



**Republic v Principal Secretary, Ministry of Defence & 3 others; Odiero (Exparte Applicant); Owiti, Otieno & Ragot Advocates (Interested Party) (Judicial Review Application 16 of 2019) [2023] KEHC 3886 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
JUDICIAL REVIEW APPLICATION 16 OF 2019  
RE ABURILI, J  
APRIL 25, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PRINCIPAL SECRETARY, MINISTRY OF DEFENCE ..... 1<sup>ST</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF FOREIGN AFFAIRS &  
INTERNATIONAL TRADE ..... 2<sup>ND</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF INTERIOR ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**HEZBON OMBWAYO ODIERO ..... EXPARTE APPLICANT**

**AND**

**OWITI, OTIENO & RAGOT ADVOCATES ..... INTERESTED PARTY**

**RULING**

1. This ruling determines the application dated 22<sup>nd</sup> March 2023 lodged by the firm of Agina & Associates Advocates in which they seek the following orders:
  - i. Spent
  - ii. Spent
  - iii. Spent



- iv. That the applicant Mr. Odiero Ombwayo be and is hereby allowed to appoint M/S Agina and Associates Advocates to act for him herein in lieu of Mr. Jude Ragot of Otieno, Owiti & Ragot Advocates.
  - v. That there be such further or other orders as the court deem fair and expedient in the circumstances of the case
2. The application is supported by the affidavit of the ex-parte applicant Hezbon Ombwayo Odero and is based on the following grounds:
- a. That the applicant has unfettered constitutional right to be represented by the advocates of his choice at any time of the proceedings.
  - b. That the applicant has decided to exercise his constitutional right to change advocates.
  - c. That the purpose of this application is to safeguard payment of fees on the outgoing advocate pursuant to *Advocates Remuneration Order* Rule 68 (2).
3. The Respondent advocates opposed the application vide a replying affidavit sworn by Jude Ragot on the 12<sup>th</sup> April 2023 on among others that the application was misconceived and constituted an abuse of the court's process as the applicant had initiated the instant proceedings but he did not want to pay the respondent/advocate's fees.
4. It was the respondent's contention that they did not consent to the change of advocates for the reasons that they had outstanding fees of Kshs. 1,360,579.08 in the instant proceedings and in Kisumu High Court Petition No. 12 of 2012 that must be settled by the applicant.
- The parties relied on the pleadings and affidavits to canvass the application which is self-explanatory and the opposition is straight forward.
5. I have considered the application for leave to change advocates. Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 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 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 Rule is clear that if a litigant wish to change counsel after judgment, he requires to procure the consent of the outgoing counsel, or have the change effected through an order of court upon filing an appropriate application.
7. In this instance, the outgoing advocate has refused to give consent hence the application for an order of change of counsel, which application is still opposed by the outgoing counsel. The rationale behind



this provision was well articulated in the case of *S.K. Tarwadi v Veronica Mueblmann* [2019] eKLR 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....”

8. In the case of *Monica Moraa v Kenindia Assurance Co. Ltd* (2012) eKLR, the court stated that:

“The mischief order 9 of the Civil Procedure Rules intended to address was to protect advocates or firms of advocates being replaced without Notice and without their legal fees being settled.”
9. I am in agreement with the above dictum. Prior to the pronouncement above and the Rule herein cited, there was no provision similar to Order 9 Rule 9, and a litigant could change counsel at any time, even after judgment, without the consent of the outgoing advocate and without any order of the court. Thus, an advocate would labour with a case to its conclusion only for another advocate to come and harvest the fruits of the judgment that the advocate has procured for the litigant. This was especially chronic in money decrees.
10. Often times, the outgoing advocate would not even be aware of the change of counsel. He could be instructing an auctioneer to execute the judgment when in fact a new advocate has already collected the funds from the judgment debtor. The advocate who would have expected to hold the money decree as a lien for his fees would be left high and dry. The incoming advocate would simply say that he has already paid the client. The only option left to the outgoing advocate was to chase the client for his fees which was never an easy task. As was stated in the case of *Monica Moraa supra*, the mischief was to avoid an advocate being replaced without his notice and without settlement of his fees.
11. Indeed, every person has the right to legal representation of his own choice and no court of law can impose an advocate on a litigant of his choice. The litigant has a right to choice of counsel, which includes the right to appoint counsel in the first instance, and also the right to change that counsel. That said, the advocate also has a right to payment of his legal fees for the work done. What Order 9 Rule 9 does is to balance the rights of the litigant and the rights of the advocate.
12. In this case, the applicant had instructed the respondent in Kisumu High Court Petition Number 9 of 2012 wherein the respondent got judgement on behalf of the applicant to the tune of Kshs. 5,000,000 as well as costs of Kshs. 538,087. The applicant subsequently seemed to have instructed the respondent to file the instant suit wherein he sought an order of mandamus compelling the other respondents to settle the decretal sum in Kisumu High Court Petition Number 9 of 2012. This is the procedure applicable in decrees against the government as the advocate could not have stopped at obtaining judgment in the petition.
13. Further to the above, the firm of Owiti, Otieno & Ragot Advocates deposed that they have already taxed their fees and that the outstanding fees is Kshs. 1,360,579.08 in the instant proceedings and in Kisumu High Court Petition No. 12 of 2012 which fees must be settled. By the exparte applicant.
14. In the circumstances, acknowledging that the applicant has a right to legal representation of their choice and conversely that the firm of Owiti, Otieno & Ragot Advocates is legally entitled to their fees, I find and hold that the instant application is merited. I grant leave to the law firm of Ojwang Agina & Associates to come on record on behalf of the exparte applicant conditional upon the exparte applicant paying and settling all legal fees due to the law firm of Owiti, Otieno & Ragot Advocates in HC Petition No. 12 of 2012 and in Petition No. 9 of 2012 as taxed by the court, together with costs of



defending this application assessed at Kshs 15,000 and which legal fees and costs the said advocate is at liberty to garnishee in the event that the ex parte applicant does not settle within sixty days of this ruling.

15. Mention on 6<sup>th</sup> June 2023 before the Deputy Registrar for further orders.

16. I so order

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF APRIL, 2023**

**R.E. ABURILI**

**JUDGE**

