



**Chege v Muiruri (Miscellaneous Civil Application 382 of 2016)
[2022] KEHC 15686 (KLR) (Civ) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15686 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION 382 OF 2016

CW MEOLI, J

NOVEMBER 24, 2022

BETWEEN

JOHN KIMANI CHEGE APPLICANT

AND

WILLIAM GATEI MUIRURI RESPONDENT

RULING

1. John Kimani Chege (hereafter the applicant) filed a motion dated January 30, 2019 primarily seeking the review, setting aside, or varying of the orders issued on July 4, 2018. The motion is expressed to be brought under section 3, 3A & 80 of the Civil Procedure Act (CPA) and order 45 rule 1 of the Civil Procedure Rules (CPR), *inter alia*. On grounds on the face of the motion as amplified in the supporting affidavit of the applicant.
2. The gist of the affidavit was that the applicant's advocates, Messrs Gathii & Co Advocates were not served with the motion dated March 17, 2017 by William Gatei Muiruri (hereafter the respondent) that gave rise to the orders issued on July 4, 2018 and that it was not brought to the attention of the court that the said firm of advocates was on record on behalf of the applicant. That the said firm does not need leave to come on record to file an appeal and the order of July 4, 2018 has caused him great hardship.
3. The respondent opposes the motion by way of a notice of preliminary objection dated March 18, 2019 and a replying affidavit dated March 13, 2019. As a preliminary point the respondent opposes the motion on the ground that the applicant's advocate, the firm of messrs Gathii and Co Advocates is not properly on record and hence the applicant's notice of motion dated January 30, 2019 supported by the affidavit of the applicant is invalid and totally defective before the court.



4. He attacks the application by deposing that this matter arose from Nairobi Milimani CMCC No 2002 of 2013 wherein the applicant was represented by the firm of Gikera & Vadgama Co Advocates; and that judgment in Nairobi Milimani CMCC No 2002 of 2013 was delivered on June 14, 2016. That being aggrieved by the said judgment the applicant had instructed the firm of EN Njue & Co Advocates to file a motion seeking leave to appeal out of time, which motion was heard *ex parte* and orders issued on September 19, 2016.
5. That the said motion proceeded *ex parte* as the applicant's counsel failed to serve the motion whereas the said firm of advocates was a stranger to the proceedings having not sought leave to come on record in place of Gikera & Vadgama Co Advocates. The deponent contends that EN Njue Advocate who filed the motion seeking leave to appeal out of time was not licensed to practice at the time and that the respondent had on September 19, 2016 instructed counsel to have the *ex parte* orders set aside.
6. He asserts that the firm of EN Njue & Co Advocates was duly served with the respondent's motion; that meanwhile the applicant through a notice of change of advocates appointed the firm of Osero & Co Advocates in place of EN Njue & Co Advocates who equally failed to properly come on record. That the firm of Gathii & Co Advocates have also failed to comply with the requisite procedure to place themselves on the record act for the applicant. The respondent swears that despite his counsel informing Gathii & Co Advocates that his motion seeking to set aside the first *ex parte* order had been served on the Applicant's purported advocate EN Njue & Co Advocates, the applicant's advocate took no steps to regularize representation in order to defend the said motion.
7. The respondent reiterates service of the hearing notice for his motion upon both Messrs Osero & Co Advocates and EN Njue & Co Advocates and asserts that the court was satisfied with the service and subsequently granted the orders of July 4, 2018 which the applicant is now seeking to set aside. In conclusion he complains that the litigation has been prolonged by the applicant's conduct and asserted that is in the interest of justice for the applicant's motion be struck out with costs.
8. The motion was canvassed by way of written submissions. Counsel for the applicant reiterated that from the affidavit material on record there was no evidence of service of the respondent's motion dated March 17, 2017 upon the applicant's counsel on record at the material hence the orders issued on July 4, 2018 were irregular. Calling to aid the decisions in [James Kanyiita Nderitu v Maries Philotas Gbika & Another](#) [2016] eKLR, [Frigoken Ltd v Value Park Foods Ltd](#) [2011] eKLR, [Kabutha v Mucheru](#) [2004] eKLR, [Bouchard International \(Services\) Ltd v M'Mwereria](#) [1987] KLR 193, [Remco Ltd v Mistry Jadua Parbat & Co Ltd & 2 Others](#) [2002] 1 EA 233 and [Baiywo v Bach](#) [1987] KLR 89 counsel urged the court to set aside the order of July 4, 2018 as a matter of right to enable the applicant ventilate his appeal which was struck out.
9. On behalf of the respondent, counsel firstly argued that the respondent's motion leading to the orders issued on July 4, 2018 had been duly served on both the firm of Messrs EN Njue & Co Advocates and Osero & Co Advocates as evinced by a return of service and that the court was satisfied that the service was proper and proceeded to allow the motion as sought. That on account of the foregoing, the orders issued of July 4, 2018 were regular and ought not to be set aside. Secondly, on the merits of the of the motion it was contended that the applicant's conduct has been dilatory. He cited the case of [Mwala v Kenya Bureau of Standards](#) EALR [2000] 1 EA 148 in support of his submissions and urged the court to dismiss the motion with costs.
10. The court has considered the material canvassed in respect of the motion. The respondent raised a preliminary point of objection to the effect that the applicant's advocate, the firm of Messrs Gathii and Co Advocates is not properly on record; and that the applicant's instant notice of motion dated January 30, 2019 is therefore not properly before the court.



11. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* (1969) EA 696, Law J. A. stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

See also *Oraro v Mbaja* (2005) KLR 141.

12. The question of representation of a party by an advocate is indeed a preliminary issue of law. Order 9 of the *Civil Procedure Rules* regulates the representation of parties by advocates before courts. The court having perused the record herein notes that the present matter was instituted *vide* a motion dated July 26, 2016 by the firm of Messrs EN Njue & Co Advocates. The applicant thereafter apparently instructed the firm of Messrs Osero & Co Advocates who filed a purported notice of appointment to that effect on April 11, 2017. On February 4, 2019 the firm of Messrs Gathii & Co Advocates filed the instant motion dated January 30, 2019, but before the motion could be determined the firm of Kiarie Joshua & Co Advocates filed a notice of change of advocates dated October 28, 2021 to come on record for the applicant.
13. Thus, the applicant has purportedly engaged four separate counsels at different instances in respect of this matter. Purportedly, because in the lower court suit, namely, Nairobi Milimani CMCC No 2002 of 2013 from which this matter emanated the applicant was represented by the firm of Messrs Gikera & Vadgama Co Advocates. However, when the firm of Messrs EN Njue & Co Advocates instituted the instant matter in 2016, they did so without seeking to come on record in compliance with order 9 rule 9 of the *Civil Procedure Rules* (CPR) and in addition the advocate himself had not taken out a practicing advocate since the year 2000 according to material on the record.
14. Order 9 rule 9 of the *Civil Procedure Rules* 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”.
15. Although the firm of Osero & Co Advocates subsequently purported to file a notice of change of advocates thereafter, the firm of Gathii & Co Advocates who allegedly took over from them did not file any notice to that effect. This notwithstanding the respondent advocate’s letter in that regard dated June 14, 2017 and served upon the firm of Gathii & Co Advocates on June 21, 2017 together with the hearing notice for July 5, 2022, also served on EN Njue & Co Advocates, which indicated to the



former firm that they had neither complied with the provisions of order 9 rule 9 of the Civil Procedure Rules nor filed a notice of change of advocates. It appears from the filed affidavit of service dated July 5, 2017 and annexures thereto evidencing the said service and filed on the same date, that by the said date, the respondent's advocate had received information that the applicant had once more changed his advocates. The said firm was purportedly replaced by the firm of Kiarie Joshua & Co Advocates before regularizing their purported representation of the applicant.

16. From the foregoing, it is apparent that the filing of the motion dated January 30, 2019 by the firm of Gathii & Co Advocates was just one of a series of actions by the purported erstwhile advocates of the applicant in contravention of provisions of order 9 rules 5,6 & 9 of the Civil Procedure Rules. Rules 5 and 6 thereof provide that: -

“ 5. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

6. The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”

17. The firm of Messrs Gathii & Co Advocates remained a stranger to the proceedings having failed to comply with the above provisions and this could not be cured by the introduction of yet another firm to prosecute the application dated January 31, 2019. The Supreme Court in Moses Mwicigi and 14 Others vs Independent Electoral and Boundaries Commission and 5 Others [2016] eKLR stated that:-

“ 65. This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so clearly intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

18. While the rules of procedure are the handmaiden of justice, the flouting of the rules in some instances, may bring into question the competency of the attendant proceedings as in this instance. In this case, the matter is compounded by the fact that the first advocate representing the applicant herein did not comply with order 9 rule 9 of the Civil Procedure Rules thus putting to doubt the competency of subsequent notices of change of advocate filed by subsequent firms purporting to represent the applicant.

19. I associate myself with the words of Kemei J in Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR :-

“ Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of advocate



should comply with the rules. Chaos would reign if parties can change advocates at will without notifying the court and the other parties.”

20. This is precisely what has happened here; the multiple instances of change of counsel and shambolic representation of the applicant has resulted not just in costly delays, but also utter confusion for which, the applicant must take responsibility as the instructing client. While a party is at liberty to change representation by counsel as he wishes, he can only blame himself if he does so in a manner that is inimical to his own interests.
21. The motion dated January 31, 2019 is not just incompetent for being filed by a stranger but it is also for the same reason without merit. The applicant’s key plank was that his advocates Messrs Gathii & Co Advocates were not served with the motion giving rise to the orders of 4.07.18. The record shows that the said advocates had not placed themselves on record in the material period, and for whatever it was worth, the respondent did on different occasions serve the said firm and the firms of Messrs Njue & Co Advocates and Osero & Co Advocates the latter two firms having at the time purported to place themselves on record for the Applicant. The motion dated January 31, 2019 must be dismissed with costs. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH NOVEMBER, 2022.

C.MEOLI

JUDGE

In the presence of:

Mr Kimani h/b for Mr. Maina for the Applicant

Ms.Kiiru h/b for Mr Thuita for the Respondent

C/A: Carol

