



**Okeno & Sons Building Contractors v Ministry of Agriculture, Livestock & Fisheries & another (Judicial Review E010 of 2022) [2024] KEHC 7683 (KLR) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7683 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
JUDICIAL REVIEW E010 OF 2022**

**KW KIARIE, J**

**JUNE 26, 2024**

**BETWEEN**

**OKENO & SONS BUILDING CONTRACTORS ..... APPLICANT**

**AND**

**MINISTRY OF AGRICULTURE, LIVESTOCK & FISHERIES 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant moved the court through a Notice of Motion dated the 11<sup>th</sup> day of December 2023. It was brought under section 3A of the [Civil Procedure Act](#) and Order 9 Rule 9 (a) of the Civil Procedure Rules. The applicant is seeking the following orders:
  - a. This application be certified urgent and be heard in the first instance and orders granted.
  - b. The firm of Prof. Albert Mumma & Company Advocates be and is hereby allowed to come on record for another applicant in place of the firm of C. Obiero & Company Advocates herein post-judgment.
  - c. Costs of the application be provided for.
2. The application is premised on the following grounds:
  - a. In May 1989, the applicant entered into a contractual agreement with the 1<sup>st</sup> Respondent for the construction and completion of the Mbita Fish Reception and Reselling Center at a contract price of kshs.16,349,159.60/ the scope of the work was contained in the terms of the contract between the applicant and the 1<sup>st</sup> respondent.
  - b. The applicant carried out the work in terms of the contract to completion and to the best of their ability and then handed over the site to the 1<sup>st</sup> respondent upon completion.



Consequently, the claimant was entitled to the payment of the contractual terms mentioned in paragraph 1 above.

- c. However, the respondent failed to honour the contractual terms, forcing the claimant to invoke the dispute resolution clause in the contract agreement.
- d. As per the dispute resolution clause, the parties were to go to arbitration before going to court in case of a dispute.
- e. The applicant then moved to an Arbitrator, who heard and determined their claim to conclusion and awarded the applicant a sum of kshs.43,511,450.094/—, which is the contractual sum owed plus interest.
- f. Pursuant to the applicants' instructions, the advocates lodged the current suit seeking orders of mandamus to compel payment of the decretal sum of kshs.43,511,450.094 to the plaintiff herein.
- g. Judgment was then entered in favour of the applicant for the sum of kshs.43,511,450.094 enforcing the said arbitral award.
- h. On 23<sup>rd</sup> November 2023, the Ministry of Agriculture, Livestock, Fisheries, and Blue Economy paid kshs.10,000,000.00 in partial settlement of the decretal sum of kshs.43,511,450.094 owed to the applicant. The sum of kshs.0,000,000.00 was paid to the defendant in account number 1292998490, held and maintained in KCB Bank Kenya Limited under the account name C. Obiero & Company Advocates.
- i. Despite having received the sum of kshs.10,000,000.00, which belongs to the plaintiff, the defendant has callously converted the said plaintiff's funds for personal use and only disbursed kshs.500,000/- by stating that the balance thereof shall be applied as fees for acting in the matter and others.
- j. Arising out of the conduct of the firm of C. Obiero & Co. Advocates, in the matter, the advocate-client relationship has been severe, and the applicant now desires to appoint the firm of Prof. Albert Mumma & Co. Advocates as they are fearful that all further funds received by the said advocates will be applied by the said advocate for his personal use.
- k. That the applicant's funds are at dire risk of dissipation as the defendant now engages in an extravagant lifestyle and has also organized various sports events in Rangwe Constituency, which the plaintiff verily believes are funded by the plaintiff's funds (which are under the defendant's possession and control) and which were recently paid by Ministry of Agriculture, Livestock and Blue Economy.
- l. The defendant has failed to render a complete and accurate account to the applicant of the applicant's funds in account number 1292998490 under the name C. Obiero & Co. Advocates held and maintained in KCB Bank Kisumu branch under the provisions of rule 3 of the Advocates (Deposit Interest) Rules.
- m. The advocate has also failed to deliver to the applicant the monies held in the said account despite multiple requests by the plaintiff.
- n. It is only fair and just that the court grants an order to allow the firm of Prof. Albert Mumma & Co Advocates to come on record for the applicant in place of C. Obiero & Associates.



- o. It is only fair, just and in the greater interest of justice that the application be allowed and merited.

The respondent will suffer no prejudice if the application is allowed.

3. Mr. Obiero verbally opposed the application; he did not file any grounds of opposition.
4. When the parties appeared before me on June 12, 2024, Mr. Obiero requested a hearing date. Directions were issued that the applicant should file and serve Mr. Obiero's firm within three days, and Mr. Obiero was to file and serve his submissions within three days of service. He did not file any.
5. Order 9 Rule 9 of the Civil Procedure Rules provides:  
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 change or intention to act in person shall not be effected without an order of the court—
  - (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person, as the case may be.
6. The High Court in *Stephen Mwandware Ndighila vs Steel Makers Limited* [2022] eKLR, stated:  
“...In my view, the essence of Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”
  28. The provisions of Order 9 do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be complied with when a party wants to change counsel. Thus, a party wishing to change counsel after judgment can only do so with the approval of the Court.
7. This is the legal position. The advocate-client relationship is based on trust. No one can compel such a relationship to exist when trust is dead, and neither party can force the other into it.
8. The applicant has an unfettered right to choose the advocate to represent him. The Court of Appeal in *Delphis Bank Ltd vs Channan Singh Chatthe & 6 Others* [2005] eKLR stated that:  
The starting point is, of course, to reiterate that most valued constitutional right to a litigant: the right to a legal representative or advocate of his choice.
9. The application is therefore allowed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 26<sup>TH</sup> DAY OF JUNE 2024.**

**KIARIE WAWERU KIARIE**

**JUDGE**

