



**REPUBLIC OF KENYA**

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

**CASE NO. 584 OF 2017**

**IRENE CHEPKOESGEI ROP (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF RAEK CHEPKOSGEI ROP)..... PLAINTIFF**

**VERSUS**

**SAMUEL KIBOWEN TOWETT ..... DEFENDANT**

**RULING**

***(Application seeking striking out of suit; suit filed without plaintiff's instructions; suit struck out; plaintiff's advocates to pay costs)***

1. This ruling is in respect of defendant's Notice of Motion dated 31<sup>st</sup> May 2017. The defendant seeks the following orders:

*1. Spent.*

*2. Spent.*

*3. The entire suit and all consequential orders therein be struck out with costs to the defendant.*

*4. Ms. Wanyama & Co. Advocates do meet the costs of the suit or do reveal their instructing client for action to be taken against him/her.*

*5. Costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the defendant and an "affidavit of protest" sworn by the plaintiff. The plaintiff deposes that she never instructed the firm of Wanyama & Co. Advocates or any other firm to file the suit on her behalf and that her signature had been forged in both the affidavits and the statement filed in this case. The defendant on his part deposes that he knows the plaintiff well since she is his neighbour. That the plaintiff informed him that she had not filed any case against him.

3. In response to the application, Mr. Moses Wanyama Onyango, an advocate practicing as a partner in the firm of Wanyama & Company swore a Replying Affidavit. He deposed that he had full knowledge of the matter and that the firm received instructions from beneficiaries to act on behalf of the estate of the deceased in or about the year 2016 and that they accordingly moved the court. He further deposed that since an injunction was granted herein the "beneficiaries of the estate through their lawfully appointed agent" have consistently failed to give further instructions to the firm despite being called upon to do so.

4. When the application came up for inter parte hearing, counsel holding brief for the advocate on record for the plaintiff opted not to make any oral submissions. He relied entirely on the replying affidavit.

5. Counsel for the defendant reiterated in his submissions that the plaintiff had not authorized the filing of the suit. He invited the court to note that the plaintiff's advocate did not specifically name the beneficiary that he has been obtaining instructions from or the specific advocate in the firm who obtained such instructions. Counsel thus urged the court to allow the application.

6. I have anxiously considered the application, the affidavits on record and submissions of counsel. The issue raised in the present application serious: Whether a suit filed by an advocate in the absence of instructions can be sustained. As a corollary to this issue the question then arises as to the duty an advocate owes the court to ascertain that he is indeed instructed by the party on whose behalf he is filing the suit.

7. In view of the affidavit evidence herein, it is clear that the plaintiff herein did not personally instruct M/s Wanyama & Co. Advocates. The advocates have not stated that they received instructions from her. They in fact state that they received instructions from unnamed beneficiaries. They go ahead to describe the unnamed person who gave them instructions as a "lawfully appointed agent." Obviously, such a description coming from an advocate cannot be construed to mean anything other than that the advocate satisfied himself upon a reasonable inquiry that the person who gave instructions was a valid agent of the plaintiff. One would have expected the advocate to avail to the court the facts and materials that he relied on to reach the conclusion that he had been validly instructed. Failure to avail such evidence can only be construed to mean that there was failure on the part of the advocate to ensure that he had been validly instructed.

8. Under **Section 1A of the Civil Procedure Act**, advocates are under a duty to assist the court to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. Such a duty extends to ascertaining that the advocate is properly instructed by the person on whose behalf he files a suit. He must reasonably be able to ascertain the identity of his client and the client's authority to bring the proceedings.

9. A suit filed without the authority of the litigant does not deserve to remain in the court or to engage more judicial time. It is at best an abuse of the court's process. Order 2 rule 15 (1) (d) of the Civil Procedure Rules 2010 provides:

*15. Striking out pleadings [Order 2, rule 15.]*

*(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*

*(a) it discloses no reasonable cause of action or defence in law; or*

*(b) it is scandalous, frivolous or vexatious; or*

*(c) it may prejudice, embarrass or delay the fair trial of the action; or*

*(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

10. Even though a court of law should try as much as possible to allow a suit to be determined on its merits, the court should not shy off taking action to rid the court process of proceedings that are clearly incompetent from the onset. I have no hesitation in finding, as I hereby do, that this suit is an abuse of court process. It is hereby struck out. All orders previously made herein in favour of the plaintiff are discharged. Since the suit was filed by the advocate without the authority of the plaintiff, I cannot condemn the plaintiff to pay costs. At the same time, the defendant who has been unnecessarily dragged to court cannot go without remedy. The advocates for the plaintiff are solely responsible for the present

state of affairs. They were given a chance to reveal the name of the person they took instructions from but they chose not to. In the circumstances, I order that costs of this suit shall be paid to the defendant by the partners of the law firm of Wanyama & Co. Advocates.

11. In conclusion, the suit is struck out with costs to the defendant. The costs to be paid by the partners of the law firm of Wanyama & Co. Advocates.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> day of October 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Ikua for the defendant /applicant

Mr. Ochang holding brief for Mr. Wanyama for the plaintiff/respondent

Court Assistant: Gichaba