



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 448 OF 2009

HOLIDAY BAZAAR LIMITED.....PLAINTIFF

-VERSUS-

COLUMBUS ADVENTURES LIMITED.....DEFENDANT

RULING

[1] This Ruling is in respect of the Preliminary Objection raised herein by the Plaintiff under **Order 9 Rule 9 of the Civil Procedure Rules, 2010**, to the hearing and determination of the Defendant's Notice of Motion dated **15 July 2016**. It was the contention of the Plaintiff that the firm of **Kimathi Wanjohi Muli & Co. Advocates** filed that Notice of Motion after judgment had been passed and therefore needed to first obtain leave of the court, or consent of the erstwhile advocates, to come on record for the Defendant in place of the firm of **Musyoka, Wambua & Katiku Advocates**. Notice of the Preliminary Objection was filed herein on **27 July 2016**.

[2] In support of the Preliminary Objection, the Plaintiff traced the background of this matter, noting that it was filed on **17 June 2009** by the firm of **Musyoka, Wambua & Katiku Advocates**; and that a default judgment having been entered thereafter in the Plaintiff's favour on **15 April 2011**, the Plaintiff has, since then, been making efforts to execute the Decree. It was further submitted that the Plaintiff initially moved the Court to have the director of the Defendant, **Mr. Deepak Pandit**, examined in respect of the assets of the Defendant; but that the said **Deepak Pandit** has never attended Court, leading to the orders for his arrest and committal to civil jail for contempt of court. It was that order that precipitated the filing of the application dated **15 July 2016**.

[3] Counsel for the Plaintiff thus argued that before the firm of **Kimathi Wanjohi Muli & Co. Advocates** could file the Notice of Change of Advocates on **26 October 2015**, it was imperative for the said firm to either obtain the consent of the previous advocates who were on record for the Defendant or seek the leave of the Court for the proposed change, in accordance with **Order 9 Rule 9 of the Civil Procedure Rules**; and that to the extent that this was not done, the application dated **15 July 2016** is incompetent and ought to be struck out with costs. Counsel relied on the cases of **Jackline Wakesho vs. Aroma Cafe [2014] eKLR**; **Langat vs. Kipkemoi Teres & 2 Others [2013] eKLR** and **Maurice Nabikliki Wata vs. Anna Nekesa Wanyonyi & 5 Others [2015] eKLR**, in support of his submissions.

[4] The Preliminary Objection was resisted by the Defendant on the ground that it is frivolous, incompetent and not founded on any known legal principles. It was the submission of the Defence Counsel that when they filed their Notice of Change on **26 October 2015** it was not within their

knowledge that the *ex parte* judgment had not been set aside by the previous advocates; and that upon realizing this, and to regularize the court record, the advocates for the Defendant filed a consent dated **12 July 2016** on the same day together with the Notice of Motion dated **15 July 2016**. Counsel for the Defendant cited the same case of **Jackline Wakesho vs. Aroma Cafe** (supra) for the proposition that the filing of their consent suffices and accords with the requirements of **Order 9 Rule 9 of the Civil Procedure Rules**; adding that there is no legal requirement that the said consent be adopted as an order of the Court.

[5] Counsel for the Defendant further relied on **Article 159 of the Constitution** and submitted that striking out a pleading is a drastic remedy which should be exercised very sparingly and only in cases where the pleading is shown to be a sham and plainly untenable. The Defence Counsel relied on the cases of **Blue Shield Insurance Co. Ltd vs Joseph Mboya Oguttu [2009] eKLR**; **Kenya Pipeline Co. Ltd vs. Lucy Njoki Njuru [2014] eKLR** and **Re Les Belles Savages Ltd [2015] eKLR**, to support the argument that the mischief that was meant to be cured by **Order 9 Rule 9 of the Civil Procedure Rules**, was to protect advocates from clients who were out to deny them their earned fees; and was not intended to strike out pleadings and court documents. Accordingly, the Defendant urged the Court to decline the Preliminary Objection and dismiss it with costs pursuant to **Article 159(2)(d) of the Constitution** and the Oxygen Principle under **Sections 1A, 1B and 3A of the Civil Procedure Act**, as the Objection is one based on a procedural technicality.

[6] **Order 9 Rule 9 of the Civil Procedure Rules**, under which the Preliminary Objection is premised provides that:

"Where 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."

[6] The court record confirms that, whereas the Defendant filed a Memorandum of Appearance herein on **14 July 2009**, it failed to file its Defence within the prescribed period, whereupon a default judgment was entered in the Plaintiff's favour as per its prayers in the Plaint. Indeed, the default judgment was not entered until **15 April 2011**, almost two years later. The record further confirms that the Defendant was initially represented by the firm of **Musyoka Wambua & Katiku Advocates**, having entered appearance herein on behalf of the Defendant and participated in the proceedings herein before the coming on board of the firm of **Kimathi Wanjohi & Muli, Advocates**. Accordingly, for the firm of **Kimathi Wanjohi & Muli, Advocates** to come on record for the Defendant vide the Notice of Change of Advocates filed on **26 October 2015**, it was imperative that the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** be complied with.

[7] Although Counsel for the Defendant was of the contention that this is a procedural technicality which ought to be overlooked by dint of **Article 159(2)(d) of the Constitution** and **Sections 1A, 1B and 3A of the Civil Procedure Rules**, I would disagree. **Rule 9 of Order 9** is explicit that such change can only be effected with an order of the Court. Indeed this edict is underscored by **Order 9 Rule 10**, which, while acknowledging that it is permissible to combine an application for an order for such change with other prayers, it specifically stipulates that the issue of representation be disposed of *in limine*. **Rule 10** aforementioned provides thus:

"...the question of change of advocate or party intending to act in person shall be determined first."

[8] I would accordingly agree with the viewpoint taken by **Makau J**, in **Jackline Wakesho vs. Aroma Cafe [2014] eKLR** that:

"...Although the foregoing objection appears like a technical procedural issue, ...the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack *locus standi*. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procure Act and entertain the Motion. The court will not however not do that...the courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9..."

[9] Accordingly, whereas a consent was filed herein that was signed by the Defendant's erstwhile advocate and the incoming firm of advocates, to the extent that no order of the Court has been issued on the basis thereof, the application remains incompetent. It is noteworthy that no attempt was made by the incoming counsel to regularize its legal standing herein since **26 October 2015** when the Notice of Change of Advocates was filed. I therefore entertain no doubt in my mind that that the application dated **15 July 2016** is incompetently before this court, and cannot be urged until an order is given sanctioning the change in accordance with **Order 9 Rule 9 of the Civil Procedure Rules**.

[10] In this regard, I find instructive the expressions of **Kiage J** in **Nicholas KiptooArapKorirSalat Vs Independent Electoral and Boundaries Commission & 6 Others [2013]eKLR**thus:

"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...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...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."

[11] In the premises, I would uphold the Plaintiff's Preliminary Objection and find that the Notice of Motion dated **15 July 2016** is incompetent and is accordingly struck out with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2017

OLGA SEWE

JUDGE