



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 103 OF 2008

MANSUKHALAL JESANG MARU.....PLAINTIFF/RESPONDENT

VERSUS

FRANK WAFULADEFENDANT/APPLICANT

RULING

(On removal of advocate from acting jointly with another, and expunging documents filed by the Advocate)

The Application

1. The Defendant/Applicant filed a Notice of Motion on **1/10/2021**. It was dated **30/9/2021**. It was brought under **Section 1A, 1B, 3, 3A, 22 and 95 of the Civil Procedure Act, Order 9 Rule 5, Order 17 Rules 2 (3) and (4), Order 51 Rule 12 of the Civil Procedure Rules (2010) and Article 50 (4) and 159 (2) of the Constitution** and “all enabling provisions of law.”

2. The Applicant sought the following specific orders:

a) ...spent

b) ...spent

c) **AN ORDER that the Notice of Appointment of Advocates filed by the firm of Ms. R.E. Nyamu & Co. Advocates on 2/2/2016 without seeking leave of the Court as provided under the law as irregular, null and void and all orders emanating and/ensuing thereafter were a nullity and ought to be cancelled.**

d) **AN ORDER that the firm of Ms. R.E Nyamu & Co. Advocates is improperly and irregularly on the record and thereafter any counsel appearing on its behalf has no right of audience before Court and all documents filed by that firm of advocates ought to be expunged from the record.**

e) **THAT this Honourable Court be pleased to bring into effect the court made on 3rd day of February 2016**

f) **THAT this Honorable Court be pleased to issue directions on the defendant’s Counterclaim.**

g) **THAT costs of and incidental to this application be awarded to the applicant.**

3. The Application was premised on ten grounds enumerated on its face. It was supported by the affidavit of one **Frank Wafula** sworn on **30/9/2021** and a further one he swore on **18/11/2021**. The grounds were repeated in the affidavits hence I will analyze them simultaneously as with the Affidavits. The Application was opposed through the Affidavit sworn by one **Mansukhlal Jesang Maru** on **11/11/2021**. Below I summarize the contents of the documents.

The Supporting Affidavit

4. In the Supporting Affidavit, the applicant deponed that the Application ought to be heard on a priority basis for the reason that learned counsel, Mr. Nyamu, in purporting to act for the Plaintiff, drew and filed a replying affidavit on **8/7/2021** in violation of the Court order made on **9/2/2021** and the Applicant had reasonable apprehension that the advocate who was both improperly and irregularly on record was likely to take steps to draw and file written submissions in the pending Application dated **5/12/2019** and the present one to his disadvantage. Thus, according to him, this Court ought to first determine on the issue of the Plaintiff’s representation in order to forestall any prejudice the Applicant might suffer.

5. His contention was that the firm of Ms. R. E. Nyamu & Company Advocates came on record on **02/02/2016** without seeking leave of the court as required by the law and therefore learned counsel's participation in the proceedings was irregular, null and void and all orders emanating from and/ or ensuing thereafter were a nullity and ought to be cancelled.

6. He deponed about a case filed before the Chief Magistrate's court in Kitale, namely **CMC Case No. 334 of 2011**, in which the decision which dismissed the Plaintiff's case in the CMC Case was final and the Plaintiff had neither appealed against the said judgment nor filed new evidence to persuade the court to re-open the case. He also opined that the duty of the court was to administer justice expeditiously and justly also the plaintiff participated and /or was not prevented from participating in the proceedings and there was no miscarriage of justice on the plaintiff's part in that case.

7. He accused the Plaintiff of attempting to block the dismissal of his (the plaintiff's) case for want of prosecution then. He blamed the firm of Ms. R. E. Nyamu & Co. Advocates for drawing and filing an affidavit to explain the delay. He attacked the Notice of Appointment of Advocates filed by the said law firm, terming it as null and void for the reason that it was filed in court on **2/3/2016** when **Order 9 Rule 5** of the **Civil Procedure Rules 2010** were in force. He annexed a copy of the Notice of Appointment to his affidavit. According to him, the Notice of Appointment of the said law firm was new evidence which did not support the averments in the pleadings did not go into the any issue and thus ought to be disregarded.

8. After acknowledging that this court had unfettered discretion to extent time and grant the orders sought, he wondered why the plaintiff took eight (8) years to hire the said law firm to represent him in the proceedings which Ms. Kiarie & Co. Advocates were actively conducting. He stated that litigation had to come to an end. He prayed that this Court makes a declaration that the plaintiff's case automatically stood dismissed pursuant to a court order made on **3/2/2016**.

9. According to him, it is the plaintiff's advocates who were frustrating his case and preventing him from being accorded fair trial. He deponed that the advocates had been threatening him and his witnesses and that Mr. Nyamu Advocate had been rejecting service of the court process whenever he was served.

10. He acknowledged that there was a delay of two (2) years in bringing the instant application. His explanation was that he was acting in person and he blamed the Corona Pandemic on the delay and that it was not inordinate and inexcusable. His contention was that he would suffer irreparable loss if he was forced to continue participating in the proceedings without Court directions on issues of service of process and whether each firm would be entitled to full fees in the event of succeeding in the matter considering the need to safeguard access to justice.

11. In his contention, that the documents filed by the firm of Ms. R. E. Nyamu & Co. Advocates which included the title of **LR No. Kitale Municipality Block 12/26** ought to be expunged because, to him, they were not the Plaintiff's documents which and could not be filed without leave of the court.

12. He termed the parties in the suit and in the Notice of Appointment of Advocates as different that they are not one and the same person. His contention was that the Plaintiff could not hire a second law firm to represent him in the matter without amending his pleadings. To demonstrate how that was so, he indicated that even after the anomaly was drawn to the attention of Ms. R. E. Nyamu & Co. advocates, he did not make any amends. He repeated that he would suffer prejudice if all the documents were admitted in evidence because, some were privileged correspondences. He stated that all the orders contained the suit be annulled as they were obtained without due process of the court.

13. He accused the Plaintiff of not being candid in the case. He prayed that the orders made on **3/2/2016** be brought into effect for the reason that the plaintiff is litigating on a title which was forfeited; therefore could not rely on it. He annexed to it a copy of the forfeiture notice which was served upon the Plaintiff. It was dated **31/1/2011**. He also annexed a notice dated **20/12/2010**, given by the Chief Land Registrar. He was emphatic that he who comes to equity must not only come with clean hands but do equity. He finally deponed that the Plaintiff would not be prejudiced if the Application was allowed because the firm of Ms. Kiarie & Co. Advocates represented him as required by law.

The Applicants' Further Affidavit

14. The Applicant filed a further affidavit on **18/11/2021** in answer to the contents of the Respondent's Replying Affidavit filed on **11/11/2021**. In it he reiterated the contents of the supporting affidavit and added that the replying affidavit lacked substance, was misconceived, bad in law and an abuse of the court process and ought to be struck out. In response to paragraph 5, he stated that plaintiff lacked capacity to hire the firm of Ms. R. E. Nyamu & Co. Advocates to represent him and that he had not attached any letter to demonstrate that the firm of Ms. Kiarie & Co. Advocates was agreeable to the new development.

15. Further, he stated that the plaintiff had failed to file a remuneration agreement as required by **Section 5** of the **Advocates Act**. He pegged his argument on his belief that without the remuneration agreement, and in the unlikely event that the Plaintiff succeeded, the advocates would tax their bill of costs to his disadvantage. He insisted that the determination of representation of the Plaintiff was necessary at this stage because it met the threshold in **Constitutional Petition No. 25 of 2019** in the High Court of Kenya at Nakuru between **George Pariken Ole Narok and Another Versus the Cabinet Secretary, Ministry of Industry, Trade & Cooperatives and 2 others**.

16. He repeated that the firm of Ms. R. E. Nyamu & Co. Advocates had not complied with **Order 9 Rule 9** of the **Civil Procedure Rules** for failing to seek leave of the Court by filing a Notice of Appointment together with the Lower Courts' judgment. He annexed to the Affidavit and marked as **FW 1** a copy of the lower courts' judgment dated **11/12/2015**.

17. In response to paragraph 6 thereof, the respondent's Replying Affidavit, he deponed that the plaintiff did not tender any explanation why he hired the firm of Ms. R. E. Nyamu & Co. Advocates. He termed it an illegality. About paragraph 7, his response was that the plaintiff received wrong advice from an advocate who was improperly on record and further that if at all, the role of Ms. Nyamu Advocates was to

hold brief for the firm of Ms. Kiarie & Co. Advocates and not to draw documents on behalf of the Plaintiff. Further, he deponed that the Plaintiff hired the firm of Ms. R. E. Nyamu & Co. Advocates as an agent and therefore was in total violation of the law of agency as read together with **Rule 61** of the Law Society of Kenya Practice Directions and for that reason he faulted the firm of said law firm for having appeared on behalf of the plaintiff on several occasions to his disadvantage.

18. Relying on a ruling dated **28/9/2016** delivered by Hon. Obaga J. which he annexed and marked as **FW2**, he pointed out that the Plaintiff had filed a similar case to this one and the same was dismissed by the trial court and that to the best of his knowledge, this court should not entertain it. He prayed that this Court downs its tools and compels the firm of Ms. R. E. Nyamu & Co. Advocates to obey the court orders of **9/2/2021** as well as the rule of law.

19. He asked the court to grant him leave to make an oral application to summon the Plaintiff who swore the affidavit of **11/11/2021** to attend court for cross-examination on that affidavit particularly on paragraphs **2, 5, 6, 7,10, 13, 14, 19, 23,** and **29**. He rubbished the relationship between Ms. R. E. Nyamu & Co. Advocates and the Plaintiff as void or voidable for the reason that the plaintiff was already represented by another advocate who according to him, did not seek consent from for him to properly come on record for the plaintiff. (**At this point I indicate here that the issue of the request by the Applicant to recall the deponent for cross-examination was determined by this Court as a preliminary point in an earlier ruling hence it will not be addressed herein again**).

20. The Applicant summed it up by indicating that he would suffer substantial loss, hardship and great injustice in the event that the two lawyers taxed their bills of costs against him and that the application met the threshold in **Petition No. 137 of 2019** in the Employment and Labour Relations Court at Nairobi between **Mr. Rono Sitienei & 4 Others versus Pharmacy Poisons Board and 6 Others**.

The Response

21. The Application was opposed strongly. The Respondent filed a replying affidavit on **11/11/2021**. In it, his response was that the Application was devoid of merit for the reason that he instructed the firm of Ms. R. E. Nyamu & Co. Advocates to act alongside that of Ms. Kiarie & Co. Advocates. He stated that thereafter, the firm of Ms. R. E. Nyamu & Co. Advocates filed a Notice of Appointment of Advocates together with other documents on his behalf. He stated further that there was no need for the said law firm to seek leave of court to come on record because the matter was not yet concluded.

22. He pointed out that it was his desire to have more than one advocate to represent him in the suit thus he appointed the said law firm to work alongside that of Ms. Kiarie & Co. Advocates whom he had appointed earlier. He pointed further that on **3/2/2021**, he explained the delay in prosecuting the suit and it was spared dismissal. He then swore that all along he was keen to have the matter concluded in accordance with the directions of **3/2/2021**.

23. Referring to a ruling of this court delivered on **9/6/2021** he was particular that the trial judge found that the plaintiff had fully complied with the courts' directions of **3/2/2016**. He annexed to his Affidavit and marked as **MJM-1** a copy of the ruling. His contention was that the defendant had frustrated all his efforts to have the matter heard and determined by filing numerous applications since **2016** and that is why the case has not been concluded.

24. Referring to the Applicants' annexure **FW-5 (b)** which was a copy of Notice of Forfeiture dated **31/01/2011**, he stated that it was of no consequence in view of the fact that he did not respond to it and that the decision was made to await the outcome of this case. His further response was that he wrote to the land registrar Trans-Nzoia District on **8/2/2011** in relation to the suit land and the said officer indicated that there was nothing that could be done until this case was concluded. He annexed a copy of the letter and the response and marked it as **MJM 2** and **3** respectively.

25. He was categorical that there were no adverse orders that were made against the firm of Ms. R. E. Nyamu & Co. Advocates on **9/2/2021**. He insisted that there was absolutely nothing wrong in him appointing the said law firm together with that of Ms. Kiarie & Co. Advocates and there was no prejudice the Applicant would suffer if the said law firm acted together with that of Ms. Kiarie & Co. Advocates in representing him.

26. He was specific that it was on record that he complied with the orders of **3/2/2016** and that the matter proceeded to hearing and he even closed his case but the same was re-opened on an application by the Defendant now Applicant and the said defendant had not been ready to proceed with the main suit and had kept the hearing of the matter stagnated, through the filing of numerous applications as demonstrated by the ruling of this court delivered on **9/6/2021**. Further, he stated that the defendants' intention was to derail the process of hearing of this case.

27. In response to the claims that the issues raised in this case had already been determined, the respondent highlighted that to the best of his knowledge, **Kitale Chief Magistrates' Court Civil Suit No 334 of 2011** never determined the Plaintiffs' claim in this suit. According to him, that suit was struck out in view of the existence of the instant suit.

28. His further response was that there was no Covid Pandemic when the firm of Ms. R. E. Nyamu & Co. Advocates came on record on **2/2/2016** and there was no law limiting the number of advocates a party could engage for representation. He stated that **Order 9 Rule 5** of the **Civil Procedure Rules** did not support the applicant's application and the applicant greatly misconstrued the provision. He urged the court to bar the Applicant from filling further applications without its leave to pave way for the hearing of this case.

29. According to him, the orders sought in the Application did not serve the interest of justice and it was an abuse of the due process of the court. He urged the court to blame the applicant for the delay towards concluding this matter. Further, he deponed that there was no basis upon which directions would be taken on the defendant's counter claim when the defendant applied to re-open the plaintiff's case and yet to cross-examine **PW2** to allow the closing of the plaintiff's case.

30. Regarding his delay to respond to the application, the respondent indicated that he was not in the country when it was filed and served. He annexed copies of his passport and marked as **MJM 4,5** and **6** which showed his departure from and arrival in the country as **6/9/2021** and **7/11/2021** respectively. He urged that the application be dismissed with costs.

Submissions

31. This court directed that the application be heard by way of submissions. The parties filed their respective submissions.

Analysis, Issues and Determination

32. I have perused the Application, the Supporting Affidavit, the Replying Affidavit and the Submissions filed by the parties herein and the issues for determination are:

- a) *Whether the Plaintiff was legally right in instructing more than one legal counsel to represent him.*
- b) *Whether the firm of Ms. R.E. Nyamu & Co. Advocates came on record irregularly and are improperly on thereon.*
- c) *Whether the documents filed by the firm of Ms. R. E. Nyamu & Co Advocates should be expunged and all orders subsequent to 02/02/2016 should be set aside.*
- d) *Whether the Court should bring into effect orders made on 3/02/2016.*
- e) *Whether the Court should issue directions on the defendant's Counterclaim.*
- f) *Who to bear the costs of this application.*

33. I anxiously and deeply considered the issues set out above. I narrowed them to be only those ones because I needed to stay on course given the prayers in the Application before me. Otherwise, the Applicant seems to have gone on a frolic of heaping before the Court as many issues as he could, some of which were irrelevant to the Application, through his supporting Affidavits and submissions. As is observed from the summaries above, and will become clear below, the Applicant hang onto every reed by raising irrelevant issue after another in the Supporting Affidavit, as his baseless arguments sank. I will not reiterate them in this ruling.

a) Whether the Plaintiff was legally right in instructing more than one legal counsel to represent him

34. The Applicant argued that it was not lawful for the Plaintiff to instruct another Advocate to represent him or to act alongside another while he already had that other. He contended that to do so amounted to him being prejudiced because in the event of him losing the case, the lawyers may charge their fees twice as against him. He stated that there was no law that permitted more than one Advocate to represent a client in a case. He also wondered why the Plaintiff would take eight (8) years to instruct another lawyer to join in the representation. He then stated that by the said subsequent law firm coming on record it violated his right to fair trial.

35. The right to counsel is a constitutional unction in the **2010** Supreme law of Kenya. Of course, there are circumstances when an Advocate may be barred from appearing in a matter. But these are laid down in the law, particularly the **Advocates Act, Chapter 16** of the Laws of Kenya and the **Advocates (Practice) Rules 1966** as made pursuant to the Act, and the Law Society of Kenya **Code of Standards of Professional Practice and Ethical Conduct**, May **2017**, Gazette Notice **No. 5212**. A party has a right to choose an Advocate of his own Choice. That right extends to a case where the party decides to have legal representation through as many Advocates as he can afford or think as appropriate. The only caution he should have in mind is that the Advocates' legal fees in terms of party and party costs lie in the discretion of the taxing master who, when faced with a situation of a claim for fees for more than one Advocate there has to be a certificate of the judge to that effect.

36. Indeed, there is no bar to a party being represented by more than one lawyer/ Advocate. The two or more Advocates may be from the same law firm or even different ones. Section 59 of the Advocates Act imports this position. It provides that:

“(1) The costs of more than one advocate may be allowed on the basis hereinafter provided in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his hand that more than one advocate was reasonable and proper having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.

(2) A certificate may be granted under this rule in respect of two members or employees of the same firm.”

37. The important point to bear in mind is that from time to time cases that are complex and difficult would be brought before Courts. This may call for concerted efforts of Advocates. Parties cannot be limited as to the number of Advocates to employ in such circumstances. Much less through or due to the apprehension of the adverse party that they will incur more costs if they lose their cause. Actually, there may be situations where parties themselves by their conduct convolute and complicate matters before the Courts, for instance where they file application after another raising complex issues which could have as well been side-stepped so as to get to the issues in controversy. In such situations, the judge may be called upon to certify the payment of costs to more than one lawyer.

38. Courts have stated often that the right to legal representation even in civil cases should not be impeded. It is a constitutional right that is

implicit in the provisions therein. No one should forum-shop Advocates for the adverse party. The right to legal representation should not be unnecessarily hindered. In Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER it was stated,

“Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act.....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated.”

39. That may be seen as being more of foreign legal opinion than local. However, in the domestic realm, courts have considered similar situations and arrived at the same result. For instance, in Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR, Mumbi Ngugi J. as she then was stated as follows:-

“However, I believe that the right to legal representation by counsel of one’s choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2)(a) of the Constitution, and it is only in exceptional circumstances that this right should be taken away.”

40. The Court of Appeal in Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others observed as follows:

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.

41. I would conclude on this issue, even as the Court of Appeal espoused how valued the right to legal representation can generally be, that a party’s right to choose an advocate is his constitutional right. It may be limited. However, even where that is the case, it has to be within the law and in the same manner as other constitutional rights and freedoms which are not absolute are limited. Absent of that, the right should be left untouched. The Applicant in this case purports to diminish the Plaintiff’s exercise of his right to have more than one Advocate to represent him in this matter. That cannot be permitted. The Applicant has not brought himself within the provisions, namely, **Article 24(1)** of the **2010 Constitution** on limitation of rights. His contention must fail.

b) Whether the firm of Ms. R.E. Nyamu & Co. Advocates came on record irregularly and are improperly on thereon

42. The Applicant raised the issue that the firm of Ms. R. E. Nyamu & Co. Advocates came on record irregularly by filing a Notice of Appointment of Advocates without seeking leave of the court as required by the law. He therefore prayed for an order declaring that action irregular, null and void and all orders emanating from that or ensuing thereafter a nullity and ought to be cancelled. In essence, the Applicant wished the Court to find that where the said law had participated in the proceedings or taken part in anything in this matter was null and void. I wish to put it clear that my understanding of the mind and prayer of the Applicant is that the prayer is not directed to any acts or participation and proceedings relating to steps taken by the law firm of Ms. Kiarie & Co. Advocates. In any event, to affect those actions or steps also would amount to depriving the Plaintiff the right to counsel, as I will explain elsewhere in this ruling, yet the Applicant did not challenge that law firm’s presence in this suit.

43. In regard to this contention the Applicant submitted that the law firm of Ms. R. E. Nyamu & Co. Advocates should have sought leave of the Court as provided for in **Order 9 Rule 5** and **6** of the **Civil Procedure Rules**. He annexed to his Affidavit a copy of the Notice of Appointment of Advocates filed on **02/02/2016** (although in Paragraph **10** he stated that it was filed on **03/02/2016**). He then stated at paragraph **11** that the Notice was new evidence led by the Plaintiff but which did not support the pleadings. In his submissions filed on **29/12/2021** the Applicant submitted that the provisions breached were **Order 111 Rules 1** and **8**, and **7(1)**. He then submitted that the firm of Ms. R. E. Nyamu & Co. Advocates ought to have a consent from the firm of Ms. Kiarie & Co. Advocates before coming on record.

44. At the same time he submitted that the said law firm could not come on record properly without amending pleadings and that that could not be possible without leave of the Court. In my view, nothing can be further than the truth. All the subsequent Advocates needed to do was to file a document to show that they had been appointed to act in the suit. Since an Appearance had been entered and defence filed by the initial Advocates it means that the subsequent law firm could only signify to the Court through a Notice of Appointment of Advocates (to act alongside) that it had been appointed. I perused the court file: that is what was done by the firm of Ms. R. E. Nyamu & Co. Advocates.

45. I reproduce the provisions under reference here below if necessary and then compare them with the facts about the record as was by the time the Notice of Appointment of Advocates was filed. But before I do so, I point out that I have never in my legal career come across the provisions **Order 111 Rules 1** and **8** or even **7(1)** in the laws of Kenya or elsewhere. Therefore, I am not sure which law the Applicant referred to. However, my reading of the law and the submissions he made makes me think, and rightly so, that the Applicant may have been referring to **Rule 6(1)** of **The Advocates (Practice) Rules 1966** as contained in the **Advocates Act, Chapter 16** of the **Laws of Kenya [2012]**.

46. **Order 9 Rule 5** provides for situations where a party wishes to change Advocates. In such a case, the change is not complete unless and until the Notice is filed and served on all parties. In this matter, the Plaintiff did not change his Advocates whom he had instructed earlier: he only appointed another law firm to act alongside the initial firm. Thus, the Rule does not apply here. The Applicant must have known that his contention on this was leading him nowhere and beat a hasty retreat while seeking shelter in the provision that I refer to below.

47. **Rule 6 (1)** of **The Advocates (Practice) Rules 1996** provides as follows: “An advocate may act for a client in a matter in which he knows or has reason to believe that another advocate is then acting for that client only with the consent of that other advocate.” I will not dwell much on the import of **Rule 7(1)** which the Applicant referred to, suffice it to say that the said Rule is about an Advocate consulting, instructing or briefing another in a matter he has been instructed by his client to Act. It does not envisage a situation

where a client instructed more than one Advocate to Act for him.

48. The relevant Rule (6(1)) refers to a situation where two or more Advocates can be on record for the same client. In such a case, the law (practice) requires that the Advocates already on record gives the new or subsequent Advocate consent to act. In my humble view, the Rule was enacted to prevent situations where Advocates ‘gate crash’ in other Advocate’s cases without instructions. Instructions obtained from clients. The Rule presupposes that by the time the subsequent Advocate is instructed, the initial Advocate must have been briefed by his client that there is need, in his view, of more legal mind assistance. And there is no legal bar to a party appointing even a million lawyers to represent him depending on his view if his case, and as long as he is able to pay them their fees.

49. The Rule is silent on how and the form of the consent is given. Nowhere does the rule require that a written consent be filed to evidence that. In such a case, it then is left to the parties to instruct Advocates to come on record to represent them, without necessarily filing a document to evidence that the Advocate already on record has given consent.

50. As long as the Advocate initially on record has neither protested nor raised any objections to the subsequent Advocates joining them in the matter, it is implied that consent is already granted. The adverse party has no business or reason whatsoever to micromanage the Advocates of the other parties. In any event, there are many ways of giving consent. The way I understand it is that the relationship between an Advocate and Client is contractual in nature. That being so, there are various ways in which contractual relationships can be created. It may be done expressly or impliedly. It may be in writing or oral. In the case if Advocate-Client relationship, in my humble view, it is up to them to decide how they immortalize their relationship. Once that is done and the two Advocates agree, whether orally or in writing, it does not prejudice the adverse party. The adverse party would do well to take care of ‘his house’ and not that of the opposite party. How they sweep theirs should be none of his worries.

51. In this case, the Plaintiff has expressly sworn An Affidavit on **11/11/2021** that he instructed the firm of Ms. R.E. Nyamu & Co. Advocates to act for him alongside the firm of Ms. Kiarie and Co. Advocates. Neither law firms have raised an objection to the other being on record. More specifically, the firm of Kiarie & Co. Advocates did not raise any objection whatsoever to the firm of Ms. R. E. Nyamu & Co. Advocates coming on record. If anything, learned counsel, Mr. Kiarie, who appeared in Court on **03/02/2016** indicated to the Court that he relied on the Affidavit sworn and filed by the mutual client of the two law firms through the law firm of Ms. R. E. Nyamu & Co. Advocates on **02/02/2016**. That means that the said law firm was happy and welcomed the subsequent law firm. The Applicant ought to have been wise enough and intelligent to deduce and see that such an action by learned counsel clearly manifested acceptance and consent by the law firm of Ms. Kiarie and Company Advocates. It does not require rocket science to come to that conclusion.

52. Again, this Court is of the view that **Article 159(2) (d)** of the Constitution of Kenya, **2010** was entrenched in our legal system to take care of such technicalities as the filing of a written consent by a law firm to evidence that it is in agreement with another acting, while that first law firm is not objecting to the subsequent one. The Court should always be inclined to do substantive justice to all parties without regarding technicalities where there is no express prohibition or bar of the step being taken.

c) Whether the documents filed by the firm of Ms. R. E. Nyamu & Co Advocates should be expunged and all orders subsequent thereto should be set aside

53. As to whether the Plaintiff’s documents filed through the firm of Ms. R. E. Nyamu and Co. Advocates should be expunged from the record and the orders made subsequent thereto should be set aside, the starting point of focus is when the firm of said law firm is said to have come on record. That was on **02/02/2016**. And it is my humble considered view that the twin prayers on this issue depend on the outcome of the first two issues I have addressed above. I have found that the Plaintiff had every right to instruct another Advocate to act for him alongside the initial Advocate. I have also found that the said firm of Advocates did not come on record irregularly. Then, it goes without saying that any documents the said law firm filed was properly so brought onto the record and cannot be expunged. It also means that any orders made pursuant to the documents filed by the said firm were properly made and should not be set aside unless through the proper legal channels of setting aside, for instance, by appeal or review.

54. I hasten to add that the prayer for expunging the documents by the said law firm and setting aside of the subsequent decisions made after the said law firm came on record is an ingenious and subtle design by the Applicant to indirectly review the orders of the learned trial judge as made on **03/02/2016**. No wonder he repeats the prayer that the suit should stand dismissed for want of prosecution. The Court is able to see further than the Applicant.

d) Whether the Court should bring into effect orders made on 3/02/2016

55. The next issue was whether or not the Orders made on **03/02/2016** should be effected. To understand and consider the nature of this prayer, this Court has to reproduce the orders made on the material date. The record of that date shows that the suit had been listed for Notice to show cause why it should not be dismissed for want of prosecution. That notice was issued on **22/01/2016** and served on both the counsel for the Plaintiff and the Defendant. By that time the Defendant/Applicant was represented by the firm of Ms. Chepkwony & Co. Advocates. The record shows further that learned counsel, Mr. Kiarie, for the Plaintiff attended court and showed cause by stating that he had filed an Affidavit which explained why there was a delay in prosecuting the matter.

56. At the end of the proceedings the learned Judge made the following finding and order:

“I am satisfied with the explanation given by the Plaintiff for the delay. The Application dated 12/2/2009 is hereby withdrawn with costs to the Defendant. Plaintiff to ensure that this case is fixed for hearing within 30 days from the date hereof. If this order is not complied with the case will be automatically stand dismissed.”

57. It is the order reproduced above that the Applicant wished this Court to bring into effect. The Court would not hesitate to do so if it was not complied with. In order to do so, the Court had to perused the record subsequent to the order. The record shows that on **26/02/2016**

learned counsel Mr. Nyamu attended in the Registry, in absence of the Defendant and listed the suit for hearing on **09/06/2016**, with a rider that a hearing notice does issue. It appears that on **09/06/2016** the Court did not sit. Therefore, a clerk by name one Simiyu attended the Registry and fixed the suit for hearing on **27/10/2016**.

58. My understanding of the Order was that the default clause required that the suit be fixed for hearing within thirty (**30**) days failure of which it would stand dismissed. The record reproduced is clear that the suit was fixed for hearing within twenty-three (**23**) days. It is beyond doubt that the order made on **03/02/2016** was complied with and there is nothing left for this Court to give effect about it.

e) Whether the Court should issue directions on the defendant's Counterclaim

59. This Court was moved by the Applicant to give directions on his Counterclaim. The record shows that on **07/06/2016**, the Applicant filed an Application dated **02/06/2016**. The Application was heard and determined by being granted on **28/09/2016** to the effect that the Defendant does amend and serve his defence and as prayed, within **14 days** of the order. The record shows that he filed his Amended Defence and Counterclaim on **11/10/2016** and served it on **18/10/2016**. Subsequent to that there was a Reply to Defence and Defence to Counterclaim filed. Although from that record it shows that the Applicant filed the documents within **14 days**, he failed to serve within the said period. There is no evidence that he sought extension of time to do so. However, since the Plaintiff filed a response to the Defence and Counterclaim without any complaint and the suit proceeded to hearing, in my opinion the failure to serve the document in time is neither here nor there at this stage. It, together with any other subsequent defaults both parties may have made, are technicalities the Court is prepared to ignore in the interest of doing substantive justice by proceeding with the hearing of the case. Perhaps these are the directions the Applicant wished the Court to give. He did not submit on that prayer.

60. The Applicant may have the filing of the documents as demonstrated by the record acquired the intellect of devising ways of filing many applications but the suit proceeded to hearing up to the stage it is despite the said numerous Applications he has been making since then. This far, I see nothing to give directions on regarding the issue before me as it arose from prayer number (**f**) of the Application dated **30/09/2021**.

f) Who to bear the costs of this application

61. I have come to the conclusion that the Application herein is baseless and an abuse of the process of the Court. It has no merits whatsoever. I therefore dismiss it with costs to the Respondent.

62. In order to monitor the progress of this suit, this Court directs that it be mentioned on **23/3/2022** in open court to fix a date for further hearing.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 10TH DAY OF MARCH, 2022.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE