



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 12 OF 2017

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER
ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: PHYSICAL PLANNING ACT, CHAPTER OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

KOOBA KENYA LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

1. The Notice of Motion herein dated 11/9/2020 prays for the following orders:

- (i) That leave be granted to the firm of Ms. Balala & Abed Advocates to come on record for the Respondent.
- (ii) That the Notice of Change of Advocates dated 11/9/2020 by Ms. Balala Abed Advocates be deemed as duly filed.
- (iii) That cost of this application be provided for.

2. The application is premised on grounds set out therein and is supported by affidavit of **Mohamed Ali Balala** sworn on 11/9/2020.

3. The Applicant's case is that the Respondent has from the inception of this petition been represented by the firm of Ms. Robson Harris & Company Advocates. The petition was canvassed and submissions made whereupon the court proceeded to enter judgment on 13/4/2017 in favour of the Petitioner. The court in the said judgment directed that should need be, parties to set a date for submissions on damages and compensation. Subsequently in or about September 2019, the Respondent sought to change its advocates on record being Ms. Robson Harris & Company Advocates and appointed the firm of Ms. Balala & Abed Advocates who filed a Notice of Change of Advocates dated 23/9/2019. Unhappy with the turn of events, the firm of Ms. Robson Harris & Company Advocates objected to the firm of Ms. Balala & Abed Advocates coming on record and filed a Notice of Motion application dated 20/11/2019 seeking for a declaration from the court that the Notice of Change of Advocates dated 23/9/2019 was irregular, unprocedural and thus null and void.

4. The Applicant states that the reasons, *inter alia*, advanced for objecting to the firm of Ms. Balala & Abed Advocates coming on record for the Respondent was that since there is already a judgment in place, the firm of Ms. Balala & Abed Advocates had overlooked the provisions of Order 9 rule 9 of the Civil Procedure Rules 2010. The Applicant states that the court vide its ruling delivered on 7/5/2020 agreed with the submissions of Ms. Robson Harris & Company Advocates and declared that the Notice of Change of Advocates dated 23/9/2019 was irregular, unprocedural, null and void. The Applicant states that in making its ruling the Court made some observations *inter alia* that courts

cannot impose an Advocate on a client and that if the Respondent wished to change its advocates on record, the Respondent must follow the proper procedure provided under Order 9 Civil Procedure Rules.

The Response

5. The application is opposed by the firm of Robson Harris & Company Advocates via a Replying Affidavit sworn by **Kelvin O. Mbogo** on 22/9/2020. Having set out the background to the application **Mr. Mbogo** deponed further that this Court delivered a Judgement on the petition on 13/4/2017 in favour of the Petitioner, where it was directed that should need be, parties to set a date for submissions on damages and compensation. Accordingly, both parties did file their written submissions and the matter is now ripe for determination with respect to the issue of

damages and compensation payable to the Petitioners. The deponent avers that it was at this juncture that the Respondent sought to change its Advocates on record in total disregard of the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010. The Respondents successfully challenged the same vide Application dated 20/11/2019, whose Ruling was delivered on 7/5/2020, declaring the Notice of Change of Advocates dated 23/9/2019 irregular, unprocedural, null and void.

6. The firm of Robson Harris & Company Advocates opposed this Application on the grounds that the Respondent has not paid legal fees with respect to the professional services rendered to them by Messrs. Robson Harris & Company Advocates. They aver that the Application by the firm of **Balala & Abed Advocates** is solely meant to perpetuate an illegality. They submitted that the entrant of new counsel in the matter will be highly prejudicial to the Advocates for Respondent, and will utterly change the course of events before they are remunerated for the work done.

Submissions

7. The motion was canvassed by way of written submissions. The Applicant filed submissions on 15/12/2020 while the Respondent did that on 15/1/2020.

8. I have carefully considered the motion and submission of parties. There exists only one issue in this application, that is, whether the Court can allow the firm of Ms. Balala & Abed Advocates to come

on record for the Respondent after judgment has been entered.

9. The incumbent advocates on record for the Respondent Ms. Robson Harris Advocates has opposed the application vide a Replying Affidavit sworn by one **Kelvin O. Mbogo Advocate** on 22/9/2020. Primarily its objection to the firm of Ms. Balala & Abed Advocates taking over the matter after judgment being entered is to be found at Paragraph 9 of the said Replying Affidavit, that is, the fact that the Respondent has not paid legal fees to the firm of Robson Harris & Company Advocates in respect of the professional services rendered to the said respondent, and due to this they should remain on record for the Respondent as lien for the payment of the outstanding fees.

10. This Court in delivering its ruling on 7/5/2020 observed *inter alia* that courts cannot impose an Advocate on a client and that if the Respondent wished to change its advocates on record, the Respondent must follow the proper procedure provided under Order 9 of Civil Procedure Rules. And this is what the Respondent through its proposed incoming advocates has done, praying for an

order of this Court for such change of representation.

11. The question now remains whether outstanding fees for professional services rendered can be an obstacle in a client accessing advocates of his or her choice. In the case of **Mohan Meakin (K) Ltd & Another v National Bank of Kenya Ltd [2020] eKLR**, the court was faced with a similar scenario and considered the import of Order 9 rule 9 of the Civil Procedure Rules 2020. The Court held as follows:

“The reason advanced by the Respondent is that their legal fees has not been settled. However, the provision of Order 9 rule 9 of the Civil Procedure Rules 2010 do not provide the payment of legal fees as a ground for grant of leave envisaged thereunder. Further the recovery of an advocates fees is provided for under Sections 44 to 52 of the Advocates Act and Advocates Remuneration Order. Generally, in the absence of agreement on payment of costs, the Advocate has to file a bill of costs for taxation. The objection to change of Advocates and/or leave as sought for herein will not resolve the issue of costs.”

12. It is thus clear that the objection made by the current advocates on record for the Respondent as to the non-payment of their fees is not a legal bar to the coming on record by a new advocate. A litigant has a right to be represented by an advocate of his or her choice and the firm of Robson & Harris Advocates knows that there still remains legal means of successfully claiming their professional fees from the Respondent. They will therefore suffer no prejudice if the application before the court is allowed, as I hereby do. Parties to bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE, 2021.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Detho holding brief Mbogo for Petitioner

Mr. Mohamed for Applicant

Mr. Mbogoh for Respondent

Ms. Peris Court Assistant