



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 47 of 2004

MAISHA FLOUR MILLS LTD PLAINTIFF

VERSUS

CHARLES MURIUKI GITHINJI)

T/A STAREHE WHOLESALERS) RESPONDENT

R U L I N G

On 4th March 2008, **Charles Muriuki Githinji T/A Starehe Wholesalers**, “the applicant” filed an application against **Maisha Flour Mills Ltd**, “the respondent” seeking amongst other orders that the judgment dated 11th July 2007 entered after hearing exparte be set aside and the suit do proceed to hearing interparties. The application was expressed to be brought under Order 1XB rule 8 of the Civil Procedure Rules. The application was predicated upon the grounds set out on the face of the application as well as supporting affidavit sworn by the applicant dated 18th February 2008.

Upon being served with the application the respondent reacted by filing a replying affidavit dated 30th April 2008. In paragraph 3 of the said replying affidavit, counsel for the respondent deponed from the outset, that the application was fatally defective for having being filed by an advocate who was not properly on record in that the Notice of his appointment dated 4th October 2007 was filed in court on 4/10/2007 well before leave was granted to him to come on record.

When the application came up for hearing, **Mr. Karweru**, learned counsel for the respondent raised the issue captured above as a preliminary point. He went on to submit that by a Notice of Motion dated 25th July 2007 the applicant herein applied to court under order III rule 9 of the Civil Procedure Rules seeking to be allowed to change Advocates. Pending the hearing and determination of the said application **H.K. Ndirangu** Advocate filed Notice of appointment of Advocates on 4th October 2007. The application was however not heard and determined until 29th January 2008. To counsel, it is at that point that any other Advocate other than **Gacheche wa Miano**, Esq, hitherto on record for the applicant could properly come on record. On that basis it was the contention of learned counsel for the respondent that the application was thus incompetent having been filed by a stranger to the proceedings. Counsel therefore prayed that the same be struck out.

In response, **Mr. Ndirangu**, learned counsel for the applicant submitted that the applicant filed the application dated 25th July 2007 in person. After filing it, the applicant appointed him to act for him. It was the contention of the learned counsel that notwithstanding that application, a party could act with one or more advocates in a matter. That order III rule 9 of the Civil Procedure Rules contemplates a situation

were judgment had been entered and a party either wants to act in person or changes advocates. It does not prevent a party from appointing an advocate after judgment has been entered. What he cannot do is to remove an advocate handling a matter after judgment without giving him Notice and without leave of court. He finally submitted that his appointment on 4th October 2007 did not in anyway derogate from the law as stipulated in order III rule 9 of the Civil Procedure Rules. Thus the application dated 18th February 2008 was not filed by a stranger, Notice of appointment of Advocate having been filed and paid for on 4th October 2007.

If I understood **Mr. Karweru's** objection correctly it was premised on the principle that **Mr. Ndirangu** could only have come on record and filed a Notice of appointment of Advocate after 29th January 2008. Anything done earlier would be tantamount to putting a cart before horse. To that extent therefore the Notice of appointment filed on 4th October 2007 and on which basis **Mr. Ndirangu** filed the application dated 18th February 2007 was an invalid Notice of appointment of Advocates. It would appear that **Mr. Ndirangu's** response is two fold; that nothing stopped the applicant from appointing **Mr. Ndirangu** to act jointly in the matter with **Gacheche wa Miano**, counsel hitherto on record for the applicant and secondly, he came on record via Notice of appointment of Advocates and not by way of Notice of change of Advocates. To counsel, there is a difference between Notice of change of Advocates and Notice of appointment of advocates.

I agree with **Mr. Karweru** that pending the hearing of the notice of motion dated 25th July 2007, no advocate would validly have come on record either by filing Notice of change of Advocates or Notice of appointment of Advocates. Pending the hearing and determination of the said application there was still an advocate by the name of **Gacheche wa Miano** acting for the applicant. My understanding of a Notice of appointment of advocates is that there has been previously no advocate on record in the matter or that having had a lawyer on record in the past a party drops him/her legally and or in a regular manner and later on opts to employ the services of another lawyer. That is not the situation obtaining here. As at the time **Mr. Ndirangu** purported to come on record for the applicant, the applicant already had **Gacheche wa Miano** on record for him though he had made an application to be allowed to have him dropped from the proceedings. This is the application which came up for hearing and was allowed on 29th January 2008. Until the application was heard and determined as aforesaid, no notice of change or appointment of advocates could be validly be filed. Accordingly, **Mr. Ndirangu** could only have validly come on record by filing Notice of appointment of Advocates or change of Advocates after 29th January 2008. Yet **Mr. Ndirangu** purported to use the Notice of change of Advocates filed 4th October 2007 to legalise his subsequent Notice of Motion filed seeking to set aside the exparte judgment herein. There having been no notice of change of Advocates or Notice of appointment of Advocates filed by **Mr. Ndirangu** between 29th January 2008 and 17th March 2008, **Mr. Ndirangu** was not validly on record as contemplated by order III rule 9 of the Civil procedure rules.

Mr. Ndirangu has submitted that he could have been appointed to act jointly with **Mr. Miano**. As I understand it, the practice has always been that if another advocate is to be appointed in a matter where there is already another Advocate, it is always to act jointly with the Advocate already on record. It is a situation of parallel instructions to different advocates. It is a situation of collaboration. The Notice of appointment of Advocates will clearly show that the subsequent Advocate has been appointed to act jointly, alongside or in collaboration with the Advocate already on record. In this matter the notice of appointment of advocate filed by **H. K. Ndirangu** is clearly in breach of the rules as he has not indicated in the same that he was being appointed to act in the matter in conjunction or jointly with **Mr. Gacheche wa Miano**. In any event I do not see how that could have been possible when the very applicant had already filed an application seeking leave of court to be allowed to change his then advocate on record. The grounds advanced in support of the application were that his previous advocate was not in court during the hearing and had prejudiced his case, he needed another counsel to file other applications and finally that in all circumstances of this case it was prudent that he be allowed to change Advocates. And in paragraph 6 of the supporting affidavit, the applicant categorically depones "..... **That I have lost confidence in my Advocate I a (sic) contemplating filing other application and cannot get legal assistance until court grants leave for me to change advocate**" So there it is in black and white.

How can **Mr. Ndirangu** reconcile what he applicant has deponed to with his rather half hearted submission that he could have been appointed to act jointly with **Mr. Gacheche wa Miano** in the matter by the applicant.

In this matter, and as already stated, the only recourse available to **H.K. Ndirangu** Advocate was to file a Notice of appointment of Advocates or change of Advocates after the order of 29th January 2008 had been made and not earlier. His Notice did not say that he was acting jointly or in collaboration with **Gacheche wa Miano** in the matter. The Notice trashed the intent and purport of order III rule 9 of the Civil Procedure Rules. It matters not that the Notice filed is a Notice of change of advocates or Notice of appointment of Advocates. Representation must be procured within the law.

In the end I uphold the preliminary objection and find that the Notice of motion dated 18th February 2007 and filed in court on 4th March 2008 was incompetent; having been filed by a stranger to the proceedings. It is accordingly struck out with costs to the respondent.

Dated and delivered at Nyeri this 30th day of June 2008

M. S. A. MAKHANDIA

JUDGE

Delivered by Hon. Lady Justice Kasango this 30th day of June 2008

MARY KASANGO

JUDGE