



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS CIVIL APPLICATION NO. 174 OF 2009

KOPOT & CO. ADVOCATES.....APPLICANTS

VERSUS

BEATRICE OTIENO MBOGO.....RESPONDENT

RULING

By her application dated 11-8-2014 applicant prays for the following orders:

- 1. That the firm of Otieno Ragot & Co. Advocates be granted leave to come on record for the respondent/applicant in place of the firm of Anne Omollo & Co. Advocates.**
- 2. There be stay of the execution commenced by the applicant/respondent pending hearing of this application.**
- 3. The proceedings, orders on ruling judgment/decree on 11-6-2014 be set aside and the application dated 2-6-2010 be heard inter parties on merit.**
- 4. The process of execution commenced against the respondent/applicant be set aside and any costs arising therefrom be met by the applicant.**
- 5. Costs be provided for.**

The application is supported by the affidavit of the applicant sworn on 11-8-2014. The substance of the affidavit are that the applicant was unable to proceed with this matter and defend the bills as her erstwhile advocate was appointed a Judge and that she came to know the existence of this matter when she was threatened with execution. According to her she never instructed the firm of Kopot & Co. Advocates, but it was her insurance company namely Standard Assurance Kenya Ltd that it did. Accordingly therefore it was the said company which ought to settle Mr. Kopot's bills.

The respondent has opposed the application. Its first argument was that the prayers sought by the applicant were a mixture of sort and they cannot be granted as they appear. In other words it was incumbent upon the firm of M/S Otieno Ragot & Company, first to be allowed to act for the applicant in place of M/S Anne Omollo & Co. Advocates.

Further, the respondent submitted that the applicant was a client for all intent and purposes as she had been insured by the instructing client, Standard Assurance Kenya Ltd.

I have perused the application together with respective affidavits, submissions and the authorities supplied by the respondent. I think the starting point should be to determine the legality of M/S Otieno Ragot & Co. Advocates, present in this matter. There is no doubt that Ms Anne Omollo precisely acted for the applicant and even went as far as filing the application dated 18-10-2010 which was never argued.

In light of the above observation the first issue to decide is whether the firm of Otieno Ragot is

properly on record and if so whether the other prayers sought can be granted. I think this is a preliminary issue which ought to be determined before venturing into the other substantive issues submitted by the other parties.

Order 9 Rule 9 presupposes that one ought to seek the leave of the court first in a situation where judgment has been entered. Rule 10 thereof provides that:

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first”.

In light of the above portion of the rules I find that the application is properly before the court. The only issue to determine is the question of representation. I do take judicial notice of the appointment of Justice Anne Omollo to the bench whom I suppose was the proprietor of the firm. Consequently it is proper to allow the firm of Otieno Ragot & Co. Advocates to act for the application Prayer (2) thereof is granted.

Having disposed off the issue of representation the next frontier is to determine whether or not to set aside the orders of 11-6-2014.

The order made on 11-6-2014 allowed effectively the application dated 2-6-2010. The affidavit of service dated 11-6-2014 sworn by one Braznev Ochieng Angwech indicates that he received a notice on 6-6-2014 and on 5-6-2014 he served the applicant at her residence at Luanda Kotieno. According to him the applicant was well known to her.

The only difficulty I find with the said affidavit is that it seemed that the notice was dated a day ahead of the service. How was this possible? Apparently none of the parties have addressed me on this. Of great significance however is the relationship between the applicant and the respondent. Who insured the respondent? If indeed it was the insurance company does it then mean that the applicant should be liable for the payment of the respondent's fees?

In my opinion this is a strong legal argument which cannot be wished away and the only forum to argue the same is on the application dated 18-10-2010 which ought to have been argued by the firm of Anne Omollo & Company.

In the premises it would not be fair to condemn the applicant unheard. I do note that the failure to prosecute the application dated 18-10-2010 was not her making. It raises real triable issues. In any event nothing is lost to the respondent as he shall have the chance to ventilate the issue of his fees.

One other issue on the question of service undertaken by Mr. Angwech on 5-6-2011 is that I do not think that about 5 days accorded to the applicant to defend the application dated 2-6-2010 on 11-6-2014 was sufficient.

Consequently, I shall allow the application dated 11-8-2014 as follows:

- a. **The firm of Otieno Ragot & Co. Advocate is hereby granted leave to come on record in place of the firm of Anne Omollo & Co. Advocates.**
- b. **The orders of 11-6-2014 are hereby set aside.**
- c. **The application dated 2-6-2010 be set down for hearing and determination forthwith.**
- d. **Costs of this application to the respondent.**

Dated, signed and delivered at Kisumu this 12th day of March, 2015.

H.K. CHEMITEI

JUDGE