



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL &ADMIRALTY DIVISION**  
**MISCELLANEOUS CIVIL APPL. NO. 586 OF 2009**

**MUCHANGI NDUATI NGINGO**

**T/A MUCHANGI NDUANTI & CO. ADV ::::::::::::::: DECREE HOLDER/APPLICANT**

**VERSUS**

**MBO-I-KAMITI FARMERS CO. LTD. ::::::::::::::: JUDGEMENT DEBTOR/RESPONDENT**

**AND**

**HARAMBEE AVENUE BRANCH ::::::::::::::: 1ST GARNISHEE**

**MARRIOT REAL ESTATE CO. LTD. ::::::::::::::: 2ND GARNISHEE**

**RULING**

1. The application before the court is a **Notice of Motion** dated **22nd October 2012**. It seeks the following orders:-
  1. *The application be certified urgent and appropriate orders be made in the first instance before service.*
  2. *The Judgement/Debtor be ordered to deposit out of sale proceeds the full amounts in issue in court forthwith pending the hearing and determination of this application.*
  3. *In the alternative the Judgement/Debtor remaining free properties L.R. No.s 96/1 Kiora Estate, 9934/2 Kiora Estate be attached by the court forthwith pending the hearing and determination of this application.*
  4. *The said properties L.R. No.s 96/1 and 9934/2 – Kiora Estate be sold by public auction in satisfaction of the decretal sums herein in default of prayer 2 above.*
  5. *Further an in the alternative in default of either of the prayers above summons be issued against the directors of the Judgement/Debtor Company to show cause why they should not be arrested and committed to civil jail for contempt of court.*
  6. *Any other just and expedient orders as appropriate in the circumstances.*

2. The application is premised on the grounds set out therein and is supported by affidavit of **MUCHANGI NDUATI NGINGO** dated **22nd October 2012**.
3. In opposing the application the 1st Respondent has filed a replying affidavit deposed to by **JAMES KAMAU NJURE** dated **21st November 2012**. The said Mr. James Kamau Njire describes himself as Director of the 1st Respondent Company.
4. The 1st Respondent has also filed a Notice of Preliminary Objection dated 2nd November 2012. The application before the court is now limited to the Applicant and the 1st Respondent, and does not concern other parties to the suit. It is noted that although the 1st Garnishee has filed a replying affidavit to the application, the said Garnishee is effectively out of these proceedings pursuant to the Ruling of this court on 21st June 2012, and their replying affidavit was to confirm that they are out of the current proceedings.
5. The brief history of the current application is as follows: On 21st June 2012, this court made an order prohibiting any dealings with parcels of land numbers L.R. 3729/2, 3729/3 and 5858 Kabaazi Estate until the earlier orders of this court dated 28th December 2011, which had required the 1st and 2nd Garnishees to deposit some Kshs.24,000,000/= in court as security, was complied with. For reasons which are now known to the parties, the said Garnishees were not able to deposit the said amount of money in court as intended security. Upon successful application by the Applicant, the court then granted the orders which prohibited any dealings in the above parcels of land until such a time as the issue of the deposit of the said sums in court was complied with. This order was necessary to secure the interest of the Plaintiff who has judgement in his favour, and to avoid a possibility that there would be no attachable property of the Defendant to satisfy the said Judgement. However, unknown to the Applicant, the above properties were sold and transferred to third parties a day before the Ruling which preserved them from any interference. The Applicant then had orders of this court which he however could not implement or execute. More importantly, the Applicant became even more exposed, as to him, it appeared that the 1st Defendant was intent on frustrating his efforts to have his fees paid for having rendered legal services to the 1st Defendant. The Applicant has interpreted the failure to comply with the order of the court as deliberate effort by the 1st Defendant to defeat justice and that this amounted to contempt of court hence this application
6. The 1st Defendant/Respondent has filed a Preliminary Objection and has stated that:-
  - ***The application is filed by an advocate or firm of advocates not properly on record and is therefore incompetent and should be struck out.***
  - ***The application is misconceived and incompetent and does not lie as a miscellaneous application NOT SUIT and has now been converted into a full trial.***
7. The 1st Defendant/Respondent further states that it did not disobey any court orders due to the fact that before the Ruling of this court was delivered on 21st June 2012, the said parcels 3729/2, 3729/3 and 5858 Kabaazi Estate had already been sold and transferred and therefore there was no intentional breach of the court order. In further submissions the 1st Respondent states that the laid parcels L.R 96/1 and 9934/2 Kiora Estate have now been subdivided and allotted to the membership of the 1st Respondent who have taken possession. They annexed a subdivision marked as “**JKN 1**”. These parcels of land, according to the 1st Defendant, are therefore not available to satisfy the prayers in this application.
8. This application was canvassed by way of written submissions. The Applicant filed his submissions on **9th January 2014** and a reply to the Preliminary Objection on **22nd January 2014**, which the 1st Defendant/Respondent did the same on **17th January 2014**.
9. I have carefully considered the application and the opposition to it. I raise the following issues for determination:-
  - i. ***Whether the preliminary objection by the 1st Respondent is sustainable.***
  - ii. ***Whether there was contempt of court.***
  - iii. ***Whether this court can again grant orders in the nature of security to the suit as prayed for.***

10. To address the first issue, it is clear that the current miscellaneous application was commenced by the Applicant acting in person as an Applicant for judgement consequent upon taxed costs obtaining in the matter. Upon entry of judgement the firm of Muchangi Nduati & company advocates, appearing for itself became the decree holder. On 16th November 2011 the firm of Mwangi Kigotho & Company Advocates took over from the Applicant firm of advocates. On 28th June 2012, the Applicant filed a Notice of Change of Advocates from Mwangi Kigotho & Company Advocates to Muchangi Nduati & Company Advocates. On 30th July 2012, the firm of Wanga & Company Advocates filed a notice of change of advocates taking over from Muchangi Nduati & Company Advocates that filed the application under consideration. Now, Mr. Mutiso for the 1st Respondent has submitted that the firm of Wanga & Company Advocates was not properly on record as the Notice of Change of Advocates filed by it on 30th July 2012 offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules which states as follows:-

***“when there is a change of advocates, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act 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 advocates and the proposed incoming advocates or party intending to act in person as the case may be.”***

11. Clearly, the Applicant did not get leave of court to act for himself in this matter, and the 1st Respondents submissions in this regard is, on its face, sustainable. However, the court must also look at the mischief which Order 9 Rule 9 seeks to stop. It primarily seeks to protect advocates who, after rendering legal services to a client and there is Judgement in the matter, may be dismissed by their clients thus putting the payment for their services in jeopardy. There are allegations, some of which are on record, that the Applicant’s advocates M/s Wanga & Company Advocates, were threatened by the 1st Defendant’s Directors and there was a complaint about this on record vide the Applicant’s letter dated 13th November 2012 to the Principal Judge in this division. Attached to that letter is an e-mail dated November 13th 2012 addressed to the Applicant by his advocates M/s Wanga & Company Advocates. In that e-mail the said advocates express their fear in representing the Applicant. At the end of the e-mail the advocates states that ***“... we are pulling out of this matter. We shall forward back the file today.”***

12. In my view, the M/s Wanga & Company Advocates voluntarily returned the instructions to M/s Muchanig Nduati. They did not claim any fees. The file was returned by their own volition. This then, in my view, amounted to a consent under Order 9 Rule 9 (b) although that consent was not filed. The court must be able to construe this conduct in a way which gives relevance to the mischief which the rule sought to cure. The rule sought to ensure that advocates who have rendered legal services are paid their fees. As long as this goal is achieved, and a court in each case considering the special circumstances, Order 9 Rule 9 must be interpreted to recognise the achievement of this purpose. In the present peculiar circumstances, where the advocate returns instructions voluntarily and is not claiming any fees from the Applicant and where the advocate has cited threats to his person, this court must uphold Article 159 (2) (d) which demands of this court to dispense justice without undue regard to procedural technicalities. I am satisfied that in the circumstances the Preliminary Objection must fail, and it hereby fails.

13. The second issue I had raised is whether or not the 1<sup>st</sup> Respondent was in contempt of the court orders pursuant to the court’s Ruling dated 21<sup>st</sup> June 2012. The simple answer is that by the time the said property were sold and transferred to third parties, on 20<sup>th</sup> June 2012 there was no court order barring the 1<sup>st</sup> Respondent’s conduct to that effect. Indeed, the order arising from that Ruling is dated 3<sup>rd</sup> July 2012. This matter has a lot of history. The 1<sup>st</sup> Defendant may have acted in expectation of such prohibiting court order. But the legal position is that there was no court order barring the 1<sup>st</sup> Defendant from dealing with the said property as if wished. The allegation in the application that the 1<sup>st</sup> Defendant disobeyed court orders or was in contempt of the court order are misleading and untrue, and any such insinuations must be condemned, as I hereby do.

14. The last issue that I had raised is whether or not this court can grant the orders in the nature of security for the suit. It is noted that this is a court of justice. It must dispense justice to all the parties who with merit, come before it. As I mentioned in the Ruling of this court dated 28<sup>th</sup> December 2011, this court is satisfied that the Applicant has a judgement which should be paid. The Applicant fears that the 1<sup>st</sup> Respondent will sell its available property so as to avoid satisfying the said decree and thereby render nugatory the judgement the Applicant has. The Applicant feels helpless. This court cannot look aside and leave the Applicant on his own without knowing how the judgement he holds will be satisfied.
15. The 1<sup>st</sup> Respondent has submitted that L.R. Numbers 96/1 and 9934/2 Kiora Estate have been subdivided and issued to the 1<sup>st</sup> Respondent Shareholders, and that the said properties are no longer available. In my view, the subdivision is merely a proposal at this stage. That proposal can be reversed to secure also the Applicant's interests.
16. In the upshot, I make orders as follows:-
- a. *The Notice of Motion application dated 22<sup>nd</sup> October 2012 is allowed on the following terms.*
    - i. *The Judgement Debtor or the 1<sup>st</sup> Respondent shall deposit the entire decretal sum now due in an interest earning account in the joint names of the parties advocates pending the hearing and determination of the miscellaneous application herein.*
    - ii. *The said deposit shall be effected within 21 days from the date of this Ruling.*
  - b. *In the alternative, and for whatever reason order (a) above is not complied with within the said 21 days the said properties L.R. No.s 96/1 Kiora Estate, 9934/2 Kiora Estate shall be attached by the court pending the hearing and determination of the miscellaneous application herein.*

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 7TH DAY OF MAY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Muchangi Nduati for Decree Holder/Applicant

Karanja holding brief for Mutiso for Judgement Debtor/1st Respondent

Teresia – Court Clerk