



**Muthandi v Muthandi (Environment & Land Case
788 of 2007) [2024] KEELC 5144 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 788 OF 2007**

AA OMOLLO, J

JULY 4, 2024

BETWEEN

FRANCIS MBURU MUTHANDI PLAINTIFF

AND

PETER KIHUHA MUTHANDI DEFENDANT

RULING

1. The Plaintiff/Applicant filed a notice of motion dated 6th April 2023 seeking for the following orders;
 - a. That the firm of J.M. Njenga & Co. Advocates LLP be granted leave to come on record for the Plaintiff herein in place of Kihara Ndiba & Co. Advocates
 - b. That the costs of this application be costs in cause.
2. The motion was supported by an affidavit sworn by Peter Kihuha Muthandi, the Plaintiff and Jeremy Njenga on 6th April 2023. The application was also based on the grounds that the Plaintiff is desirous of pursuing the subject matter to its logical conclusion and have instructed the firm of J.M. Njenga & Co. Advocates LLP to act for him in place of his previous Advocates.
3. That on perusal of the court file shown that a judgment was delivered on 12th April 2019 thus for proposed Advocates to come on record, the Advocates previously on record must be notified and leave sought and granted by the court. That the prayers sought be granted so that the proposed Advocates are able to deal with the remaining bit of the matter.
4. The motion was opposed vide replying affidavit sworn on 19th July 2023 by Samuel Kihara Ndiba, an Advocate of the High Court in conduct of this matter since year 2007 till the delivery of judgement on 12th April 2019 practising as such in the name and style of the firm of Kihara Ndiba & Co. Advocates.
5. That after the matter had been finalized, he proceeded to file taxation proceedings in E.L.C. Misc. Application No. 69 of 2019 and a Ruling was delivered on 18th August 2020 and a Certificate of



Taxation for the sum of One Million One Hundred and Twenty Seven Thousand Eight Hundred and Seventeen only. (Kshs 1,127,817/=) was issued in favour of the firm of Kihara Ndiba & Co. Advocates against the Defendant herein which to date has not been settled.

6. That after Judgment was delivered on 12/04/2019, the Plaintiff Francis Mburu Muthandi appealed against the Judgement at the Court of Appeal in Civil Appeal No. 484 OF 2019 and subsequently filed Memorandum of Appeal dated 1st October 2019 which he has conducted on behalf of the Plaintiff/Applicant and waiting for delivery of the Judgment.
7. The Advocate deposed that for the firm of J.M. Njenga & Co. Advocates to come on record for the Defendant in the High Court, then they and their instructing agent, the Defendant ought to clear the Advocates costs of Kshs.1,127,817/= and undertake to clear the costs pending in the Court of Appeal.

Submissions

8. In support of his application, the Plaintiff/Applicant filed submissions dated 27th September 2023 and in opposition, the firm of Kihara Ndiba & Company Advocates filed submissions dated 17th October 2023.
9. The Applicant submitted that the application is brought under Order 9 Rule 9 of the Civil Procedure Rules, 2010 which provides for change of Advocates to be effected by order of Court or consent of parties and that a litigant is entitled to representation of his choice citing the case of William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04).
10. That this application ought to be allowed on account of the decree not being a money decree and that the motivation to change counsel is a genuine change of counsel and not with the intention to only defeat the right of counsel to his fees.
11. Further that the fees for Kihara Ndiba & Co. Advocates have been taxed and if the same have not been paid, the said law firm knows what options are available to them to recover the same but certainly those options cannot be by blocking any other advocate from taking up the now concluded matter on the defendant's behalf.
12. That if the court were to disallow the application, it would be tantamount to blocking the defendant from his constitutional right of legal representation by counsel of one's choice. The Applicant relied in the case of Miriam Mbeke Nyamasyo & others v Dishon Odhiambo & others [2022] eKLR where the court held that;

“The case at hand does not involve a money decree. I have also considered the fact that the plaintiffs do not appear to be impecunious. The first plaintiff is a business woman, and I would presume that she is a person of means as she lives in Nyali, Mombasa, an upmarket estate. The 2nd plaintiff is employed by the Kenya Ports Authority. The 3rd plaintiff is a medical doctor. I do not think that the advocate would find it hard to procure his fees upon taxation. In the circumstances of this case, I do not find any prejudice which will be suffered by the advocate if there is a change of counsel even before any outstanding fees are settled, and without any conditions being imposed by court.”

13. The firm of Kihara Ndiba & Co. Advocates submitted that order 9 rule 9 Civil Procedure Rules was effected to protect Advocates from mischievous clients who will wait until a judgment has been delivered and then sack the Advocate and either replace him with another or act in person as was held



in the case of Miscellaneous Civil Application No. 6 of 2018 at Malindi, S.K. Tarwadi Vs Veronica Muehleemann and Case No. 2062 of 2011, Stephen Mwandware Ndighila vs Steel Makers Limited.

Determination:

14. Order 9, rule 9 of the [Civil Procedure Rules](#) provides as follows;

“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.”

15. The above provision makes it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The case of [S. K. Tarwadi v Veronica Muehlmann](#) [2019] eKLR, W. Korir J. expounded on the rationale behind the provision of Order 9 rule 9 as follows:

“...In my view, the essence of the Order 9 Rule 9 of the [CPR](#) was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

16. The Plaintiff/Applicant argues that his constitutional right of representation will be breached if the orders sought are not granted. Article 50 (2)(b) of [the Constitution](#) protects the rights of an accused person to choose and be represented by an Advocate. However, Order 9 does not impede that right because it only provides rules for orderliness in civil proceedings. Therefore, any change of advocate should comply with the rules.

17. The firm of Kihara Ndiba & Co. Advocates are opposed to the change on the basis that the Applicant is yet to settle their taxed cost of 1,127,817/= and pending cost at the Court of Appeal. In answering this issue, the Applicant cited the case of Miriam Mbeke Nyamasyo supra. I have read the said case and find it distinguishable with this one inter alia, the judge noted the advocate client costs had not been taxed. Second, the capability of the Applicants in that case to pay the costs once taxed were expressed in detail. In the instant, the Applicant did not depose to his capacity to pay or provide any form of undertaking to his previous counsel.

18. In the stated case ([Miriam Mbeke Nyamasyo](#)), Munyai Sila J had this to say;

“10. In the case of [Monica Moraa vs Kenindia Assurance Co. Ltd](#) (2012) eKLR, the court also had this to say :-

“The mischief order 9 of the Civil Procedure Rules intended to address was to protect advocates or firms of advocates being replaced without Notice and without their legal fees being settled.”

11. I agree with the above dictum. There before, we had no provision that is similar to Order 9 Rule 9, and a litigant could change counsel at any time, even after judgment,



.....

This was especially chronic in money decrees. Most of the times the outgoing advocate would not even be aware of the change of counsel. He could be instructing an auctioneer to execute the judgment when in fact a new advocate has already collected the funds from the judgment debtor. The advocate who would have expected to hold the money decree as a lien for his fees would be left high and dry. The incoming advocate would simply say that he has already paid the client. The only option left to the outgoing advocate was to chase the client for his fees which was never an easy task. As was said in the case of *Monica Moraa v Kenindia Assurance* (2012) eKLR the mischief was to avoid an advocate being replaced without his notice and without settlement of his fees.”

19. There is nothing stopping the Applicant from enjoying his right to choice of legal representation other than himself. As soon as he settles the taxed costs of previous counsel, the former counsel will give him the consent he so desires. For now, I decline to grant his request particularly in a scenario where he has been made aware of the purpose of Order 9(9) of the *Civil Procedure Rules*. The application dated 6th April 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2024

A. OMOLLO

JUDGE

