REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 238 OF 2015

MIRIAM MBEKE NYAMASYO & OTHERS .....PLAINTIFFS

VERSUS

DISHON ODHIAMBO & OTHERS .....DEFENDANTS

RULING

(Application by plaintiffs to be allowed to change counsel after judgment; application opposed by the outgoing advocate; outgoing advocate asserting that the plaintiffs have not fully paid his legal fees and the change of advocate should not be effected before he is fully paid; Order 9 Rule 9; considerations that a court should take into account when faced with such an application; right of litigant to be represented by an advocate of his choice vis-à-vis the interest of the advocate to be compensated of his fees; in the circumstances, outgoing advocate can file his bill for taxation and execute against the plaintiffs who do not appear to be impecunious; application allowed)

1. On the face of it, the application before me is a simple one, but it has been strongly opposed. It is an application filed by M/s Mutisya & Company Advocates who seek an order to come on record for the plaintiffs in place of the law firm of M/s B.W Kenzi & Company Advocates which firm has been on record for the plaintiffs until judgment was delivered. The application is premised upon the provisions of Order 9 Rule 9 which is drawn as follows :-

> *9. Change to be effected by order of court or consent of parties*
>
> *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 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.*

2. The outgoing advocate does not wish to have this application allowed and has opposed it through a replying affidavit.

3. To put matters into context, the plaintiffs commenced this suit via a plaint filed on 28 September 2015 through the law firm of M/s B.W Kenzi & Company Advocates. The suit was filed by three persons, Miriam Mbeke Nyamasyo, Stephen Muindi Mutisya and Dr Edward Mwaringa, as a representative suit on behalf of all the plot owners of Miritini Site & Service Scheme. The contention of the plaintiffs was that the 1st – 6th defendants had encroached into their plots in the Scheme and denied them their right to utilise their plots. The 7 th defendant is the County Government of Mombasa, the lessor of the plots in the Scheme. I heard the case and delivered judgment on 3 March 2021 in favour of the plaintiffs and ordered the defendants to give vacant possession of the suit properties and also pay the costs of the suit. I have seen that the 1st – 6th defendants, being aggrieved by the judgment, filed a notice of appeal on 11 March 2021 and promptly followed it up with an application dated 19 March 2021 seeking a stay of the judgment pending appeal. On 16 April 2021, the law firm of M/s Mutisya & Associates Advocates filed a Notice of Appointment of Advocates. That notice states that the plaintiffs have appointed the said firm to act for them together with the law firm of M/s B.W Kenzi & Company Advocates. I have seen that on 15 June 2021, the outgoing advocate filed a

party and party bill of costs in the sum of Kshs. 5, 802,780/= which is yet to be taxed.

4. The matter came up on 7 June 2021 for the inter partes hearing of the application for stay pending appeal, on which day Mr. Tindi was present for the applicants and Mr. Mutisya stated that he is representing the plaintiffs. I was uncomfortable with the Notice of Appointment of Advocate that Mr. Mutisya had filed, and I pointed him to the provisions of Order 9 Rule 9. I asked him to regularize the position and caused the case to be mentioned on 15 June 2021. On that day, Mr. Kenzi acknowledged being served with the Notice of Appointment of Advocate but challenged it as being irregular for want of compliance with Order 9 Rule 9. I directed that there be compliance with Order 9 Rule 9 and this application was then filed.

5. The application is supported by the affidavit of Stephen Muindi Mutisya, the 2nd plaintiff. He claimed that they had sat with Mr. Kenzi where his fee was agreed and that it has been fully paid. He annexed some receipts to that effect. He deposed that after judgment, they informed Mr. Kenzi that they intended to appoint M/s Mutisya & Company Advocates, and that he (Mr. Kenzi), raised no objection so long as he was paid the balance of his fees of Kshs. 50,000/=. He claims that the balance was paid and in fact over paid by Kshs. 10,000/= but when Mr. Mutisya Advocate forwarded a consent to Mr. Kenzi, so that he can come on record, Mr. Kenzi refused to sign it with no reasons at all. He avers that Mr. Kenzi has no basis to object to the change of counsel.

6. Mr. Kenzi filed a replying affidavit to oppose the motion. He deposed that the application is not brought in good faith as it has come after judgment. He contends that the applicants have not remunerated his firm in accordance with the Remuneration Order. He avers that he has acted for 129 allottees of the parcels of land in issue and that the plaintiffs had agreed that each allottee would pay Kshs. 20,000/= but so far barely Kshs. 120,000/= has been paid, which he claims is not even enough to cover his disbursements. He has deposed that he successfully represented the plaintiffs, and since they wish to now abandon his firm, then they should pay his fees first. He avers that he has done the bulk of the work and he is ready to handle the appeal and any interlocutory applications. He has pointed out that he has filed a Party & Party Bill of Costs which is awaiting taxation and if the court is to allow M/s Mutisya & Company to come on record, then it will essentially be denying him fees from the Party & Party Bill of Costs. He avers that the firm of M/s Mutisya & Company Advocates is only coming on record to receive the costs which is the mischief that Order 9 Rule 9 intended to cure.

7. Both Mr. Kenzi and Mr. Mutisya filed written submissions in respect of the application. In his submissions, Mr. Mutisya more or less argued that Mr. Kenzi's fees have been paid in full and he had no reason not to sign the consent allowing his firm to come on record for the plaintiffs. He submitted that Mr. Kenzi's objection is an outright breach of the plaintiffs' constitutional right to representation and the application should be allowed. He submitted that Mr. Kenzi can tax his Advocate/Client bill of costs and execute against his clients and he will suffer no prejudice. He submitted that there is no longer any cordial relationship between the parties and Mr. Kenzi cannot insist on acting for them.

8. On his part, Mr. Kenzi submitted that the reason he is opposing the application is because he is yet to be paid his fees. He acknowledged filing an Advocate/Client bill of costs which he insisted should first be taxed and paid before the change of counsel can be effected. He referred me to the case of *James Ndonyu Njogu vs Macharia* and dictum in the case of *Lalji Bhimji Shangani Builders & Contractors vs City Council of Nairobi (2012) eKLR.*

9. I have considered the matter. I have already set out the provisions of Order 9 Rule 9. In essence, if a litigant wishes to change counsel after judgment, he requires to procure the consent of the outgoing counsel, or have the change effected through an order of court upon filing an appropriate application. In this instance, the outgoing advocate has refused to give consent hence the application for an order of change of counsel, which application is still opposed by the outgoing counsel. In the case of *James Ndonyu Njogu vs Muriuki Macharia*, referred to me by Mr. Kenzi, the court cited with approval the dictum in the case of *S.K Tarwadi vs Veronica Muehlmann (2019) eKLR* where the judge stated as follows :-

> *"in my view, the essence of Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him."*

10. In the case of *Monica Moraa vs Kenindia Assurance Co. Ltd (2012) eKLR*, the court also had this to say :-

> *"The mischief order 9 of the Civil Procedure Rules intended to address was to protect advocates or firms of advocates being replaced without Notice and without their legal fees being settled."*

11. I agree with the above dictum. There before, we had no provision that is similar to Order 9 Rule 9, and a litigant could change counsel at any time, even after judgment, without the consent of the outgoing advocate and without any order of court. You would find a situation where an advocate has laboured with a case to its conclusion only for another advocate to come and harvest the fruits of the judgment that the advocate has procured for the litigant. This was especially chronic in money decrees. Most of the times the outgoing advocate would not even be aware of the change of counsel. He could be instructing an auctioneer to execute the judgment when in fact a new advocate has already collected the funds from the judgment debtor. The advocate who would have expected to hold the money decree as a lien for his fees would be left high and dry. The incoming advocate would simply say that he has already paid the client. The only option left to the outgoing advocate was to chase the client for his fees which was never an easy task. As was said in the case of *Monica Moraa v Kenindia Assurance (2012) eKLR* the mischief was to avoid an advocate being replaced without his notice and without settlement of his fees.

12. I agree with the principle that a litigant is entitled to representation of his choice. The litigant has a right to choice of counsel, which includes the right to appoint counsel in the first instance, and also the right to change that counsel. That said, the advocate also has a right to payment of his fees. What Order 9 Rule 9 tries to do is to balance the rights of the litigant and the rights of the advocate. Mr. Mutisya made the point that the advocate can as well tax his bill and execute the same against the client. This is a strong argument on the face of it. However, that right to tax the bill and execute against the client existed even before the regime of Order 9 Rule 9, and if we are to take that route, then it will be as if Order 9 Rule 9 was never enacted in the first place. In fact, it would mean that such application is merely filed as a formality and must be allowed as a matter of course. The requirement for an order of court before change of counsel must mean something

and must be given effect. There was a purpose to the provision of Order 9 Rule 9 and that purpose would be defeated if we are to say that an application for change of counsel must be allowed as a matter of course irrespective of any circumstances and the only path the advocate must take is tax his bill and execute against the client. I decline to rubberstamp the argument that the only remedy to counsel is to proceed and tax his fees then execute.

13. My view is that the court must assess the application and utilise its discretion in order to do justice to the parties and see to it that both the rights of the litigant and the rights of the advocate are adequately protected. Each case will certainly depend on its facts and peculiar circumstances. For example in a money decree, where the advocate has successfully procured judgment for a litigant, I do not see why the advocate should be told to go and tax his fees and execute, when the money can easily be made available through an appropriate order of the court, or a suitable undertaking by the incoming counsel, before the court can allow the change of advocate. The court can also consider factors such as the financial status of the client and can also question the motivation to change counsel, i.e whether it is a genuine change of counsel or whether the intention of the application is only to defeat the right of counsel to his fees. The court needs to consider whether it is possible in the circumstances to make orders safeguarding the interests of the outgoing advocate without necessarily prejudicing the right of the litigant to change counsel.

14. The case at hand does not involve a money decree. I have also considered the fact that the plaintiffs do not appear to be impecunious. The first plaintiff is a business woman, and I would presume that she is a person of means as she lives in Nyali, Mombasa, an upmarket estate. The 2nd plaintiff is employed by the Kenya Ports Authority. The 3rd plaintiff is a medical doctor. I do not think that the advocate would find it hard to procure his fees upon taxation. In the circumstances of this case, I do not find any prejudice which will be suffered by the advocate if there is a change of counsel even before any outstanding fees are settled, and without any conditions being imposed by court.

15. I will thus allow the application and make the order allowing the firm of M/s Mutisya & Company Advocates to come on record in place of M/s B.W Kenzi & Company Advocates. An appropriate notice of change of advocate be filed and be served before the incoming firm can be considered properly on record.

16. I make no orders as to costs.

17. Orders accordingly.

DATED AND DELIVERED THIS 16TH DAY OF FEBRUARY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA