



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 210 of 2008

RIYAZ HIRJI.....PLAINTIFF

VERSUS

AKBAR KURJI..... DEFENDANT

RULING

This is a Notice of Motion application dated 28th July, 2008 filed by the Defendant. The application is brought under Order XLIV rule 1, order XXI Rule 22 order L rule 1 of the civil Procedure rules, section 3 and 3A of the Civil Procedure Act. The Defendant is seeking the following orders.

- 1. THAT this Honourable Court be and is hereby pleased to review, vary and/or set aside its orders delivered on the 1st July, 2008.**
- 2. THAT the Plaintiff himself, his agents (West Minister Commercial Traders) and his servants and or whomsoever is acting on his behalf be hereby restrained from selling by either public auction or by private treaty or in any way alienating or transferring Motor vehicle registration No. KAY 716U and other items till further orders of this court.**
- 3. THAT costs of this application be borne by MR. MICHAEL OCHARO personally and the Auctioneer.**

There are several grounds on the face of the application which I have considered. The main ground is that the Advocate, one Michael Omolo Ocharo, filed the instant suit on 21st April 2008. The Applicant contends that on the 7th April 2008, before filing the instant suit, the said Advocate's name was struck off the roll of Advocates. That despite being struck off the roll of Advocates the Advocate proceeded with this matter and even took out execution and instructed auctioneers on the 11th July 2008, to break into the Defendants' premises. The 1st Defendant's goods were impounded, including a motor vehicle Reg. No. KAY 761U, without warrants of attachment issued by the Court.

The application is supported by the affidavit of the 1st Defendant of even date. I have considered the contents of this affidavit.

The Applicant in this case advertised the suit three times. There is an affidavit of service annexing one of those advertisements which was carried on the 5th February, 2009 issue of The Standard. Despite service the Plaintiff was not represented at the hearing of the application.

The application is unopposed. Mr. Bosire for the Applicants sought to have the order made by the court on 1st July, 2008 varied, reviewed or set aside. The Advocate submitted that the order of the court of 1st July, 2008 was made pursuant to the Chamber Summons application dated 21st April, 2008. Counsel submitted that the order was granted in terms of prayer 2 in proceedings filed by an Advocate without a practicing certificate. Counsel submitted that since the Advocate had no practicing certificate, all pleadings filed by him were a nullity and should be struck out. Counsel relied on the letter from the Law Society of Kenya confirming that the Advocate in question, Michael Omolo Ocharo, was deregistered on April 2008, just before instituting the current proceedings. Mr. Bosire submitted that in the circumstances the proceedings are a nullity. Counsel relied on two cases, Brooke Bond (K) Limited vs. Sisiria Kerubo Kenyuru CA No. 37 of 2004 eKLR and Raphael Kawai Maitha & 3 Others vs. Jayssynicate Limited & 3 Others HCCC No. 507 of 2003 eKLR.

I have considered the application. The Chamber Summons application dated 18th April, 2007 and filed in court on 21st of April 2008 was granted by Hon. Kariuki, J. on the 1st July, 2008 in terms of prayer 2. Prayer 2 provided as follows;

“2. The Defendant be directed to release to the Plaintiff goods held at Meridian Court Hotel Mansionaatte No. 601 together with the Motor Vehicle Reg. No. KAY 761U.”

The application had been filed by M.O. Ocharo & Co. Advocates. This is the order the Applicant herein seeks to have set aside or varied. This Court granted ex-parte prayer 4 of this application restraining the Plaintiff and/or his agents or servants from selling, alienating or transferring the motor vehicle Reg. No. KAY 761U and the other items pending *interpartes* hearing of the application.

Section 9 of the Advocates Act is a mandatory provision of law and it provides as follows:

“Subject to this Act, no person shall be qualified to act as an advocate unless

(a) ...

(b) his name is for the time being on the roll; and

(c) he has in force a practicing certificate...”

I am satisfied that the Applicant has demonstrated to the satisfaction of the court, that Michael Omolo Ocharo had no practicing certificate and that his name had been struck out of the Roll of Advocates, at the time he filed the instant suit and took out proceedings, including the execution in which the suit properties and the goods were attached. The letter from the Law Society of Kenya confirms that the Advocate in question was struck out of the roll of advocates on 7th April 2008 and therefore could not practice as an advocate. Under Section 9 of the Advocate’s Act, Michael Omolo Ocharo was not qualified to act as an Advocate at the time that he instituted these proceedings including the time he took out the execution proceedings against the Defendant. Any papers he filed as part of the court process were a nullity, including the filing of the instant suit and the execution process which he carried out in this suit. The Court of Appeal in the case of Geoffrey Orao-Obura vs. Martha Karambu Koome CA Civil Appeal No. 146 of 2000 (Nairobi) (unreported) held that the requirements of Section 9 of the Advocates Act were mandatory and where an advocate filed pleadings while he did not have a practicing certificate, such pleadings are incompetent. In the present suit, it is clear that Michael Omolo Ocharo, at the time he filed the suit on behalf of the Respondent, was not authorized in law to practice law. In the circumstances of this case therefore, the pleadings filed by the said Advocate, being an unauthorized person in law cannot be sustained on record.

I find merit in the Defendants’ application and accordingly, set aside the order of the learned Kariuki, J. of 1st July, 2008. In particular I set aside the orders granted in terms of prayer 2 of the Chamber Summons application dated 18th April, 2007 and filed on 21st April 2008. The costs of the application be to the Applicant.

Dated at Nairobi this 8th day of May 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Ojuku Bosire for the Applicants

N/A for the Respondent

LESIIT, J.

JUDGE