



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khayimba v Laxmanibhai Construction Ltd (Civil Suit 223 of 2016)  
[2023] KEHC 22990 (KLR) (Civ) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22990 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 223 OF 2016**

**JN MULWA, J**

**SEPTEMBER 29, 2023**

**BETWEEN**

**ANTONY MBWABI KHAYIMBA ..... APPLICANT**

**AND**

**LAXMANIBHAI CONSTRUCTION LTD ..... RESPONDENT**

**RULING**

1. This Ruling is in respect to the Plaintiff's Notice of Motion application dated 30<sup>th</sup> July 2021 brought pursuant to order 9 rule 9 & 10, order 14 Rule 4 & 6 and order 51 rule 1 of the Civil Procedure Rules as well as section 3A and 63 of the Civil Procedure Act. The Plaintiff seeks the following Orders: -
  - a. That the instant suit was heard and determined and it's now necessary for the Plaintiff/Applicant to file the instant Application to allow the firm of Avedi and Company Advocates to come on record;
  - b. That the firm of Avedi and Company Advocates be allowed to come on record in place of Nyasae & Company Advocates;
  - c. That this Honourable Court be pleased to compel the firm of Nyasae & Company and CMS Daly Inamdar & Company Advocates to produce all the documents in relation to the release of the decretal award from this Honourable Court;
  - d. That the firm of Nyasae & Company Advocates be compelled to file its Bill of Costs in respect of HCCC 223 of 2016;
  - e. That the costs of the Application be in cause.



2. The application is premised on the grounds set out on its face and accompanied by the Plaintiff's Supporting and Further Affidavits. The Plaintiff avers that Justice Njuguna J entered judgment in this suit in his favour on 25<sup>th</sup> October 2018 in the sum of KShs. 21,976,776/- less 20% contribution, together with costs and interest. He stated that on 30<sup>th</sup> June 2021, his then advocates on record, Nyasae & Company Advocates, released to him a sum of KShs. 7,355,025/- only out of the awarded decretal sum and unjustifiably withheld over KShs. 10 million as their legal fees.
3. The application was opposed vide a Replying Affidavit sworn on 18<sup>th</sup> October 2021 by Amota Nyangera Nyasae, an Advocate practicing in the name and style of Nyasae & Associates Advocates. He avers that this application is premature and unnecessary. He contends that neither the Plaintiff nor the firm of Avedi & Co. Advocates have adduced any written instructions for the said firm to come on record or disclosed to this court what they intend to do with the matter post judgment that cannot be done by his firm. It was further his contention that he cannot be compelled to file an Advocate – Client Bill of Costs in this matter when there exists a binding Retainer Agreement between the Plaintiff and himself.
4. In rebuttal, the Plaintiff stated that he instructed Avedi & Company Advocates to take over his representation in the matter after facing numerous frustrations from Nyasae & Company Advocates regarding the release of the decretal sum. In addition, the Plaintiff averred that he is a stranger to the annexed Retainer Agreement as he never made, seen nor signed any such agreement. It was his further assertion that a representative of the firm, one Hezron Nyasae, approached him while he was still in hospital after the accident subject of this suit and offered to take up the matter on the understanding that legal fees would be discussed later.
5. The court has carefully considered the prayers sought, the Affidavits in support and against the same, the parties respective submissions and cited authorities, and flags issues that fall for determination thus:
  - a. Whether the firm of Avedi & Company Advocates should be granted leave to come on record for the Plaintiff in place of Nyasae & Company Advocates post judgment?
  - b. What orders should issue regarding the release of the decretal sum to the Plaintiff by the firm of Nyasae & Company Advocates?

**Whether the firm of Avedi and Company Advocates should be granted leave to come on record for the Plaintiff in place of Nyasae & Company Advocates post judgment?**

6. Order 9 Rule 9 of the *Civil Procedure Rules* provides as follows: -

“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.”
7. Order 9 Rule 10 provides;

“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.”



8. The essence of the provisions of order 9 rule 9 is to protect advocates who have represented parties before judgment from being shoved aside without notice or settlement of legal fees, upon the delivery of judgment. See *S.K. Tarwadi v Veronica Mueblmann* [2019] eKLR. Justice Mutungi also expounded on the purpose of the said provision in *Ngitimbe Hudson Nyanumba v Thomas Ongondo* [2018] eKLR as follows:

“The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.”

9. The instant application is founded on the first scenario envisaged under rule 9(a) which simply requires the new advocate or the party in person to make a formal application to the court and give notice to all parties who participated in the suit, for grant of leave to come on record or act in person. The consent of the previous advocate is not necessary. It is not in dispute that the instant application and the Notice of Change of Advocates were duly served on Nyasae & Company Advocates as well as the Advocates for the Defendant herein. In the premises, the court finds that the Plaintiff fulfilled the requirements of Order 9 Rule 9(a). Leave is therefore granted to the firm of Avedi & Company Advocates to come on record for the Plaintiff in place of Nyasae & Company Advocates.

**What orders should issue regarding the release of the decretal sum to the Plaintiff by the firm of Nyasae & Company Advocates?**

10. The Plaintiff’s former advocates did not address the court nor explain its reasons for withholding the balance of the decretal sum. It simply contends that it cannot be compelled to file an Advocate Bill of Costs as there is a binding Fees /Retainer Agreement between itself and the Plaintiff.
11. Section 45 of the *Advocates Act* allows advocates to enter into agreements with their clients on remuneration. It stipulates as follows;

- “(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—
- a. before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;
  - b. before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;
  - c. before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fees for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing



and signed by the client or his agent duly authorized in that behalf.”

12. From the above provision, it is clear that a fees agreement between an advocate and the client can only be considered valid and binding on the parties if it is in writing and signed by the client or his duly authorized agent.
13. The court has examined the purported Retainer Agreement dated 1<sup>st</sup> August 2016 annexed to the Advocates’ Replying Affidavit. On the face of it, the agreement appears to have been signed by both the advocates and the Plaintiff herein. The Plaintiff denied any knowledge of the agreement and contended that he was at his sister’s home in Kakamega at the time he is purported to have entered into and signed the agreement in Nairobi. However, he did not support this assertion with any evidence. In the court’s considered view therefore, the evidence on record supports the Advocates’ position that there was a valid retainer agreement between the Plaintiff and his erstwhile counsel.
14. What were the terms of the Retainer Agreement on legal fees? Clause 2 to 5 of the Agreement provided as follows:
  - “ 2. That the advocate shall be entitled to 25% of the total award as issued by the court and/or as per the judgment of the court before contribution (if any) as legal fees.
  3. That in furtherance to Clause No. 2 above, the Advocate shall be entitled to reimbursement of any disbursement and/or any amounts paid on behalf of the client.
  4. That the advocate shall deduct the legal fees referred in paragraph (2) above from the judgment amount without making any reference to the client whatsoever.
  5. That this suit shall not be subjected to taxation through Advocate-Client’s Bill of Costs upon signing of the agreement.”
15. Did the Plaintiff’s former advocate deduct his legal fees in the manner envisaged in the agreement? The determination of this question requires the court to briefly highlight the background of the matter from the moment judgment was entered. It is common ground that this suit was concluded vide a judgment delivered by Justice Njuguna J on 25<sup>th</sup> October 2018, in which decision the Plaintiff was awarded Kshs. 17,590,620.80/- (being 80% of the judgment sum) together with costs and interest. It is further not disputed that the total decretal amount due to the Plaintiff in this suit according to the annexed decree is Kshs. 18,181,828/-. In addition, there is no contestation that the decretal sum was deposited in Court as security upon an application for stay pending appeal by the Defendant herein but was later released to Nyasae & Company advocates when the Defendant failed to lodge the then intended Appeal.
16. The Plaintiff’s erstwhile advocates have not disputed the allegation that they gave the Plaintiff the sum of Kshs. 7,355,025/- only and retained the balance of the decretal sum which constitutes over sixty percent (60%) thereof. The said advocate has not bothered to account for the colossal amount retained by them over and above 25% and reimbursement on disbursement envisaged under clause 2 and 3 of the Agreement. Indeed, nothing has been placed before this court tabulating the disbursements and/or the amount of money expended by the advocate on behalf of the Plaintiff concerning this suit.



17. Section 45(6) of the *Advocates Act*, just like Clause 5 of the subject Retainer Agreement, provides that the costs of an advocate where an agreement has been made shall not be subject to taxation. However, the court notes that there is absolutely no justification for an advocate to retain such a big percentage- (60%)- of the decretal sum due to a client as legal fees only contrary to the terms of the Retainer Agreement and without any explanation for the same. It is noteworthy that section 3A of the *Civil Procedure Act* donates to this court the inherent power to make such orders as may be necessary for the ends of justice. This means that the court will not condone the unexplained injustice being perpetrated by the advocates against their client. For the foregoing, Nyasae and Co. Advocates must be held accountable for the amount retained in excess of what was payable to the client under the Retainer Agreement.
18. Consequently, this court finds the Plaintiff's application dated 30/7/2021 merited and makes the following orders in the interest of justice: -
- a. Leave is granted to the firm of Avedi & Company Advocates to come on record for the Plaintiff in place of Nyasae & Company Advocates.
  - b. Nyasae & company Advocates are directed and ordered to provide to the Plaintiff's new appointed Advocates with full proof of all disbursements that were incurred while rendering services to the Plaintiff on this suit and to remit the balance of the retained decretal sum to the Plaintiff within fourteen (30) days of this Ruling.
  - c. In the Alternative, if not satisfied with order (b) above, Nyasae & Company Advocates shall file an Advocate/Client bill of costs in respect of this case within 30 days of this ruling, and cause the said bill of costs to be taxed by the Deputy Registrar of the court within 45 days of filing the bill.
  - d. The firm of Nyasae & Company Advocates shall meet the costs of this application.
  - e. This matter shall be listed for mention for a status report on the 22/01 2024.
- Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**JANET MULWA**  
**JUDGE**

