



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE NO.339 OF 2014

GODFREY TOM OKEYO OBIERO.....PLAINTIFF

VERSUS

PHILISTA ANYANGO NDIRADEFENDANT

RULING

1. **Godfrey Tom Okeyo Obiero**, the Plaintiff, commenced this suit through the plaint dated 10th December 2014 filed through M/S D.O. Okech & company advocates. **Philister Anyango Ndira**, the Defendant, filed the memorandum of appearance dated 18th March 2015 and statement of defence dated 17th April 2015 through M/S J.D. Oduor & Company advocates.

2. Then the Plaintiff filed the notice of motion under certificate of urgency dated 13th April 2016 seeking for injunctive orders against the Defendant in respect of land parcel **Siaya/South Gem/Gombe/1303**. The notice of motion application was filed and placed before the court on 19th April 2016 and directions issued on service and fixing of hearing date. The application came up for hearing on the 23rd June 2016 when counsel for the Defendant filed and prosecuted the preliminary objection dated 22nd June 2016. The preliminary objection had listed five grounds which were condensed into one ground at the time of hearing. The ground is whether or not the notice of motion dated 13th April 2016 was filed by counsel properly on record and if not whether it should be expunged from the court record.

3. M/S Kyamazima and Mr Lore for the Defendant and Plaintiff respectively agreed to have the preliminary objection heard first as is the practice and their submissions are as summarized below:

DEFENDANT’ COUNSEL’S SUBMISSION;

The learned counsel submitted that the plaint was filed through the firm of D.Okech & Company advocates who was therefore the counsel on record for the Plaintiff. That the notice of motion dated 13th April, 2016 was filed through Lore & company advocates without complying with **Order 9 Rule 5** of the Civil Procedure Rules which required a party changing an advocate to file and serve a notice of change of advocate. That if the firm of Lore & company advocates had filed a notice of change of advocate before filing the notice of motion dated 13th April 2016, then the Defendant’s counsel on record has not been served with such notice and the application should be struck out.

PLAINTIFF COUNSEL’S SUBMISSIONS:

The learned counsel opposed the preliminary objection submitting that none of the grounds listed had raised a question of law as prescribed in the celebrated case of **Mukhisa Biscuits**. The counsel also

submitted that the preliminary objection does not cite the provision of the law that it was based on. That the firm of Lore and company advocates had filed a notice of change of advocate dated 30th March 2016 and were therefore properly on record for the Plaintiff and had capacity to file and serve the notice of motion dated 13th April 2016. The learned counsel further submitted that the Defendant's counsel ought to have perused the court record to confirm the Plaintiff's representation. The counsel asked the court to ensure substantive justice is done in terms of **article 159** of the Constitution, **section 1A and 1B** of the Civil Procedure Act. Finally the counsel submitted **that order 9 of Civil Procedure Rules** require the leave of the court to be obtained before change of advocate where judgment has been entered. The counsel prayed that the preliminary objection be struck out with costs.

4. The following are the main issue for the courts determination;

a) Whether the firm of Lore and company advocates had complied with **order 9 Rule 5 of Civil Procedure Rules** to be properly on record for the Plaintiff and if not whether the notice of motion dated 13th April 2016 should be struck off with costs.

b) Who pays the costs of the preliminary objection.

5. The court has carefully considered the preliminary objection dated 23rd June 2016, the court record, the rival verbal submissions by counsel and come to the following conclusions;

a) That the firm of D.Okech & Co. Advocates, being the one who drew and filed the plaint dated 10th December 2014, were the counsel on record for the Plaintiff until replaced through the filing and serving of a notice of change of advocate in terms of **Order 9 Rule 5** of the Civil Procedure Rules which states:

***“ A party suing or defended by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rule 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter including any review or appeal”.* [emphasize mine).**

b) That indeed the firm of Lore & Co. Associate had filed the notice of change of advocate dated 30th March 2016 on the same date to come on record for the Plaintiff whom they had wrongly described as the “Respondent”. That partially complied with the requirement of **Order 9 Rule 5** of Civil Procedure Rules on filing the notice. That the said rule requires such filed notice to be served in accordance with rule 6 which states:

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).” (emphasize mine).

c) That the requirement of the notice being served on the other party and former advocate is mandatory. That the firm of Lore & Co. Advocates did not avail affidavit of service of the notice of change of advocate on the counsel on record for the Defendant or the Plaintiff’s former advocate.

d) That the basis of the preliminary objection raised by counsel for the Defendant is that the notice of motion dated 13th April 2016 that was drawn and filed by Lore & Co. Associates for the Plaintiff was done by counsel not properly on record for the Plaintiff and therefore a stranger in these proceedings. That the court finds merit with the Defendant’s counsel position as they could not legally be expected to recognize Lore & Co. Associates as counsel on record for the Plaintiff until they are served with the filed notice of change of advocate in accordance with **Order 9 rule 5** of Civil Procedure Rules.

6. That in view of the foregoing the Defendant’s counsel preliminary objection vide notice dated 22nd June 2016 is upheld and the notice of motion dated 13th April 2016 found to have been drawn and filed for the Plaintiff by a firm of advocates not properly on record for failure to serve their filed notice of change of advocate. The notice of motion dated 13th April 2016 is therefore struck out with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2016.

In presence of;

Plaintiff Absent

Defendant Absent

Counsel M/S Kyamasima for Oduor for Defendant/Applicant and Mr Lore for Plaintiff/Respondent

S. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/9/2016

28/9/2016

S.M. Kibunja J

Oyugi court assistant

Parties absent

Mr Lore for Plaintiff/Respondent

Mr Oduor for Defendant/Applicant

Court: Ruling delivered in open court in presence of M/S Kyamazima for Oduor for Defendant/Applicant and Mr Lore for Plaintiff/Respondent.

S. KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/9/2016