

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 105 OF 2006

DOSHI IRON MONGERS LIMITED.....PLAINTIFF

VERSUS

1. KENYA REVENUE AUTHORITY

2. THE ATTORNEY GENERAL.....DEFENDANTS

R U L I N G

1. This file was fixed today for the hearing of an application by the defendant, as judgment debtor, seeking stay pending appeal. That application initially came to court on the 9/9/2019 and again on 12/9/2019 before Nyakundi J, as the vacation duty judge, when today's date was fixed. On 12/9/2019, the proceedings of the court say that Mr. Oluga attended court and addressed the court as the advocate appearing for the plaintiff/decreeholder and addressed the court in the presence of Ms. Lavuna Counsel for Applicant and was granted leave to file a Replying Affidavit in the presence of the said counsel.

2. Pursuant to that Order a Replying Affidavit was filed on 25/9/2019. By the date of filing the Replying Affidavit, the said counsel had on the 11/9/2019, a day before appearing before judge Nyakundi, filed a consent between his firm and the firm of Anjarwalla & Khanna Advocate permitting him to take over the conduct of the matter.

3. It is however clear from the record that the said consent was never endorsed as an order of the court and therefore when the file was called out today, Ms. Odundo, Advocate, sought from the court an order that the Replying Affidavit be struck out for having been filed by an advocate who was not properly on record.

4. In opposing the request Mr. Oluga Said that there was no prejudice to be visited upon the Applicant/defendant to merit the drastic order of striking out the Affidavit being made.

5. I have noted that there is no dispute between Mr. Oluga's firm and the firms he is taking over the brief from. I also appreciate the purpose of Order 9 Rule 9 to have been intended to protect an advocate who has acted in the matter from being ejected from the brief unceremoniously after judgment without regard to his lien on the file as to fees. It is a provision that must be left to guide the relationship between an advocate and his client and should never be exhalted to the level of granting to an adversary the right to dictate what advocate his opponent instructs. To say otherwise would be to negate on a litigants right under article 50(2)g guaranteeing the right to have an advocate of own choice.

6. In addition, I have not been told that failing to expunge the Affidavit from the Record would visit any prejudice upon the Applicant/Defendant. In my view I cannot imagine any such prejudice. The only prejudice that may result is that, if I expunge the Affidavit, I would grant leave to the same advocate leave to file an Affidavit of the same effect and thereby delay the conclusion of the matter. I am sure that would be a prejudice on both sides and a negation on the courts overriding objective to administer justice expeditiously.

7. I am hesitant to wade in the mud of delay and decline the request to strike out for tending to serve no interests of substantial justice.

8. The last point is my understanding on how the court system works. It is that once a consent is filed, it is the Registry personnel to undertake the clerical duties of having the consent noted in the court file and having the file before a deputy Registrar for endorsement. In that process a litigant and his counsel have totally no role to play. It would be an act in punishing a litigant for no mistake of theirs to expunge a document on the basis of a default by the Registry staff.

8. The upshot is that I decline to expunge the Replying Affidavit because to do that would not serve the interests of justice. Instead I deem the consent as endorsed and the Replying Affidavit filed pursuant thereto, properly filed. Let the matter proceed on the basis of the papers filed as at today.

9. I further note that it is now 3.25pm and there is a meeting for the station I have to attend hence this matter cannot be reached. It is stood over to the 10/12/2019.

10. In the meantime, I direct that status quo be maintained in that no execution shall issue prior to taxation of costs and extraction of the decree in accordance with the law.

Dated and delivered at Mombasa this 19th day of November 2019.

P.J.O. OTIENO

JUDGE