



REPUBLIC OF KENYA

High Court at Meru

Civil Case 72 of 1995

SAMSON OKUN ORINDA PLAINTIFF

VERSUS

AYUB MUTHEE M'IGWETA & 2 OTHERS..... DEFENDANT

RULING

The firm of M/S Muthomi & Co. Advocates through a Notice of Motion dated 23rd October, 2002 filed on the same day pursuant to Section 3A of the Civil Procedure Act, Order 9 Rule 9(a), and Order 51 Rule 1 of the Civil Procedure Rules sought the following Orders:-

1. That we have been served with an application for Change of Advocate by a firm of advocates by the name Muthomi & Co. Advocate who describes themselves as ***“Advocates for the defendants.”***
2. ***That curiously, the learned Counsels seems to have already usurped their “appointments already” since no court has allowed them to act for the defendants. This is contrary to Order Rule 9. The application is therefore defective and incompetent. It is only a party who can file such an application.***
3. ***That the counsel wants to enter into HCCC NO. 72 of 1995. This case is completed and final judgment given. What is remaining is the Appeal No. 356 of 2009 which is not finalized. It is therefore questionable to ask what the counsel seeks to do for the parties engaging him to enter a case which is finalized and not seeking to enter the case which is still current?***

The application is based on grounds on the face of the application. The application is further supported by annexed affidavit deponed upon by Japhet Murithi M'Igweta on his behalf and that of his co-defendants applicants.

That before the application was heard the firm of M/S M. M. Kioga & Co. Advocates filed a preliminary objection dated on 24th November, 2012 on the ground that the applicant's counsel had filed notice of change of advocates replacing the firm of M/S M. M. Kioga & Co. Advocates without Court's leave contrary to the provision of Order 9 Rule 9(a) of the Civil Procedure Rules. The respondent contended the application before court is therefore defective and incompetent. The counsel further contended application for change of Advocate can only be filed by the party who seeks to change an Advocate, himself and not through an Advocate. The respondent further contended as this suit has been determined and final judgment entered it is therefore questionable to ask what the counsel for the applicants seek to do for the parties. He contended also there is pending appeal at the Court of Appeal. He further argued that the application is contrary to Order 51 Rule 4 of Civil Procedure Rules as it is not supported by any reasonable grounds. The respondent further contended that he wished to have guarantee that their unpaid

professional fees would be paid before any new Counsel is allowed to enter into this suit. The respondent further argued that he would be prejudiced if the incoming counsel should enter into this matter and change the course of events before the counsel on record is fully remunerated.

When the matter came up for hearing of the preliminary objection Mr. M.M. Kioga, Advocate appeared for the respondent and Mr. Muthomi, Advocate appeared for the applicant. This court heard oral submissions by both counsel. The court also has considered the authorities by the counsel in support of their respective opposing positions.

The issue for determination in this preliminary point of law is whether the application before the court is defective and incompetent and whether the same should be struck out.

The applicant's application dated 23rd October, 2012 was filed and to which application the applicant annexed annexure "JMMI" being Notice of Change of Advocate which the applicant's sought incase application is allowed to be deemed as duly filed and served. The applicants did not as contended by respondent; file any notice of change of advocates. The applicants are yet to file notice of change of Advocate's.

I therefore do not find any basis of the respondent's assertion that the firm of M/s Muthomi & Co. Advocates have come on record and replaced him.

Under Order 9 Rule 9(a) and (b) of the Civil Procedure Rules it is provided:-

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 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.

It is therefore clearly provided under the aforesaid Order when a change of Advocate is desirable for party to either be represented by another advocate or to act in person after judgment has been passed, such as in the instant case, such change of an Advocate or intention to act in person shall only be effected only with an order of court upon an application with Notice to all parties or 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. I have gone through Order 9 Rule 9 of the Civil Procedure Rules and nowhere does it indicate that an application for change of Advocates can only be filed by the party himself and not by his intended Advocates.

Under Order 9 Rule 1 it is recognized that an application or appearance can be made by party's recognized agent save where it is expressly provided by law be made by the party in person. Order 9 Rule 1 of Civil Procedure Rules provides:-

1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

I therefore find and hold the application before this court was properly drawn and filed by the firm of M/S Muthomi & Co. Advocates after the firm of M/S Muthomi & Co. Advocates after they had been duly instructed by the applicants as per paragraph 6 and 7 of the affidavit by 3rd applicant dated 23rd October, 2012.

The law further requires that after judgment has been passed a change of Advocates can be effected upon an application and with an order of the court. The provision referred to by the respondent do not bar a party from changing his Advocate simply because the case had been completed and final judgment entered. The provision allows change after judgment. Further under Article 50(2) (g) of the Constitution of Kenya,2010 any party to a suit has a right to choose and be represented by an Advocate of his choice. 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 file Advocate/client bill of costs for taxation on his 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 mechanism 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 any change of advocate should not be allowed as he would be greatly prejudiced if an incoming Advocate is allowed to come on record.

There is no prejudice if a party who seeks to change an advocate has his *application allowed*. *There is prejudice on the other hand to the party who has to change his advocate if the change of Advocate is denied*. Consequently any party who is not satisfied with his change of his advocate at any provided appropriate application for change of Advocates is filed as per Order 9 Rule 9 of Civil Procedure Rules.

On the issue that the application offends the provision of Order 51 Rule 4 which provides as follows:-

4. Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.

In the instant application the applicant gave grounds for seeking change of Advocate as follows:-

“the defendants wish to engage the firm of Muthomi & Co. Advocates to take over the conduct of this matter on their behalf.”

The applicants did put the ground on which they sought the prayers in their application. I therefore do find that the applicants have complied with Order 51 Rule 4 of Civil Procedure Rules.

Further had I found that the applicants had not complied with the said Order. I would not have struck the application as Order 51 Rule 10 (2) of Civil Procedure Rules provides:-

“10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

Further Article 159(2) (d) of the Constitution would have come to the aid of the applicants’ application as it provides:-

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

- (a).....
- (b).....
- (c).....

(d) Justice shall be administered without undue regard to procedural technicalities; and.....”

The upshot of the matter is that I find no merits in the preliminary objection. The same is rejected and the applicants application dated 23rd October, 2012 is granted as follows:-

1. *The firm of M/S Muthomi & Co. Advocates is granted leave to come on record as advocates for the defendants/applicants in place of M/S M. M. Kioga & Co. Advocates.*
2. *That the Notice of change of Advocates annexed be deemed as duly filed and served upon payment of the prescribed court fees.*
3. *That the applicants get costs of the application.*

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF FEBRUARY, 2013.

**J. A. MAKAU
JUDGE**

Delivered in open court in the presence of:

1. *Mr. M. M. Kioga for the respondents (absent)*
2. *Mr. Muthomi for the applicants (absent)*

**J. A. MAKAU
JUDGE**