



Mawingo Construction 2010 Limited v Mombasa Water Products Limited, Mombasa Water Products Limited v Mawingo Construction 2010 Limited (Environment & Land Case 288 of 2014) [2024] KEELC 13652 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13652 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 288 OF 2014
LL NAIKUNI, J
DECEMBER 3, 2024
MAWINGO CONSTRUCTION 2010 LIMITED.....PLAINTIFF
AND
MOMBASA WATER PRODUCTS LIMITED.....DEFENDANT
BY WAY OF COUNTER – CLAIM

BETWEEN
MOMBASA WATER PRODUCTS LIMITED PLAINTIFF
AND
MAWINGO CONSTRUCTION 2010 LIMITED DEFENDANT

RULING

I. Introduction

1. The Honourable Court is called upon to hear and determine the Notice of Motion application dated 2nd August, 2024. It was instituted by Mawingu Constructions 2010 Limited, the Plaintiff/Applicant herein. The Application was brought under the dint of the provision of *Judicature Act*, Cap. 8, Section 10 and High Court(Practice and Procedure Rules), Article 159 (2) (d) of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap. 21, Order 12 Rule 7, Order 22 Rule 22 and Order 22 Rule 52 of the Civil Procedure Rules, 2010 and all other enabling Laws.
2. Upon service of the Notice of Motion application to the Law firm of Messrs. Miller George Gekonde Advocates; the Respondents responded through a Replying Affidavit sworn on 15th October, 2024.

II. The Plaintiff/Applicant’s case

3. The Plaintiff/Applicant sought for the following orders:-



- a. Spent.
 - b. Spent.
 - c. That pending hearing and final disposition of the malpractice suit in Mombasa Hccomm/e036/2024 Mawingo Construction Company (2010) Limited - Vs - Miller George Gekonde Advocates this Honourable court be pleased to grant stay of execution of the Judgement entered on 3rd July 2024 and all other consequential orders.
 - d. That the Honourable Court be pleased to vary, review, and/or set aside the judgment entered on 3rd July 2024 and all consequential orders arising thereunder and the suit be set down for full hearing.
 - e. That cost of this application be provided for.
4. The application by the Plaintiff/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 28 Paragraphed Supporting Affidavit of Clive Erskine, the director of the Plaintiff/Applicant sworn and dated 2nd August, 2024 averred that:-
- a. At all material times, the Applicant and the Law firm of Messrs. Miller George Gekonde Advocates were in an ongoing Advocate client relationship in the civil case of: "Mombasa ELC /288/2014 - Mawinjo Constructions 2010 Limited – Versus - Mombasa Water Products Limited".
 - b. The Applicant instructed the Law firm of Messrs. Miller George Gekonde Advocates to take over the suit from the previous counsel on record and prosecute the suit to finality.
 - c. However, on 1st November 2023, the suit was dismissed for non-attendance and want of prosecution under the provisions of Order 12 Rule 1 and Order 17 Rules 1, 2 and 3 of the Civil Procedure Rules 2010 respectively.
 - d. The previous Counsel, the Law firm of Messrs. Miller George Gekonde Advocates herein. However, he never filed an application for reinstatement of the dismissed suit and abandoned the main suit but proceeded to file a Statement of Defence to the Counter - Claim dated 8th September 2023.
 - e. Pursuant to that the matter was fixed for hearing on 1st November 2023 with regards to the filed Counter- claim by the Respondent dated 12th April 2022 and which subsequently proceeded accordingly to conclusion.
 - f. Due to the non-attendance of the previous counsel on the hearing date, the Applicant's suit was dismissed and Mombasa Water Products Limited, the Plaintiff in the Counter - Claim in the Civil Case of "Mombasa ELC/288/2014 - Mawingo Constructions 2010 Limited – Versus - Mombasa Water Products Limited" proceeded with the hearing ex - parte and the matter proceeded by way of adducing 'viva voce' evidence.
 - g. Due to non - attendance, no witnesses were called by the Applicant herein and neither did cross examination of the witness presented by the Respondent.
 - h. Subsequently, the Honourable court in directed that parties to file submissions with stringent timelines thereof. However. by the time of penning down the Judgement dated 3rd July 2024, the only submissions on record were from the Respondent.



- i. The Law firm of Messrs. Miller George Gekonde Advocates failed to file submissions in the matter despite still being counsel on record on behalf of the Applicant herein.
- j. As a result of the previous counsel's malpractice and professional negligence, the Honourable Court proceeded to reserve a date to deliver the Judgement which was extremely adverse, and the Applicant would suffer irreparable harm if stay was not granted and be allowed to defend the counter claim.
- k. In the Judgement delivered and dated the 3rd July 2024, the court cited the previous advocate's malpractice and professional negligence in not calling any evidence to prove its defence and thus the defence remained mere allegation
- l. According to Paragraph 73 of the Judgement dated 3rd July 2024 delivered in the civil case of "Mombasa ELC /288/2014 - Mawingo Constructions 2010 Limited – Versus - Mombasa Water Products Limited" the court cited that:-

“It is instructive to note that the Plaintiff's claim in the main suit was dismissed. Further, its Defence to the counter claim was found to have been unproved by evidence. The same remains unavailable for consideration.”

Annexed in the affidavit and marked as “CE – I” was a copy of the Judgement dated 3rd July 2024.

- m. Failure by the Applicant's former Advocate to file to prosecute the main suit, attend the hearing of the Counter - Claim, call witnesses and file submissions is a mistake by Counsel which should not be visited upon the Applicant.
- n. As a result of the previous Advocates breach of his contractual obligation to the Applicant, the Applicant has filed a malpractice suit against his previous Advocate on record under case number “HCCCOMM/E036/2024 - Mawingo Construction Company (2010) Limited – Versus - Miller George Gekonde Advocates”.
- o. The previous Counsel failed to exercise the degree of skill, duty and care of an Advocate of the High Court and failed to use the proper care towards the fulfilment of the instructions they had issued to him.
- p. He only found out that the previous Counsel had abandoned the matter without being given any prior notice when the Judgment was about to be delivered and his attempts to arrest the judgement were futile.
- q. Due to the malpractice and the consequence reflected in the judgement dated 3rd July 2024, there should be liability on the part of the Law firm of Miller George Gekonde Advocates and they have thus filed a malpractice suit against under the civil case number “HCCCOMM/E036/2024 Mawingo Construction Company (2010) Limited - Versus - Miller George Gekonde Advocates. Annexed in the affidavit and marked as “CE – 2” was a copy of the Malpractice suit against the firm of Miller George Gekonde Advocates.
- r. The matter had been set for hearing of the Applicant's Application on 14th October 2024. Annexed in the affidavit and marked as “CE – 3” was a copy of the order dated 24th July 2024.
- s. The Applicant stood to suffer irreparable loss and/or harm if the ORDERS sought herein are not granted and execution proceeds.



- t. The Applicant was apprehensive that if the Judgement entered was left to stand, the Respondent would execute, and the Applicant condemned unheard.
- u. The Applicant's case had a high chance of success, and the Applicant should be given a chance to be heard during the hearing.
- v. This Application was brought without unreasonable delay.
- w. It was in the highest interest of justice that the orders sought herein be granted.
- x. No prejudice whatsoever or at all shall be visited upon the Respondent if the orders sought herein are granted save that the correct position of the law and proper dispensation of justice shall be done once and for all.
- y. In order for the end of justice and fairness to be met, this application be allowed as prayed.
- z. The Affidavit was sworn in support of the Application.

III. The Defendant/Respondent's case

- 5. The Defendant/Respondent responded to the Notice of Motion application through an 11th paragraph Replying Affidavit sworn by Joseph Mbugua Gichanga, the Director of the Respondent on 15th October, 2024 where he averred that:-
 - a. Prior to the filing of the Plaintiff/Applicant's application dated 2nd August, 2024, the Plaintiff was represented by the law firm of Miller George Gekonde Advocates. The present application has however been filed through the law firm of Messrs. Elkana Mogaka & Associates Advocates.
 - b. The Defendant/Respondent was not aware of any leave that was sought and granted by this Court to enable Messrs. Elkana Mogaka & Associates.
 - c. The proposed incoming advocates only filed a Notice of Change of Advocates without leave of the Court yet judgment had already been entered against the Plaintiff.
 - d. It followed that the law firm of Messrs. Elkana Mogaka & Associates Advocates are not properly on record for the Plaintiff and therefore the application dated 2nd August, 2024 was incompetent and should therefore be struck out with costs at the earliest opportunity.
 - e. Without prejudice to what he had stated above, on the merits of the application; it was clear that the Judgment entered herein is a regular Judgment. Indeed, that explains why the Plaintiff/Applicant chose to prefer legal actions against his Advocates for alleged negligence. Logically, enforcement of the regular Judgment by way of execution is to follow.
 - f. A clear reading of the grounds set out in the Supporting Affidavit, it was apparent that the Plaintiff/Applicant abdicated his responsibility to diligently handle the Plaintiff/Applicant's case by failing to file the relevant pleadings within the prescribed time and attending court. Furthermore, the Plaintiff/Applicant failed to take tangible steps and exercise due diligence in following up on the progress of his case.
 - g. Further, the Plaintiff/Applicant had sought for damages in the case of "Mombasa High Mawingo Construction Limited – Versus - Miller George Gekonde Advocates for what it alleged to be negligence by his advocates. That suit provides an adequate relief for the Plaintiff/Applicant. The Defendant/Respondent should not be punished by being denied enjoying fruits of its judgment on account of alleged negligence of the Plaintiff/Applicant's counsel.



- h. The alleged negligence on the part of the Plaintiff/Applicant's counsel was not and could not be a ground for setting aside the Judgment entered herein. The solution for the alleged negligence was what the Plaintiff had done in the Civil Case of "Mombasa High Court Civil Suit No. E036 OF 2024; Mawingo Construction 2010 Limited – Versus – Miller George Gekonde Advocates and not the current application. If anything, the Plaintiff/Applicant could not seek for damages in one breath and apply for setting aside at the same time.

IV. Submissions

6. On 17th October, 2024, while both parties were present in court, the Honourable Court directed that the Notice of Motion application on 2nd August, 2024 be canvassed by way of written submissions. Pursuant to that the Honourable Court reserved a ruling date for the 3rd December, 2024.

V. Analysis and Determination

7. I have carefully read and considered the pleadings herein by the Appellants/Applicants, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
8. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
- a. Whether the Law firm of Elkana Mogaka & Associates Advocates are properly on record for the Plaintiff.
 - b. Who will bear the Costs.

Issue No. a). Whether the Law firm of Elkana Mogaka & Associates Advocates are properly on record for the Plaintiff

9. Under this sub – title the court shall examine if the firm that filed the Notice of Motion application dated 2nd August, 2024 is properly on record. The underpinning legal provisions for legal representation is outlined in Order 9 Rules 5, 9 and 10 Civil Procedure Rules, 2010 that: -
- “ 5. Change of advocate [Order 9, rule 5.]A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until 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 rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.
 9. Change to be effected by order of Court or consent of parties [Order 9, rule 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.



10. Procedure [Order 9, rule 10.] An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
10. Accordingly, for a valid change of Advocates to be effected after Judgment, Court order must issue either on application or by consent filed in Court. Such an application need not be separate from the substantive application as the prayers for change of advocates can be dealt first but within the same application which may contain other prayers as may be desired by an Applicant.
11. It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be. I will also borrow from the case of “Kazungu Ngari Yaa – Versus - Mistry v Naran Mulji & Co.”, where the court in considering Order 9 Rule 9 held as below: -
- “The provision envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.”
12. In this particular case, according to the Defendant, the Notice of Motion application dated 2nd August, 2024 was a non-starter and it could not see the light of day. Prior to the filing of the Plaintiff's application dated 2nd August, 2024, the Plaintiff was represented by the law firm of Miller George Gekonde Advocates. The present application has however been filed through the law firm of Elkana Mogaka & Associates Advocates. The Defendant was not aware of any leave that was sought and granted by this Court to enable Messrs. Elkana Mogaka & Associates.
13. The proposed incoming advocates only filed a Notice of Change of Advocates without leave of the Court yet judgment had already been entered against the Plaintiff. It followed that Elkana Mogaka & Associates Advocates are not properly on record for the Plaintiff and therefore the application dated 2nd August, 2024 was incompetent and should therefore be struck out with costs at the earliest opportunity.
14. The Court had taken note of the fact that the Plaintiff was represented by the firm of Miller George Gekonde Advocates by the time the judgment was being delivered on 3rd July, 2024; there has been no leave sought by the firm of Messrs. Elkana Mogaka & Associates. In blatant violation of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, the law firm of Messrs. Elkana Mogaka & Associates neither sought this Court's leave to come on record as acting for the Plaintiff nor entered a consent with the outgoing Law firm of advocates, Miller George Gekonde Advocates. In my view, the essence of Order 9 Rule 9 of the Civil Procedure Rules is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with



another advocate or act in person. The provision is therefore an important one and cannot be wished away.

15. The purpose of the provision of Order 9 rule 9 Civil Procedure Rules, 2010 was aptly discussed in the case of “Serah Wanjiru Kung’u – Versus - Peter Munyua Kimani [2021] eKLR” where the Court struck out an application by Advocates who were not properly on record:

“ 13. The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...”

16. Even going by the dictum of the case of:- “Serah Wanjiru Kung’u, (Supra)”, that consent has not been filed in this Court for it to be adopted; in this case there is no consent filed for the previous firm handing over the conduct of the matter to the current firm. In the instant scenario, the Civil Procedure Rules, 2010 governs the conduct of proceedings in this Court. Courts have not been hesitant to uphold Order 9 Rule 9 of the Civil Procedure Rules, 2010. In the case of “Jackline Wakesho – Versus - Aroma Cafe [2014] eKLR” the Court held as follows:-

“ Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Sections 1A and 1B of the Civil Procedure Act and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant which show that Courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9....”

17. Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be 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 reasoning behind the provision was well articulated in the case of “S. K. Tarwadi – Versus - Veronica Muehlmann [2019] eKLR” where the judge observed 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....”

18. In the case of “Lalji Bhimji Shangani Builders & Contractors –Versus - City Council of Nairobi [2012] eKLR” the Court held as follows: -

“ A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for



assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

19. The Plaintiffs’ counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates before filing the application dated 2nd August, 2024. It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the Court and other parties.
20. Although the Plaintiff has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.
21. Having found that these procedures was not followed by the Messrs. Elkana Mogaka & Associates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Plaintiff and therefore all pleadings filed by it ought to be struck out.
22. Consequently in the absence of such leave of court as provided for by the law, the Application by Notice of Motion under certificate of urgency dated 2nd August, 2024 filed by the firm of Messrs. Elkana Mogaka & Associates is hereby struck out with costs to the Defendants.

Issue No. b). Who will bear the Costs

23. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.
24. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in awarding the Defendants the costs.

VI. Conclusion & Disposition

25. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below orders:-
 - a. THAT the Notice of Motion application dated 2nd August, 2024 be and is hereby struck out for being filed by an advocate who has no standing in court to act for the Plaintiff.
 - b. THAT the firm of Messrs. Elkana Mogaka & Associates is improperly on record for having not sought the leave of the Court before appearing to represent the Plaintiff.
 - c. THAT the costs shall be in favour of the Defendants.



IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 3RD DAY OF DECEMBER 2024.

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HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s. Mwizi Advocate for the Plaintiff.
- c. Mr. Chege Advocate holding brief for Mr. Mwanzia Advocate for the Defendants

