



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

HCC No. 149 OF 2008

DUNCAN WAITHAKA NDEGWA.....PLAINTIFF

VERSUS

JOSEPH MAINA WANGOMBE.....DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 22nd May 2019, an application brought inter alia under **Order 9 rule 9** and **Order 42 rule 6 (2) (a)** of the **Civil Procedure Rules**. The following orders are sought in the application:

1. *Spent.*

2. *That leave of court be granted to the firm of Messers Muraguri, Muigai & Waweru & Co. Advocates, Upperhill Gardens, Block D15, 3rd Ngong Avenue, Milimani Area, P.O Box 59722-00100 Nairobi to come on record for the Plaintiff/Applicant in place of Messrs Kang'ethe & Co Advocates.*

3. *That as a matter of priority, this honorable court be please to grant a stay of execution of the warrants of attachment of movable property and the Notice of Attachment dated 25th March 2019 pending the hearing and determination of this application.*

4. *That upon hearing inter parties, the warrants of attachment of movable property and the Notice of Attachment issued and dated 25th March 2019 be delivered up to the Registrar of this Honorable Court and cancelled.*

5. *That the costs of this application be borne by the respondent.*

2. The application is supported by an affidavit sworn by the plaintiff and is opposed through a replying affidavit sworn by Joseph Karanja Mbugua, advocate for the defendant/respondent.

3. Counsel for the applicant argued that the proclamation of attachment that was served on the applicant indicated that the law firm of Mirugi Kariuki & Co was on record for the plaintiff when in fact the law firm of Kangethe & Co has always been on record. Counsel further argued that there is a pending application to the Court of Appeal being Civil Application No. Nai 40 of 2014.

4. In response, counsel for the respondent argued that the suit herein was dismissed for want of prosecution on 3rd December 2009 and an application for reinstatement was also dismissed on 20th December 2013. The plaintiff filed a Notice of Appeal on 13th January 2014 and later an application to the Court of Appeal being Civil Application No. Nai 40 of 2014 in which he sought stay of further proceedings in this suit. The application was dismissed by the Court of Appeal on 10th February 2016 for non-attendance. That the defendant's bill of costs having been taxed, Warrants of Attachment were duly issued and that the mere fact that the warrants wrongly indicated in the heading that the law firm of Mirugi Kariuki & Co was on record for the plaintiff did not invalidate them. He urged the court to dismiss the application.

5. I have carefully considered the application, the affidavits and oral submissions of counsels. I note that prayer 2 wherein the applicant seeks leave for the firm of Messers Muraguri, Muigai & Waweru & Co. Advocates to come on record for him in place of Messrs Kang'ethe & Co Advocates is not opposed. I will therefore grant it. At payers 3 and 4 the applicant essentially seeks cancellation of the warrants of attachment herein. The sole reason for seeking the cancellation is that the warrants wrongly indicated in the heading that the law firm of Mirugi Kariuki & Co was on record for the plaintiff. I have looked at the warrants. Other than the said minor error, I see nothing wrong with them. The applicant has not identified any fatal error in them. More importantly, the applicant has not demonstrated that the error will make it difficult or impossible for him to satisfy the decree or costs. If I was to allow the prayer for cancellation of the warrants of attachment herein, I would be placing an unnecessary stumbling block on the plaintiff's path to justice. In **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** Ouko JA stated:

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

6. In view of the foregoing, the prayer for cancellation of the warrants of attachment herein must fail. I will not grant it.

7. In the end, I make the following orders:

a) Leave is hereby granted for the law firm of Messrs Muraguri, Muigai & Waweru & Co. Advocates to come on record for the plaintiff in place of Messrs Kang'ethe & Co Advocates.

b) Costs to the defendant.

8. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr Karanja Mbugua for the defendant/respondent

Court Assistants: Beatrice & Lotkomo