



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISC. JUDICIAL REVIEW NO. 24 OF 2018

REPUBLIC.....APPLICANT/RESPONDENT

VERSUS

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF EMBU.....1ST RESPONDENT/APPLICANT

CHIEF OFFICER,

FINANCE/COUNTY TREASURER,

COUNTY GOVERNMENT OF EMBU.....2ND RESPONDENT/APPLICANT

UNION TECHNOLOGY LIMITED.....EX-PARTE APPLICANT/RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the 2nd respondent's Notice of Motion dated 5th July 2019 in which the law firm of Ahmednasir Abdikadir & Company Advocates seeks this court's leave to come on record for the 2nd respondent in place of the firm of Ileri & Company Advocates.
2. The firm of Ileri & Company Advocates who represented the 2nd respondent from the beginning of the case opposed the application on grounds that several fee notes they had raised had not been settled, that they held a lien on the file for unpaid professional fees and that the firm stood to suffer substantial loss and damage if the application was allowed.
3. Both parties filed submissions to dispose of the matter.

B. Applicant's Submissions

4. It was submitted that any person has the right to be legally represented by an advocate of their own choice and as such a client cannot be compelled to be represented against his or her will. They relied on the case of **Elsek & Elsek Construction Company Limited v Presbyterian University of East Africa Registered Trustees [2016] eKLR** where the court held that where judgement has been passed there must be consent between the two advocates purporting to act for the client or alternatively, the incoming advocate must seek leave from court and further that the advocate who has been replaced cannot hold the client ransom and refuse to be replaced.
5. Reliance was also placed on the case of **Samson Okun Orinda v Ayub Muthee Igweta & 2 Others [2013] eKLR** where the court held that an advocate cannot impose himself upon a client simply because he has not been paid as there are mechanisms for recovery of said fees as provided under the Civil Procedure Rules under Order 11 Rule 9A by filing of Bill of Costs as was held by the Court of Appeal in the case of **Boniface Kiragu Waweru v James K. Mulinge & Another [2015] eKLR**, a procedure which it was submitted that the said procedure had been followed by the firm of Ileri & Company Advocates who had already filed numerous Bill of Costs that were awaiting taxation.
6. It was also submitted that there was need for the advocate being replaced to be notified of the pending change as they had done as was held in the case of **Isaac Kaesa Mwangangi & Another v Jacob Kipchumba & Another [2014] eKLR**

C. Submissions by the firm of Ileri & Company Advocates

7. It was submitted that since there was an advocate on record before the judgement was rendered, it was only in order that the incoming advocate seeks consent from the outgoing advocate as provided under **Order 9 Rule 9 (b) of the Civil Procedure Rules 2010**.

8. It was also submitted that the appointment of a new advocate by the client was a way to circumvent, delay or avoid paying dues owed to the advocates. Reliance was placed on the Canadian case of **Metrin Mechanical Contractors Ltd v Big H. Construction Inc. [2001] O.J. No. 1319** where the court analyzed the rationale behind a solicitor's lien and stated that it was a *mechanism intended to prevent a client from "lawyer shopping" after running up an account with a prior lawyer.*

9. It was also submitted that the court should order the client to deposit an amount of money in court to cover the costs of the firm that is owed so that the firm is cushioned from loss that may occur due to withdrawal of instructions. Further it was submitted that in as much as the client had the right to legal representation of his own choice, that was not to be enjoyed at the detriment of its right.

D. Analysis & Determination

10. I have considered the application dated 5th July 2019 and determine that the only issue for determination is whether the law firm of Ahmednasir Abdikadir & Company Advocates should be allowed to come on record for the 2nd respondent in place of the firm of Ileri & Company Advocates.

11. Under Order 9 Rule 9(a) and (b) of the Civil Procedure Rules it is provided: -

"9. 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."

12. It is therefore clearly provided under the aforesaid order when a change of advocate is desirable for party to either be represented by another advocate or to act in person after judgment has been passed, such as in the instant case, such change of an advocate or intention to act in person shall only be effected only with an order of court upon an application with notice to all parties or 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.

13. It is noteworthy that under **Article 50(2) (g) of the Constitution of Kenya, 2010** any party to a suit has a right to choose and be represented by an advocate of his choice. No advocate can impose himself upon a client simply because he has not been paid his professional fees in full. The same was the holding in the case of **Samson Okun Orinda**(supra).

14. Further it is important to note that an advocate who has not been paid his professional fees in full has a remedy to file advocate/client bill of costs for taxation on his fees. However, failure to receive professional fees cannot be a reason to insist on acting for a client whether he likes it or not. Nor can he insist on being given a guarantee that all his unpaid professional fees would be paid before a new counsel is allowed to come on record.

15. As the law provides for mechanism on how an advocate can recover his unpaid fees from his former client who has changed his advocate, the former counsel cannot be heard to say any change of advocate should not be allowed as he would be greatly prejudiced if an incoming advocate is allowed to come on record. I do note that the firm of Ileri & Company Advocates has filed numerous Bill of Costs against the client herein, The County Government of Embu that are pending determination. The firm will thus get its day in court in regard to the assessment and payment of its fees.

16. In my considered view, there is no prejudice that will be occasioned if a party who seeks to change an advocate has his *application allowed*. *On the other hand, prejudice may be caused to the party who requires to change the advocate if the orders are denied.*

17. Accordingly, I find that the application dated 5th July 2019 is meritorious and is hereby allowed.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthoni for Ahamed Nassir for 1st and 2nd Respondent

(Applicant in application dated 5/07/2019)

Ms. Munene for Ileri for 1st and 2nd Respondent

Mr. Kimondo for Applicant