



Lery Enterprises Company Limited v Ngugi (Environment & Land Case E352 of 2022) [2023] KEELC 22191 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E352 OF 2022**

**JO MBOYA, J
DECEMBER 7, 2023**

BETWEEN

LERY ENTERPRISES COMPANY LIMITED APPLICANT

AND

MARGARET WAMBUI NGUGI RESPONDENT

RULING

Introduction and Background

1. The Plaintiff/Applicant herein filed and/or lodged the instant suit vide Originating Summons dated the 27th August 2022; and in respect of which same sought for various reliefs touching on and/or concerning all those properties otherwise referred to as LR No's 23364/27, 28, 29, 30 and 31, respectively [which shall hereinafter be referred to the suit properties].
2. Pursuant to and upon service of the Originating Summons, [details in terms of the preceding paragraph], the Defendant/Respondent herein duly instructed counsel, who proceeded to enter appearance and thereafter filed the requisite Statement of Defense/ Replying Affidavit on her behalf.
3. Be that as it may, on or about the 1st March 2023, the Plaintiff/Applicant through her advocates on record, namely, Mr. Mberere, applied to have the suit withdrawn and which application was thereafter allowed/granted by the Honourable court. Consequently and in this regard, the court proceeded to and marked the suit as withdrawn, albeit with costs to the Defendant.
4. Arising from the withdrawal of the suit, the Defendant herein filed and/or lodged her Bill of costs for taxation and which bill of costs appears to have been duly taxed and certified by the Deputy Registrar in the sum of Kes 5, 885, 138/= only. For good measure, it is the taxation of the Defendant's bill of costs and the ultimate issuance of the Certificate of taxation that has provoked the filing of the instant Application.



5. As pertains to the current Application, namely, the Application dated the 27th October 2023, the Plaintiff/Applicant has sought for the following reliefs;
 - i.Spent.
 - ii.Spent
 - iii. That this Honourable Court be pleased to stay the execution of the orders for costs issued 1st March 2023 and subsequent orders of taxation issued on 7th September 2023 and all consequential orders in this matter pending the hearing and determination of this Application inter-partes.
 - iv. That this Honourable Court be pleased to vacate, set aside and/or review its ruling and/or order issued on 1st March, 2023 in regard to costs pending the hearing and determination of this Application inter-partes.
 - v. That this this Honourable Court be pleased to order that no proper suit ever existed herein and that the same remains struck out for want of instructions with no orders of costs pending the hearing and determination of this Application inter-partes.
 - vi. That this Honourable Court does allow the firm of Kinyanjui Kirimi & Company Advocates to be placed on record in place of Ahamed Mberere & Co Advocate for the Plaintiff/Applicant.
 - vii. That this Honourable Court be pleased to stay the execution of the orders for costs issued 1ST March 2023 and subsequent orders of taxation issued on 7th September 2023 and all consequential orders in this matter.
 - viii. That this Honourable Court be pleased to vacate, set aside and/or review its ruling and/or order issued on 1st March, 2023 in regard to costs.
 - ix. That this this Honourable Court be pleased to order that no proper suit ever existed herein and that the same remains struck out for want of instructions with no orders of costs
 - x. That this Honourable Court be pleased to give further orders and directions as it may deem fit and just.
 - xi. That the costs of this Application be provided for.
6. The instant Application is premised on a plethora of grounds, which have been alluded to and enumerated at the foot of the said Application. Furthermore, the Application is supported by the affidavit of one Pricilla Njige, sworn on the 27th October 2023.
7. On the other hand, upon being served with the subject Application, the Defendant/Respondent filed a Replying affidavit sworn on the 27th October 2023; and in respect of which, the Defendant/Respondent has vehemently opposed the subject Application. In any event, the Defendant/Respondent has averred, inter-alia, that the instant Application constitutes and/or amounts to an abuse of the Due process of the court.
8. Be that as it may, the Application under reference came up for hearing on the 14th November 2023; whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently and in this regard, the Honourable Court proceeded to and circumscribed the timeline for the filing and exchange of written submissions.



9. Pursuant to and in line of the directions of the court, the Plaintiff/Applicant herein proceeded to and filed written submissions dated the 16th November 2023; whilst the Defendant/Respondent filed written submissions dated the 28th November 2023.
10. Both sets of Written submissions are on record.

Parties' Submissions:

a. Applicant's Submissions:

11. The Applicant herein filed written submissions dated the 16th November 2023 and in respect of which same has adopted and reiterated the grounds contained at the foot of the instant Application, as well as the averments in the supporting affidavit. Furthermore, the Applicant has thereafter raised, amplified and highlighted four [4] issues for consideration by the Honourable court.
12. Firstly, Learned counsel for the Applicant has submitted that the suit herein was allegedly filed by and on behalf of the Plaintiff/Applicant through the firm of M/s Ahamed Mberere & Company Advocates, who however, had no instructions or at all to act for and on behalf of the Plaintiff.
13. Furthermore, Learned counsel for the Applicant has submitted that insofar as the firm of M/s Ahamed Mberere & Co Advocates, did not have instructions to act for and on behalf of the Plaintiff, the suit and/or proceedings which were mounted by the said law firm are therefore a nullity ab initio.
14. In support of the submissions that the firm of M/s Ahamed Mberere & Company Advocates were neither instructed nor retained by the Applicant herein, Learned counsel has cited and relied on the decision in *Wilfred N Konosi T/a Konosi & Co Advocates v Flamco Ltd* (2019)eKLR, to emphasize that where a firm is instructed, there must be instructions in writing by and on behalf of the Company.
15. Secondly, Learned counsel for the Applicant has also submitted that there was no Advocate- client relationship between the Applicant and the law firm of M/s Ahamed Mberere & Company Advocates, to warrant the said firm purporting to act for and on behalf of the Applicant company.
16. Additionally, Learned counsel for the Applicant has submitted that to the extent that there was no Advocate- Client relationship between the Applicant and the named law firm, the said law firm could not thus purport to act for the Applicant company, albeit without instructions.
17. Thirdly, Learned counsel for the Applicant has submitted that following the withdrawal of the instant suit, the Defendant/Respondent proceeded to and filed a Bill of cost, which has since been taxed and certified in the sum of Kes.5, 885, 138/= only as against the Applicant company.
18. On the other hand, Learned counsel for the Applicant has contended that arising from the taxation of the Bill of costs and the issuance of the Certificate of taxation, the Defendant/Respondent has since taken out warrant of attachment and sale and hence there is a likelihood that the Applicant's properties shall be attached and sold (sic) in the execution of the said Costs. In any event, the Applicant's Properties are on the verge of being attached and/or alienated, in execution the warrants of the Honourable court.
19. Consequently and in this respect, Learned counsel for the Applicant has therefore contended that there exists sufficient basis/ cause to warrant the grant of an order of stay of Execution to avert the imminent attachment and alienation of the Applicant's properties.



20. Further and in any event, Learned counsel for the Applicant has submitted that if the execution of the impugned warrants is not stayed, then the Applicant shall be exposed to suffer substantial loss, not compensable in monetary terms.
21. To this end, Learned counsel for the Applicant has cited and relied on the case of *Butt v Rent Restriction Tribunal* (1982)eKLR; and *Charles Ngugi v A. S. L Credit Ltd* (2022)eKLR, respectively.
22. Finally, Learned counsel for the Applicant has submitted that the Applicant has demonstrated to the court that there exists sufficient reason and/or basis to warrant the review and variation of the orders of the court, *inter-alia*, the orders granting costs to and in favor of the Defendant/Respondent.
23. In this respect, Learned counsel for the Applicant has contended that the Directors of the Applicant Company were not aware of the filing and/or institution of the instant suit for and on behalf of the Applicant.
24. Furthermore, Learned counsel for the Applicant has also contended that upon the discovery of the existence of the instant suit, the Applicant herein proceeded to and instructed her current advocates to move with due dispatch and to seek to have the impugned orders reviewed and/or set aside.
25. On the other hand, Learned counsel for the Applicant has also submitted that upon the discovery of the impugned suit, the Applicant herein made and/or mounted a Complaint with the Police at the Mlolongo police Station pertaining to and concerning the lodgment of the impugned suit, albeit without the instructions of the Applicant company.
26. For coherence, the Learned counsel for the Applicant has therefore contended that the case beforehand meets and/or satisfies the requisite ingredients envisaged under the provisions of Order 45 of the *Civil Procedure Rules* 2010, which underpins the requisite circumstances for Review.
27. In support of the foregoing submissions, Learned counsel has cited, *inter-alia*, the holding in *Silvester Nthenge v Johnstone Kiamba Kiswili* (2021)eKLR, *Shanzu Investment Ltd v Commissioner of Lands* Civil Appeal No. 100 of 1993 (UR), *Zablon Mukuba v Solomon N Choti & 3 Others* (2016)eKLR and *Wachira Karani v Bildad Wachira* (2016)eKLR, respectively.
28. Premised on the foregoing, Learned counsel for the Applicant has thus implored the Honourable Court to find and hold that the instant Application is meritorious and thus ought to be allowed.

b. Respondent's Submissions:

29. The Respondent herein filed written submissions dated the 28th November 2023; and in respect of which same has adopted and reiterated the contents of the Replying affidavit sworn on the 7th November 2023.
30. Other than the foregoing, Learned counsel for the Respondent has thereafter highlighted, canvassed and amplified three [3] salient issues for consideration by the Honourable Court.
31. First and foremost, Learned counsel for the Respondent has submitted that the Honorable court ought not to grant Leave to and in favor of the firm of M/s Kinyanjui Kirimi & Co Advocates to come on record in place of M/s Ahamed Mberere & Company Advocates, either as sought or at all.
32. In particular, Learned counsel for the Respondent has contended that if the firm of M/s Ahamed Mberere & Company Advocates, had no instructions to act for and on behalf of the Applicant herein, in the manner alleged, then the firm of M/s Kinyanjui Kirimi and Company Advocates, cannot now purport to seek Leave and come on record in lieu of the said law firm which had no instructions or at all.



33. Furthermore, Learned counsel for the Respondent has submitted that if the law firm of M/s Kinajui Kirimi and Company Advocates are keen on coming on record in place of the firm of M/s Ahamed Mberere & Company Advocates, then it means that the firm of M/s Ahamed Mberere & Company Advocates, were lawfully instructed and retained by the Applicant.
34. Nevertheless, Learned counsel for the Respondent has submitted that the Applicant herein cannot be allowed to approbate and reprobate at the same time, namely, by contending that same did not instruct the law firm of M/s Ahamed Mberere & Company Advocates, whilst on the other hand, same seeks to appoint a firm of advocate to take over the conduct of the proceedings from (sic) the erstwhile advocate.
35. Consequently and in this regard, Learned counsel for the Respondent has contended that the instant Application thus constitutes and/or amounts to an abuse of the Due process of the court and therefore ought to be dismissed.
36. In support of the submissions that the Applicant herein is approbating and reprobating at the same time, Learned counsel for the Respondent has cited and relied on the case of *Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteru* (2010)eKLR and *Macfoy v United Africa Co Ltd* (1961) 3 ALL ER 1169, respectively.
37. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein duly and lawfully instructed the firm of M/s Ahamed Mberere & Company Advocates to file and/or mount the instant suit on her behalf and in any event, one of the Directors of the Applicant company duly swore and executed an affidavit in support of the impugned Originating Summons.
38. Furthermore, Learned counsel for the Respondent has also submitted that other than one of the directors of the Applicant executing an affidavit for use in respect of the instant matter, the Applicant also availed assorted documents, which were used by the erstwhile advocates to file the Originating Summons herein.
39. Besides, Learned counsel has also submitted that despite the denials by the Applicant herein that same neither instructed nor retained the firm of M/s Ahamed Mberere & Company Advocates, there is no gainsaying that the Applicant's director who swore the affidavit in support of the Originating summons duly appeared before a Commissioner of Oaths ; and thereafter, knowingly executed the supporting affidavit.
40. In view of the foregoing, Learned counsel for the Respondent has submitted that the contents of the current Application are merely meant to evade/ circumvent the legal consequences attendant to and arising from the suit that was filed by the Applicant.
41. Thirdly, Learned counsel for the Respondent has submitted that even though the Applicant herein has contended that same neither instructed nor retained the firm of M/s Ahamed Mberere & Company Advocates, the Applicant herein has failed to place before the Honourable court cogent, plausible and credible evidence to vindicate the allegations made against the erstwhile Advocates.
42. Further and in addition, Learned counsel for the Respondent has also submitted that it was incumbent upon the Applicant to prove the allegation of (sic) fraud, illegality and lack of instruction against her erstwhile advocates, to the requisite standard.
43. Furthermore, Learned counsel for the Respondent has also submitted that given the magnitude and allegations made and/or mounted against the erstwhile advocate, it was incumbent upon the Applicant to prove the allegation to the requisite standard, namely, a standard above the balance of probabilities, but not beyond reasonable doubt.



44. To vindicate the submissions that the allegations of fraud and lack of instructions against the erstwhile advocate ought to have been proved on a standard above balance of probabilities, Learned counsel has cited and relied on the case of *S. N. M v Z. M. S & 3 Others* (2017)eKLR, where the Court of Appeal underscored the necessity to prove allegations of fraud against an Advocate to the requisite standard of proof.
45. Lastly, Learned counsel for the Respondent has submitted that the relief(s) sought by and on behalf by the Applicant herein ought not to be granted, either as sought or at all. Further and in any event, Learned counsel for the Respondent has submitted that the Applicant herein has failed to establish the allegations contained at the foot of the impugned allegations.
46. Based on the foregoing, Learned counsel for the Respondent has thus implored the Honourable court to find and hold that the Application beforehand is not merited and thus ought to be dismissed.

Issues for Determination:

47. Having reviewed the instant Application together with the Response thereto; and upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether the instant Application has been maintained and prosecuted by a firm of Advocates seized of the requisite Locus standi or otherwise.
 - ii. Whether the Applicant herein has established and demonstrated the requisite basis to warrant the grant of an order for Review, either as sought or at all.
 - iii. Whether the instant Application constitutes and amounts to an abuse of the Due process of the court.

Analysis and Determination

Issue Number 1

Whether the instant Application has been maintained and prosecuted by a firm of advocates seized of the requisite Locus standi or otherwise.

48. Before venturing to address the issue highlighted hereinbefore, namely, whether the firm of M/s Kinyanjui Kirimi & Co Advocates, are lawfully on record for and on behalf of the Applicant herein, it is imperative to state and underscore that the instant suit was filed by and on behalf of the Applicant through the law firm of M/s Ahamed Mberere & Company Advocates.
49. Subsequently, the said law firm, namely, M/s Ahamed Mberere & Company Advocates made an application before the court for Leave to withdraw the suit by and on behalf of the Plaintiff herein. Consequently and in this regard, the Honourable Court proceeded to and granted liberty to have the suit by and on behalf of the Applicant to be withdrawn.
50. Arising from the foregoing, it is therefore common ground that up to and including the time when the suit was marked as withdrawn, the law firm of M/s Ahamed Mberere & Company Advocates, was the lawful firm of advocates on record for the Applicant herein and not otherwise.
51. Based on the foregoing, it is therefore instructive that if any other law firm, the firm of M/s Kinyanjui Kirimi and Company Advocates, not excepted, were to seek to come on record for and on behalf of



the Applicant herein, then it would be incumbent upon the intending/incoming advocates to seek for and obtain Leave of the Court prior to and before effecting a Notice of change of advocates.

52. At any rate, it is not lost on this Honourable court that where an intending/incoming advocates wishes to come on record, same is at liberty to co-join the Application for Leave to come on record with the substantive reliefs, to be sought for, albeit upon being granted Leave to come on record. [See Order 9 Rule 9 of the *Civil Procedure Rules* 2010].
53. Nevertheless, it is important to point out and to underscore that where an incoming advocate has sought for Leave to come on record in place of the outgoing firm of advocates and that the said prayer has been mounted alongside the substantive reliefs, then it behooves the incoming advocates to impress upon the Honourable court to hear and dispose of the limb of the Application seeking for Leave to come on record beforehand; and in any event, at the onset.
54. Furthermore, it is thereafter incumbent upon the incoming advocate to file the requisite Notice of change of advocate(s) upon procuring and obtaining the Leave to come on record.
55. Suffice it to emphasize that the Leave to come on record by itself does not constitute a Change of advocates. Instructively, the Leave provided for under the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* 2010; would provide a basis upon which to effect the change of advocates. Simply put, the Leave if granted, is precursor to the filing and service of the Notice of Change of Advocate.
56. Arising from the foregoing, there is no gainsaying that it was incumbent upon the firm of M/s Kinyanjui Kirimi & Company Advocates to impress upon the court to hear the limb to hear the aspect of the application seeking to come on record at the onset and upon (sic) obtaining the Leave, to proceed and effect the Notice of change of advocates in compliance with the provisions of Order 9 Rules 5 and 6 of the *Civil Procedure Rules*, 2010.
57. However, in respect of the instant matter, the firm of M/s Kinyanjui Kirimi & Co Advocates filed an omnibus application, wherein same sought, inter-alia, Leave to come on record in lieu of M/s Ahamed Mberere & Company Advocates, but failed to implore the court to deal with the limb pertaining to leave in the first instance.
58. Furthermore, it is also not lost on this court that up to and including the point in time when the Parties herein filed and exchange their written submissions, the firm of M/s Kinyanjui Kirimi & Co Advocates had not only failed to procure and obtain Leave to effect the change of advocates either as required or at all, but had also not filed any Notice of change in the manner prescribed under the law.
59. Pertinently, it is therefore common ground that the firm of M/s Kinyanjui Kirimi & Co Advocates, who had filed and prosecuted the Application beforehand are certainly devoid and bereft of the requisite Locus standi to maintain and/or sustain the impugned Application.
60. To be able to understand the requisite procedure attendant to obtaining Leave to come on record in lieu of an erstwhile firm of advocate, it is instructive to take cognizance of the provisions of Order 9 Rules 9 and 10 of the *Civil Procedure Rules*, 2010, which provides as hereunder;

[Order 9, rule 9.] Change to be effected by order of court or consent of parties.

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 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.

[Order 9, rule 10.]

10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.
61. My reading of the provisions of Order 9 Rule 10 (*supra*) drives me to the conclusion that where a composite/omnibus application, including a prayer for Leave to come on record on behalf of an intending advocate is made, then it behooves the designated advocates to dispose of and procure the requisite Leave at the onset before venturing to canvass the substantive reliefs.
62. Additionally, what I discern from the named provisions, (*supra*) is that the Leave alluded to, does not ipso facto amount to change of advocates. To the contrary, the Leave is a precursor to effecting the change of advocate, which change of advocate can only be actualized by filing and serving the requisite Notice of change of advocates.
63. From the foregoing analysis, what becomes apparent is that the firm of M/s Kinyanjui Kirimi & Co Advocates who filed, maintained and prosecuted the current Application, have engaged in the prosecution of the impugned Application, albeit prior to and before obtaining the requisite authorization by the court.
64. Consequently and in the premises, it is my finding and holding that the entire Application dated the 27th October 2023, has been prosecuted by and on behalf of a firm of advocates who have no authority and/or Locus standi so to do.
65. To buttress the foregoing position, it suffices to reiterate that this court had occasion to appraise and expound on the import and tenor of the provisions of Order 9 Rules 9 and 10 of the [Civil Procedure Rules, 2010](#) in the case of *Sarah Wambui Kariuki v Peter Kahama John*, Milimani ELC E149 of 2020 [UR], where the court stated and observed thus;
1. Having outlined the foregoing preliminary facts, which are not in dispute, it is now appropriate to revert to the issue under consideration and to interrogate whether the current advocate for the Applicant was required to comply with Order 9 Rule 9 of the *Civil Procedure Rules 2010* or otherwise. Furthermore, it would also be appropriate to interrogate whether non-compliance or at all, vitiates and/or invalidates the entire Application before the court.
 2. To start with, it is important to state and underscore that where a Party, the Applicant not excepted, seeks to either act in person or to effect change of advocate, after Judgment has been entered; such change of advocate can only be effected with Leave of the court and not otherwise. See Order 9 Rule 9 of the *Civil Procedure Rules, 2010*.
 3. Additionally, whereas an Applicant seeking to procure leave of the court to effect change of advocate after Judgment, is at liberty to co-join the limb seeking for leave to come on record alongside other reliefs; however it behooves the limb for leave to come on record to be prosecuted and/or canvassed in the first instance, before venturing into the merits of the Application. See Order 9 Rule 10 of the *Civil Procedure Rules, 2010*.
 4. However, despite the clear terms and tenor of the Order 9 Rules 9 and 10 of the *Civil Procedure Rules, 2010*, there is no gainsaying that the Applicant's current advocates neither procured nor



obtained the consent from the previous counsel, who was on record for the Applicant; nor did the Applicant's current advocate file an Application for leave to come on record in lieu of the erstwhile counsel.

5. In any event, it is import to point out that even after being served with the Notice of Preliminary Objection dated the 10th July 2023, Learned counsel for the Applicant herein did not deem it fit and/or expedient to make reasonable efforts to comply with the crystal-clear provisions with Order 9 Rule 9 of the *Civil Procedure Rules*, 2010.
 6. Clearly, Learned counsel for the Applicant herein has been acting and continues to act with gross impunity and utter disregard of the provisions of the law. In this respect, there is no doubt in my mind that the learned counsel for the Applicant, is not only guilty of gross negligence but serious inaction, which cannot be countenanced by a court of law.
 7. Most importantly, it is worthy to underscore that the Rules of Procedure and the provisions of law at large, are made to be complied with by all and sundry. Furthermore, there is no gainsaying that ignorance of the law is no defense.
66. In a nutshell, my answer to issue number one [1] is to the effect that the firm of M/s Kinyanjui Kirimi & Co Advocates, who have prosecuted the Application beforehand are devoid of the requisite locus standi.

Issue Number 2

Whether the Applicant herein has established and demonstrated the requisite basis to warrant the grant of an order for Review, either as sought or at all.

67. In respect of the issue herein, the question that the Honourable court must grapple with and thereafter endeavor to address is whether or not a person who willingly, knowingly and conscientiously apply to withdraw a suit, can turn around and (sic) contend that same is aggrieved by an order that was made at his/her request at instance.
68. For coherence, it is imperative to recall that the provisions of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010; is intended to provide reprieve and succour to a person who is aggrieved by an order and/or decree of the court. Consequently, before invoking and relying on the provisions of Order 45 of the *Civil Procedure Rules*, 2010; the Applicant must establish and demonstrate that same is truly aggrieved with the impugned order.
69. To my mind, where an order is procured by and at the instance of a particular Party, who is the one who implored the Honourable court to issue the impugned order, then such a Party cannot turn round and say that same is aggrieved by an order that was requested for and granted at his/her instance.
70. Consequently and in this regard, I entertain serious doubts and reservations as to whether the current Applicant herein, who unreservedly implored the Honourable court to mark the suit as withdrawn, can now be heard to say that same is (sic) aggrieved.
71. Secondly, it is important to point out that where a Claimant, the Applicant herein not excepted, seeks to procure an order of review, then it behooves such an Applicant to strictly establish and prove the requisite ingredients that underpins the request for review.
72. In this respect, the Applicant herein has contended that same was not privy to and or knowledgeable of the filing of the instant suit; and furthermore, that the existence of the instant suit was only discovered when execution had been commenced by and on behalf of the Respondent.



73. Nevertheless, there is no gainsaying that the supporting affidavit attached to the current Application has been sworn by the same Pricilla Njige, who is the same person who swore the previous Supporting affidavit and which was annexed to the Originating Summons.
74. Further and in any event, despite the fact that the same Director is stated to have sworn the affidavit in support of the Originating Summons, same has not come out clearly to deny the signature contained at the foot of the affidavit in support of the Originating Summons.
75. Additionally, it is also not lost on this Honourable court that even though the affidavit in support of the Originating summons was sworn before a Commissioner of oaths, yet again the deponent, has neither disputed appearing before the named Commissioner of oath or otherwise.
76. Quiet clearly, the director of the Applicant herein was privy to and knowledgeable of the filing of the instant suit and hence it is misleading, incorrect and erroneous for the Applicant to now deny the filing of the suit, which ex-facie, appears to have been filed with the blessings and on the instructions of the Applicant.
77. In any event, it is also important to point out that where an Applicant is seeking for an order for review, it is not enough to merely mention and throw on the face of the court omnibus allegations. To the contrary, it is incumbent upon the Applicant to implead the grounds for review and thereafter venture forward to demonstrate and prove same, albeit on a balance of probabilities.
78. Unfortunately, in respect of the instant matter, the Applicant has made several omnibus allegations, including fraud, illegality and lack of instructions on the part of her erstwhile advocates, but the Applicant has failed to place before the Honourable court any scintilla or iota of evidence to anchor her allegations.
79. Most importantly, one would have expected the Applicant herein to have raised a complaint with the Law Society of Kenya [LSK], against the firm of M/s Ahaned Mberere & Company Advocates for acting on a matter albeit without instructions, which however is not the case.
80. On the other hand, it would also have been instructive if the Applicant herein had lodged and/or mounted a Complaint with the Disciplinary Tribunal [DT], established under the Advocates Act, Chapter 16, Laws of Kenya; to ensure that the proprietor of M/s Ahamed Mbere & Co Advocates are suitably dealt and punished for (sic) professional misconduct.
81. On the other hand, it is also appropriate to underscore that the Applicant herein was also at liberty to take out a suit for professional negligence as against the erstwhile advocates, as further evidence of the contention that the said erstwhile advocates (sic) acted without instructions.
82. However, in respect of the instant matter, the Applicant herein appears to be content with the allegation that upon (sic) discovery of the existence of the instant suit, same caused a Letter to be written to the erstwhile advocate, but which letter has allegedly not been responded to.
83. To my mind, the Applicant herein does not appear to be serious in the various allegations that are being used and utilized to anchor the suit Application. In any event, the Applicant herein appears to be content with throwing serious allegations against the erstwhile advocates, albeit without endeavoring to prove the allegations.
84. In my humble, albeit considered view, the perfunctory approach exhibited and displayed by the Applicant herein does not meet the threshold for proving allegations of fraud, illegality and misconduct, if at all on the part of the erstwhile advocate, who is being accused for having acted/filed the instant suit without instructions.



85. Without belaboring the point, the requisite threshold to be met and established where illegality and fraud is alluded to as against an Advocate was expounded and elaborated by the Court of Appeal in the case of SMN v ZMS & 3 Others (2017)eKLR, where the court stated and held thus;

“The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in Court is certainly one of utmost gravity. It destroys the advocate’s honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges.”

86. Before departing from the issues herein, it is worthy to reiterate that he who seeks to procure review must establish, demonstrate and prove the allegations/factors upon which the review is sought. In the event of failure to do so, no favorable order for review can issue and/or be granted.

87. To buttress the foregoing exposition of the law, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of Otieno Ragot & Company Advocates v National Bank of Kenya Ltd [2019]eKLR, where the court stated and observed as hereunder;

“The respondent failed to prove that it had discovered new evidence after the exercise of due diligence not within its knowledge or which could not be produced at the time when ruling was delivered. Order 45 Rule 3(2) provides that an application for review shall “... not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation. Other than the confusion in dates, no sufficient reason was given by the respondent as to why the letters were not filed before the taxing officer. This to my mind was an oversight on the part of the respondent but it was not a mistake apparent on the face of the record.”

88. To surmise, the Applicant herein has neither established nor demonstrated that same merits an order of review, taking into account the totality of the facts and the evidence obtaining in respect of the instant matter.

Issue Number 3:

Whether the instant Application constitutes and amounts to an abuse of the Due process of the court.

89. The Applicant herein is on record to be stating that same neither retained nor instructed the firm of M/s Ahamed Mberere & Co Advocates, either to file and or mount the instant suit.

90. Furthermore, the Applicant has escalated her arguments to the extent of stating that the impugned of proceedings/suit was filed without her knowledge, blessings and/or instructions. Consequently, the Applicant herein posits and espouses a position that the entire suit was/is thus a nullity.



91. Despite the foregoing position, the Applicant herein makes an interesting about-turn and now states that same is keen and or desirous to instruct a new firm of advocates to take over the conduct of the suit from (sic) the erstwhile advocates, who is alleged to have filed the suit albeit without instructions.
92. To my mind, if the erstwhile advocates were not seized of the requisite instructions to mount and/or commence the instant suit, for and on behalf of the Applicant; then the entire proceedings were/are a nullity and cannot be taken over at the instance of the new advocates.
93. On the other hand, if the Applicant herein holds the position that the new advocate is obliged to take over and substitute the erstwhile advocate, then there is an inherent acknowledgement and admission on the part of the Applicant that the suit beforehand, was lawfully filed and mounted on her behalf.
94. Either way, the Applicant herein cannot on one hand be approbating and on the other hand reprobating, [namely, blowing hot and cold at the same time], albeit in respect of the same matter.
95. Surely, by adopting the dual positions, which are inherently contradictory and antithetical, the Applicant herein is no doubt, abusing the due process of the court and cannot be allowed to adopt such a scenario, whose net effect is tantamount to playing lottery with the Due process of the court.
96. Without belaboring the point, it is instructive to cite and restate the holding of the Court in the case of *Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteru* (2010)eKLR, where the court stated and held thus;

“It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in *Evans v Bartlam* (1973) 2 ALL ER 649 at page 652, where Lord Russel of Killowen said; The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit. Again in *Banque De Moscou v Kendersley* (1950) ALL ER 549, Sir Evershed said of such conduct. This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating or, in the more homely English phrase blowing hot and cold.”

97. Similarly and without much ado, I come to the conclusion that by blowing hot and cold, as pertains to whether or not the erstwhile advocates were duly instructed, the Applicant herein is guilty of abuse of the Due process of the court.

Final Disposition:

98. Flowing from the discussion, [whose details have been enumerated in the body of the Ruling herein], there is no gainsaying that the impugned Application by and on behalf of the Applicant, is not only pre-mature and misconceived, but same is legally untenable.
99. Consequently and in the premises, I find and hold that the Application dated the 27th October 2023, is devoid and bereft of merits and hence same be and is hereby dismissed with costs to the Respondent.
100. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.



In the Presence of

Mr. Kirimi D for the Applicant.

Mr. E K Mutua [SC] for the Defendant/Respondent.

