



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**E&L 237 OF 2012**

**RURAL HOUSING ESTATES LIMITED.....PLAINTIFF**

**VERSUS**

**MOHAMMED GHANI.....DEFENDANT**

**AND**

**THE ADMINISTRATOR OF THE ESTATE OF**

**AHMED MALAKWEN ARAP SISIWA.....THIRD PARTY**

**RULING**

**INTRODUCTION**

This ruling is in respect of an application brought by way of Notice of Motion dated 19<sup>th</sup> May, 2017 by the third Party who sought for the following orders.

1. THAT this application be and is hereby certified as urgent and its service be dispensed within the first instance.
2. THAT there be stay of proceedings herein pending inter parties hearing and further orders of the court.
3. THAT the proceedings of 18.5.2017 and all the consequential orders emanating therefrom be and are hereby set aside and the matter be and is hereby set down for fresh hearing.
4. Cost be provided for.

This application came up for hearing on 13<sup>th</sup> June 2017 when argued the application and a ruling date reserved for 29<sup>th</sup> June 2017.

**3<sup>RD</sup> PARTY'S CASE.**

The 3<sup>rd</sup> party's application was supported by an annexed affidavit of MUSA KIPKEMBOI KITUR sworn on 19th May 2017. It was the 3<sup>rd</sup> party's case that they had instructed Kitur & Co Advocates but later a Notice of change of Advocates was filed by Chemitei & Co Advocates. They stated that later Mr.

Hillary Chemitei J. was later appointed a High Court Judge and left the file with Kiboi Tuwai & Co Advocates. The 3<sup>rd</sup> party averred that he was called by Mr Kiboi who informed him that he wanted to see him over this matter. The 3<sup>rd</sup> party also stated that he was called by the defendant's Advocates who served him with a hearing Notice for 22/5/17.

The 3<sup>rd</sup> party stated in paragraph 16 of the supporting affidavit that he sought the assistance from his current Advocates on record to peruse the court file and establish the status of the case. It was the 3<sup>rd</sup> party's case that his advocates on record informed him that the plaintiff's case had been heard and a defence hearing date fixed.

### **3<sup>rd</sup> Party's Counsel's Submissions**

Mr Kiboi held brief for Mr. Nyambegera for the 3<sup>rd</sup> party and argued the application. He relied on the grounds on the body of the application together with the supporting affidavit. He reiterated what the 3<sup>rd</sup> party had stated in his supporting affidavit but further submitted

that the particulars of proprietorship were changed to Kiboi and Kathili Advocates which was later wound up and he later opened his own practice in the name and style of Kiboi Tuwai & Co. Advocates. Counsel further submitted that the clients were to elect whom to give instructions and the 3<sup>rd</sup> party had not given him such instructions. Counsel further stated that he appeared before Matheka J. with the physical file minus the instructions. The same was adjourned and the matter referred back to the registry for a hearing date. The plaintiff and the defendant took a hearing date and served the Advocate. Counsel submitted that the matter proceeded without the party being legally represented therefore being condemned unheard. Counsel referred the court to the provisions of order 9 Rule 12 which states as follows:

*12 (1) Where an advocate who has acted for a party in a cause or matter has died or become bankrupt or cannot be found or has failed to take out a practicing certificate or has been struck off the roll of advocates, or is otherwise unable to act as an advocate, and the party has not been given notice of change of advocate or notice of intention to act in person in accordance with this Order, any other party to the cause or matter may, on notice to be served on the first-named party personally or by prepaid post letter addressed to his last-known place of address, unless the Court otherwise directs, apply to the Court for an order declaring that the advocate has ceased to be the advocate acting for the first-named party in the cause or matter, and the Court may make an order accordingly*

He stated that parties should have moved the court under this order. He prayed that the application be allowed as prayed.

Mr Kipkorir who held brief for the Mr. Songok for the defendant submitted that counsel for the defendant was not opposed to the application as his client would not be prejudiced if the said application is allowed.

### **Plaintiff's Counsel's Submissions**

Mr Akenga Counsel for the plaintiff opposed the application and relied on the affidavit of Shrikesh Ghewala sworn on 9<sup>th</sup> June 2017. He submitted that from the onset this matter had been handled by one Andrew Tuwai Kiboi who took over the conduct of this case when Justice Chemitei was appointed a Judge. Counsel submitted that there was no truth in what counsel had submitted that he was not in the conduct of the case.

Counsel for the plaintiff submitted that on 2/10/14 when this matter came up before Justice Munyao, Mr. Kiboi was on record for the 3<sup>rd</sup> party and there was no indication that he was holding brief for anyone. Counsel never told the court that he lacked instructions on behalf of the 3<sup>rd</sup> party. Mr. Akenga urged the court to look at the records for 8/2/17, 23/2/17, 23/3/17 and 30/3/17 to which he stated would bear witness of the correct position. Counsel also stated that this is an old matter, a 2006 matter which has been

adjourned severally at the instance of the 3<sup>rd</sup> party and the defendant.

Counsel further submitted that Mr. Kiboi was represented in the matter by Miss Matoke Advocate who held his brief for the 3<sup>rd</sup> party and no affidavit was sworn to show that Miss Matoke did not have such instructions. He submitted that the hearing Notice was served on Kiboi Tuwai & Co Advocates who received it without any complaint or under protest. He stated that Counsel could have declined to receive the hearing notice on the grounds that he did not have instructions from the client. This was never done. Lastly Mr. Akenga Counsel for the plaintiff submitted that Order 9 rule 12 alluded to by Mr Kiboi does not apply to the current application. He stated that the 3<sup>rd</sup> party representatives were acting on his behalf and were not unable to act as envisaged in the order.

Mr. Akenga also submitted that the hearing notice was done by the defendants who served the 3<sup>rd</sup> party. He further submitted that the certificate of urgency was done by one Andrew T. Kiboi and signed by one Nyambegeera. Counsel submitted that this was a ploy by the applicant to defeat justice. He prayed that the application be dismissed as it lacks merit.

Mr Kiboi in response reiterated his earlier submissions and urged the court to allow the application.

### **Analysis and Determination**

Having reviewed and considered the application together with the supporting documentations and the parties submissions, the issues that stand to be determined by the court are: -

1. Whether Mr. Kiboi Tuwai.Advocate had instructions to act for the 3<sup>rd</sup> party /Applicant in the matter,
2. Whether the 3<sup>rd</sup> party is entitled to the order he is seeking for?

### **Whether Mr. Kiboi Tuwai Advocate had instructions to act for the 3rd party /Applicant in the matter?**

It is instructive that the 3<sup>rd</sup> party had earlier been represented by Kitur & co Advocates who were later replaced by Chemitei and Co Advocates. It is also not in doubt that Mr. Kiboi has been in the conduct of this suit on behalf of the 3<sup>rd</sup> party. When we look at the attendance and representation chronologically, it is clear from the court record that Mr. Kiboi has been acting for the 3<sup>rd</sup> party as early as 2012. On 19/9/12 the Coram was that Mr. J K . Songok for plaintiff, Mr. A K Songok for defendant and Mr. Kiboi for 3<sup>rd</sup> party. It was not indicated that he was holding brief for anyone.

Further on 2/10/14 Mr. A .T Kiboi was recorded as present for the 3<sup>rd</sup> party and similarly he was not holding brief for anyone. Mr. Kiboi stated that the file was left in his custody by the defunct Chemitei and Co. Advocates and he needed more time to confirm instructions.

On 8/2/17 it was recorded in the court file that Mr. Kiboi was appearing for the 3<sup>rd</sup> party and on 23/2/17 Mr. Nyandoro held brief for Mr. Kiboi for the 3<sup>rd</sup> party. He informed the court that the 3<sup>rd</sup> party had not yet complied with order 11 and therefore he needed 15 days to enable him comply.

On 23/3/17 Mr. Kiboi was recorded as acting for the 3<sup>rd</sup> party. He informed the court that he took over the matter from another firm and he was in physical possession of the file but he had not had communication with the 3<sup>rd</sup> party. He further stated that the defendant is well known to him and he would assist him in getting the 3<sup>rd</sup> party. He therefore applied for an adjournment. Advocate for the plaintiff objected to the adjournment but the court allowed it and noted it as a last adjournment.

On 30 /3/17 the matter came up for mention and Mr. Kiboi indicated that he was acting for the 3<sup>rd</sup> party

and that he had not traced the client. He urged the court to make an order that the plaintiff do serve the 3<sup>rd</sup> party in person. The court ordered that the parties take a hearing date in the registry. By consent of both the plaintiff and the defendant the matter was listed for hearing on 18/5/17

Indeed, it is the duty and obligation of any party who has appointed an advocate to follow up with his advocate to ensure that the Advocate is giving effect to his instructions in the conduct of the suit. In the instant case the plaintiff is entitled to assume that the Mr. Kiboi was acting for the 3<sup>rd</sup> party as he had made it known to the court and other parties that he was so acting. Mr Kiboi cannot be heard to turn around that he did not have instructions to act for the 3<sup>rd</sup> party.

I agree with Counsel for the plaintiff that order 9 rule 12 of CPR does not apply in this current case . The order deals with situations where an Advocate has died or become bankrupt or cannot be found or has failed to take out a practicing certificate or has been struck off the roll of Advocates, or is otherwise unable to act as an Advocate. I find that the above scenario does not apply to this case.

In any even the case has not been concluded, the defendant and the 3<sup>rd</sup> party still have an opportunity to ventilate their issues and defend themselves. The 3<sup>rd</sup> party was brought into this suit by the defendant who has not yet given evidence.

From the above analysis and consideration of the court record together with the rival submissions of the Counsel's, I find that the application has no merit as is hereby dismissed with costs to the plaintiff. Matter to proceed for further hearing.

Dated and delivered at Eldoret on this 29<sup>th</sup> day of June, 2017.

**M. A ODENY**

**JUDGE**