REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 605 OF 2016

BETWEEN

REPUBLIC…….…….....…….……..…..APPLICANT

VERSUS

THE COUNTY SECRETARY,NAIROBI CITY COUNTY…..…1ST RESPONDENT

THE COUNTY TREASURER,

NAIROBI CITY COUNTY……...…….....……..2ND RESPONDENT

NAIROBI CITY COUNTY…….....……INTENDED 3RD RESPONDENT

EX PARTE APPLICANT:NJAGI WANJERU& COMPANY ADVOCATES

RULING

The Application

1. The Respondents herein filed a Notice of Motion application dated 18th February, 2021 and are seeking the following substantive orders:

> **a) THAT the 1st and 2nd Respondents and the 3rd Intended Respondent herein be granted leave to change their advocates on record in this suit from Osero & Co. Advocates with Abwao Advocate to M/s J. Harrison Kinyanjui & Co. Advocates.**
>
> **b) THAT the Court exercises its discretion under the inherent power to admit the Respondents'/Applicants' process hitherto filed prior to the making of the order prayed in prayer (a) herein.**
>
> **c) THAT there be a stay of execution of the judgment herein, warrants of arrest, orders to show cause, and all execution process herein, pending the determination of this application.**
>
> **d) THAT the orders of the Court directing the hearing of the ex-parte Applicant's Motion for Contempt of Court against the Respondents dated herein made be set aside in light of the pleas herein made and further directions be issued.**
>
> **e) THAT the cost of this motion be to the Applicants.**

2. The application is supported by the grounds set out in the application and an affidavit sworn on of even date by Eric Odhiambo Abwao, the Legal Director of the Nairobi City County, the intended 3rd Respondent herein. It was averred therein that the firm of advocates on record for the Respondents were so placed at the instance of the previous government of the intended 3rd Respondent. However, that the Respondents and the County Government have since instructed the firm of J. Harrison Kinyanjui & Co. Advocates to pursue the matter on behalf of the Respondents, since all correspondence to the firm hitherto on record, namely Osero & Co. Advocates, have gone unanswered necessitating this motion.

3. The Respondents annexed correspondence on the said instructions, notably instructions from then Acting County Attorney dated 5th March 2019, instructions dated 21st January 2021 by the Acting County Solicitor, as well as a consent dated 9th October 2020 between the

advocates on record and the Respondent's Chief Litigation Officer for the said officer to come on record.

4. The Respondents averred that Order 9 of the Civil Procedure Rules envisages the making of a motion such as this in the circumstances, and that to this end that the Respondents will have a fair trial contemplated within Article 25(c) of the Constitution. It was further averred that due to failure on the part of the Respondents' advocates on record, the intended 3rd Respondent Garnishee has been enjoined in the suit herein, and contempt of court process initiated with the sole purpose to compel the release of the County Government funds. In their view, Order 29 Rule 3 of the Civil Procedure Rules removes the Government from any garnishee process of execution, hence it is imperative to issue an order of stay of further execution in the meantime, since such garnishee process would be patently unlawful.

5. They further argued that Sections 21(4) and (5) of the Government Proceedings Act forbids the execution process in the manner sought against the Respondents, and that by operation of Article 6 of the Constitution it would be unconstitutional to circumvent the process of settlement of claims set out in the Government Proceedings Act against the 1st Respondent. The Respondents therefore contended that the orders made in favour of the ex-parte Applicant herein were made without this disclosure being made, and the ex-parte Applicant had no capacity or authority to commit the County Government to execution processes outside the contemplation of the law. As such, the orders of mandamus and contempt issued herein outside the scope of the law ought to be set aside and discharged.

The Response

6. In response to the application, Njagi Waweru, the ex-parte Applicant herein, filed a replying affidavit he swore on 5th March, 2021. In sum, Mr. Njagi alleged that the application herein is an abuse of the Court process, and that letters dated 5th March 2019 and 21st January 2021 which relied upon by the Respondents are fictitious and only aimed at delaying the enforcement proceedings for as long as possible thereby derailing the course of justice. He analysed the said letters, giving reasons why he was of the opinion that the same were improper, mainly arising from their timing.

The Determination

7. The instant application was canvassed by way of written submissions. J. Harrison Kinyanjui Advocates for the Respondents filed written submissions dated 31st March, 2021, while the ex-parte Applicant on his part filed written submission dated 14th April 2021. The Respondents submitted that Article 227 of the Constitution espouses the principles of public funds and that and it is imperative that the County adheres to these principles.

8. To that end, counsel cited the cases of **County Government of Mandera & 2 Others vs The Commission of Revenue Allocation & 4 Others, (2017) eKLR** and **Shaban Mohamud Hassan & 3 Others, (2013) eKLR** for the propositions that the County Government cannot spend funds that are not authorized and therefore in breach of the Public Finance Management Act and the Constitution, and that the function of the High Court is to see that lawful authority vested in state organs and independent bodies is not abused by unfair treatment. Counsel therefore argued that it is therefore imperative that the intended 3rd Respondent is afforded the right to articulate these issue and present its case in furtherance of that constitutional mandate.

9. Counsel also went on to argue that the Respondents have a constitutional right to access justice part of which right cannot be realized were the Ex-parte Applicant's position were to be adopted to bar the Respondents from electing their advocate of choice. To that end, counsel cited the case of **Sebel District Administration v Gasyali & Others (1968) E.A. 300**. Lastly, it was submitted that in order for this court to make a conclusive determination of the matter, it is imperative that the intended 3rd Respondent is enjoined as a party in these proceedings, and the decision of the Court of Appeal in **JMK v MWM & Another, (2015) eKLR** and **Meme vs Republic, (2004) 1 EA 124** were cited to buttress this argument.

10. The ex-parte Applicant on his part submitted that the application was an abuse of court process and to that end, cited the case of **Satya Bhama Ghandi v Director of Public Prosecutions & 3 Others (2018) eKLR.** It was further his submission that the order for leave to take over the conduct of a suit is a discretionary relief and the applicant must show that he or she is deserving of the same. Indeed, he argued that inordinate or unexplained delay in applying for the same coupled with mischievous conducted as exhibited herein would disentitle such an applicant to the prayers sought. Be that as it may, he argued that the so-called "intended 3rd Respondent" is not a party to these proceedings as yet and no application has been made for its joinder and to that extent the said Respondents' submissions are misplaced.

11. I will commence my determination by agreeing with the ex parte Applicant that joinder of the intended 3rd Respondent is not pleaded nor prayed for in the instant application, and is therefore not in issue. Whilst the Respondents and intended 3rd Respondent submitted on the issue, they will have to pursue it in separate proceedings as this Court is bound by their pleadings. The two substantive issues that therefore arise in the application are firstly, whether the Respondents should be granted leave to change their advocates on record, and secondly, whether stay of the execution processes should be granted.

On Leave to change the Respondents' Advocates

12. The law on appointment and retainer of advocates in civil matters is provided for in Order 9 of the Civil Procedure Rules. Order 9 Rule 1 of the said Rules provides that any application to, or appearance, or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.

13. Order 9 Rule 5 provides for change of advocate , and 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.

14. The general rule therefore is that a client may retain an advocate of his or her choice or change that advocate whenever the need arises. The client may also terminate a retainer of an advocate at any time. It is notable in this regard, and as held in **Uhuru Highway Development Ltd & Others vs Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654**, that it is not the business of the Courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate, unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter.

15. In this regard the two circumstances when leave of the Court is required is firstly, where an advocate who has been retained wishes to withdraw from acting for a client, and not to be on record for the client for stated valid reasons. The applicable rule and procedure is provided for under Order 9 Rule 13 as follows:

> **(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:**

Provided that, unless and until the advocate has—

> **(a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and**
>
> **(b) procured the order to be entered in the appropriate court; and**
>
> **(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.**
>
> **(2) From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person.**
>
> **(3) Any order made under this rule shall not affect the rights of the advocate and the party as between themselves.**

16. The advocate is required to make a formal application and give notice to all affected parties. Once the court is satisfied that this requirement has been met and there is no valid objection, it has no reason not to grant leave. These provisions do not apply to the circumstances of the present application, as it is the client seeing to change its advocate, and not the other way round.

17. The second circumstance where leave of the Court is required for an advocate to cease acting is where judgment has been delivered in a case under the provisions of Order 9 rule 9 of the Civil Procedure Rules, which state 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 of 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."**

18. These provisions are the ones relevant to the present application since judgment as issued herein by Odunga J. on 14th December 2008. The essence of Order 9 Rule 9 is to protect advocates after a judgment has been delivered, as explained in the case of **Isaac Kaesa Mwangangi & Another vs Jacob Kipchumba & Another (2014) eKLR** as follows

> **"I am of the view that the mischief that was being addressed by Order 9 Rule 9 was two-folds. Firstly, it was to notify the Advocate who is on record that another one was taking over the conduct of the case. The purpose of that in my view is to inform the previous Advocate to whom the clients file should be forwarded and it was also to enable the previous Advocate to have addressed his or her legal fees earned to that date. Secondly, it was intended to notify all the other advocates on record or parties acting in person that the party was changing advocates and consequently that the address of service would henceforth change."**

19. Since the previous advocates on record for the Respondent have signed a consent to the change of advocates, and no evidence of any fraud or wrongdoing has been brought by the ex parte Applicant to substantiate his claims of impropriety, there is no reasons why leave should not be granted to the firm of J. Harrison Kinyanjui Advocates to come on record for the Respondents. Any prejudice suffered by the ex parte Applicant by the various processes of changing the Respondents' advocates is one that can be adequately compensated by an award of costs.

On the Stay of the Execution Processes

20. The Respondents have sought a stay of execution of the judgment herein, warrants of arrest, orders to show cause, and all execution

processes. They appear to have relied on the provisions of section 21 of the Government Proceedings Act in this regard. The purpose of section 21 was explained by Odunga J. in **Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwadhihi, (2014) eKLR** as follows: -

> **"33 ……It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule…"**

21. It is notable that the judgment in favour of the ex parte Applicant for orders of mandamus was issued herein by Odunga J. on 14th December 2008, and the same has not been set aside. The fact of issuance of the said orders of mandamus is proof that the learned Judge was satisfied that the provisions of section 21 of the Government Proceedings Act were complied with. There is also a pending application by the *ex parte* Applicant dated 7th December 2018, seeing to cite the Respondents for contempt of Court, which is the correct fora in which the Respondents should raise any defense they may have as regards enforcement of the said orders of mandamus. Lastly, it is also notable that a stay of execution process of a judgment can only properly be granted under Order 42 of the Civil Procedure Rules in the event of an imminent or pending appeal, which the Respondents have not pleaded nor demonstrated.

22. It is thus the finding of this Court that the prayers seeing to stop execution of the judgment given herein are not only premature, but also incompetently brought for the above reasons.

The Disposition

23. In the premises, the Respondents' Notice of Motion application dated 18th February 2021 is merited only to the extent of the following orders:

> **I. The 1st and 2nd Respondents are granted leave to change their advocates on record in this suit from Osero & Co. Advocates and /or Abwao Advocate to M/s J. Harrison Kinyanjui & Co. Advocates.**
>
> **II. The prayers seeking a stay of execution of the judgment herein, the warrants of arrest, orders to show cause, and all execution process herein are declined.**
>
> **III. The prayers seeking to set aside the orders of this Court directing the hearing of the ex-parte Applicant's Motion for Contempt of Court against the Respondents are declined.**
>
> **IV. The 1st and 2nd Respondents shall meet the costs of the Notice of Motion application dated 18th February, 2021.**
>
> **V. A mention date of the *ex parte* Applicant's application dated 7th December 2018 shall be given by the Judge seized of this matter.**

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

J. NGAAH

JUDGE