



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC NO 259 OF 2011**

**PETER NYAGA NJOKA.....PLAINTIFF**

**VERSES**

**RICHARD MANZI.....DEFENDANT**

**RULING**

1. This suit is one among seven suits which the plaintiff instituted against various defendants in relation to tenancy disputes relating to business premises located on LR No 209/3011/10. They are Nairobi ELC Case Numbers 258/2011, 259/2011, 260/2011, 261 of 2011, 262/2011, 264/2011 and 265/2011. Upon separate applications by the defendants, Nyamweya J dismissed all the seven suits through separate dismissal orders on 10/7/2013. Subsequently, the seven defendants drew and presented separate bills of costs for taxation and the said bills of costs were taxed by the taxing officer of the court. Although the seven file folders relating to the seven suits are tied together, I have not seen, and my attention has not been drawn to, any consolidation order relating to the seven files. What has been happening in the past is that the court has been making orders that the order made in one file do apply to the other six files.

2. Before me for determination are two applications brought by the plaintiff in one of the seven suits, Nairobi ELC No 259 of 2011. The first application is the plaintiff's notice of motion dated 25/1/2019 through which the plaintiff seeks orders of stay of execution and leave in terms of the following verbatim orders:-

*(a) That this matter be Certified Urgent and be dispensed with at the first instance Ex-Parte.*

*(b) That pending the hearing and determination of the Application, this Honourable court be pleased to set aside the execution for costs.*

*(c) That pending the hearing and final determination of this Application, there be a stay of execution in respect of the taxed costs awarded to the Defendant/Respondent's advocate.*

*(d) That the honourable court be pleased to grant leave for the law firm of Ocieng, Achach & Kaino advocates to come on record for the Plaintiff/Applicant in the place of Omondi, Waweru and Company advocates.*

*(e) That the costs of this application be borne by the Defendant/Respondent.*

3. The said notice of motion dated 25/1/2019 was supported by the plaintiff's affidavit sworn on 25/1/2019 in which the plaintiff deposed that ELC No 259 of 2011 was filed by his advocate while other cases were ongoing in the Business Premises Rent Tribunal (**the Tribunal**) and his advocate did not give him an update on the status of this case. He further deposed that he had since then been advised that the Environment & Land Court had no jurisdiction to handle the dispute in this suit. The plaintiff further deposed that if the defendant was allowed to recover his costs against him, he would suffer insurmountable loss. He urged the court to stay execution in relation to the taxed costs.

4. The defendant opposed the application dated 25/1/2019 through an affidavit sworn on 5/2/2019 by Mr Simeo Mugalavai Keyonzo. He deposed that he was the advocate for the defendants in the seven suits itemized above. He was not privy to what happened between the plaintiff and his advocates, M/s Omondi Waweru & Co Advocates. Counsel further deposed that there was nothing pending in the seven suits to necessitate a stay. He urged the court to dismiss the application.

5. The second application by the plaintiff is the notice of motion dated 16/5/2019 through which the plaintiff sought joinder of his advocates in the following terms:-

*(a) That this matter be certified urgent and be dispensed with at the first instance Ex-parte.*

***(b) That the firm of Omondi, Waweru and Company Advocates be and is hereby enjoined (sic) in this suit as an interested party only for purposes of prosecuting this motion.***

***(c) That the costs of this application be borne by the defendant/respondent.***

6. The application dated 16/5/2019 was supported by the plaintiff's affidavit sworn on 16/5/2019. He deposed that after he filed the first application mentioned above, there was an admission from his erstwhile advocates, M/s Omondi Waweru & Company Advocates, that they did not receive instructions to file the seven suits. He exhibited a letter dated 11/2/2019 from Omondi Waweru & Company Advocates. He also exhibited a copy of the plaint in Nairobi ELC 259/2011 but did not exhibit the verifying affidavit and witness statement which formed part of the pleadings in the said suit. He urged the court to grant an order joining the firm of Omondi Waweru & Company Advocates as parties to the motion.

7. The application was opposed by the defendant through grounds of opposition dated 22/9/2019 in which the defendant concluded that there was no suit pending to which a party would be added. The defendant further stated that the firm of Omondi, Waweru & Company Advocates were not a necessary party to the proceedings herein. He added that if the plaintiff through his counsel, Mr. Achach had grievances against his advocates, there were appropriate avenues of redress available to him.

8. Pursuant to the directions of the court issued on 23/5/2019, the two applications were canvassed together through written submissions. The plaintiff through his counsel Mr. Achach, filed written submissions dated 14/6/2019. He itemized the following as the three issues following for determination in the two applications: (a) whether the interested party had certified the legal requirement to be enjoined in the proceedings; (b) who should bear the costs of ELC Case Nos 258, 258, 260, 261, 262, 263, 264 and 265 of 2011; (c) whether the order for execution for costs against the plaintiff/applicant should be set aside?

9. The plaintiff submitted that Order 1 rule 10(2) of the Civil Procedure Rules allowed a party who is necessary in determining a dispute to be joined in the suit. He contended that M/s Omondi, Waweru and Company Advocates were a necessary party because they were at the centre of serious allegations of acting without instructions. He argued that the party to bear the defendant's costs was M/s Omondi, Waweru & Company Advocates because they acted without instructions. Lastly, the plaintiff submitted that he stood to suffer substantial and irreparable loss if execution proceeded on the basis of a case which was filed by his advocates without his instructions. He urged the court to grant the prayers sought in the two applications.

10. The defendant, through his counsel Mr. Keyonzo, filed written summons dated 27/6/2019. He defendant submitted that the application dated 25/1/2019 was brought under "Article 40(a)" which did not exist in the Constitution. It was contended that in essence, the applicant did not cite any appropriate rule under which he wanted the court to exercise jurisdiction. The defendant further submitted that the impugned costs were regularly given in regular court proceedings involving the plaintiff and the defendant and the plaintiff had neither appealed against nor sought a review of the award of costs.

11. The defendant further submitted that the use of the words "who might have been joined" in Order 1 rule 10 of the Civil Procedure Rules meant that the person was a necessary party from the time of institution of the suit and the use of the words "settle all questions involved in the suit" in the said legal framework meant that the suit must still be ongoing. The defendant contended that the suit herein and the other six related suits were dismissed and there was nothing pending on which the intended interested party would be required to assist the court. Lastly, the defendant submitted that the prayer for joinder specified that the joinder was "for the purpose of prosecuting this motion" and the motion dated 16/5/2019 having been prosecuted, the plea was meaningless for joinder at this point.

12. I have considered the two applications dated 25/1/2019 and 16/5/2019 respectively. Before I deal with the substantive issues raised in the two applications, I will deal with the plea for leave to effect a change of advocates which was made as prayer number 4 in the notice of motion dated 25/1/2019. The said plea was not opposed. Indeed, prior to the filing of the application dated 25/1/2019, the firm of M/s Omondi Waweru & Company Advocates had brought a chamber summons dated 27/4/2018 seeking leave to cease acting for the plaintiff. Although the plaintiff did not pursue that plea as a preliminary step, I will allow it and admit all the pleadings and submissions filed by the plaintiff's current firm as if they had obtained leave prior to filing them. Having decided so, I will first deal with the notice of motion dated 16/5/2019 because it seeks an order of joinder.

13. The single question in the application dated 16/5/2019 is whether the applicant has satisfied the criteria for joinder under Order 1 rule 10(2) of the Civil Procedure Rules. The said legal framework provides as follows:-

***(2) The court may at any stage of proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.***

14. In the present suit, a dismissal order and an award of costs were made on 10/7/2013 and the defendant's bill of costs was subsequently taxed on 13/11/2014. The suit has not been reinstated and no review application is pending in relation to the dismissal order. Similarly, there is no pending proceedings relating to the taxed costs or in respect of the taxing officer's decision to allow taxation to proceed. In essence, there is no substantive issue pending. Significantly, on 3/7/2018, the Deputy Registrar allowed the defendant's application dated 17/11/2017 through which the defendant sought leave of the court to sell Land Reference Number 209/3011/10 to recover his costs. The Deputy Registrar directed that the said order was to apply to all the seven suits.

15. For an order of joinder to be granted under Order 1 rule 10(2), there must be pending questions in the suit. In my view, in the absence of an order setting aside Judge Nyamweya's Order which awarded the defendant costs against the plaintiff, there is no pending question to be settled by the court in relation to the costs awarded in this suit. Consequently, an order for joinder of the firm of Omondi Waweru & Company Advocates cannot issue. It is therefore my finding that the plaintiff/applicant has not satisfied the criteria for joinder of a party

under Order 1 Rule 10(2) of the Civil Procedure Rules. Consequently the notice of motion dated 16/5/2019 fails.

**16.** There are two key questions to be answered in the application dated 25/1/2019. The first question is whether the applicant has made out a case for setting aside the order allowing the defendant to execute for costs in this suit. The second question is whether the applicant has made out a case for stay of execution in respect of taxed costs awarded to the defendant in this suit.

**17.** The Deputy Registrar granted the defendant leave to sell LR No 209/3011/10 after the defendant's bill of costs had been taxed. The decision of the taxing officer was not challenged as provided under the law. The taxation followed an award by Nyamweya J which remains unchallenged. In my view, in the absence of a challenge against the taxing officer's award and against Judge Nyamweya's order, there is no proper basis for setting aside the order allowing recovery of the taxed costs.

**18.** Lastly, the plaintiff sought a temporary stay of execution pending the hearing and determination of the notice of motion dated 25/1/2019. The said application having been determined through this ruling, there is no legal basis for further stay. The net result is that the notice of motion dated 25/1/2019 lacks merit.

**19.** Lastly, the plaintiff's counsel has severally submitted that the firm of Omondi Waweru & Company Advocates acted for the plaintiff without instructions. It is however noted from the court record that on 20/5/2011, the plaintiff swore a verifying affidavit which accompanied the plaint herein. On the same day, he signed a witness statement which was filed together with the plaint. A verifying affidavit is the instrument through which a plaintiff sanctions the pleadings presented to the court. If an advocate has acted without instructions, the first instrument of reference is the verifying affidavit. The applicant is deliberately quiet about the verifying affidavit and the written statement and expects the court to believe him in his contention that his lawyers acted without instructions. It is apparent from the plaintiff's decision to be quiet about his verifying affidavit and witness statement that he is not truthful.

**20.** In light of the foregoing, it is my finding that the two applications by the plaintiff dated 25/1/2019 and 16/5/2019 respectively lack merit and both of them are dismissed. The plaintiff shall bear costs of the two applications. The findings made by the court on the issues raised by the plaintiff in this suits shall apply to the related suit itemized in paragraph 1 of this ruling.

**DATED, SIGNED and DELIVERED at NAIROBI on this 17th day of October 2019.**

**B. M. EBOSO**

**JUDGE**