REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 158 OF 2015

ADBLU EAST AFRICA LIMITED.....1ST PLAINTIFF

GAVIN WILLIAM GERAGHTY.....2ND PLAINTIFF

DAVID GAVIN GERAGHTY.....3RD PLAINTIFF

VERSUS

JEAN FARHAT.....1ST DEFENDANT

JEAN CLAUDE FIGALI.....2ND DEFENDANT

NETWORK INDUSTRY & SERVICES (NETIS) COTE D'IVOIRE LIMITED....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 22nd November 2019, the defendants/applicants moved this court seeking the following orders:

> ***i. That this suit be dismissed for want of prosecution by the Plaintiff/s Respondents.***
>
> ***ii. That the plaint herein be struck out for not confirming to the provisions of the law in terms of disclosing particulars of defamation.***
>
> ***iii. That the plaint herein be struck out for having been filed out of the time allowed by the Limitations of Actions Act and therefore being bad in law, misconceived, frivolous and vexatious.***
>
> ***iv. That the costs of this application and of the suit be awarded to the defendants/applicants.***

2. The application is supported by the grounds stated on its face and the affidavit sworn on 22nd November 2019 by the 1st defendant *Jean Farhat* on his own behalf and on behalf of the 2nd and 3rd defendants. In the main, the defendants (applicants) contend that since the suit was filed about four years ago, the respondents secured a hearing date only once on 1st February 2018 but the hearing did not take off; that since then, the respondents have not taken any step to facilitate prosecution of the suit; that delay in the prosecution of the suit is prejudicial to the applicants and amounts to denial of justice.

3. The applicants further assert that the suit is incompetent in that the particulars of the specific facts on which the claim for defamation is based were not disclosed in the plaint as required by *Order 11 Rule 7* of the *Civil Procedure Rules*; that the suit is statute barred as it was filed more than 12 months of publication of the alleged defamatory material.

4. The application is opposed. The respondents' learned counsel *Mr. Francis Wanjohi Munyororo* swore a replying affidavit on 22nd January 2020 in which he narrated the efforts expended by the respondents in their attempt to have the suit fixed for hearing which efforts did not bear any fruit. Counsel further averred that the respondents are desirous of prosecuting the suit to its logical conclusion.

5. In addition, *Mr. Wanjohi* challenged the competence of the applicant's motion alleging that it was filed by a firm of advocates who were not properly on record. He thus invited me to strike out the application with costs.

6. By consent of the parties, the application was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered. Having done so, I find that the application raises several important legal issues but before I address those issues on merit, I think it is important to first deal with the preliminary issue raised by the respondents regarding competence of the application since its outcome will determine the fate of the entire application.

7. In their submissions, the respondents stated that in response to the suit, the applicants through their advocates *M/s Wambasi & Company Advocates* filed a memorandum of appearance dated 9th June 2015 and a statement of defence dated 25th June 2015; that the said firm of advocates have been on record for the applicants' since then.

8. It is the applicants' contention that the firm of *M/s Lehmann & Associates Advocates* were improperly on record as they never filed or served a notice of change of advocates as required by *Order 9 Rules 5* and *6* of the *Civil Procedure Rules, 2010*. Reliance was made on the authorities of ***Aggrey Ndombi & Another V Grace Ombara, [2008] eKLR*** and ***Industrial Commercial Development Corporation V Elias M. Mategwa, Civil Appeal No. 130 of 2008*** for the proposition that an advocate who is appointed by a party in a case remains that party's advocate until the matter is concluded even on appeal unless a notice of change of advocates is filed or leave is granted by the court for the change of advocates under *Order 9 Rule 9* of the *Civil Procedure Rules* (Rules); that since no change of advocates has been filed or served in this case, the firm of *M/s Wambasi & Company Advocates* are still on record of the defendants and therefore, the instant application was filed by a stranger.

9. In their response, the applicants in their submissions admitted that they did not file a notice of change of advocates after they were appointed to represent the applicants in place of the firm of *Wambasi & Company Advocates.* They instead filed a memorandum of appearance dated 3rd June 2019 which was served on the firm of *M/s John Mburu & Company Advocates* which was on record for the respondents; that since then, they had actively dealt with the plaintiffs' advocates who had constructively recognized them as the advocates on record for the applicants.

10. The applicants advanced the view that the court should be guided by the provisions of *Article 159 (2) (d)* of the *Constitution* which emphasizes the need for courts to dispense substantive justice; that if the court were to make a finding that the firm *Lehmann & Associates* is not on record for the applicants, such a finding would greatly prejudice the applicants as it would deny them access to justice.

11. Having carefully considered the written submissions filed by both counsel on behalf of the parties, I find that it is not disputed that upon being appointed by the applicants to represent them in this case, the firm of *Lehmann & Associates* did not file or serve a notice of change of advocates either on the advocates on record for the plaintiffs or on the firm of *Wambasi & Company Advocates* who were then on record for the applicants having filed a memorandum of appearance on behalf of the applicants on 10th June 2015 and a statement of defence on 25th June 2015.

12. Whereas a party who has been represented by an advocate can at any time of the proceedings change his advocate without leave of the court, such change must be effected in accordance with the law. The law governing change of advocates is stipulated in *Order 9 Rules 5, 9 and 12* of the *Rules*. The most relevant of the above Rules for purposes of this application is *Order 9 Rule 5* which states as follows:

> ***"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."***

13. It may be important to note that *Order 9 Rule 9* deals with change of an advocate with leave of the court if the change occurs after judgment in the suit had been delivered while *Rule 12* deals with removal of an advocate from record at the instance of another party in certain circumstances, for instance, where the advocate on record has died or has been struck off the Roll of Advocates or has failed to take out a practising certificate or is otherwise unable to act as an advocate.

14. A reading of *Order 9 Rule 5* shows that the provision is couched in mandatory terms. It therefore means that an advocate wishing to come on record for a party to replace another advocate who is on record must file in the suit in question a notice of change of advocates and serve it on every party in the suit who has entered appearance and on the advocate on record for that party before the purported change of advocates can be recognized in law.

15. The rationale for this mandatory requirement is in my view quite straight forward. It is to ensure that parties in a suit are notified of any change of advocates for any party in the suit to enable them identify which firm of advocates should be served with court processes on behalf of which party and who to engage with on matters pertaining to the suit. In my view, this is an important procedural requirement which ensures orderly conduct of court processes and proceedings.

16. In this case, the firm of *M/s Lehmann & Associates* came into the picture when the applicants had another firm of advocates on record. But instead of filing a notice of change of advocates as required by the law, for undisclosed reasons, they chose to file a memorandum of appearance. This is notwithstanding the fact that the firm of *M/s Wambasi & Company Advocates* had already filed a memorandum of appearance on behalf of the applicants. The memorandum of appearance subsequently filed by the firm of *M/s Lehmann & Associates* was for that reason superfluous.

17. Having not complied with the mandatory provisions of *Order 9 Rule 5*, it automatically follows that the firm of *M/s Lehmann & Associates* was not formally on record for the applicants at the time it filed the instant application. Whether or not the firm had interacted with the respondents' counsel on record for whatever period of time is irrelevant as the bottom line is, its appointment was not recognised in law.

18. Having found as I have above, I agree with the respondents' submission that the application is incompetent having been filed by a firm of

advocates which was not formally on record for the applicants. I beg to disagree with the applicants' submissions that this finding will cause them prejudice as it will allegedly deny them access to justice. This cannot be true because even if I strike out the application on the basis of that finding, the firm of *M/s Lehmann & Associates* can, if it so wishes, regularise its appointment and defend the suit on behalf of the applicants in any manner it deems fit.

19. Before I pen off, I wish to comment on the submission made by the applicants that I should be guided by the dictates of substantive justice as provided for under *Article 159 (2)(d)* of the *Constitution* and disregard their advocates failure to file and serve a notice of change of advocates as a procedural technicality. I am very clear in my mind that the people of Kenya in promulgating *Article 159 (2) (d)* of the *Constitution* did not intend that it would be used to allow parties to deliberately violate procedural rules with impunity. The provision is not a panacea for all procedural shortfalls.

20. It cannot be gainsaid that procedural rules are hand maidens of justice. They serve a very important function in the administration of justice. They ensure that order and some measure of predictability is maintained in the conduct of judicial proceedings. If newly appointed advocates are allowed to assume legal representation of parties without notifying the court and other parties in the suit and advocates already on record for the party in question, this would for obvious reasons create total confusion and chaos in the conduct of court proceedings. I am not prepared to be the one who encourages such chaos.

21. I am persuaded and I fully associate myself with the dictum of *Kiage JA* in ***Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 Others, [2013] eKLR*** in which he stated as follows:

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."***

I will say no more.

22. In view of the foregoing, I find that it is not necessary for me to delve into the merits of the application having found that it is, indeed, incompetent. The application is consequently struck out with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of December 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Wambua for the plaintiffs/respondents

Mr. Amisi for the defendants/applicants

Ms Mwinzi: Court Assistant