



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 23 OF 2015

KINYUA MWANIKI & WAINAINA ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF KITUI.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated **24th November, 2016** the firm of **Iseme Kamau & Maema Advocates** seeks leave to come on record for the Respondent in place of the firm of **J. K. Mwalimu & Co. Advocates** and that the Respondent's application dated **7th November, 2016** be deemed as duly filed.
2. The application is premised on grounds that: The Applicant filed a bill of costs against the Respondent which was subsequently taxed and a Certificate of Taxation issued on the **15th May, 2015**; the same was converted into a Judgment of the Court pursuant to **Section 51(2)** of the **Advocates Act** and a Decree of Taxation was issued on **18th February, 2016**; the firm of **Iseme Kamau and Maema Advocates** seeks to come on record pursuant to the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules, 2010**; That no prejudice will be occasioned to the firm of **J. K. Mwalimu & Co. Advocates** or the Applicant's application herein; and it will be in the interest of justice to allow the Respondent to be represented by Counsel of its own choice.
3. The application is supported by an affidavit sworn by **Hiram Nyaburi**, Counsel who is seized of the matter from the firm of **Iseme Kamau & Maema Advocates**. He deponed that they were retained to come on record in place of **J. K. Mwalimu & Co. Advocates** with instructions to commence proceedings in view of setting aside warrants of arrest issued against the Acting County Secretary of the Respondent. Judgment having been entered in the matter, leave is required to enable the firm of **Iseme Kamau & Maema Advocates** to proceed with the matter and that the High Court is empowered to regularize the Respondent's Notice of Motion dated **7th November, 2016** even though it was filed without leave.
4. **Joel Kinyua**, a partner of the Law Firm of **Kinyua Mwaniki & Wainaina Advocates** filed a response to the application by way of Replying Affidavit. He deponed that the Law Firm of **Iseme Kamau & Maema Advocates** that was aware of the law and the status of the file flagrantly disregarded the procedure and opted to file documents without leave in utter disrespect of Counsel on record; That failure to adhere to the law amounted to impunity which should deny them the discretionary powers of the Court.
5. Further, he stated that he who comes to equity must come with clean hands, allowing flagrant and deliberate disregard of express provisions of the law is prejudicial. That the Court should not be used to regularize that which is null and void. The application is an admission of the Notice of Preliminary Objection raised that should be upheld to strike out the processes unlawfully filed by the firm.
6. It is important to look at the background of the matter that necessitated the current application. On the **7th day of November, 2016** the Applicants filed a Notice of Motion seeking stay of Warrant of Arrest issued against the County Secretary of the Respondent herein without leave of Court as judgment in the matter was already entered and there was Counsel on record representing the Respondent. On the **11th November, 2016** the Applicant's Counsel filed a Notice of Preliminary Objection of his intention to raise an objection as the application offended the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**.
7. On the **14th November, 2017** the matter was placed before **Nyamweya, J.** where she directed parties to file and serve submissions to dispose of the application. On the **25th November, 2016** **Iseme Kamau & Maema Advocates** filed the instant application dated **24th November, 2016**. On the same date they filed submissions to the Preliminary Objection Notice dated **7th November, 2016**. The firm of **Kinyua Mwaniki** also filed submissions relating to the Preliminary Objection raised on a point of law.
8. On the **23rd February, 2017** **Mr. Akhaabi** appeared for the Respondent/Applicant while **Mr. Kalili** was holding brief for **Mr. Nzili** for the Applicant. Per the order of the Court, following the address of both Counsels the ruling to be delivered was for the application dated **24th November, 2016**. The same is therefore deemed to be canvassed by way of affidavit evidence filed on record.

9. The application is brought pursuant to the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules, 2010** that provides thus:

“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 by 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.”

10. As correctly submitted by Counsel for the Applicant the purpose of **Order 9 Rule 9** of the **Civil Procedure Rules, 2010** is to notify the Advocate on record of the fact that another Advocate is taking over the matter so that he is aware and able to address issues concerning him with the client if any and the other party to be aware of the changes.

This was aptly put in the case cited of **Isaac Kaesa Mwangangi & Anor. vs. Jacob Kipchumba & Another (2014) eKLR** where the Court held that:

“I am of the view that the mischief that was being addressed by Order 9 Rule 9 was twofold. Firstly it was to notify the Advocate who is on record that another one was taking over the conduct of the case. The purpose of that in my view is to inform the previous Advocate to whom the clients file should be forwarded and it was also to enable the previous Advocate to have addressed his or her legal fees earned to that date. Secondly it was intended to notify all the other advocates on record or parties acting in person that the party was changing advocates and consequently that the address of service would henceforth change....”

11. It was well within the knowledge of Counsel seeking leave that they were to notify the firm of **J. K. Mwalimu and Company Advocates** of the application. The application as indicated was to be served upon **J. K. Mwalimu & Co. Advocates**. However no step was taken to notify him of the existence of the application. There is no affidavit on record to prove that he was aware of the application. Failure to do so would be prejudicial to him as he will be in a position to raise concerns if any.

12. In the premises I decline to grant the orders sought. The application dated **24th November, 2016** stands struck out with no orders as to costs.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of August, 2017.

L. N. MUTENDE

JUDGE