



Anyoka t/a Anyoka & Associate Advocates v Ongwacho (Miscellaneous Application E175 of 2021) [2024] KEHC 13549 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION E175 OF 2021
MS SHARIFF, J
OCTOBER 25, 2024**

BETWEEN

**JULIUS ANYOKA T/A ANYOKA & ASSOCIATE ADVOCATES DECREE
HOLDER**

AND

ABEL MORANGA ONGWACHO JUDGMENT DEBTOR

RULING

1. Pending before court are an application dated 23rd February 2024 by the Judgment Debtor and a Preliminary objection dated 1st March 2024 by the Decree Holder.
2. The application by the Judgment Debtor seeks the lifting of warrants of arrest issued on 13th October 2023, permission for the firm of Onyango, Jonyo & Co Advocates to come on record for the Judgment Debtor, and a refund of Ksh.240,500 in excess legal fees.
3. Conversely, the Preliminary Objection aims to declare the application of 23rd February 2024 as res judicata and to challenge the locus of Onyango, Jonyo & Company Advocates, citing Order 9 Rule 9 of the Civil Procedure Rules 2010.
4. On the 29th May 2024 when the matter was in court Mr Onyango appeared for the Judgment Debtor while Ms. Chelagat held brief for Mr. Maengwe for the Decree Holder. Mr Onyango proposed that the Preliminary Objection be canvassed by way of written submissions, while Ms. Chelangat retorted that the Application dated 23rd February 2024 was res judicata.
5. Thereafter the court directed that both parties submit orally to both the Preliminary Objection and the application and placed the matter aside to 11.00 am the same day.
6. When the matter was called up at 11.05 am only Mr. Onyango for the Judgment Debtor was present.



7. Before delving into Mr. Onyango's submissions, it is important to restate the prayers and the grounds in support of the application dated 23rd February 2024.

The Application dated 23rd February 2024

8. The orders sought are: -
1. Spent
 2. That leave be granted to the firm of M/s Onyango, Jonyo & Company Advocates to come on record as advocates for the applicant/Judgment Debtor.
 3. That the Notice of Appointment of Advocate annexed herein be deemed as duly filed and served.
 4. That pending the determination of the application and proceedings herein, an order do issue suspending, lifting and/or staying execution of the warrants of arrest in execution issued against the person of the Applicant herein issued by this honourable court on the 13/10/2023 as it is a violation of the law as the purported costs the subject of the warrants herein have since been paid in full and/or settled in totality by the applicant.
 5. That the honourable court do grant stay of any further action execution or other legal processes against the person of the Applicant herein.
 6. That the warrants of arrest in execution in the hands of the OCS Kisii Central Police be recalled as they are null and void in law.
 7. That an order do issue to George Maengwe t/a GMM & Co Advocates to appear before this honourable court to shed light on his relationship with the Respondent herein and whether or not he was receiving money on behalf of the Respondent herein or not.
 8. That an order do issue to George Maengwe t/a GMM & Co Advocates to appear before this honourable court to shed light on the total amount he has received from the Applicant herein.
 9. That George Maengwe t/a GMM & Co Advocates and/or the Respondent be ordered to refund to the Applicant any excess amount paid to them, towards settling their legal fees, the same is computed at Kshs 240,500/=.
 10. That costs of this application be in the cause.
9. The application is premised on the grounds that two consents in Miscellaneous Applications No's 175 and 176 of 2021 both of Kisumu for payment of a total of Kshs.399,000/= by 10/3/2022 was entered between the Judgment Debtor and the Decree Holder.
10. That after the Judgment Debtor's failure to abide by the conditions of the consents the Decree Holder extracted warrants of arrest for payment of Kshs.552,500/=.
11. That the warrants of arrest were taken out despite Judgment Debtor having paid the Decree Holder Kshs.793,000/=.
12. Additionally, that despite settling the debt in full the Decree Holder in conjunction with the OCS Kisii Central Police have continued harassing the judgment debtor, in the process, extorting a further Kshs.240,500/= from him.



13. That the continued pendency of the warrants of arrest is a threat to the Judgment Debtor's liberty and freedom, thus should be set aside.
14. The application was equally supported by a supporting affidavit sworn by the Judgment Debtor in which he rehashed the grounds in support of the application and attached copies of the Mpesa statements.

Judgment Debtor/Applicant's Submissions

15. In his oral submissions, counsel argued against the Preliminary Objection and in support of the application. He contended that no prior application has been filed to make the orders sought herein res judicata.
16. He avowed that the Decree Holder had been paid in excess of Kshs 240,000/= which he now seeks to recover.
17. Regarding their firm's lack of locus standi due to a contravention of Order 9 Rule 9 of the Civil Procedure Rules, counsel noted that they have included a request for leave within the application.
18. To support this argument, he highlighted that after a judgment, an advocate may only come on record either by consent or with the court's leave.

Analysis and Determination

19. After careful analysis of the Preliminary Objection, Motion, Supporting Affidavit and submissions the following issues arise for determination: -
 - i. Whether leave should be granted to the firm of M/S Onyango to come on record for the Judgment Debtor.
 - ii. Whether the Judgment Debtor has paid the Decree Holder Kshs 793,000/= and if so whether he is entitled to a refund of Kshs 240,500/=
 - iii. Whether the warrants of arrest of the 13/10/2023 should be annulled or recalled.

Whether leave should be granted to the firm of M/S Onyango to come on record for the Judgment Debtor

20. The firm of M/s Onyango & Company advocates sought leave to be to come on record for the Judgment Debtor. The instructive provision for such leave is Order 9 Rule 9 of the Civil Procedure Rules which states: -

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.



21. The rationale for this provision was aptly captured in the case of *Serah Wanjiru Kung'u v Peter Munyua Kimani* [2021] eKLR as follows: -

“The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...”

22. In the circumstances of this case, it is evident that the firm of GMM & Co Advocates represented the Judgment Debtor before judgment. The firm of GMM was duly served with the Application which would explain why they filed the Preliminary Objection.
23. Given the foregoing this court is satisfied that the firm of Onyango, Jonyo and Company Advocates has complied with the provisions of Order 9 Rule 9, having applied and served the firm of GMM & Company Advocates. They are thus granted leave.

Whether the Judgment Debtor has paid the Decree Holder Kshs 793,000/= and if so whether he is entitled to a refund of Kshs 240,500/=.

24. It is the Judgment Debtor's contention that he has settled all the dues and even overpaid to the tune of Kshs 240,500/= which amount he seeks the court's intervention to recover. In support of this contention, he has availed Mpesa statements which he avers amount to Kshs.793,000/=.
25. I have taken a look at the Mpesa statements and the petty cash vouchers. The statements show transactions between the Judgment Debtor and George Maengwe among others. However, it is not immediately apparent what the payments were for. There are no letters for instance outlining that the payments are in relation to fees in this or any other case. There is no evidence to aid the court in drawing an inference that the payment was in settlement of the consents.
26. Regarding the payment vouchers it is also not clear whether the Decree Holder actually received the monies. Rather than inviting the court to make wild guesses it would really have helped the Judgment Debtor if he would have filed official correspondence on settlement of the amounts.
27. In light of the foregoing this court finds that there's no proof of payment of Kshs 793,000/=. Additionally, the prayer for refund of Kshs 240,500/= is unmerited and falls by the wayside.

Whether the warrants of arrest of the 13/10/2023 should be annulled or recalled.

28. It is not in dispute that there exist two consents between the Judgment Debtor and the Decree Holder in respect of Kisumu High Court Miscellaneous Applications Number 175 and 176 of 2021. Both consents are identical and obligate the Judgment Debtor to pay Kshs 199,500/= for each of the files before 10th March 2022, failure to which a warrant of arrest would issue.
29. Having found that payment has not been proven it follows that there is no basis for annulling or recalling the warrant of arrest. This prayer is also denied.



30. The upshot of the foregoing is that the application only succeeds to the extent that the firm of Onyango, Jonyo & Company Advocates is granted leave to come on record for the Judgment debtor. The rest of the prayers are unmerited and are thus disallowed.
31. Each party to bear its own costs

DELIVERED, SIGNED AND DATED AT KISUMU THIS 25TH DAY OCTOBER 2024

M. S. SHARIFF

JUDGE

