



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 6 OF 2018

S.K. TARWADI.....PLAINTIFF

VERSUS

VERONICA MUEHLEMANN.....DEFENDANT

RULING

[APPLICANT'S NOTICE OF MOTION DATED 27TH MARCH, 2018]

1. Two of the orders sought by the Applicant, S.K. Tarwadi, through the notice of motion dated 27th March, 2018 are leave to appeal out of time against the ruling dated 13th February, 2018 delivered by Dr. Julie Oseko, CM in Malindi CMCC No. 306 of 2014 Veronica Muehleemann v S.K. Tarwadi and stay of execution, pending the hearing and determination of the intended appeal against the judgement delivered by the same court on 17th February, 2017. The application is supported by the grounds on its face, the supporting and supplementary affidavits of the Applicant and annexures thereto.

2. The Respondent, Veronica Muehleemann, opposed the application through her replying affidavit sworn on 12th April, 2018.

3. In brief, the Applicant's case is that on 17th February, 2017 judgement was entered against him in favour of the Respondent in Malindi CMCC No. 306 of 2014 without his defence being heard. He filed an application seeking to set aside the judgement and on 30th June, 2017 his application was allowed on condition that he deposited in court the sum of Kshs. 1,000,000 or furnished security for an equivalent amount within 30 days from the date of the ruling. He was also ordered to pay thrown away costs of Kshs. 20,000 to the Respondent within 30 days.

4. It is the Applicant's case that his then advocates on record Wasuna Kiamba and Company Advocates notified him late about the conditions attached to the setting aside of the judgement and on 18th August, 2017 he appointed Kilonzo and Aziz Advocates to act for him. His new advocates immediately forwarded the sum of Kshs. 20,000 to the Respondent's counsel and filed an affidavit in court sworn by one Timothy Mwambogo Tuva seeking leave of the trial court to offer as alternative security the title deed for L.R. No. Kilifi/Jimba 250 valued at Kshs. 1,500,000. Counsel for the Respondent declined to receive the thrown away costs.

5. On 22nd September, 2017 the Applicant was served with a notice to show cause why he should not be arrested and committed to civil jail for failing to pay the decretal amount in the matter. The Applicant filed a notice of motion dated 28th September, 2017 whose main theme was to seek an extension of time for complying with the trial court's orders issued on 30th June, 2017. That application was rejected by Dr. Julie Oseko, CM in a ruling delivered on 13th February, 2018. It is in respect to that ruling that the Applicant seeks leave to appeal out of time. He also seeks stay of the judgement delivered on 17th February, 2017.

6. The advocates for the parties agreed to dispose of the application by way of written submissions.

7. Counsel for the Respondent raised a preliminary issue on the competency of the instant application. The issue is captured in the Respondent's replying affidavit as follows:

“24. THAT the Hon. Dr. Julie Oseko in her ruling of 13th February, 2018 did point out that the Applicant's current advocate is improperly on record for not seeking leave to come on record after Judgement had already been delivered in the lower court matter.

25. THAT Applicant's Counsel is yet to comply with this requirement of the law and therefore the Application herein is still

an abuse of the process of court for reason that it has been brought by a firm which is not properly before the court as they did not seek leave to enter appearance and file a notice of appointment and are thus mere busy bodies.”

8. Order 9 Rule 9 of the Civil Procedure Rules, 2010 (CPR) 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.”

9. Counsel for the Respondent submitted that though the Applicant had been alerted by the court in the ruling of 13th February, 2018 that his advocate was improperly on record for failure to seek leave of the court to come on record after judgement had been delivered, the Applicant had failed to rectify this state of affairs.

10. It is the Respondent’s case that the application is incompetent. Reliance is placed upon the decisions in **John Langat v Kipkemoi Terer & 2 others [2013] eKLR** and **Florence Hare Mkaha v Pani Tawakal Mini Coach & another [2014] eKLR**.

11. According to the Respondent, the Applicant is seeking stay of execution pending the hearing of an appeal against the decision of the trial court to reject the incompetent application dated 28th September, 2018. In her view, such an appeal does not have any chances of success. Further, that the Applicant continues to abuse the court process as he is yet to take any remedial action in regard to compliance with Order 9 Rule 9 CPR.

12. The Applicant’s response to the issue is found at paragraph 13 of his supplementary affidavit sworn on 7th May, 2018 where he avers:

“THAT with regard to the issue of my current advocates not being properly on record for failure to seek leave of the court since judgement had already been issued by the court my advocates advise me which advise I verily believe to be true that this was a technicality since they were busy making an application to extend time in order to reopen my case. In law justice should be administered without undue regard to technicalities which is founded under Article 159(2)(d) as well as Section 3A of the Civil Procedure Act that provide for inherent jurisdiction of the court to make orders that are necessary to meet the ends of justice.”

13. Submitting on this issue, counsel for the Applicant through the supplementary submissions dated 15th October, 2018 stressed that the failure to seek leave to come on record after the default judgement had been entered on 17th February, 2017 was occasioned by the fact that the current advocates on record had moved in haste in order to file a notice of change of advocates in order to aid the Applicant to satisfy the conditions for re-opening his case as per the ruling of 30th June, 2017.

14. The Applicant urged this court to follow the decision of J.M. Mutungi, J in **Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR** and find that no prejudice was occasioned to the Respondent in the failure to comply with Order 9 Rule 9 CPR. Further, that the Applicant’s previous advocates have not raised any objection to the notice of change of advocates filed by the current advocates on 18th August, 2017.

15. Two different positions have been presented to this court on the effect of failure to comply with Order 9 Rule 9 CPR. On one hand is the statement of Muchelule, J in **John Langat** (supra) that:

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgement. He annexed the consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the court.” No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

16. The same position is found in **Florence Hare Mkaha v Pwani Tawakal Mini Coach & another [2014] eKLR; Mombasa H.C.C.C. No. 85 of 2010** wherein Mary Kasango, J held that:

“16. The question is; was the execution validly carried out on behalf of the Plaintiff? There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31st July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the Plaintiff’s Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff’s case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff’s case.”

17. Mutungi, J however treated the failure to comply with Order 9 Rule 9 CPR as a mere technicality and held in **Ngitimbe Hudson**

Nyanumba (supra) that:

“19. The appellant’s Notice of Motion dated 8th July 2013 was predicated on the view that the firm of Nyamori Nyasimi came on record for the respondent after judgment without leave of the court and therefore was irregular, null and void and all orders emanating and/or ensuing thereafter were a nullity and ought to be cancelled. The appellant had every opportunity to challenge the appointment but did not do so. Instead the appellant participated in the proceedings and did not raise any issue regarding the irregularity of the Notice of Change of Advocate that placed Nyamori Nyasimi advocate on record. One may ask what injustice was occasioned to the appellant by the appointment of Nyamori Nyasimi advocate after judgment allegedly without leave? I discern none, the appellant continued to participate in the proceedings without raising any objection. The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.

20. Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice.”

18. In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has ben delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

19. The excuse by the Applicant that his advocate was in a hurry to ask for extension of time in order to comply with the conditions in the ruling of 30th June, 2017 and could therefore not comply with the requirements of Order 9 Rule 9 CPR is therefore without merit. The Applicant’s new advocate was allowed by Rule 10 to apply for extension of time to comply with the conditions of the trial court and at the same time comply with the requirements of Rule 9.

20. Even after the anomaly was drawn to the Applicant through the ruling of 13th February, 2018, he has neglected to make amends. He continues to act in total disregard of the rules and expect the court to act in support of such impunity. That will not happen. Had he moved to redress the failure to comply with Rule 9, I would have exercised discretion in his favour for it is the duty of courts to dispense substantive justice. He has not taken any action. I will thus proceed to strike out the instant application for being incompetent. Costs are awarded to the Respondent.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT