



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. APPLICATION NO. 36 OF 2019**

**KEW GARDENS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**GIOVANNI RINALDI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**BRENTWOOD ESTATES LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Kidenda, Onyango, Anami for the Applicant**

**Ms. Sagana, Biriq and Mwanyale Kahindi for the Respondents**

**RULING**

This is an application by the firm of Kidenda, Onyango, Anami & Associates in which it seeks two substantive orders.

- 1. That this honorable court be pleased to issue a temporary stay of taxation of the Bill of Costs in HCCC No. 23 of 2014 pending the hearing and determination of this application.***
- 2. That this honorable court be pleased to declare that the bill of costs as presented is incompetent, vexatious and an abuse of the court process and ought to be struck out.***

The notice of motion is based on the following grounds:

- 1. That the firm of Kidenda, Onyango, Anami & Company Advocates is still on record for the company – Kew Gardens Limited and they ought to be allowed to respond to the bill of costs.***

The chronology of events of this application as between the applicant and respondent is clearly set out in the supporting affidavit of **Kevin Anami**. As indicated in the replying affidavit **Swalha Chuma** raised an objection to the application contending that the bill of costs was properly filed and served upon the respective counsels on record for the applicant.

**Analysis**

The central issue in this case is on legal representation. The firm of Advocates trying to flex muscle as who is best suited to provide professional legal services to a client.

I have no doubt quite deliberately that the right to legal representation is a fundamental right which is essential and necessary for attainment of fair trial rights in civil and criminal administration of justice. From the provisions of Article 50 2(g) of the Constitution the right of a party to choose and be represented by an advocate or solicitor of his choice is jealously protected in any proceedings. In elaborating the issue of legal representation Order 9 of the Civil Procedure Rules sets out guidelines on appointment and notice of change of advocates who has been retained by a client to act in a particular matter or case.

There is no absolute rule to prohibit a party or litigant to a claim to instruct more than one counsel to act on his or on their behalf. What the court may require from the advocates as recognized agents and officers of the court is prima facie evidence of retention to act for a particular client or litigant.

From the provisions in Order 9 of Civil Procedure Rules the procedure on first appearance or subsequent change of counsel is well spelt out. It would not be left entirely to this court to formulate the principles by which litigants will be guided in determining how to instruct or retain an advocate or legal counsel to accommodate their wishes or advance their course of justice.

The matter on legal representation being a fundamental human right is always left in the hands of respective clients to make informed choices as to who is best suited to provide professional legal services on their behalf.

There are special circumstances on legal representation that a court in its inherent jurisdiction demands an advocate be excluded in acting for a particular client or litigant. I have in mind, an advocate who has no practicing certificate, has misconducted himself; there is prima facie evidence on conflict of interest etc. The basic test on the right to a fair trial when considered together entitles the court to disqualify counsel in contravention to Article 50 2 (g) of the constitution.

The application before me is premised on the bill of costs pursuant to the proceedings in **HCC NO. 25 OF 2014**. The applicant seeks an order of this court to disqualify the firm of **Sagana Biriq & Co. Advocates** from representing the applicant company for reasons that they have no instructions and on account of conflict of interest.

In assessing the merits of disqualification the court is enjoined to balance the litigant rights to appoint counsel of his own choice as predicated in Article 50 2(g) of the constitution. Public policy and the fair administration of justice as provided for in section 4 of the Fair Administrative Action Act 2015.

In considering the question by the applicant on the basis of the affidavits there is no clear evidence of conflict of interest capable of disqualifying the firm of **Sagana Biriq & Co. Advocates** to represent and defend the said company.

The rule under Order 9 has to be read with Order 50 2 (g) of the constitution. In similar vein under Section 3 and 3A of the Civil Procedure Act the inherent powers of the court cannot ever come to the aid of the applicant. In my view the applicant's affidavit evidence has failed to demonstrate that in allowing the firm of **Sagana Biriq & Co. Advocates** to file the bill of costs it would be vexatious or an abuse of the court process. It is therefore clear that according to the criteria laid down in Order 9 of the Civil Procedure Rules the application amounted to a non-suited motion that any exercise of discretion to quash retainer will be simply in all done in excess of jurisdiction.

For the above reasons, the notice of motion dated 23.9.2019 is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF OCTOBER 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Thuku holding brief for Ms. Ndirangu for the applicant