



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 2843 OF 1996

EUNICE WANGUI MUTURI.....PLAINTIFF/RESPONDENT

-VERSUS-

FRANCIS KAMANDE..... DEFENDANT/APPLICANT

RULING

1. The Preliminary Objection is rather prolix but at the hearing of the same the Plaintiff raised two basic points. The Plaintiff stated that the Application dated 27th October, 2014 was filed without this court's permission as the Applicant's Counsel Mr. Onyancha came on record after the court had entered judgment. The Plaintiff further submitted that pursuant to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, the change of advocacy for the Defendant from Wanjao & Wanjau Advocates to J. M Onyancha & Associates Advocates, could only be effected through an order of the court. A court order to approve such a change, however had not been effected or granted and consequently, in the Plaintiff's submission the application filed by the Defendant on 28th October, 2014 was a nullity for being an abuse of the court's process. The Plaintiff also submitted that even if the court's permission was not required, the fact that the new advocate had not filed and served a Notice of change of Advocates pursuant to the provisions of Order 9 Rules 5 & 6 meant too that any action undertaken by the current counsel for the Defendant was a nullity, once again for abuse of the process of the court.

2. Secondly, the Plaintiff raised the objection that the application as filed is bad in law as any prayers for review of the order of 22nd July, 2014 and for reinstatement of the application dated 13th March, 1997 can only be dealt with after the applicants Florence Njoki Kamande and Hellen Wanjiku Muchimi have been joined to the proceedings in substitution of the deceased defendant. In short, the Plaintiff says that the joinder of prayers is wanting and fatal.

3. The Defendant's Counsel opposed the Preliminary Objection. Terming it as unmeritorious, the Defendant's Counsel submitted that there is no judgment entered or passed in this case to bring into play the provisions of Order 9 Rule 9. As regards the filing and service of a notice of change of advocates under Order 9 Rule 5, Counsel for the Defendant conceded that the same was filed late but that such late filing had since regularized the situation.

4. The court notes that the Notice of Change of advocates was only filed on 10th November, 2014 just before the Preliminary Objection was urged. One cannot help but infer that it is the Preliminary Objection which prompted the filing of the Notice of Change of Advocates.

5. There is controversy as to whether judgment had been passed in this matter. I have read through the court file carefully and I found no minute by the court, judge or Deputy Registrar passing judgment in favour of or against any party. The only record of finality is a dismissal of an application for want of prosecution. Such orders were made on 17th July, 2014 by Hon. Lady Justice Ougo. The provisions of Order 9 Rule 9 therefore cannot be invoked in the circumstances.

6. With regard to the filing of a notice of change of advocates, the Defendant freely admits that this was done late. It was done after the fact. I hold the following view. Both the common law and now our Constitution guarantee a party the right to representation by an advocate of his choice. This is through the right to a fair administrative action as well as the right to a fair hearing. A party may therefore retain an advocate today and with reason relieve the advocate of the retainer the next day. For purposes of good order and better management of the retainer the newly attorned advocate is however expected not only to inform the relieved advocate but also the court and any other party to the proceedings. The court as well as the other parties must be made aware of who is in control of the case on behalf of the parties. It is for that reason that the filing and service of a Notice of Change of Advocates or Notice to act in person or Notice of Appointment of Advocates is provided for.

7. Upto 10th November, 2014 the Advocates whose names appeared on the record as acting for the Defendant were Wanjao & Wanjau Advocates. The firm of J. M. Onyancha & Associates Advocates was apparently attorned on 27th October, 2014. This can be gathered from the certificate of urgency filed in support of the Notice of Motion dated 27th October, 2014. The firm of Wanjao and Wanjau Advocates had apparently been debriefed due to what the Applicant call negligence if one liberally reads paragraph 13 of the Affidavit in support of the application. It has however been freely admitted that the Notice of Change of Advocate was not filed on time and I so find. The question then is what is the effect? The effect of late or non-filing of a Notice of Change is provided under the proviso to Order 9 Rule 5 which reads as follows:

“... but unless and until the notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former Advocate shall subject to Rule 12 and 13 be considered the advocate of the party until the final conclusion of the case or matter including any review or appeal”.

8. The rule is not explicit on the effect of documents and court process filed in the absence of Notice of Change of Advocate. In my view, as the filing of a notice of Change is simply to notify the other parties as well as the court who then becomes in charge of a party's case it is a technicality which our rules expect parties to observe. Non-observance may lead to consequences including striking out of proceedings and pleading. The court must however always balance both the scales of justice as well as the scales of prejudice. The inherent powers of the court under Sections 1A and 1B of the Civil Procedure Act as read together with Article 159 of the Constitution would dictate that the court so proceeds. The circumstances of each case must be individually or singularly considered.

9. In the instant case the Notice of Motion filed by the applicant's Counsel was not misleading in any way. The Plaintiff's Counsel became aware that there was now a new advocate apparently acting for certain Applicants who wanted to be enjoined in the proceedings in place of the deceased Defendant. What was missing was a Notice of Appointment of Advocates rather than a notice to change of advocates. It is not possible that the deceased Defendant could have instructed a new firm of advocates. The instructions came from the two applicants who were not party to the proceedings as yet. They had also not acted in person. I am disposed to agree with the Applicants that as no clear prejudice has been occasioned to the Plaintiff, it would not be in the line of justice for me to exercise judicial authority with extreme regard to a technicality or lapse thereof and lock out the Applicants.

10. I would not in the circumstances strike out the Notice of motion for having been filed without a notice of change of advocates on record. I would by the same vein however order for the removal of the Notice of change of advocate filed on 10th November, 2014 from the court's record for simple reason that the Defendant is deceased and could possibly not be instructing any advocate. The advocate for the Applicant

should instead have filed a notice of appointment of advocate. There could have been hardship in determining who to deal with but the mere hardship is not enough to justify a striking out of the motion. The failure to file a Notice of Appointment on time or the erroneous filing of a Notice of change of Advocates was a mere irregularity which should be ignored subject only to the same being regularized. Once regularized no further action ought ordinarily to be taken along the lines of striking out: see **Instrumatic Ltd –vs- Superbase Ltd [1969]2 All ER 131, per Lord Denning at page 133.**

11. The second point of the preliminary objection is whether the joinder of prayers is bad in law. The Applicants have sought a recall of the Notice of Motion dated 31st March, 1997 which was dismissed on 17th June, 2014 for want of prosecution. In the same notice of motion the Applicants have also sought to be enjoined to these proceedings. I see nothing wrong in joining prayers on the notice of motion unless once against a party is likely to be prejudiced by such a joinder or where the prayers sought are completely exclusive of one another. The objection raised by the Plaintiff is more of a technicality that one grounded on any law. In the instant application there is no good reason advanced why the prayers should not be tried and determined together. The first prayer is for substitution and could certainly be dealt with together with the second prayer as to the recall of the dismissed application. There is in my view, no ground for severance of the prayers. The better course is to let the whole application to be tried and determined as a whole. The court may then refuse the substitution in which case the other prayers would also collapse or the court may then allow the application at once.

12. I would, in epilogue, decline the preliminary objection and dismiss the same but with no order as to costs as the conduct of the Applicant’s Counsel though brisk was injudicious on two occasions.

13. The Applicant will file the appropriate Notice of Appointment of Advocates within the next seven (7) days before listing the application dated 27th October, 2014 for hearing.

Orders accordingly.

Dated, signed and delivered at Nairobi this 18th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent