REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 343 OF 2002

ORION EAST AFRICA.....PLAINTIFF /DECREE HOLDER

Versus

MUGAMA FARMERS CO-OPERATIVE UNION LIMITED....DEFENDANT/J/D

AND

CO-OPERATIVE BANK OF KENYA LIMITED.....GARNISHEE

RULING

Brief background

[1] The Plaintiff herein instituted this suit against the Defendant vide a Plaint dated 19th March, 2002 for a sum of Kshs. 1,956,736.10/= and interest thereon at the rate of 3% per month from 1st November 2001 until payment in full. The Plaintiff also prayed for costs of and incidental to the suit. The suit involved a debt owed to the Plaintiff by the Defendant for the supply of farm inputs on or about the year 1999 and 2000. According to the court record, a Memorandum of Appearance by the Defendant was filed on 15th may, 2012 by M/s Muraguri & Muraguri Advocates. However, no defence was filed thereafter. Consequently, the court entered judgment in default of defence against the Defendant on 27th August, 2002 and ordered the Defendant to pay the Plaintiff a sum of Kshs. 2, 485,058.60/= together with interest thereon at the rate of 3% per month from 28th August 2002 until payment was made in full. A decree was issued on 16th September, 2002.

Preliminary objection: Change of advocate after judgment

[2] Two separate Motions were subsequently filed by the Plaintiff and the Defendant. The first one is by the Plaintiff and is dated 7th March 2014 by the Plaintiff, and the second is by the Defendant and is dated 27th March, 2014. There was however a preliminary issue that was raised by the Plaintiff's Learned Counsel, Miss Nyaga, that is; the Defendant's Advocate, Mr. Evans Gaturu Advocate was not properly on record. And on 7th November, 2014 the Court directed the Plaintiff and Defendant to file brief submissions on the preliminary issue.

[3] The objection is simple; that the firm of Muraguri & Muraguri was still on record for the defendant

in this suit as at 7th March, 2014; and although Mr. Gaturu subsequently filed a notice of change of advocates on 20th June 2014, it was filed without the leave of court as stipulated in Order 9 rule 9 of the Civil Procedure Rules, 2010. Therefore, the Plaintiff asserted that any application, affidavit and submission filed by the aforesaid advocate were incompetent and ought to be stuck out. In support of this submission, the Plaintiff cited various cases including **Mbogo –vs- Asikoyo & 3 others High Court Civil Case No. 71 of 2000**, **Kabon Chekonga &Others –vs- Rodger Kiptui & Others, High Court Appeal No. 28 of 2000** and **Mohammed Abdul Adan –vs- Ardo Mohammed, High Court Civil Appeal No. 147 of 2010**.

[4] Mr Gaturu replied and submitted that he was properly on record, as he had penetrated the case through the Garnishee proceedings which were served on the Defendant. Mr. Gaturu argued that on service with the Garnishee proceedings, the Defendant engaged his services. He insisted that Muraguri & Muraguri Advocates were no longer on record as he was appointed to act for the Defendant in the Garnishee proceedings. Therefore, the circumstances outlined in Order 9 Rule 9 did not apply in the instant case. He therefore concluded that there was no merit in the Plaintiff's arguments and the same should be dismissed by this court.

[5] I have heard these arguments many times before. Except, those by Mr. Gaturu seem to introduce a new terminology, ''penetrated the case'' which is quite unusual. As far as I am aware, an advocate comes on record for a party in the manner prescribed in law. The terminology ''penetrated the suit'' is foreign and denotes some force or other acts in law other than the honourable act of coming on record or acting for a party in a judicial proceeding. The term penetration is familiar in the realm of sexual offences and bears a meaning of particular illegal action. Again, penetration is common term in the military and disciplined forces, for it means the depth reached by a bullet or other projectile in something against which the projectile is fired. And in common parlance, penetration is understood without any doubt to mean the act of piercing or passing something into or through a body or object. I do not want to forget commercial terms such as penetrating pricing used in business world, to denote pricing of a new product below its anticipated market price in order to enter a market and capture market share by breaking down existing brand loyalties. And so forth and so forth. But in relation to entry into a judicial proceedings by an advocate for a party in the suit, using the phraseology ''I penetrated the suit'' is most inappropriate.

[6] Having stated the above, one fact is not disputed in this matter; that judgment in this case has already been entered. Immediately on that realization, Order 9 Rule 9 of the Civil Procedure Rules is called into play. The order provides as follows :

> ***"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***
>
> ***a. upon an application with notice to all the parties; or***
>
> ***b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."***

The Defendant is the primary party in this suit and had previously engaged Muraguri & Muraguri Advocates to act for them. The said firm of advocates filed a Notice of Appointment on 14th May, 2002. However on perusal of the file, I noted that the firm of Evans Thiga Gaturu, has also filed a Notice of Appointment of Advocate dated 19th March, 2014 and filed on the same date. In the circumstances of this case, as judgment is already entered, Mr. Gaturu or any other advocate coming on record for the Defendant must adhere to Order 9 rule 9 of the CPR. The Garnishee is brought to the proceedings in the execution of the decree and his position in law is different from that of a primary party who had previously engaged an advocate in a matter where judgment has been entered. The Defendant cannot, therefore, equate himself to the Garnishee and seek to engage an advocate to come on record without following the prescriptions of Order 9 rule 9 of the CPR.

[7] A party can have as many advocates as he/she wishes, but any advocate who wishes to comes on

record for the Defendant after judgment has been entered cannot do it by ‘’penetrating the case through the Garnishee Proceedings’’ as it has been argued by Mr. Gaturu. Garnishee proceedings are in execution of a decree and are not independent of the primary suit. Therefore, as long as judgment has been entered in the suit and the Defendant had previously engaged an advocate, the Garnishee proceedings do not provide entry into the suit, of another advocate for that party unless through Order 9 rule 9 of the CPR. Mr. Gaturu neither sought the permission of the court nor the consent of the outgoing advocate in order to come on record for the Defendant. There are sound policy reasons why this rule was introduced into the Civil Procedure Rules, and it serves to protect rights arising out of advocate-client relationship; it must be adhered to. Notice to the outgoing advocate is paramount and that is why the rule states that an application of change of advocates made under Order 9 rule 9 of the CPR must be served on the outgoing advocate. I do not understand why Mr. Gaturu thought the requirements in Order 9 rule 9 of the CPR do not apply when Garnishee proceedings are involved, because the basic fact is that he was coming on record after judgment had been entered and there was a previous advocate on record for the Defendant. Nothing stopped him from even including the request to come on record as part of the first filings by him, and we would have simply dealt with that issue first and expeditiously. Alternatively, he should have filed consent between the outgoing advocate and him, and the court would have effected the change of advocates upon that consent. Accordingly, Mr. Evans Gaturu Advocate did not comply with Order 9 Rule 9 of the Civil Procedure Rules, and is, therefore, irregularly on record. The Notice of appointment filed on 19th May, 2014 is therefore not in accordance with the law as the same was filed without the leave of this court. See the case of **Mohammed Abdul Adan –vs- Ardo Mohammed (supra).**

[8] I am, however, aware that this procedural lapse will affect the rights of the Defendant if I were to apply it strictly; i.e. declare all the proceedings by Mr. Gaturu to be incompetent and strike them out. In light of article 159 of the Constitution and the overriding objective, courts are expected to take a much wider approach in dealing with such procedural lapses. The lapse herein can be remedied by requiring Mr. Gaturu to either file consent from the foregoing advocates or apply for leave of the court to come on record as per Order 9 rule 9 of the CPR. I am surprised even after this lapse was brought to his attention he chose to ignore it and set on a path to justify his position. I should emphasize that article 159 of the Constitution is not a panacea of all ills including deliberate default by counsels to adhere to procedural requirements which serves important legal purposes in judicial proceedings. Nonetheless, I will spare the application dated 27th March, 2014, as well as all the affidavits and submissions filed by Mr. Gaturu and direct him to file consent of the outgoing advocate or file and serve an application for leave to come on record within 14 days of today. Once he has complied with order 9 rule 9 of the CPR as per the directions of the court, I will deliver rulings on the applications for setting aside judgment herein as well the Garnishee proceedings. A mention date will be given in due course to confirm compliance by Mr. Gaturu with the directions of the court and to give ruling date for applications dated 7th March 2014 and 27 March, 2014. It is so ordered.

Dated, signed and delivered in court at Nairobi this 2nd day of February 2015

F. GIKONYO

JUDGE