



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 314 OF 2010

SURAYA PROPERTY GROUP LTD.....1ST PLAINTIFF/APPLICANT

W & K DEVELOPERS LTD.....2ND PLAINTIFF/APPLICANT

VERSUS

W & K ESTATES LTD.....1ST DEFENDANT/RESPONDENT

ISAAC KAMAU NDIRANGU.....2ND DEFENDANT/RESPONDENT

ELVIN WAMBUI KAMAU.....3RD DEFENDANT/RESPONDENT

RULING

BACKGROUND

1. Though a ruling delivered on 11th April 2019, this court (differently constituted) made the following orders:

- a) The suit brought by the First plaintiff dismissed with costs.*
- b) The suit brought by the second plaintiff is dismissed with costs, the first plaintiff to pay the defendant's costs of that suit.*
- c) The reference on the taxation is dismissed with courts. Leave to enforce immediately is granted.*
- d) Should the defendant wish to obtain an order that the Architect/Promoter personally pay the costs assessed, he must bring a specific application supported with detailed evidence for the court's adjudication.*

2. Following the said ruling, the plaintiffs/applicants herein filed an application dated 2nd May 2019, under certificate of urgency, in which they seek the following orders:

1. Spent.

2. That the Honourable court be pleased to stay execution of the ruling and/or order/decree of Lady Justice Farah S. M. Amin delivered on 11th April, 2019 together with the Certificate of Taxation dated 9th February, 2015, and all other further/consequent proceedings thereto, pending the inter partes hearing and determination of this application.

3. That the Honourable court be pleased to stay execution of the Ruling and/or Order/Decree of Lady Justice Farah S. M. Amin delivered on 11th April, 2019 together with the Certificate of Taxation dated 9th February, 2015, and all other further/consequent proceedings thereto, pending the hearing and determination of the plaintiffs/applicant's intended appeal.

4. That the grant of an order of stay in terms of prayers(1) and (2) herein above, do operate as a reinstatement and/or maintenance of the conservatory order made on 28th September, 2012 by the Honourable Justice Mabeya.

5. That the costs of this application do abide the results of the intended appeal.

3. The said application came up for hearing on 15th May 2019 when Mr. Murgor, Mr. Ouma and Mr. Otieno appeared for the applicants while Mr. Mwaura and Mr. Gichuru appeared for the respondents.

4. At time of the said hearing, Mr. Kopere advocate informed the court that he had way back on 27th September 2017 filed a Notice of Change of Advocates in respect to all the defendants. He further stated that at the time of the filing of the said Notice, he was unable to place it in the court file because the said file was pending the writing of a ruling by Justice Farah Amin, who then had the conduct of the case but that he promptly served the said Notice on both Gichuru & Gichuru Advocates, then acting for the defendant and Ms Miller & Company Advocates for the plaintiff.

5. Mr. Kopere further informed the court that he was not aware that the matter was coming up for hearing on 15th May 2019 as he only learnt of the same when he saw it on the day's cause list by chance and further, that he was also not aware that the ruling that was pending before Justice Amin had already been delivered. Mr. Kopere urged the court to grant him the opportunity to peruse the court file so as to acquaint himself with the matter and to be served with the application dated 2nd May 2019 so that he can respond to it.

6. On his part, Mr. Mwaura, learned counsel for the defendants, submitted that since judgment had already been delivered in the matter in favour of the 1st and 3rd defendants way back in September 2014, Mr. Kopere was by dint of the provisions of Order 9 Rule 9 of the Civil Procedure Rules (CPR) required to either obtain the consent of Gichuru & Gichuru Advocates or the leave of the Court before appearing for any of the parties to the suit. Mr. Mwaura however conceded that as at the time M/S Kopere & Company advocates filed the Notice of Change of Advocates, the court file was still with Justice Amin for the purposes of writing a ruling that was eventually delivered on 11th April 2019 and that it was therefore not possible to place the said Notice on the court file.

7. Mr. Murgor, learned counsel for the plaintiffs, on the other hand submitted that no judgment had been delivered in the matter as at the time the impugned notice was filed so as to necessitate compliance with Order 9 Rule 9 of the CPR. In order to fortify this assertion counsel confirmed that his law firm similarly came on record for the plaintiffs in place of the plaintiff's former advocates M/S Miller and Co. Advocates after 27th September 2017 and was not required to comply with the provisions of the said Order 9 Rule 9 of the CPR. According to Mr. Murgor, the defendants withdrew their instructions from M/S Gichuru & Gichuru advocates way back in September 2017 and the said law firm could not therefore purport to continue acting for them.

8. I have considered the rival submissions made by counsel regarding the issue of representation and I note that the main issue for determination is whether the firm of M/S Kopere & Company advocates is properly on record for the defendants. It was not disputed that M/S Kopere & Company Advocates filed a Notice of Change of Advocates on 27th September 2017. It was further not disputed that as at the time of the filing of the said Notice, the court file was with Justice Amin for purposes of writing a ruling that was eventually delivered on 11th April 2019.

9. A determination of the issue of representation will require a perusal of the court file so as to confirm if judgment had been entered in the matter as at 27th September 2017 when the firm of M/S Kopere & Co. filed the Notice of Change of Advocates. I note that what precipitated the filing of the Bill of Costs by the defendants was a ruling delivered on 25th March 2014 in which Justice Havelock allowed an application by the 1st and 3rd defendants for orders that their names be struck out of the plaint.

10. Order 9, rule 9 of the Civil Procedure Rules provides as follows;

“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.

11. My understanding of Order 9 rule 9 of the CPR is that it is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The rationale for the provision was well articulated in the case of **S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR** where the judge observed as follows:

“...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”

12. Black's Law Dictionary defines the word “judgment” as *the courts final determination of the rights and obligations of the parties in a case*. In the case of **Ngome v Plantex Company Limited (1984) KLR 792**, the Court of Appeal held that a judgment is a judicial determination or decision of a court on the main question or questions in a proceeding.

13. Having regard to the above definition of the word ‘judgment’ and the decision in the above cited authority, I find that there was no final determination on the main question in the suit in September 2014 so as to justify the contention by M/S Gichuru & Gichuru Advocates position that M/S Kopere Advocates needed to comply with Order 9 Rule 9 of the CPR.

14. To my mind, the striking out of the name of one or more parties from the proceedings cannot be deemed to be a judgment as it does not amount to the final determination of the main dispute in the suit.

15. My further finding is that even assuming that judgment had been entered in the case, the circumstances of this case are such that there is no way that the firm of Kopere Advocates could have known about it so as to be able to comply with the provisions of Order 9 Rule 9 of the CPR as it was not disputed that the court file was, as at the time they filed the Notice of Change of Advocates, with the judge for purposes of writing a ruling.

16. Needless to say, the right of a party in any legal proceedings to be represented by an advocate of his/her choice is constitutional right which cannot be wished away and which this court is under an obligation to observe and protect. In the present case, it would appear that the defendants had as at September 2017 opted to appoint new advocates to act for them which is a fact that was brought to the attention of M/S Gichuru & Gichuru Advocates who, as I have already noted in this ruling, were promptly served with the Notice of Change of Advocates. My humble view is that no party will suffer prejudice by reason of change of advocate as every person is entitled to legal representation of their choice. I am guided by the words of Mutungi, J in the case of **Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR** where he held that:

“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.”

17. From the above decision, it is clear that courts have adopted a liberal approach when it comes to the issue of representation and deviated from the strict application of the rules of procedure in favour of the wider interest of dispensing substantive justice to all the parties in recognition of the well-known principle of natural justice that recognizes that no one should be condemned unheard. It is also noteworthy that the firm of Gichuru & Gichuru Advocates did not **file any application to challenge notice of change of advocates served upon them way back in September 2017 on grounds that it was filed without leave so as to justify their contention that the new firm of advocates is improperly on record.**

18. For the above reasons and having found that there was no judgment or final determination of the main dispute between the parties as at 27th September 2017, coupled with the observation that the appearance of M/S Murgor & Murgor Advocates who similarly came on record for the plaintiffs after the said date remains unchallenged, I find that the firm of M/S Kopere & Company Advocates is properly on record for the defendants and deserve to be granted an opportunity to participate in the application dated 2nd May 2019 and any further proceedings that may ensue in this case.

It is so ordered.

Dated, signed and delivered in open court at Nairobi this 28th day of May 2019

W. A. OKWANY

JUDGE

In the presence of

Mr. Murgor and Mr. Ouma for the applicants

Mr. Kopere for the defendant

Mr. Gichuru and Mr. Mwaura for the defendants

Court Assistant – Margaret