REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Miscellaneous Application 120 of 2004

PATRICK O. OTIENO AND GEOFREY O. YOGO

T/A OTIENO, YOGO & CO ADVOCATES…… APPLICANT

VERSUS

MUHORONI SUGARCANE OUTGROWERS……. RESPONDENT

RULING

(On Preliminary Objection dated 8th October 2009)

On 25th May 2009, the respondent Muhoroni Sugarcane Outgrowers filed a notice of motion under Order 21 Rule 22 Civil Procedure Rules, Order 44 Rules 1, 2, 3 Civil Procedure Rules and Section 3A and 80 of the Civil Procedure Act for Orders that the firm of Mwamu and Company Advocates be allowed to come on record on behalf of the respondent and that the consent judgment entered in Milimani HCCC Number 379 of 2002 and the garnishee order dated 20th April 2009 be set aside.

The respondent also seeks for a stay of the consent judgment and the garnishee order and that the consent judgment be reviewed, set aside and/or vacated. The application was in the first instance presented ex-parte under certificate of urgency and on the 28th May 2009 the court certified the application urgent and ordered that service be effected for inter-parties hearing within twenty one (21) days. In the meantime, interim orders were granted for the stay of the consent judgment and garnishee order.

Upon being served with the application the applicants Patrick J. O. Otieno and Geoffrey O. Yogo trading as Otieno, Yogo and Company Advocates filed a replying affidavit on 22nd June 2009 followed by a notice of preliminary objection to the application on the 8th October 2009.

The said Notice of Preliminary Objection is two pronged in that:-

(i) The application dated 28th May 2009 is incompetent having been filed by a stranger to the proceedings and ought to be struck out.

(ii) The application seeks to challenge an order on taxation and being brought pursuant to the Civil Procedure Act is most misconceived does not lie and the court has no discretion to entertain in it.

On the first point, **Mr. P. J. Otieno** appearing for the applicant contended that when the application was filed on 25th May 2009, the firm of Mwamu & Co Advocates had not come on record pursuant to the provisions of Order III Rule 9A of the Civil Procedure Rules. Further, on the 20th July 2009 a consent letter was executed between the firm of Mwamu & Co Advocates and the firm of Onyango, Olel, Ingutia & Co Advocates by which prayer (1) of the respondent's application was allowed such that the firm of Mwamu & Co Advocates came on record.

Mr. Otieno contended that the said consent was not validated and effected by a court order. In that regard learned Counsel relied on the decisions in **Ann And Agnes [1997] ltd =vs= Diamond Trust Bank Ltd Ksm HCCC No. 388 of 1999 and Victoria Finance Co Ltd =vs= Nicholas R. O. Ombija KSM HCCC No. 353 of 1994**

In response **Mr. Mwamu**, appearing for the respondent contended that a notice of change of advocates was filed on 25th May 2009 and served upon Otieno, Yogo & Co Advocates and Onyango, Olel & Co Advocates. Later, the application dated 25th May 2009 was filed to give effect to the notice of change. Thereafter, the court directed that the application be served but granted preservatory orders.

Mr. Mwamu, further contended that prior to the application being heard, the firm of Onyango, Olel & Co Advocates did not raise any objection to the firm of Mwamu & Co Advocates coming on record. Therefore, having given notice, order III Rule 9A Civil Procedure Rules was complied with and what remained was a court order prior to the respondent arguing its application.

Mr. Mwamu went on to argue and contend that the stay order granted by the court was discretionary and if anything, an irregularity does not necessarily mean anullity.

Relying on the decisions in **Mukisa Biscuit Manufacturing Co Ltd =vs= West End Distributors Ltd [1969] EA 696, Nanjibhai Prabhudas & Co Ltd =vs= Standard Bank Ltd [1968] EA 670 and D. T. Dobie & Co Ltd =vs= Muchina [1982] KLR 1**, Mr. Mwamu implied that the preliminary objection is not merited.

The issue arising from the foregoing is whether the respondent's application dated 25th May 2009 is incompetent for failure by the firm of Mwamu & Co Advocates to comply with the provisions of Order III Rule 9A Civil Procedure Code. The said provides that:-

"When there is a change of advocate or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such charge or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record".

The provision is very clear, where judgment in a suit has been passed and there is a change of advocate or a party decides to act in person such change will only be effected by an order of the court upon an application with notice to the advocate on record. The incoming advocate must first and foremost obtain the necessary court order prior to taking over the matter from the previous outgoing advocate.

The scenario herein is rather interesting and included a double change of advocate such that the original advocates were replaced by new advocates who in turn were themselves replaced by the original

advocates. It may be said that either the respective clients had not made up their minds on whom to represent them or they lost confidence with their latest advocates and opted to revert to the original advocates. It may also be said that this was simply an abuse of the court process by both parties either intentionally or unintentionally.

Be that as it may, the history of this matter started way back in the year 2004 when the firm of Otieno, Yogo & Co Advocates filed a number of bills of costs for taxation against its then client Muhoroni Sugar Outgrowers (the respondent herein).

The bills were filed pursuant to the Advocates Act (Cap 16 Laws of Kenya).

The filing of the bills was a precursor to the execution process against the respondent meaning that there was already a finality in the matters under consideration as between the applicant and the respondent.

The notice of motion filed by the firm of Otieno, Yogo & Co Advocates on the 31st May 2004 listed several matters handled by itself on behalf of the respondent.

The bills of costs were for taxation by the deputy Registrar to facilitate the intended execution for costs.

On 15th June 2004, the firm of Mwamu, Nyanga & Co Advocates filed a notice of appointment and on 21st June 2004 filed grounds of opposition on behalf of the respondent.

The record shows that the applicant's bills were taxed on 3rd March 2005 and on the 14th March 2005 the applicant wrote to the Deputy Registrar requesting for reasons for the decision on specified items. This was pursuant to Rule 11 of the Advocates (Remuneration) Order.

Upto this point and all along the matter was at the execution stage. It was therefore imperative that any change of advocate or intention to act in person had to be in accordance with Rule 9A of Order III of the Civil Procedure Rules.

However, on the 23rd May 2005, a notice of change of advocate was filed by the firm of Odhiambo Owiti & Co Advocates who replaced Otieno, Yogo & Co Advocates who previously acted for the applicant partners of the firm. By that change, the applicants separated their personal status from their business status, so it would seem.

The notice of change was served upon the respondent advocates and the applicants advocates Messrs Otieno, Yogo & Co Advocates. This was the first change of advocates and does not appear to have been effected by a court order in accordance with Rule 9A of Order III Civil Procedure Rules.

It may thus be stated that the applicants were the first to flout the said Order III Rule 9A Civil procedure Rules. In the circumstances, it is doubtful whether the incoming advocates Odhiambo Owiti & Co Advocates were proper on record to handle the matter from that point and make any application against the respondent or enter into any consent with the respondent such as the one entered on 5th October 2005 between themselves (in coming advocates) and Mwamu, Nyanga & Co Advocates regarding the taxed amounts. As of that date, the respondent had already filed a Chamber Summons dated 6th April 2005 made under the provisions of the Civil Procedure Act.

The consent order was apparently in respect of that application of the 6th April 2005.

On 28th October 2005, the applicants filed a reference to the High Court under Rule 11 (2) of the Advocates Remuneration Order to have the ruling on assessment of costs by the Deputy Registrar set aside and there be a re-assessment of the costs or alternatively the taxation of the costs be undertaken by the High Court. The reference was filed after the applicants had been given the reasons for the decision of the Deputy Registrar on specified items.

It is instructive to note that the reference was filed by the firm of Otieno, Yogo & Co Advocates and not the advocates on record whether property or improperly Messrs Owiti Odhiambo & Co Advocates who again entered into a consent with the firm of Mwamu, Nyanga & Co Advocates filed on 21st February 2006. Where did Otieno, Yogo & Co Advocates come from if it had already been replaced by Owiti Odhiambo & Co Advocates or was it saying that Owiti Odhiambo & Co Advocates were not proper on record"

As of 21st February 2006, the reference filed on the 28th October 2005 had not been determined. The reference eventually came up for hearing on 2nd July 2008 but the respondent's learned Counsel (Mr. Mwamu) indicated that he wished to file an application to cease from acting for the respondent.

Indeed, on 16th July 2008, the firm of Mwamu, Nyanga & Co Advocates filed an application to cease from acting. The application was granted on 31st July 2008.

On the 1st September 2008, the firm of Olel, Onyango and Ingutia & Co Advocates filed a notice of appointment in a move that reflected the first change of advocate by the respondent.

Notably, the change was not effected in accordance with Rule 9A of Order III Civil procedure Rules. Yet, on the 13th February 2009, the firm of Otieno, Yogo & Co Advocates (not Owiti Odhiambo & Co Advocates) and the firm of Olel, Onyango, Ingutia & Co Advocates filed a consent letter confirming the taxation by the Deputy Registrar of Kshs. 3,908,918/80cts. The consent further provided for the issuance of costs and entry of judgment in favour of the applicants. A thirty (30) days stay of execution was agreed. As of that time, the reference dated 28th October 2005 had not been determined and when it came up for hearing on 30th October 2008 it was stood over generally after the parties failed to appear.

On 4th February 2009 when the reference came up for hearing, the parties intimated to the court that there was a likelihood of recording a consent, the matter was then stood over to 13th February 2009 for mention. The parties did not however appear in court. They instead filed the consent on that day. The said consent was confirmed as an order of the court on 18th February 2009.

In effect the consent determined the reference dated 28th October 2005 and on 2nd April 2009, the applicant through Otieno, Yogo & Co Advocates filed an urgent ex-parte chamber summons for garnishee orders against the respondent's bankers – Kenya Commercial Bank. The Garnishee entered appearance on 9th April 2009 through the firm of Ochoki & Co Advocates.

On 20th April 2009 certificates of costs reflecting the entire amount of Kshs. 3,908,918/80 cts were issued by the Deputy Registrar pursuant to the consent order of the 13th February 2009. On the same 20th April 2009, a consent was entered between the applicant and the Garnishee. The record shows that all along the firm of Owiti Odhiambo & Co Advocates was still on record for the applicant but it was not party to the material consent of the 13th February 2009.

In a sudden turn of events, the firm of Mwamu & Co Advocates and not Mwamu, Nyanga & Co Advocates filed the disputed notice of motion dated 25th May 2009 under the provisions of the Civil Procedure Act for orders that the firm be allowed to come on record for the respondents and for the

setting aside of the consent judgment / order for the sum of Kshs. 3,244,710/= and the garnishee order of 20th April 2009. The respondent also sought to have a stay of execution of the consent order and the garnishee order and a review of the consent order.

The application was filed under certificate of urgency and was accompanied by a notice of change of advocate. This reflected the second change of advocate by the respondents and was also not effected in accordance with Rule 9 A of Order III Civil Procedure Rules.

The application came to court in the first instance on 28th May 2009 in the absence of the applicants. The court ordered that the application be served for inter-parties hearing within twenty one (21) days. In the meantime, the court ordered that there be a stay of execution in terms of prayer (c) of the application. In reaction to the ex-parte order of stay of execution the applicants again through the firm of Otieno, Yogo & Co Advocates filed a notice of motion on 18th July 2009 under certificate of urgency for the discharge of the ex-parte stay order. The application was made under the provisions of the Civil Procedure Act and was certified urgent on 20th July 2009 with an order that the same be served for inter-parties hearing.

The application came up for inter-parties hearing on 17th September 2009 but was stood over generally.

Meanwhile, the respondent's application dated 25th May 2009 came up for hearing on 8th October 2009 on which date the respondent's advocate Mr. Mwamu indicated that he had just been served with the current notice of preliminary objection. Indeed the notice was filed on that 8th October 2009 prompting the court to direct that the same be heard first on a different date.

On 30th November 2009, both the preliminary objection and the application dated 25th May 2009 came up for hearing. The application was held in abeyance pending the hearing and determination of the preliminary objection.

Emerging from the foregoing is the bare fact that all the firms of advocates involved in this matter have in one way or the other come on record in a manner which was improper.

The firm of Mwamu & Co Advocates may not be properly on record in as much as its notice of change has not been effected by a court order even though the notice was duly served and a consent order recorded on the 22nd July 2009 between the said firm of Mwamu & Co Advocates and that of Olel, Onyango and Ingutia Advocates. The consent was a statement from Olel, Onyango & Ingutia Advocates that they were not opposed to the taking over of the matter by Mwamu & Co Advocates.

Seemingly, the take-over was regularized and all that remained was the appropriate court order to give it effect. However, even before the consent was filed, Mwamu & Co Advocates filed the disputed application dated 25th May 2009 seeking among other things an order of the court allowing it to come on record on behalf of the respondent.

In normal circumstances, the court order allowing change of advocate ought to have been obtained prior to the filing of the application.

Nonetheless, the application is yet to be determined and any accruing irregularity on appointment or change of advocates may be rectified if only to allow the parties an opportunity to be represented by advocates of their choice and be heard on the matter.

Taking cognizance of the combination of prayers sought in the application the court had to do justice to

all the parties by exercising its discretion to grant a stay of execution pending the hearing and determination of the application otherwise the application would have been overtaken by events and rendered useless.

While it is accepted that Mwamu & Co Advocates may not be proper on record the same may also be said of the firm of Otieno, Yogo & Co Advocates who have raised this preliminary objection. The record does not show that the said firm replaced the firm of Owiti Odhiambo & Co Advocates who also may not have properly come on record. The firm of Olel, Onyango & Ingutia Advocates also did not properly come on record when taking over from the firm of Mwamu, Nyanga & Co Advocates.

It is worth noting that the consent judgment /order sought to be set – aside and / or reviewed was entered between Otieno, Yogo & Co Advocates and Olel, Onyango & Ingutia Advocates. The firm of Owiti Odhiambo & Co Advocates did not feature in the consent.

It may therefore be said that having not been proper on record, the advocates recording the disputed consent order had no capacity to do so. It may also be said that the firm of Otieno, Yogo & Co Advocates which must be treated separately from the partners who form it had no capacity to raise this preliminary objection. The confusion on representation arising herein was largely contributed by the firm of Otieno, Yogo & Co Advocates because they failed to strictly separate their personal status from their business status.

All the mistakes made herein regarding representation are more of procedural matters amounting to mere irregularities which may be corrected outside the realm of preliminary objections. Issues pertaining to "**locus standi**" are matters of fact **(See, Selesio M'Aribu =vs= Meru County Council Criminal Appeal No. 183 of 2003 C/A/ at Nyeri).**

Further, what is being sought in the first limb of the objection is to have the disputed application struck out on a matter of procedure.

A mere irregularity would not render an application incurably defective as it does not go to the jurisdiction of the court **(See, Nanjibhai Prabhudas & Co Ltd =vs= Standard Bank Ltd (supra) and Mukisa Biscuit Manufacturing Co Ltd =vs= West End Distributors Ltd [supra])**

The first limb of the preliminary objection was improperly raised at this stage and lacks merit. In this court's view the correct forum would be at the hearing of the disputed application dated 25th May 2009.

On the second limb of the objection learned Counsel Mr. Otieno, contended that regarding the taxation of costs, the Advocates Act is complete and conclusive and leaves no gap for the application of the Civil Procedure Act. Therefore, the disputed application is misconceived and does not lie.

In that regard Mr. Otieno relied on the decisions in the case of **In the matter of Winding up of Leisure Lodges Ltd And in the matter of the Companies Act High Court Winding up cause No. 28 of 1996 (Nbi) and Behan & Okero Advocates =vs= National Bank of Kenya Kisumu HCC MISC Application No. 114 of 2004.**

Mr. Mwamu, on the other hand, contended that the consent order sought to be set aside and/or reviewed was an ordinary consent between the parties and was not made pursuant to the Advocates Act. Therefore, the provisions of the Civil Procedure Act had to be relied on in making the disputed application.

Mr. Mwamu argued that in the Winding up cause referred herein above, the process of taxation was conducted and the objection taken was against the decision of the taxing master whereas in this case, a reference to the High Court was lodged but before it was heard the disputed consent was filed.

Mr. Mwamu contended that the respondents are not appealing against any decision of the taxing master but are questioning the validity of the disputed consent order.

As noted earlier hereinabove, the effect of the disputed consent order was to compromise and or determine the reference to the High Court dated 28th October 2005. It took about four years for the reference to be determined. The consent resulted in the Garnishee Order being issued against the Kenya Commercial Bank, the respondent's bankers.

The Garnishee order was made vide a chamber summons dated 31st March 2009 taken under the provisions of the Civil Procedure Act. The order is a subject of the disputed application even though it may have been compromised.

On 16th July 2009 the applicants filed a notice of motion to have the disputed stay order discharged. This is the same order which is yet to be confirmed and was issued at the court's discretion.

The notice of motion was made under the provisions of the Civil Procedure Act yet in this preliminary objection the applicants contended that the disputed application by the respondent does not lie as it is brought under the provisions of the Civil Procedure Act. In this court's opinion, such contention is self – defeatist and an application of double standards in this matter. The applicants cannot be heard to say that the respondent is at fault in bringing its application under the provisions of the Civil Procedure Act yet they themselves by their own application dated 16th July 2009 for the discharge of the stay order applied the provisions of the Civil Procedure Act.

Besides, the disputed application is essentially against the disputed consent order and no appeal lies from a decree passed by the court with the consent of the parties (**See, Section 67 (2) Civil Procedure Act and Munyiri =vs= Ndunguyu [1985] KLR 370).**

The only remedy is for the parties to apply for setting aside or review of the consent order under the provisions of the Civil Procedure Act which is an Act of parliament to make provision for procedure in civil courts.

This is exactly what the respondent has done by its disputed application dated 25th May 2009.

It matters not that the consent order arose from a taxation process. It led to or was likely to lead to execution which a court has the discretion to stay

In a broad spectrum, the process of taxation is all part of the civil process normally undertaken by the Civil courts. It would therefore be foolhardy for this court to uphold the second limb of the preliminary objection. It is devoid of merit.

In sum, the preliminary objection is dismissed with costs.

Dated, signed and delivered at Kisumu this 11th day of December 2009.

J. R. KARANJA

JUDGE

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