



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Gulf Fabricators Limited v Municipal Council of Kisumu (Miscellaneous Application 236 of 2012) [2023] KEHC 18521 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18521 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION 236 OF 2012**

**RE ABURILI, J**

**MAY 31, 2023**

**BETWEEN**

**GULF FABRICATORS LIMITED ..... DECREE HOLDER**

**AND**

**MUNICIPAL COUNCIL OF KISUMU ..... JUDGMENT DEBTOR**

**RULING**

1. Before me is an application dated 21<sup>st</sup> March 2023 in which Mr C. Obiero Advocate seeks leave of court to be granted to appear for the judgment debtor/applicant in the place of the law firm of Otieno Ragot & Company Advocates, among other prayers namely:
  - a. Spent
  - b. Spent
  - c. That the firm of C. Obiero & Associates be granted leave to come on record for the respondents in place of Otieno, Ragot & Company Advocates; and the annexed notice of change of advocates be deemed as duly filed after payment of requisite fees.
  - d. That after hearing of this application inter parties, this court does declare the ongoing execution as statute barred, in breach of legal procedures of execution and are null and void for contravening section 15 of the 6th Schedule of the *Constitution* of Kenya 2010, section 35 of *Transition to Devolve Government Act* 2012, section 15 of the 6th Schedule of *Transition to Devolve Government Act* 2012 and section 12 (b) of *Intergovernmental Relations Act*.
  - e. That in the alternative, this court does waiver such interest to be fortified with regard to the decree dated 30th March 2006 in line with section 4 subsection 4 of *Limitation of Actions Act* 2012.
  - f. That the court does make such additional orders as may be fit in the circumstance.



- g. That cost of this application be provided for.
2. The application is supported by the grounds on its face as well as the supporting affidavit of Edris Omondi.
  3. Prior to the hearing of the application, a preliminary issue regarding legal representation arose following the filing of a replying affidavit sworn on the 19th April 2023 by one David Otieno on behalf of the firm of Otieno, Ragot & Company Advocates.
  4. It was deposed by Mr. David Otieno Advocate that the Judgment debtor herein had sometimes on the 23.8.2008 instructed the firm of Otieno, Ragot & Company Advocates to represent it in the suit which their law firm conducted on behalf of the judgment debtor until 30th September 2015 when the firm of Rodi, Orege & Company Advocates was granted conditional leave to represent the applicant.
  5. Mr. Otieno further deposed that vide a ruling delivered on the 19.11.2015, the applicant/ judgment debtor herein was directed to pay his law firm outstanding legal fees within 14 days and that the firm of Rodi, Orege & Co. Advocates would be at liberty to represent the judgment debtor herein upon payment of the said outstanding legal fees but that the applicant despite service, failed to settle the outstanding legal fees.
  6. Mr. David Otieno further deposed that as a result, his firm formally sued for recovery of the said fees vide Kisumu HC Misc. E115 of 2021 and the advocate client bill of costs was taxed and allowed in the sum of Ksh. 174,541.88 vide a ruling delivered on the 14.4.2022 and further that the taxed costs remain unsettled to date.
  7. It was deposed by Mr. Otieno that by granting the orders sought by the applicant herein, the court would be furthering the applicant's disobedience of court orders and that the court ought to direct that the applicant resolve the outstanding fees before proceeding with the new Counsel.
  8. Opposing the objection raised by Mr Otieno's law firm, the applicant through Mr C. Obiero advocate, vide a further affidavit sworn on the 23<sup>rd</sup> April 2023 by Edris Omondi deposed that neither the applicant nor the County Government of Kisumu were aware of the order of taxed costs against them as a Certificate of order pursuant to order 29 of the Civil Procedure Rules 2010 and section 21 of the Government Proceedings Act had not been brought to their attention by the firm of Otieno Ragot & Company Advocates and that the procedure that the law firm had elected to execute their taxed costs was unknown in law.
  9. It was further deposed on behalf of the applicant that it had fully complied with the provisions of order 9 of the Civil Procedure Rules and should be allowed to separate from its estranged advocates and that in any case, the order dated September 30<sup>th</sup>, 2015 referred to County Secretary Kisumu and not the Municipal Council of Kisumu or Kisumu County Government.
  10. The decree holder did not file any affidavit in response.
  11. The parties made oral submissions

### **The Applicant's Oral Submissions**

12. Mr. Obiero submitted and conceded that advocates were entitled to their legal fees but that where there was a dispute, there was an applicable procedure for recovery of their costs and thus no advocate ought to decline to allow another advocate from representing a party. He relied on the cases of HC Eldoret CC 42/1997 Zachary Mogeni v Standard Chartered Bank and the case of Samson Okul Orinda v Ayub



Muthee Igweta 7 2 Others where it was stated inter alia that an advocate cannot impose himself on a client.

13. It was further submitted that there was no Certificate of Order for costs against Government and that the only existing order was against the firm of Rodi Orege representing the County Secretary and not the County Government of Kisumu.
14. Mr. Obiero submitted that once a matter was determined by the court, the pleadings were of no value and thus this matter ought to proceed as it was long overdue and that his firm had complied with order 9 of the Civil Procedure Rules and that advocate's costs could be dealt with separately without tying down this matter to the issue of payment.
15. He further submitted that article 159 of the Constitution provided for the right of a party to be heard and that the procedure employed by the former advocate was for recovery which has an independent procedure.

#### **Mr. Otieno's Oral Submissions**

16. Mr. Otieno David Advocate submitted and denied the assertion by the applicant that it took over representation of the County Secretary and not the Judgement Debtor. He further submitted that the contents of order 9 of the Civil Procedure Rules must be read wholly to avoid such disputes and that the aim of the Order was to ensure that advocates who had completed cases were not denied their fees thus necessitating a consent or leave of court.
17. It was submitted that costs were determined and are payable and that the authorities cited by the applicant had been overturned with the passing of the new Constitution as well as the Civil Procedure Rules 2010. Reliance was placed on the Court of Appeal case of Stephen Gitiba v Family Finance Bank Society & 3 Others Case No. 263 of 2019 wherein it was stated that rules which do not take into account the overriding objectives must be ignored.
18. No submissions were made on behalf of the decree holder.

#### **Analysis and Determination**

19. I have considered this matter. The issue for determination is whether the firm of C. Obiero & Associates should be granted leave to come on record for the judgment debtor in the place of the firm of Otieno, Ragot & Co Advocates.
20. I have dealt with this issue alone as the parties only submitted on this issue and more so, before determining this issue fully and satisfying myself that the said firm can be allowed to take over the conduct of this matter on behalf of the judgment debtor, it would be premature to determine the prayer (d) and (e) of the application.
21. Order 9 Rule 9 of the Civil Procedure Rules, 2010 (CPR) 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.”



22. In essence what this rule provides for is that if a litigant wishes 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.
23. In this instance, the outgoing advocate has refused to give consent because an attempt by another law firm to get on record in their place was allowed conditional upon the advocates costs being settled within 14 days of the order for leave, way back in 2025, which costs have never been settled despite assessment of the same vide HC Misc Appl No. E115 of 2021 hence the application for an order of change of counsel, which application is still opposed by the outgoing counsel. I must mention here that the fact that the applicant has cited the firm of Otieno Ragot & Company advocates instead of Rodi Orege & Company advocates who were granted conditional leave to take over the conduct of the matter on behalf of the judgment debtor means that the judgment debtor acknowledges that they have no other advocate on record other than Otieno Ragot & co Advocates.
24. 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....”
25. In the case of [Monica Moraa v Kenindia Assurance Co. Ltd](#) (2012) eKLR, the court also had this to say:
- “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.”
26. I agree with the above dictum. There before, there was no provision that is 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. One would find situations where an advocate had laboured 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.
27. More often than not, the outgoing advocate would not even be aware of the change of counsel. He/she could be instructing an auctioneer to execute the judgment when in fact a new advocate had 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 a huge and difficult 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.
28. I am in agreement with the applicant through Mr. Obiero advocate that a litigant has a right to be heard as enshrined in the Constitution and would further add that a litigant is entitled to legal representation of their choice. Thus, a 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 their legal fees. What order 9 rule 9 tries to do is to balance the rights of the litigant and the rights of the advocate.
29. In this case, there is evidence that the applicant, predecessor in title, the Municipal Council of Kisumu to the successor in title now being County Government of Kisumur had instructed the firm of Otieno,



Ragot & Co. Advocates who represented them in this very old matter and subsequently, the firm obtained judgement for recovery of their costs in Kisumu High Court Misc E115 of 2021 to the tune of Kshs. 174,541.88, which fees are yet to be settled. The respondent herein in 2015 attempted to change advocates but the court made very specific conditional orders which have not been complied with to date-the order of settlement of the advocate's costs within 14 days. The respondent in my view, cannot claim at this stage that it was never made aware of the said costs and or that a certificate of order against the government has never been obtained. If that were the case, nothing prevented it from enquiring from the advocate on any outstanding legal fees for settlement before engaging another advocate when the advocate who was granted conditional leave to come on record has never come on record. In my view, the respondent is avoiding and circumventing orders of this court which have never been vacated. That is unacceptable.

30. Recovery of legal fees is governed by a different legal regime yes but there being a conditional leave, the respondent must first comply with that order before it can bring on record any other advocate to represent them in this matter.
31. 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 entitled to their fees as ordered by this court in 2025, fit is my finding and holding that the instant application can only be allowed conditional upon the applicant paying in full, all the monies owed to the firm of Owiti, Otieno & Ragot Advocates as earlier ordered on 19/11/2015 by this court.
32. The issue of how much money is due to the decree holder herein by the judgment debtor or whether the decree is time barred or whether interest should be waived cannot be determined until the advocate/client dispute herein is resolved and the orders of this court as stated above complied with.
33. Similarly, the issue of how much the firm of Otieno Ragot advocates is owed to date is a matter that is governed by the advocates Remuneration Order and not in these proceedings.
34. Each party to bear their own costs of this application which has been determined partially with the other prayers as stated above being stayed until the advocate/ client costs are settled.
35. I so Order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF MAY, 2023**

**R.E. ABURILI**

**JUDGE**

