



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 356 OF 2015

**ELSEK & ELSEK CONSTRUCTION COMPANY LIMITED...DECREE
HOLDER/RESPONDENT**

- VERSUS -

PRESBYTERIAN UNIVERSITY OF EAST AFRICA

REGISTERED TRUSTEES.....JUDGEMENT DEBTOR/APPLICANT

RULING NO.2

- 1. The application before me was brought by Law Firm of MIYARE & COMPANY ADVOCATES, who are seeking the leave of the court to act for the Decree Holder, ELSEK & ELSEK CONSTRUCTION COMPANY LIMITED.**
- 2. Until now the Law Firm on record as the advocates for the Decree – Holder is GATHENJI & COMPANY ADVOCATES.**
- 3. The firm still on record does not dispute that fact that the Decree – Holder had already given instructions to Miyare & Company Advocates.**
- 4. However, Gathenji & Company Advocates still oppose the attempt by Miyare & Company Advocates to come on record for the Decree-Holder.**
- 5. Mr. Miyare advocate perceives the said opposition as an attempt by Gathenji & Company Advocates to impose itself on a client who no longer wanted to be represented by that firm.**
- 6. I do agree with the applicant that every person has a right to choose the advocate who he would like to represent him in any case or matter which requires legal representation.**
- 7. Of course, the said right of choice, ordinarily goes hand in hand with the ability of the person to pay the lawyer he had chosen.**
- 8. On the other hand, the lawyer also has a right to determine whether or not to accept instructions from any particular person.**
- 9. Ordinarily, there would be a contract between the advocate and his client, which among other things, specifies either the fees which the client would pay or the method which would be used to determine the quantum of the fee which is payable to the advocate.**

10. When the advocate has performed his duty, he expects his remuneration. However, differences sometimes arise between the advocate and his client when the client is not satisfied with the quality or the speed of the work. Or there might simply arise a difference in opinions, giving rise to incompatibility.
11. At other times, it is the advocate who may want to stop acting for the client, because of reasons such as non-payment or late payment of fees and disbursements.
12. Or the advocate may feel that the client was not giving to him the full story, thus causing embarrassment to the advocate when he is confronted by the other party.
13. When the advocate chooses to discontinue working for the client, he cannot simply walk away. He needs to notify his client and the other party. He may even need to obtain an order from the court, which he must then serve upon erstwhile client and also upon the other party.
14. Similarly, if a client wishes to replace his advocate, he may do so. However, when the replacement is to take place after judgment, the client must either get the concurrence of his advocate or, in the alternative, he or his new advocate must obtain leave of the court.
15. Does that mean that an advocate who has been replaced by another advocate can refuse to be replaced?
16. If an advocate were to be allowed to insist on continuing to act for a client who no longer desired his services, that would imply that the advocate was permitted to impose himself upon an unwilling client. Obviously such a scenario would be most unwelcome.
17. In the case of **SAMSON OKUN ORINDA V. AYUB MUTHEE IGWETA & 2 OTHERS, HCCC NO. 72 OF 1995** (*at Meru*) J.A. Makau J. expressed himself thus:

“No advocate can impose himself upon a client simply because he has not been paid his professional fees in full. The advocate who has not been paid his professional fees in full has a remedy to full Advocate/Client Bill of Costs for taxation of this fees, but he cannot simply say, since I have not been paid my fees in full, I shall continue to act for you whether you like 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.

As the law provides for mechanisms 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 that any change of advocate should not be allowed, as he would be greatly prejudiced if an incoming Advocate is allowed to come on record?.

18. Those words of Makau J. provide a comprehensive response to the submissions which were put forward by Gathenji & Company Advocates.
19. In this case the client had signed an Agreement pursuant to which it was to pay to its former advocates, fees out of the decretal amount.
20. The Agreement would therefore form the foundation upon which the advocate could choose to pursue the client, to recover the agreed fees.
21. On the other hand, the client says that the Agreement it had signed with Gathenji & Company Advocates was un-enforceable.
22. The client’s view was that the Agreement was of a champertous nature, thus rendering it invalid and unenforceable.

23. Whether or not the Agreement was valid and therefore enforceable, can only be determined in due course, if the parties choose to put its validity to the test.

24. In **BONIFACE KIRAGU WAWERU VS. JAMES K. MULINGE & ANOTHER, CIVIL APPEAL NO. 70 OF 2005**, the Court of Appeal stated that although the provisions of Order 111 Rule 9A of the Civil Procedure Rules did not go to the root of the proceedings;

“By that we do not mean that that provision was put on the statute book simply to decorate it. It has a purpose to serve, in that the court should sanction the change of representation, in person or by advocate particularly after judgment has been entered. The lawyer to be “replaced” should be notified of the changes because after judgment has been entered, proceedings are at a crucial stage. Accordingly, we hold the view that counsel who, all along, was on record, having expended money and time in the process, ought to know when a change in representation occurs, in order to take course to secure his costs.

.....

So either way, the change of representation after judgment has been entered, to us meant ensuring the orderly conduct of further proceedings and not to expose the lawyer being replaced to the risk of loss of fees or other.”

25. The advocates being replaced would be afforded an opportunity to “*secure his costs*”. He would then not be exposed to risk of the loss of his fees.

26. In the case of **ISAAC KAESA MWANGANGI & ANOTHER VS. JACOB KIPCHUMBU & ANOTHER HCCC NO. 248 OF 2003**, (*At Mombasa*), Kasango J. also expressed the view that the advocate being replaced needed to be notified of that fact so that;

“.....the previous Advocate was informed, to whom the client’s 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.”

27. In my understanding, whether Kasango J. nor the Court of Appeal stated that before the advocate could be replaced, the court had to ensure that the outstanding fees, if any, had to be paid.

28. If it was a requirement that fees be paid to an advocate on record before he could be replaced, it ought to have been made an express requirement.

29. In my view, such a requirement, if it had been imposed would have resulted in the client being held to ransom, because his case could never proceed until he first paid fees regardless of any dispute he may have had over fees payable to his former advocate.

30. Of course, I do also appreciate that the advocate who had worked for the client until the state in which judgment had been given, should not just be replaced without any regard to the payment for services which he had rendered.

31. Therefore, in appropriate circumstances, the court may impose conditions on the client, if that was deemed necessary to meet the ends of justice.

32. In this case the Advocate is convinced that the quantum of the fees has been agreed upon. Therefore, if the Agreement embodying the fees is upheld, it would not be difficult for the Advocate to move forward the process of recovering the fees.

33. On the other hand, if the Agreement were found to be unenforceable, the Advocate may have to take steps to have his Bill of Costs taxed.

34. I cannot compel the newly appointed advocate to give an undertaking to pay fees, yet the Agreement embodying the fees is being challenged.

35. Furthermore, the rejection of leave to have the new advocates come on record would be inconsistent with justice, as it would be tantamount to forcing the client to continue working with an advocate in whom the client has lost faith.

36. Meanwhile, the insistence that the former advocates remain on record until the issue of their fees was resolved, would imply that the advocate would be expected to represent a client with whom they were already fighting. Such a development would be wholly inconsistent with justice.

37. In the result I find that the interests of justice demand that the Decree – Holder be permitted forthwith to engage its new advocates, and that the new advocates be permitted to come on record, unconditionally.

38. Accordingly, it is now ordered that the Law Firm of Miyare & Company be and are hereby granted leave to come on record as the new advocates for the Decree-Holder. In effect, the Law Firm of Gathenji & Company Advocates are hereby replaced by Miyare & Company Advocates.

39. It is further ordered that Gathenji & Company Advocates will pay to the Decree-Holder the costs of the application dated 30th June 2016, to the extent that that application was in relation to the quest for leave to have the new advocates replace them in this case.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of December 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miyare for the Decree Holder/Respondent

No appearance for Judgement Debtor/Applicant

No appearance for Gathenji & Co. Advocates

Collins Odhiambo – Court clerk.