



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC MISC. APPL. NO. 1374 OF 2013 (O.S)

DR. KENNEDY MUYESU MUNAVU.....APPLICANT

VERSUS

WANGALWA OUNDORESPONDENT

RULING

The Applicant herein made an oral application that the Notice of Preliminary Objection and Replying Affidavit both dated 22nd November 2013 and filed in court on the same date by the Respondent's Advocate be struck out. The said oral application was made during the hearing of the Originating Summons filed herein held on 4th April 2014. The ground for the application was that the Notice of Appointment of Ashurima and Company as the Advocates for the Respondent is dated 22nd November 2013, and yet was filed in court on 28th November 2013. Further, that the said Notice of Preliminary Objection and Replying Affidavit were filed in court by the said Advocates on 22nd November 2013, and are therefore incompetent and not properly before the court.

The Respondent's Advocate responded by submitting that there is no provision in the law that a Notice of Appointment be filed before the filing of pleadings. Further, that Ashurima and Company Advocates were on also record for the Respondent in proceedings between the same parties in a lower court.

I have perused the court record and note that Mr. Ashurima has been entering appearance as the Advocate for the Respondent since the *inter partes* hearing of the Originating Summons herein commenced on 26th November 2013. The Notice of Appointment by Ashurima and Company as the Advocates for the Respondent is dated 22nd November 2013 and was filed in court on 28th November 2013. This court is in this respect guided by the applicable law on the appointment of an Advocate to act for a party, which is found in Order 9 Rules 1 and 7 of the Civil Procedure Rules which provide as follows:

“1. 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...

7. 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.”

The provisions of the Order referred to in Rule 7 on the Notice of Change of Advocate are found in Rules 5 and 6 thereof, and provide as follows:

“5. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

6. The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”

It is my view the primary issue for consideration in this application herein therefore is what the effective time of appointment of an Advocate is, and particularly whether the effective time is the date of a Notice of Appointment or the date of filing in court and service of the said Notice of Appointment. The determination of this issue will also determine the secondary issue of whether the Notice of Preliminary Objection and Replying Affidavit dated and filed in court on 22nd November 2013 by the Respondent's Advocate are properly on record or not.

This Court in this regard notes that an Advocate once appointed, is deemed to be an agent of his or her client, and the normal agency rules apply as to authority to act. In the circumstances of this application, the time when such authority was given, whether actual or implied, is at the date of the Notice of Appointment which is therefore the effective date of appointment. The purpose served by the filing and service of the said Notice of Appointment is as explained by Waki J. (as he then was) in **Kobo Safaris Ltd vs About Africa Ltd & Others, Mombasa High Court Civil Suit No 681 of 1995** when he made reference to the provisions on appointment of advocates under Order 3 of the repealed Civil Procedure Rules, whose provisions were similar to those in Order 9 of the Civil Procedure Rules of 2010 as follows:

“The order contains 12 elaborate rules spelling out the manner of participating in court proceedings through agents and advocates where parties so choose. The provisions are not mere niceties but necessary provisions to leave no doubt in the mind of the court, the parties to the suit and the world at large, as to who inter alia takes responsibility for the various orders made by the Court in those proceedings and where documents may be validly served. That is why, in my view, some of the rules in the Order are couched in mandatory terms.”

I wholly adopt the sentiments by the learned Judge, and particularly note that the main purpose of the requirements as to filing and service of a notice of appointment of an Advocate is to give notice to the court and affected parties as to the representation of a particular party by a named Advocate. Such filing and service of a Notice of Appointment does not in my view diminish nor affect the authority of the Advocate to act for a client, which authority may well be conferred prior to the said filing and service, as was the position in the present case.

I am accordingly convinced that provided an Advocate can show that he or she had actual authority to act for a party at the time that he undertook particular acts on that party's behalf, then his actions are not rendered void by the fact that the Notice of Appointment evidencing such authority was filed later on. These acts in my opinion include the filing of necessary pleadings on behalf of a client.

I therefore find for the foregoing reasons, that the Notice of Preliminary Objection and Replying Affidavit both dated 22nd November 2013 and filed in court on the same date by the Respondent's Advocate are properly before this Court, as the said Advocate had authority to file the same. The Applicant's oral application is therefore dismissed.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____10th ____ day of ____June____, 2014.

P. NYAMWEYA

JUDGE