



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 62 OF 1998

ESTHER IGANDU WILLY.....PLAINTIFF (DECEASED)

KENNEDY KAUNDA NYAGA

LENAH NYAWIRA NYAGA.....SUBSTITUTED PLAINTIFFS/RESPONDENTS

VERSUS

SEVENTH DAY ADVENTIST CHURCH (EA) LTD....DEFENDANT/APPLICANT

R U L I N G

A. Introduction

1. This is a ruling on the application dated 14th May 2018 in which the applicant seeks an order to the effect that the amount of Kshs. 213,236/= demanded as interests on costs taxed at Kshs. 138,452/= is unreasonable and uncalled for.
2. It is the applicant's case that the original plaintiff in this case died on 24th February 2009 and was not substituted. The applicant further puts forth the case that the interest on the accessed costs should not be allowed since delay in execution for costs was not caused by the applicant.
3. In an affidavit in support of the application, Mr. Momanyi counsel for the applicant deposes that the respondents through Giant Auctioneers have issued several warrants of execution on the 16/02/2018 and subsequently on the 18/05/2018. The applicant was served with a Notice of Sale of his land LR. Kagaari/Kigaa/T.128 for recovery of costs plus interest totalling Kshs. 353,618/=. Mr. Momanyi further deposes that the respondents did not follow the correct procedure in his attempts to have the property auctioned and thus exposes the applicant to irreparable loss.
4. In rejoinder the respondents filed grounds of opposition dated 2nd June 2018 arguing that an application for substitution of the deceased plaintiff was filed on the 24/09/2015 and allowed on the 25/11/2015 and that the applicant has never paid the costs taxed at Kshs. 138,452/= on 30/05/2006. Neither has the applicant ever applied for the setting aside of the taxation order and/or costs.

B. Applicant's Submissions

5. Mr. Momanyi for the applicant submitted that there is no law forbidding an advocate from swearing a supporting affidavit but one is only restrained from deposing where there are contentious issues on which he might be cross examined.

6. The counsel further submitted that it was not the applicant's fault that there was delay in paying the taxed costs as the respondents had not commenced execution proceedings and thus the accruing interests on the taxed costs should not be applied on the applicants.

C. Respondent's Case

7. The respondent submitted that the original plaintiff died on 24/02/2009 after which they filed an application for substitution on the 24/09/2015 which was heard and determined by Justice Bwonwonga and allowed on the 25/11/2015. Further the respondent submits that the orders for substitution are still valid for they have not been set aside.

8. The respondents further submit that the affidavit in support of the instant application by the applicant's counsel is incompetent and should be struck out as it offends Rule 8 of the Advocates Practice Rules that prohibit an advocate from appearing in a contentious matter that he may be called to give evidence. The respondents rely on the cases of **Simon Isaac Ngui Vs Overseas Courier Services (K) Limited [1998] eKLR** and **Francis Kimuta Bii Vs Kaisugu (Kenya) Ltd [216] eKLR** where the court upheld Rule 8 of the Advocates Practice Rules and struck off the affidavit from the court record.

9. Further, the respondent also submit that the applicant wants to evade paying costs and interests owed to them and has failed to make a case why its application is warranted having failed to demonstrate how the purported sale by auction is flawed.

D. Analysis & Determination

10. The respondent has submitted that the affidavits in support of the instant application sworn by Mr. Momanyi is defective for there are a number of authorities where it has been held that it is not proper for counsel appearing for a party to depone to evidentiary matters of facts in a suit.

11. In the case of **Kuya Investments Ltd & Another Vs Kenya Finance Corporation & Others Nairobi HCCC No. 3504 of 1993**, Ringera AG J in upholding a preliminary objection that counsel for the applicant should not have sworn an affidavit in disputed matters had this to say: -

The first objection is well founded. The applicant's counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge and information and belief. It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters the advocate courts and adversarial invitation to step from his privileged position at the bar into the witness box."

12. This decision was followed in the case of **Simon Isaac Ngui Vs Overseas Courier Services (K) Limited** (supra) where A. Mbogholi Msagha J., when he dealt with the question of striking out affidavit especially on the ground that the affidavit had been made by counsel for one of the parties, quoted with approval the holding in the case of **Kuja Investments Ltd (supra)**.

13. Similarly, in the case of **Scholastica M. Shegu Vs Kenya Power & Lighting Co. Ltd Kisumu HCCC No. 215 of 1992** where Wambilyangah J. cited the decision of **Kisya Investment Ltd** case and stated: -

In doing so the judge held that a party's advocate was not competent to swear the supporting affidavit on disputed facts. For these reasons I hold that Mr. John Olago Aluach was not competent to swear an affidavit in this case.

14. It is therefore trite law and in line with Rule 8 of the Advocates Practice Rules that an advocate acting for a party should not swear an sworn affidavit on disputed matters. I have perused the said affidavit and in my view the entire affidavit contains contested facts relating to the dispute, matters of fact and evidence which cannot be within the knowledge of the advocate.

15. It goes without saying that the counsel never witnessed the demolition of the church and other related incidents. As such he cannot be heard to say that those matters not within his knowledge, information and belief as he has deposed. Contrary to the counsel's arguments, the matters deposed therein are no doubt contentious.

16. Notwithstanding the above, I must state that even if this court was to proceed and uphold the said affidavit, this court is incapable of granting the orders that are sought in the application dated 14/05/2018. The record reveals that the respondent's costs were taxed at Kshs. 138,542/= on 22nd April 2009.

17. The decision by the taxing master has not been set aside or appealed. The applicant cannot therefore seek this court's indulgence in varying the taxed costs. The record also reveals that the respondents herein validly substituted the original plaintiff vide a ruling delivered on 25/11/2015 by Justice Bwonwonga.

18. It is my finding that the affidavit sworn by Mr. Momanyi is defective and is hereby struck out. This order leaves the application with no foundation. The application without an affidavit is not application in the real sense of the word. It is incompetent and not properly before the court.

19. The said application is hereby struck out with costs to the respondent.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF SEPTEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Kiai for Kathungu for Respondent