



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 28 OF 2016

AGNES CHEPUS.....APPELLANT/RESPONDENT

VERSES

MARGARET GOKO.....RESPONDENT/APPLICANT

KIARIE & COMPANY ADVOCATES.....INTERESTED PARTY

RULING

1. By her Notice of Motion dated 29th August 2019 the Applicant prays for the following orders

(a) that there be stay of execution of the decree in the appeal herein pending hearing and determination of this application

(b) this court does set aside the judgment and or judgments of any kind and decree entered against the applicant in this appeal.

2. The application is based on the grounds thereof and her affidavit sworn on the even date and basically the Applicant contents that the appeal was conducted without her involvement as the interested party who was her counsel in the lower court failed to notify her. She blamed the interested party for proceeding in her absence and that she only learned of the decree once proclamation was undertaken against her.

3. The Applicant has attached the copy of the proclamation of her goods dated 5th August 2019 in which her moveable goods were proclaimed.

4. The other argument she advanced is that the interested party was not instructed by the AMACO Insurance Company which had insured her in the appeal although it had represented her at the lower court.

5. The Respondent AGNES CHEPUS responded via her replying affidavit dated 28th October 2019 in which she said that the application was an abuse of the court process and the same ought to be dismissed and that she should be allowed to enjoy the fruits of the judgment.

6. She deponed that the applicant was well represented during the appeal process by the interested party and she cannot be allowed to cry foul now.

7. She said that reopening the appeal will mean a long delay again yet she has been waiting for this matter to end as at the year 2008. She prayed that the same should be dismissed.

8. The Interested Party through the Replying Affidavit of ISAAC NDARWA KIARIE dated 4th March 2020 opposed the application on the grounds that they were instructed by AMACO Insurance Company which had insured the Applicant and thus it had the contractual capacity to defend the Applicant both in the lower court and at the appeal level.

9. He further deponed that the directions given by the court was to the effect that the appeal was to be disposed by way of written submissions and there was therefore no need of having the Applicant present in court during the hearing of the appeal. He said that they acted on behalf of the Applicant by virtue of an insurance contract between the appellants and AMACO.

10. The Interested Party took issue as well with the firm representing the Applicant for not complying with the provisions of Order 9 rule 13 of the civil procedure rules.

11. There is no evidence that the Applicant changed her advocates in the lower court or at the appellate stage. The presumption and indeed

the above provisions of the law provided that the interested party would continue to act on her behalf. The current firm which has filed the application has not complied with the provisions of order 9 of the Civil Procedure Rules.

12. The parties were instructed to file written submissions which it appears the Appellant alone did comply. The main issue to determine is whether in light of the reasons adduced by the applicant there is need to reopen this appeal afresh and set aside the judgment.

13. The main reason advanced by the Applicant is that she was not aware of the matter when it came on appeal as her erstwhile counsel failed to notify her. She said that she learned of the matter when Auctioneers proclaimed her goods.

14. What is not disputed is that the interested party acted for the Applicant at the lower court courtesy of direct instructions from AMACO insurance company. To that extent the applicant does not deny. Her beef however is that she did not instruct the interested party to act for her at the appeal level.

15. The Applicant does not tell the court how the interested party acted for her at the lower court. Did she instruct them or they were instructed by the Insurance Company? I think the obvious answer is the latter. The reality is that she was insured by AMACO Insurance Company who indemnified her in the event of any accident. The accident unfortunately occurred and it was incumbent upon the said company to defend her which it did.

16. At the appeal level as well the insurance company instructed the interested party to defend her. Unfortunately, the appeal went south and that is why her goods were proclaimed. The said insurance company was as expected supposed to indemnify her. It is yet to do so.

17. It is the finding of this court that she was well represented and if she has a problem of representation then the Appellant was not to blame. She should as a matter of fact take the issue separately with the interested party in terms of professional negligence or otherwise. By allowing this application, the Appellant shall be subjected to unnecessary delay as she has no issues with the applicant's representation.

18. It is noted that the interested party ably represented the Applicant in the matter and duly filed the relevant submissions. It cannot therefore be argued that she was not represented. In any event wasn't she supposed to take up the matter with her advocate? She was ideally supposed to be vigilant enough and by extension take up the matter with the Insurance Company.

19. An issue was raised concerning the representation of the Applicant by the firm of Apollo Ambutsi Advocates. The interested party relied on the provisions of Order 9 rule 13 of the Civil Procedure Rules which states as follows. The above order ought to be read together with order 9 rule 5 which states that;

“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 notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

20. This argument is valid. Judgement is already on record and the law firm representing the applicant was and is still the interested party. The firm of Apollo Ambutsi Advocates did not seek leave of the court or consent of the interested party before filing the application. More importantly the interested party acted for her at the lower court and at the appellate stage without any objection by the Applicant. Rule 5 above envisaged such a situation and that is why the interested party acted for her.

21. As stated above if any issue of representation has brought injustices to the applicant then the same should be taken up between the Interested Party and the Applicants Insurer and not the Appellant.

22. For the foregoing reasons the application is hereby dismissed with costs.

Dated, signed and delivered via zoom at Kitale this 21st day of May 2020.

H. K. CHEMITEI

JUDGE

21/5/2020