBR 340Z and at whose instance the suit Mombasa SRMCC No. 942 of 2017 was defended and I am conversant with the issues relating to the aforementioned suit and I am duly authorized and competent to make this affidavit by dint of our rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle or prosecute any claims in the insured name"

24. The Plaintiff/Respondent does not dispute that M/s Isabell Nyambura was indeed a Legal Officer working with the insurance company that had insured the motor vehicle that was involved in the accident which was the subject matter of the primary suit. Under *Section 10* of the *Insurance (Motor Vehicles Third Party Risks) Act Cap 405*, an insurance company which has issued a motor vehicle policy against 3rd party risks is under a mandatory legal duty to satisfy any judgment entered in favour of a 3rd party against the owner of the motor vehicle in question who is its insured – (See: ***Thomas Muoka Muthoka & Another v Insurance Company of East Africa Limited, [2008] eKLR***).

25. Also, *Section 10 (2)* of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings.

26. The fact that an insurer is required to be notified of the proceedings giving rise to the judgment and to satisfy the judgment obtained against its insured, leaves no doubt that the insurer has an interest in the proceedings leading to the judgment and in any appeal against that judgment.

27. Consequently, it is my view that a legal officer or any authorized officer of the insurer would be seized of information pertaining to the proceedings in the primary suit and any appeal lodged against the decision or decree arising therefrom and has capacity to swear an affidavit in either the suit or the appeal. In any case, there is no law that provides that only co-litigants can swear affidavits in a matter. In my view, any person with information relevant to an action and who is duly authorized can swear an affidavit in the action.

28. M/S Isabella Nyambura swore the supporting affidavit and as reflected above, she was the legal counsel at the Defendant's Insurers and conversant with the issues in this matter. This averment, in my view, amounted to evidence on oath which could be controverted by other evidence to the contrary. This issue cannot therefore be taken out as a point of law based on the reasons I have set out under paragraph eighteen (18) (14) of this ruling.

29. It is therefore my finding that the Respondent's claim that the supporting affidavit is incompetent for want of capacity by the deponent is not well founded and cannot be sustained. Thus, the supporting affidavit sworn by M/S Isabella Nyambura is competent and properly before the court.

30. That notwithstanding, I have already stated in my finding above that the Preliminary Objection raises a point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the Court has since been delivered. To that extend the preliminary objection has merit and is hereby granted.

31. Consequently, the Notice of Motion application dated 9/9/2020 which is the bone of this suit be and is hereby struck out.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF FEBRUARY, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by

His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY