



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 46 OF 2019

MARINO HARDWARE LTDAPPLICANT/APPELLANT

-VERSUS-

1. FRABHUDAS CHUNILAL

2. SAVITA FRAVHUDAS HIRA

3. NAMIXA CHUNILAL HIRA

4. MURPHY AUCTIONEERS.....RESPONDENTS

RULING

1. The application for consideration is the Notice of Motion dated 27th November, 2019 in which the applicant is seeking the following orders:

1. That service of this application be dispensed with in the first instance as the object of this application will be defeated and rendered nugatory if the respondents execute warrant for eviction of the applicant issued on 20th November, 2019.
2. That this Honourable Court be pleased to grant leave to the firm of Lawrence Obonyo Legal Advocates herein to act on behalf of the Appellant in place of the firm of Messrs Muthee Soni & Associates.
3. That this Honourable Court be pleased to grant stay of execution and/or further execution of the orders granted on 27th November, 2019 delivered by the learned Honourable Justice Yano pending the hearing and determination of this application.
4. That this Honourable Court be pleased to grant leave to appeal out of time from the judgment and decree of the Business Premises Tribunal delivered on 26th July, 2019.
5. That the draft Appeal herein duly filed and attached be deemed as filed on time and properly on record.
6. That this Honourable Court be pleased to grant stay of execution of the judgment and decree dated 26th July, 2019 delivered by Business Premises Tribunal pending hearing and determination of this application.
7. That this application be heard inter-partes on such date and at such time as this Honourable Court may direct.
8. That costs of this application be provided for.

2. The application is stated to be brought under Section 3A of the Civil Procedure Act, Order 40 Rule 1(a), (b), Rule 2 and 4 and Order 51 of the Civil Procedure Rules. The application is premised on the ground set out thereon and supported by the affidavit of Lawrence Omondi Obonyo Advocate sworn on 27th November, 2019. He has deposed that the applicant has been a tenant on the respondents' property since July, 1981 and that the respondent sought to terminate the applicant's tenancy through a notice dated 31st July, 2018 to which the applicant challenged its validity. That the Tribunal dismissed the applicant's reference and being aggrieved, the applicant filed an application for stay of execution of the judgment and sought leave to appeal out of time. That the applicant seeks leave of the court to allow the firm of Lawrence Obonyo Legal Advocates to come on record for them in place of the firm of Messrs Muthee Soni & Associates. That it has come to the

applicant's attention that the respondent has caused a warrant of eviction to be signed in Chief Magistrate's Court, Miscellaneous Application No.428 of 2019 and that unless the orders sought are issued, the applicant will suffer irreparable loss and damage and the appeal will be rendered nugatory. Annexed to the affidavits are the Order of 27.11.2019, letter dated 25.11.2019 warrants in Misc. No.428 of 2019 and photographs.

3. In opposing the application, the respondents filed a replying affidavit sworn by Prabhudas Chunilal Hira, the 1st respondent on 11th December, 2019. It is deposed that the application is bad in law and fatally defective. That the Tribunal's judgment was rendered on 26th July, 2019 whereby it proceeded to terminate the applicant's tenancy. It is also deposed that all documents and pleadings which were filed by the Applicant's Advocates were declared by his court to be void and of no legal consequence through the ruling rendered on 27th November, 2019. It is averred that execution for vacant possession has already been handed to the 1st respondent by Murphy Auctioneers who were mandated to conduct the execution, hence there is nothing to stay. The respondents further aver that the application granting of time cannot be granted because the applicant has not shown cause at all and/or any sufficient cause to warrant granting of the orders. The respondents aver that it is in the best interest of justice that the application be dismissed in its entirety.

4. Directions were given on 18th December, 2019 that the application be canvassed by way of written submissions. The applicant was to file theirs within 14 days and the respondents to file their within 14 days of service. The matter was then fixed for highlighting of submissions on 2nd March, 2020. However, by 2nd March, 2020, only the respondents had filed their submissions. Although the applicant was granted more time to file their submissions, they failed to do so within the time granted or at all.

5. I have considered the application. In this matter, there is no dispute that the applicant was being represented by the firm of Muthee Soni & Associates. There is also no dispute that judgment was entered by the Tribunal on 20th July 2019. The applicant filed the application dated 17th October, 2019 through M/s Lawrence Obonyo Legal Advocates. In the ruling delivered by this court on 27th November, 2019, this court found that the said application and indeed all pleadings filed by Lawrence Obonyo Legal Advocates were incompetent as they were filed without authority and without leave of the court as required by Order 9 Rule 9 of the Civil Procedure Rules. The applicant has now filed the instant application. Among the prayers sought is order for leave to the firm of Lawrence Obonyo Legal Advocates to act on behalf of the applicant in place of the firm of Messrs Muthee Soni & Associates.

6. Order 9 Rules 9 and 10 provides as follows:

9. 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.

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.

10. 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."

11. In this case, it is clear that no consent has been filed between Messrs Muthee Soni & Associates and Messrs Lawrence Obonyo Legal Advocates. Order 9 Rule 9 requires that an application such as this ought to be filed with notice to all the parties. In this case, there is no evidence showing that Messrs Muthee Soni & Associates were given notice of the application. A perusal of the application as drawn does not indicate that it was also to be served upon Messrs Muthee Soni & Associates. In the absence of a consent, and there being no notice served on Messrs Muthee Soni & Associates, this application has to fail.

12. I have also noted that the affidavit in support of the application herein was sworn by Lawrence Omondi Obonyo the advocate for the applicant. In this case, there are contentious issues such as whether or not execution has been carried out and the applicant evicted. In the case of **Regina Waithira Mwangi Gitau –v- Boniface Nthenge (2015)eKLR** Aburili J stated: -

".....the established principle of law is that advocates should not enter into the arena of the dispute by swearing on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In Simon Isaac Ngugu-v- Overseas Courier Services (K) Ltd (1998)eKLR and Kisya Investments Ltd & Others –v- Kenya Finance Corporation Ltd, it was held that: -

"....it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit."

13. In addition, Rule 9 of the Advocates Practice Rules prohibit Advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or orally. In the present case, not only has the advocate sworn to contentious matters of fact, including annexing documents and photographs to his affidavit, but is also yet to obtain leave to come on record. I find that the application before court is incompetent. I do not think it is necessary to consider the other prayers in the application.

14. The upshot is that the notice of motion dated 27th November, 2019 is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 19th day of November 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE