

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI Civil Suit 86 of 2009

ALI BAKARI MOHAMEDPLAINTIFF VERSUS

SONGHAI INVESTMENTS LTD

FABIO MARELLIDEFENDANTS

RULING

The Notice of Motion application dated 16-02-10 is made under Order LIII Rule 9A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks that the court allows the firm of Fadhil and Kilonzo Advocate to come on record for the plaintiff in place of the firm of M/s Maranga Maosa & Associates Advocates. It is based on grounds that:

- (1) There is judgment and decree on record.
- (2) The advocate-client relationship between the applicant/plaintiff and the former advocates, and the fiduciary and confidence of an advocate-client basis has completely broken down.
- (3) The former advocates have been fully paid by the plaintiff all the agreed fees for disbursement and representation. (4) No prejudice will be caused to the former advocates.

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- (5) There are objection proceedings in this matter which have to be taken urgently but which the former advocates have not taken because of the breakdown in the relationship.

The affidavit in support of the application is sworn by the plaintiff/applicant, in which he depones that he paid to his previous advocate sum of Kshs. 250,000/- as fees at the commencement of the matter although to date he has not been issued with an official receipt for the payment. The firm of Maranga Maosa acted for him in the matter where judgment was entered in his favour. He has written several reminders to the former advocate's firm asking for the receipts but to no avail.

After judgment the firm of Maranga Maosa advertised the defendant's property for sale and the highest bidder was Paradise Acres Ltd. However the firm of Maranga Maosa then advised applicant that the bid was invalid as the property had already been sold to Messy Investment Co. Ltd which never bid at the auction and Kinyua Auctioneers were served with objection proceedings instituted by Messy Investments and marked MB(a). As a result applicant has completely lost faith in the firm of Maranga Maosa Advocate and no longer wish to be represented by that firm – hence the present application. In a replying affidavit sworn by Maranga Maosa Advocate, he confirms that he represented the applicant in the matter to its conclusion on 30-09-2009. That applicant is not being candid regarding the auction as the bidder failed to deposit the 25% required having got wind of objection proceedings (a copy of a letter dated 30-12-09 from the auctioneer is annexed MM1). Secondly at the material time, there were orders issued by Hon. Justice Ojwang in Msa HCCC 136 of 2008 restricting any dealings in the Title (a copy of the order is marked MM2, and that is when the advocate wrote to the auctioneers with a copy to the applicant. Soon thereafter, plaintiff/applicant wrote to the advocate saying he had withdrawn instructions with immediate effect. He denies ever receiving instructions from applicant to contest the objection proceedings and says he is likely to be prejudiced if the application is allowed without his fees and auctioneer fees of Kshs. 414,428/- first being settled. It is stated that subject to applicant paying the advocate fees plus auctioneers fees, he has no objection to the application.

Whatever the true position is regarding the aborted auction, the fact of the matter is that there is no more trust by the client and the issue of representation can no longer go on because applicant does not wish to retain the services of Maranga Maosa any more. Legal representation operates largely on the element of trust and once that trust is eroded or questioned – justifiably or otherwise – then it becomes very difficult to carry on and one cannot force the relationship to go on. I think that Mr. Maosa recognizes this and that is why he is not categorically contesting withdrawal of instructions – only that he places a condition that it be pegged to his fees and that of the auctioneers being paid.

Of course other issues may arise as to what was the agreed fees, what were the terms and conditions of engagement and is this the proper form to address the issue of contested fees? Mr. Kilonzo for the applicant argues that payment of advocate fees should not be used to bar a litigant from changing advocates and if there is disagreement on fees, then the advocate can file a bill of costs for taxation. However Mr. Momanyi for the respondent submits that this is a classic example of the kind of mischief the legislature sought to cure by the enactment of Order III Rule 9A. Should the issue of unpaid fees take away the litigant's right to legal representation? Whereas the rationale for the provision of Order III Rule 9A is not stated, I don't think Mr. Momanyi is completely off the mark that the rule was to control litigants from advocate hopping? But it was also to control mischievous hijacking of a matter by an advocate who may not have had instructions in the matter – but it's not a reason to disallow a litigant from "dropping" off his counsel. The issue of fees and payment thereof can best be canvassed at the hearing of a taxation which is what Mr. Maranga Maosa ought to pursue. I therefore allow the change as sought and order that the firm of Fadhil Kilonzo do take over representation of the applicant. The costs of this application shall be borne by the applicant. Delivered and dated this 22nd day of April 2010 at Malindi.

H. A. Omondi

JUDGE