REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 488 OF 2015

VAKKEP BUILDING CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

AL KHEYR PROPERTIES LIMITED.....DEFENDANT

R U L I N G

1. In or about October, 2015, the plaintiff instructed the firm of **Muturi Mwangi & Associates** to recover a sum of Kshs. 117,000,000/- from the defendant. In pursuance thereof, the said firm of advocates lodged the present suit and vigorously prosecuted the same.

2. As a resut of the said prosecution, the suit was compromised on 19/11/2019 at Kshs. 60 million. The said compromise was adopted by the Court and a requisite order issued on 6/2/2020.

3. On 24/2/2021, the firm of **Taibjee and Bhalla, Advocates LLP** applied for leave to come on record for the plaintiff in the place of **Messrs. Muturi Mwangi & Associates.** The application was brought under ***Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules.***

4. The Motion was supported by the affidavit of **Lawrence Nganga,** advocate who deposed that; the suit had been compromised by a consent judgment of 19/11/2019, that the plaintiff had instructed the said firm to come on record for the plaintiff. That it was therefore necessary that leave be granted for the said firm to come on record and proceed appropriately with the suit.

5. The application was opposed by the firm of **Muturi Mwangi & Associates** vide grounds of opposition dated 8/3/2021. They contended that; the said firm had not given its consent to the firm of **Taibjee and Bhalla Advocates LLP** to come on record as provided for under ***Order 9 Rule 9 of the Civil Procedure Rules.*** That the application was silent on the fees due to the said firm and that since it sought only the prayer for **Taibjee and Bhalla Advocates LLP** to come on record, the same was mischievous.

6. The cases of **Ngitimbe Hudson Nyanumba v. Thomas Ongondo [2018] Eklr** and **S. K. Tarwadi v. Veronica Muehlemann [2019] Eklr,** were relied on for the proposition that the said application was untenable.

7. I have considered the record and the oral submissions of Learned Counsel. This is an application for a law firm to come on record on behalf of a party in the place of another firm which has hitherto been representing the said party. Judgment has already been entered and therefore, any change of advocate must be sanctioned by the Court, or must be by the consent of the advocates previously on record.

8. ***Order 9 Rule 9 of the Civil Procedure Rules*** provides: -

> ***"(9) Where 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 consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be".***

9. I agree with the holding by **Mutungi J** in **Ngitimbe Hudson Nyanumba v. Ongondo Case (supra)** on the mischief that the rule was supposed to address. It is correct that the intention was to guard against those mischievous clients who would vanish immediately an advocate obtained judgment on their behalf leaving the advocate holding the short end of the stick.

10. In my view, the requirement that there be an application that is served upon the advocate who conducted the trial is to enable that advocate to be sufficiently warned that his erstwhile client is about to take off. The warning is supposed to trigger the advocate to immediately demand his fees, failing settlement he lodges a bill of costs for taxation.

11. In this regard, once an application has been made under the aforesaid rule, in my view, there is no jurisdiction to deny the application if it has been properly served upon the affected advocate. All that the Rule sought to do was to protect advocates from being removed from record without their consent while their fees was still outstanding.

12. In this regard, my view is that before the order for leave is granted, where an advocate has not been paid his fees as in this case, the Court should not as a matter of course grant the leave sought, unless the advocate consents. The Court should give the affected advocate a reasonable time to agree with his client as to the settlement of the fees between themselves and the release of the client's file to the incoming advocate.

13. If there is no agreement, then the advocate should proceed to lodge his Advocate-Client Bill of Costs for taxation. It is after the lapse of the time given to the parties to sort out the issue of fees that the order for leave in my view should be granted.

14. I take the foregoing view because, it would be gravely unfair for an advocate who has toiled up to post judgment to be shoved off the case by a stroke of a pen whilst his fees remain unpaid. Leave should only be granted after the advocate and his client disagree on fees and the necessity to lodge a bill for taxation arises.

15. In the same vein a party should not unnecessarily be forced to remain under the representation of an advocate he no longer wants to retain. There is freedom to choose representation. This is why such leave should be granted within a reasonable time.

16. In this regard, I will allow the application on condition that, the firm of **Taibjee and Bhalla Advocates LLP** shall only file and serve their Notice of Appointment after 30 days of this ruling. That will give time to the firm of **Muturi Mwangi & Associates** to sort out the issue of fees with the plaintiff. The costs of the application is awarded to **Muturi Mwangi & Associates** in any event**.**

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2021.

A. MABEYA, FCI Arb

JUDGE