



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 243 of 2008

BLUE SHIELD INSURANCE CO. LTD.....PLAINTIFF

VERSUS

RATEMO OIRA & CO. ADVOCATES.....DEFENDANT

RULING

This application is made by a Notice of Motion dated 1st July, 2011 and taken out under **Sections 1A, 1B and 3A of the Civil Procedure Act, and Order 9 Rule 9, Order 22 rules 22,57 and Order 40 Rule 1 of the Civil Procedure Rules.**

By the application, the Applicant seeks orders that the firm of Malonza & Co. Advocates, be granted leave to come on record for the Applicant in place of Nduati & Co. Advocates; that an order of stay of execution or injunction do issue restraining the Respondent from executing any decree for taxed fees and subject of this suit in the sum of Kshs. 6,295,285/= or any other sum, that same having been compromised and settled by the consent order of 8th June, 2010; and that an order do issue to the Respondent and his agent to unconditionally return the Applicant's goods attached on 29th June, 2011.

The application is supported by the annexed affidavit of Jean Mumbi Ngugi and is based on the grounds that-

- (a) Upon conclusion of the matter vide consent dated 8th June, 2010 M/S Nduati & Co. Advocates ceased acting for the Applicant and were duly remunerated.**
- (b) The Applicant desires to be represented by M/S Malonza & Co. Advocates**
- (c) Despite the matter being conclusively determined by a consent order of 8th June, 2010 the Respondent commenced execution by attaching the Applicant's properties on 29th June, 2011 for an alleged balance of Kshs. 6,295,285.00 which was the subject of the suit and the consent order of 8th June, 2010.**
- (d) In terms of the consent order of 8th June, 2010 the Respondent was fully paid Kshs. 9,000,000.00 for all taxed costs and no balance is outstanding in respect of any fees.**

Opposing the application, the Respondent filed a Notice of Preliminary Objection on the grounds that-

(i) The application does not comply with the provisions of the Civil Procedure Rules

(ii) The whole application is fatally defective, incompetent and bad in law.

(iii) The supporting affidavit offends the provisions of Order 9 of the Civil Procedure Rules.

I have considered the pleadings and the submissions of Mr. Orenge for the Applicant and Mr. Oira for the Respondent. I take note of the Respondent's Preliminary Objection to the effect that the application does not comply with the provisions of the Civil Procedure Rules, and that the supporting affidavit offends the provisions of Order 9 of the said Rules. Although Mr. Oira has been very economical with his words and does not elaborate the target of his attack, I note that the firm of Malonza & Co. Advocates, seeks leave to come on record for the Applicant in place of Nduati & Co. Advocates. In addition to that prayer, the said firm has also sought five other prayers. It is my considered view that the application is compliant with **Order 9 Rule 10** which stipulates that-

“An application under Rule 9 may be combined with other prayers provided the question of change of advocate...shall be determined first.”

In any event, when this matter came for hearing, counsel for the Respondent did not raise any of the issues in the Preliminary Objection. I took it that he had decided to abandon the issue, and the matter therefore proceeded without reference to that issue.

With regard to the substantive application, it is not in dispute that the parties hereto entered into a consent on 8th June, 2010. It was in the following words-

“By consent...

1. That out of the sum of (Kshs. 15,000,000) Kenya Shillings Fifteen Million the sum of (Kshs. 9,000,000) Nine Million be and is hereby released in the firm of Ratemo Oira & Company Advocates for the defendant/Respondent to be transferred by electronic Money Transfer to Account No. 1107744660 situated at Kenya Commercial Bank Limited Moi Avenue branch Nairobi bearing Bank Code No. 01 and Branch Code No. 01100.

2. That the remaining balance of (Kshs. 6,000,000) Six Million out of the sum deposited (Kshs. 15,000,000) Fifteen Million be and is hereby released to the firm of Nduati & Company Advocates for the Plaintiff/Applicant by Electronic Money Transfer to Account No. 03017320000 situated at Bank of Africa Limited, Westland branch bearing Bank Code No. 19 and Branch Code No. 000.

3. That after the conclusion of the above transactions the matter be marked as settled with no orders as to costs.”

The wording of clause 3 is very telling. The parties were agreed that after the conclusion of the above transactions, the matter would be marked as settled.

Since the transactions were concluded by the payment to the respective interested parties, that settled the matter and there is nothing more to be done. For these reasons, I hereby make the following orders-

1. Prayers 2, 4 and 5 of the application by Notice of Motion dated 1st July, 2011 are hereby granted as prayed.

2. The Applicants will also have their costs of the application.

**L. NJAGI
JUDGE**

DATED and DELIVERED at NAIROBI this 6th day of November, 2012

**ODUNGA
JUDGE**