



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO 326 OF 2017**

**SITONIK OLE LOTAPASH.....APPLICANT/DEFENDANT**

**VERSUS**

**HUMBPREY MBUGUA NJACHE.....RESPONDENT/PLAINTIFF**

**RULING**

1. Vide an application dated 21<sup>st</sup> January 2020 by way of Notice of Motion brought under Section 1A, 1B, and 3A, of the Civil Procedure Act, Order 10 Rule 11, Order 12 Rule 7, Order 40 Rule 1 of the Civil Procedure Rules, Article 159(1) (d) of the Constitution of Kenya, and all other enabling provisions of the law, the Applicant herein has sought Orders to stay further dealings in title No. Laikipia/Marmanet/4909 and 4910 which were sub-divisions of title No. Laikipia/ Marmanet 4563. The Applicant also sought for the court to set aside the ex-parte judgment delivered on 9<sup>th</sup> November 2019 together with all consequential orders and to grant the Applicant unconditional leave to defend the suit.

2. The Application was premised on the grounds on the face of it and supported by an affidavit sworn by the Applicant on the 20<sup>th</sup> January 2020.

3. The Application was opposed by the Respondent through his notice of Preliminary Objection dated the 14<sup>th</sup> February 2020, to the effect that it was incompetent, misconceived and incurably bad in law because the Defendant had violated the mandatory requirements of the law and therefore the Application ought to be struck off.

4. By consent Counsel agreed to dispose of the Preliminary Objection in the first instance, by way of written submission to which I shall summarize the same as follows:

**Applicant's submission:**

5. The Applicant's submission was that the Respondent/Plaintiff herein instituted an Originating Summons dated 10<sup>th</sup> March 2017 wherein he failed to effect service upon him and proceeded ex-parte pursuant to which judgment was obtained in his favour.

6. That the Respondent only came to know of the above captioned proceedings on the 9<sup>th</sup> January 2020 when his Counsel visited the Land Registry to peruse a withdrawal of a Caution that had earlier been placed on the land by the Respondent. Following the above sequence of events, the Applicant appointed Counsel on the same day who filed the present application on the 10<sup>th</sup> January 2020.

7. That the Preliminary Objection raised by the Respondent, although relying on law, was based on misconstrued facts. That the notice of appointment of Advocate which is the subject of his preliminary objection had been served upon to Counsel for the Respondent along with all the pleadings.

8. That the Preliminary Objection dated 14<sup>th</sup> February 2020 was simply a waste of the judicial time, a distraction and delaying tactic by the Respondent and the same ought not to see the light of the day. The Applicant submitted that they had complied with all the provisions of the law before filing their Application dated 21<sup>st</sup> January 2020, which had been duly served upon the Respondent's Counsel. That the Preliminary Objection lacked merit and the same ought to be dismissed with costs to the Applicant.

**Respondent's submission.**

9. In opposition to the Application dated the 21 January 2020, the Respondent's submission was to the effect that the said Application was incompetent, misconceived and incurably defective in law and should be struck off and/or dismissed with costs because it was filed by a

stranger to the proceedings thereby violating the provisions of Order 9 Rule 1 of the Civil Procedure Rules.

10. That upon Counsel for the Applicant receiving instructions from his client, he was mandated to file a Notice of Appointment of Advocate in terms of Order 9 Rule 7 of the Civil Procedure Rules. That no notice had been filed by the firm of Kabira Kioni & Co Advocates and therefore they were strangers to the proceedings.

11. That the bundle of documents drawn, filed and served by the said firm of Advocates were illegally filed and should be struck off or dismissed with costs in favour of the Respondent since the same had been drawn and filed before Counsel was appointed which was in contravention with the provisions of Order 9 Rule 1 and Rule 7 of the Civil Procedure Rules. In so submitting, Counsel for the Respondent relied on the provisions of law herein above stated as well as the decided cases in;

**i. Republic vs Busia Senior Resident Magistrate ex-parte David Henry Muchelule & Others**

**ii. Sunrise Properties Limited & Another vs Fifty Investments Limited & Another [2017] eKLR**

**iii. Kenya Building Construction Timber & Furniture Industries vs Newline & Furniture Limited.**

12. The Respondent thus submitted that the Applicant's entire Application and pleadings dated 21<sup>st</sup> January 2020 were incompetent, misconceived and incurably defective in law and should be struck off. They sought that the Court upholds their Preliminary Objection dated the 14<sup>th</sup> February 2020 which had raised legal issues of the law.

#### **Determination.**

13. Following the delivery of an ex-parte Judgment in this matter on the 19<sup>th</sup> November 2019, the firm of M/S Kabira Kioni & Co Advocates, filed their Notice of Appointment of Advocate dated the 9<sup>th</sup> January 2020 seeking to come on record for the Applicant. On the 21<sup>st</sup> January 2020 they also filed an Application by way of Notice of Motion seeking to stay further dealings in title No. Laikipia/Marmanet/4909 and 4910 which were sub-divisions of title No. Laikipia/ Marmanet 4563. The firm of Advocates also sought that the court sets aside its ex-parte judgment delivered on 9<sup>th</sup> November 2019 together with all consequential orders and to grant the Applicant unconditional leave to defend the suit.

14. The Preliminary Objection dated 14<sup>th</sup> February 2020 by the Respondent to this Application was based on the fact that the Application was incompetent, misconceived and incurably defective in law and should be struck off and/or dismissed with costs because it was filed by a stranger to the proceedings thereby violating the provisions of Order 9 Rule 1 and Rule 7 of the Civil Procedure Rules.

15. Order 9, Rule 1 of the Civil Procedure Rules provide as follows:

Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—

(a) any such appearance shall, if the court so directs, be made by the party in person; and

(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.

16. I have considered the Preliminary Objection dated 14<sup>th</sup> February 2020 and the issue arising for consideration is as follows:-

**a) Whether the Application dated 21<sup>st</sup> January 2020 violated the provisions of Order 9 Rule 1 and 7 of the Civil Procedure Rules.**

17. The Plaintiff/Respondent's contention is that the Application dated 21<sup>st</sup> January 2020 violates the provisions of Order 9 Rule 1 of Civil Procedure Rules as it was lodged by persons with no legal authority to represent the Applicant to wit that no notice had been filed by the firm of Kabira Kioni & Co Advocates to come on record for the Applicant and therefore this firm was a stranger to the proceedings. On that basis the Plaintiff /Respondent urged that the Application before the said firm of Advocates lodged their Notice of Appointment was null and void and should be set aside and/or struck out for being invalid.

18. From the reading of Order 9 Rule 1 of the Civil Procedure Rules, and my understanding of the said provision, there is nothing that requires a formal Notice of Appointment of an Advocate.

19. I find that the Preliminary Objection to the effect that Counsel for the Applicant was not on record before filing his Application is not valid as the Applicant was not a party to the proceedings and had not previously acted on his own or through another Counsel to warrant his Counsel to file a Notice of Appointment before filing the Application. That notwithstanding, the Applicant's Counsel had filed his Notice of Appointment on the 9<sup>th</sup> January 2010 before he filed the impugned Application. There is no requirement in law that stipulates that having

previously not been involved in a suit, a party who wishes to file an Application therein must first file a Notice of Appointment.

20. Order 9 Rule 1 of Civil Procedure Rules does not require the filing of Notice of Appointment of an Advocate as filing of the said notice only applies where a party appoints an Advocate having previously acted in person or having sued or defended in person as clearly provided for under Order 9 Rule 7 of the Civil Procedure Rules which provides that:

**Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."**

21. Again in the instant case, there was no Advocate on record previously engaged for the Applicant and the Applicant is not proposing to act in person, there would therefore be no logic in the Applicant's Advocate giving notice to his client that he proposes to come on record for him and then seeking leave of Court.

22. The Plaintiff /Applicant referred the Court to the case in **Kenya Building, Construction, Timber & Furniture Industries Employees Union vs Ms. Newline Furniture Ltd [2017] eKLR**, in which the Employment and Labour Relations Court found that the applications filed by an Advocate who had not yet lodged a Notice of Appointment of Advocates were irregular and invalid as they had been taken by a stranger to the proceedings.

23. The case is distinguishable from the present case scenario in that in the former case, the Advocates for the Respondent had specifically asked for time to file a notice of appointment and had been directed to file a notice of appointment within 7 days. The advocate failed to comply. Rule 13(1) of the Employment and Labour Relations Court (*Procedure*) Rules, 2016 Legal Notice 146/2016 specifically requires a Memorandum of Appearance separate from the Response. This provision is not equivalent to Order 6 Rule 2(4) of the Civil Procedure Rules which specifically provides that a defence will suffice without a Memorandum of Appearance so long as the defence contains the address and service. (reference is made to **Iway Africa Limited v Infonet Africa Limited & another[2019] eKLR**)

24. The upshot is that the Plaintiff /Respondent's Preliminary Objection dated 14<sup>th</sup> February 2020 is without merit and is accordingly dismissed with costs to the Defendant/Applicant.

**Dated and delivered at Nyahururu this 14<sup>th</sup> day of July 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**