



REPUBLIC OF KENYA



**Kisia v Lubulellah & Associates Advocates (Miscellaneous Civil Application 1060 of 2020)
[2023] KEHC 1268 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION 1060 OF 2020**

A MABEYA, J

FEBRUARY 24, 2023

BETWEEN

PATRICK SAGWA KISIA CLIENT

AND

LUBULELLAH & ASSOCIATES ADVOCATES ADVOCATE

RULING

1. Before Court are two applications for determination. The first was dated 22/7/2022. It was brought under Order 5, Order 10 Rule 11, Order 22 Rule 5, Order 42, and Order 51 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act, Rule 11(3) of the Advocates Remuneration Order and Article 159 of the Constitution.
2. In the application, the respondent sought leave to appeal to the Court of Appeal against the ruling of this Court of 15/7/2022, and a stay of execution of the certificate of taxation dated October 13, 2021 pending the determination of the intended appeal.
3. The grounds for the application were set out on the face of the application and in the supporting affidavit sworn by Patrick Sagwa Kisia on 22/7/2022. It was the respondent's case that he was dissatisfied with the said ruling and intended to appeal against it. That the applicant was in the process of execution thus stay was necessary failure to which the respondent would suffer irreparable harm.
4. That in the intended appeal, serious issues will be canvassed including the value of the subject matter which the respondent contended to be Kshs. 17,539,699/=. That the court had erroneously relied on the security of costs of Kshs. 257,607,130.35 which was filed in a different case being Civil Case 60 of 2016 as the basis of upholding the taxation. That leave ought therefore to be granted.



5. The applicant opposed that application vide the replying affidavit sworn by Eugene Lubale Lubulellah on 28/7/2022. He averred that the ex parte orders dated 25/7/2022 were obtained dishonestly by failing to disclose that the suit had already been determined by Odero J on 12/2/2021 and the client awarded interest on the principal amount of Kshs. 17,539,699.92 at 19.49% from 24/3/2009 till payment in full. That the interest formed an integral part of the subject matter of a suit thus the claim that both the taxing master and this Court were wrong for factoring fees for anything above the principal amount was misplaced.
6. That there was therefor no arguable appeal as both this Court and the taxing master identified the subject value of the suit as the awarded principal amount plus interest thereon. That the reference to the security of costs of Kshs. 250,607,130.35 in HCC No. 60 of 2016 was therefore immaterial to the outcome of the taxing master's decision which was not based on that security of costs. That such mention was only in addition to this Court's finding on the correctness of the taxing master's taxation, such that even without reference to those securities, the outcome would have remained the same.
7. That the application was also incompetent as the respondent failed to file a notice of appeal within 14 days of the ruling stating the specific issues upon which an appeal was sought. That consequently, the requisite appellate jurisdiction had not been invoked and leave to file an appeal could not issue. That orders for stay were not available in the Advocates Act and could therefore not issue as the Advocate's Act was self-contained and independent of the Civil Procedure Act.
8. The second application was dated 28/7/2022. It was brought under Order 9 Rule 9 of the Civil Procedure Rules.
9. The application sought that the notice of appointment by Messrs Tito & Associates Advocates (herein 'the firm') as well as the application dated 22/7/2022 filed by the said firm and that the ex parte orders issued on 25/7/2022 be set aside.
10. The grounds for the application were set out on the face of it and in the supporting affidavit sworn by Eugene Lubale Lubulellah sworn on 28/7/2022. It was the applicant's case that the firm had unlawfully filed an undated notice of change of advocates to come on record for the respondent in this suit in place of the firm of Oluoch-Olunya & Associates, Advocates. That this was after entry of judgment in contravention of Order 9 Rule 9 of the Civil Procedure Rules.
11. That the firm proceeded to file the impugned application dated 22/7/2022 without being properly on record for the respondent thus the same was irregular and ought to be set aside. That the irregularity could not be cured by Article 159 of the Constitution or Section 1 & 3 of the Civil Procedure Act. That the ex parte orders obtained by the firm were obtained by non-disclosure of facts and were similarly irregular. This was because it was not disclosed that judgment had already been entered on 12/2/2021 and the applicant awarded Kshs. 17,539,699.92 plus interest at 19.49% from 24/3/2009 till payment in full.
12. That in any event, the respondent had no arguable appeal and the decree was monetary which could be compensated in the event the appeal was successful. That the respondent did not demonstrate how he would suffer any substantial loss if stay was not granted.
13. The application was opposed vide the replying affidavit of by John Tito sworn on 3/8/2022. He was a partner at the firm of Tito & Associates Advocates. He contended that the notice of change of advocates was filed in agreement of both advocates and there was on record a consent dated 29/7/2022 to change advocates.



14. That Order 9 Rule 9 of the Civil Procedure Rules only applied when the change in advocates is to take over conduct of a matter post judgment, yet the impugned application dated 22/7/2022 was a fresh suit in which the former firm of Oluoch Olunya Advocates had never acted for the respondent.
15. It was therefore contended that consent was unnecessary and the respondent had a right to choose his representative, or have more than one advocate. That an application for leave to appeal to the Court of Appeal after judgment was a fresh suit, and that non-compliance was curable under Article 159 of the Constitution. That the former firm was aware to the change of advocates and were agreeable to it thus no prejudice could occasion to it.
16. The application was also opposed vide the replying affidavit of Joan Misere sworn on 2/8/2022. She was an advocate at the former firm of Oluoch Olunya & Associates Advocates. It was admitted that the former firm represented the respondent in the taxation of the bill of costs and the taxation reference at the High Court. That the former firm had no instructions to represent the respondent in the intended appeal, and that the firm of Tito & Associates Advocates informed them that they had been instructed to handle the intended appeal.
17. That the former firm was agreeable to the notice of change of advocates being filed and the two firms executed a consent dated 21/7/2022. It was thus denied that the firm filed the notice of change secretly. That the application for leave to file an appeal was a fresh suit which the former firm had not represented the respondent in, thus Order 9 of the Rules was inapplicable.
18. Both applications were heard orally in court on 10/11/2022. This Court has considered the applications and the record. The first issue to be determined is whether the application dated 22/7/2022 and consequential orders ought to be set aside for breaching Order 9 of the Civil Procedure Rules. The finding therein will then determine whether the second issue of leave to file an appeal will be analyzed and determined upon.
19. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties. The provision states that: -
 - a. “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”
20. Order 9, rule 10 of the Rules provides;
 - a. “An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”
21. From the foregoing, Order 9 Rule 9 of the Civil Procedure Rules makes it mandatory that for any change of advocate after judgment has been entered to be effected, there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.



22. In *S. K. Tarwadi v Veronica Mueblmann* [2019] eKLR, the court explained the reasoning behind that provision where the judge observed as follows:
- “...In my view, the essence of the 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....”
23. Further, in *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR the Court held as follows:
- “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”
24. This court further quotes with approval the holding in *Monica Moraa v Kenindia Assurance Co. Ltd.* [2010] eKLR where the court held as follows: -
- “.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”
25. In the present case, judgment was entered 12/2/2021 in favor of the respondent. The parties proceeded to taxation which was found in favour of the applicant/advocate. The respondent/client filed a taxation reference in this court which was again found in favor of the applicant. All along, the respondent retained the representation of the firm of Oluoch Olunya & Associates Advocates.
26. However, the firm of Tito & Associates Advocates filed an undated notice of change of advocate, and filed the application dated 22/7/2022 seeking leave to file an appeal against this court’s ruling of 15/7/2022. As at that time, they had not obtained leave of court. There was also no application under Order 9 Rule 9 & 10. When the applicant filed the application dated 28/7/2022 challenging that firm’s representation, the firm rushed to file a consent dated 21/7/2022, though the same was filed on 29/7/2022, that is, subsequent to the application of 28/7/2022. The consent was shown to be between the former and new firm.
27. The proper position to have been followed was that the counsel coming on record ought to have sought leave of Court to come on record, then file and serve the notice of change of Advocates before filing the application seeking leave to appeal against the ruling. The application dated 22/7/2022 was filed without leave of court and only filed a consent after the firm’s representation was challenged.



28. When faced with a similar situation, the court in *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR found that:

“In the present case, the Applicant’s Counsel, without leave of the Court, filed their certificate of urgency dated the 13th December 2019 wherein he purported to come on record, and sought for orders therein stated above wherein after an objection had been raised, Counsel filed a consent between the outgoing Advocate and themselves which consent did not cure the status of the Application and clearly offended the express provisions of Order 9 Rule 9 of the Civil Procedure Rules. It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules 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 adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the Court and other parties. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality. Having found that this procedure was not followed by M/S Nyiha, Mukoma & Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore all pleadings filed by it ought to be struck out.”

29. The consent that was filed after the application for leave had been filed could not cure the defect. This Court notes that the consent was dated 21/7/2022. It defeats reason why it was only filed after the applicant had raised an objection to the new firms representation. Even the Notice of Change of Advocate was undated thus it was not clear when the incoming firm was instructed to take over the matter. In this regard, the application filed by the firm of Tito & Associate Advocates and any other pleading thereof was irregular and must be struck out. The same fate must visit upon the ex parte orders obtained by the said firm on 25/7/2022 as the same were irregularly obtained.

30. In any case, this Court notes that the respondent was again at logger heads with the rules of procedure when he again failed to file a Notice of Appeal within 14 days of the ruling he intended to appeal against. No explanation was given for the delay. This Court is unable to aid a party who puts no effort to comply with procedures especially when the litigant is represented by Counsel.

31. In the end, the Court finds that the application dated July 28, 2022 to be meritorious and makes the following orders: -

- a. The application dated July 22, 2022 is hereby struck out with costs to the applicant/advocate.
- b. The *ex parte* orders issued on July 25, 2022 are hereby set aside.
- c. The applicant/advocate is awarded costs for the application dated July 28, 2022.

32 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

A. MABEYA, FCIArb

JUDGE

