



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 152 OF 2018

RICHARD KIPKORIR RONO.....1ST APPELLANT

SWAN CARRIERS LTD.....2ND APPELLANT

-VERSUS-

SARAH BONARERI MOSETI.....1ST APPLICANT/RESPONDENT

BATHSHEBA MORAA MIRUKA...2ND APPLICANT/RESPONDENT

KENNEDY OMBURA MIRUKA (Suing as legal representative of estate
of PETERSON MOSETI NYAMBANE.....)(DECEASED)

RULING

1. Before me is a Chamber Summons filed under Article 48, 50(1), 159(2)(a)(b)(d) of the Constitution of Kenya 2010 and Order 52 Rule 7 of the Civil Procedure Rules 2010, filed by Sarah Bonsreri Moseti & 2 Others seeking the following orders –

- 1. That the firm of Mwangangi & Associates advocates be allowed to come on record for the respondents/applicants.**
- 2. That the respondents'/applicants' former advocate David Thomas Matwetwe of Matwetwe & company advocates be ordered to remit and/or surrender Kshs.2,299,457/= to the applicant less 30% advocates fees which monies he received on behalf of the respondents/applicants from Occidental Insurance Company Limited and in default the applicant to execute.**
- 3. That this honourable court does order Kshs.2,299,457/= being half of the decretal amount deposited into a joint interest earning account to be deposited in court, pending the hearing and determination of the appeal herein.**
- 4. That the appeal be given a date for directions.**
- 5. That the costs of this application be in the cause.**

2. The application has grounds on the face of the Chamber Summons that judgment had been entered for the respondents in Kilungu PMCC No. 113 of 2017 against the appellants, wherein the applicants were awarded Kshs.4,287,622.50/= and that by a consent in the appeal entered into on 5/10/2020, it was agreed that half of the decretal amount be paid to counsel for the applicants and half be paid into a joint interest earning account in the name of the advocate for the parties.

3. It is also a ground that though the former advocate of the applicants David Thomas Matwetwe of Matwetwe and Company advocates had been paid half of the decretal amount of Kshs.2,299,457/= he had not surrendered the money to the applicants despite constant demands and that the applicants had now instructed another advocate.

4. The application is supported by the affidavit of one of the applicants Kennedy Ombura Miruka sworn on 10th December 2020 which amplifies the grounds of the application.

5. The application is opposed through an affidavit sworn on 23rd July 2021 by Kinyanjui Theuri advocates of Kinyanjui Njuguna & Company advocates, in which it is deponed that indeed, Kshs.2,299,457/= was deposited in a joint interest earning account in the name of

Kinyanjui Njuguna and Matwetwe & Company advocates, but that the applicant merely wished to delay the progress of appeal through filing of the present application.

6. It is also deposed in the replying affidavit, that transferring the money from the joint interest earning account of the advocates would deprive the parties interest to be earned from the bank, and would amount to varying the consent already recorded.

7. The application was canvassed through written submissions. I have perused and considered the written submissions of both the applicants' and the respondents counsel.

8. The first issue is with regard to the appointment of fresh firm of advocates for the applicants. In accordance with the provisions of Article 50(2) (g) of the Constitution which gives entitlement for a litigant to be represented by an advocate of his choice, I cannot deny the applicants the right to change their advocate of his choice. Thus prayer 1 is granted but they should know that they have an obligation to pay any fees due to the previous advocate.

9. With regard to the request for repayment of money by his former counsel of half of the decretal amount herein paid to that advocate, this request has not been contested in any way, as the said advocate Matwetwe & Company has not filed any response to the application.

10. I note from the facts on record that the said money was paid to the advocate on behalf of the applicants, and Order 52 Rule 4 of the Civil Procedure Rules also provides as follows –

4. Where a relationship of advocate and client exists or has existed the court may, on application of the client or his legal representative, make an order for –

(a)

(g) payment or delivery up by the advocate of money or securities.

11. Thus this court has power to order payment of the money received by the advocate. Since the advocate has not challenged the request of the applicants for payment of the money, I will grant prayer (2) of the application.

12. Prayer 3 of the application is opposed, but not by the former advocate of the applicants but by Matwetwe & Company, the advocate for the opposite party, the appellants. I note that the reasons for opposition to the prayer is that the applicants wants to vary a consent, recorded, and that interested parties will lose interest to be earned from the bank, and that the applicants bent on delaying the progress of the appeal by bringing the present application.

13. With regard to variation of consent, the record shows that the consent was entered into between counsel for the parties. The applicants have now said that they were kept in the dark on given false information or the status of the case or appeal, by their former advocate. The consent in my view was meant to protect the interests of the parties, not the counsel. In the circumstances of this case, the advocate seems to have abandoned his clients and the consent or some aspects of it cannot be implemented. We cannot thus rely on the case.

14. On the issue of loss of bank interest, the applicants are the parties who will be affected, if there will be any such loss. Thus that ground raised by counsel is for the other side is invalid.

15. With regard to the allegation of the application causing delay of the appeal, the applicants did not appeal, and it is evident that the appeal of the appellants was initially dismissed and later reinstated. It was thus the advocates who were infact to blame for the delay, if there is any such blame, not the applicants. I will thus grant the prayer for release of the money from the bank.

16. Prayer 4 is for this court to give a date for directions in the appeal. I will readily give directions that the Deputy Registrar fixes a date for directions of the appeal for next term early 2022; otherwise the appeal will stand dismissed.

17. Consequently I allow the application and grant prayers 1, 2 and 3. With regards to prayer 4, I order the Deputy Registrar of this court to fix the appeal for directions in March 2022. Costs in the cause.

DELIVERED, SIGNED & DATED THIS 7TH DAY OF DECEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE